

# Attempt – Elements

## ➤ Actus Reus Requirement:

- The act must be one that tends to effectuate the illegal result

## ➤ Mens Rea Requirement: Specific Intent Crime!

### ○ How do you prove intent?

- By surrounding circumstances
- By events or actions

- One cannot attempt a reckless or negligent crime!

## ➤ Distinguish: Crime of Attempt vs. Mere Preparation

- The crime of attempt does not require the last act (contemplated by the crime) to be implemented.

## Attempt – Elements (cont.)

- The Model Penal Code (the MPC) gravitates *more towards preparation in defining attempt*.
  - Any “substantial step” is enough; the MPC includes:
    - lying in wait for the victim
    - luring a victim to a place where the crime will to be committed
    - staking out a location where the crime will to be committed
    - unlawful entry into the place where the crime is to be committed
    - gathering material necessary to commit the crime
    - soliciting another person to help with the crime

# Attempt – Defenses and Penalties

Defenses to a charge of attempt:

## ➤ **Impossibility:**

- Legal impossibility is a good defense; i.e. Attempting to commit an act that is not really a crime
- Factual impossibility is generally not a defense; i.e. Shooting a person with the intent to kill, but the person was wearing a bullet proof vest

## ➤ **Withdrawal:**

- Is a *valid defense*; but only if:
  - the withdrawal is completely voluntary; and
  - the withdrawal is done before the last act necessary to effectuate commission of the crime is completed

# Attempt – Defenses and Penalties (cont.)

## Penalty for attempt:

- Common Law rule and the rule in most jurisdictions today: Penalty is based on the penalty for the completed offense, but is less than the penalty for the completed offense
- MPC Rule: Penalty is the same for attempt as it is for the completed offense!

## Merger:

- The crime of attempt merges with the completed offense, so that a person cannot be charged with attempt and the completed offense
- Attempt is a lesser included offense of the completed crime

# Factual Impossibility vs. Legal Impossibility

## FACTUAL IMPOSSIBILITY

Thrusting hand into empty pocket

Mugging a victim who has nothing of value

Firing a gun at a lump in a bed that you think is a person

Firing a gun that malfunctions

## LEGAL IMPOSSIBILITY

Receiving property that you think is stolen but is not

Buying a narcotic that you think is illegal but is not

Shooting at a stuffed deer that you thought was alive out of season

Having sex with a 17 year old when you believed the age of consent was 18; but it was really 17

**"We must reject the possibility of adopting an antiquated and discredited rule involving such nebulous distinctions as factual and legal impossibility. Nor can we espouse formulae for the solution of this question which have been universally condemned as unsound, unworkable, absurd or nonsense"**

**- United States Court of Military Appeals**

# Conspiracy – Background and Elements

Conspiracy is called the “prosecutor’s darling” because:

- (1) **evidence**; evidence against one conspirator is admissible against all conspirators
- (2) **hearsay**; statements made against one co-conspirator is admissible against all co-conspirators
- (3) **joinder**; all conspirators can be tried together, as they all participated in the one crime of conspiracy
- (4) **jurisdiction**; prosecution can choose any one of the jurisdictions in which the conspiracy was planned to try all the conspirators
- (5) **scope**; encompasses people who didn’t commit any of the criminal acts which are the subject of the conspiracy

# Conspiracy – Background and Elements (cont.)

## Elements:

- (1) **agreement** between the parties for the illegal purpose
- (2) must have **intent to form the agreement** (specific intent crime)
- (3) **intent to accomplish an objective** that is known to be criminal act
  - (ignorance of the law is a defense/excuse when it comes to conspiracy because of this element)
- (4) (in most states) an **overt act** in furtherance of that conspiracy

## Types of Conspiracies:

- Chain and link: series of transactions toward a single criminal goal
- Wheel and spoke: once central figure coordinates the criminal enterprise

# Conspiracy – Defenses and Penalties

- All conspirators are liable for all crimes committed in furtherance of the conspiracy until the conspiracy ends (i.e., until the final objective of the conspiracy is completed or abandoned.)
- Withdrawal is no defense to a conspiracy, because the crime is completed as soon as the conspiracy is agreed to.
  - However, withdrawal is a defense to crimes committed by co-conspirators after the withdrawal.
  - **Withdrawal requires:**
    - no longer taking part in the conspiracy
    - announcing to the other conspiracy members that you are withdrawing
    - (in many jurisdictions) attempting to stop the conspiracy from succeeding in its criminal objectives



# Conspiracy – Defenses and Penalties (cont.)

## Penalty:

- Old rule: misdemeanor
- Modern Rule: penalty is based on the most serious of the contemplated offenses; but is less severe than the completed offense
- MPC: same penalty as the most severe contemplated offense

## Merger:

- DOES NOT merge with the completed crime – the co-conspirator can be convicted for both the conspiracy to commit a crime and the completed crime

# Solicitation

- Definition: Where the defendant advises, encourages, induces or requests another person to either commit a crime or join the defendant in committing a crime.
- *Actus Reus* requirement: volitional act by defendant advising, encouraging, inducing, or requesting another person to commit a crime
- *Mens Rea*: The defendant must have acted with the intent to cause the solicited individual to commit the crime
- **Penalty:**
  - Most states: a misdemeanor of lesser penalty than the penalty for the completed crime
  - MPC: Same penalty as completed crime
- **Merger:**
  - The crime of solicitation merges with the completed offense; so that a person cannot be charged with solicitation and the completed offense
  - Solicitation is a lesser included offense of the completed crime

**QUIZ TIME**