

TAMPERING WITH WITNESSES AND INFORMANTS
(N.J.S.A. 2C:28-5a) (Cases arising before September 10, 2008)

The indictment charges the defendant in Count(s) _____ with Tampering with [Witnesses] [Informants] in violation of a statute that reads as follows:

- a. Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, (he/she) purposely attempts to induce or otherwise [knowingly] causes a witness or informant to: **(choose applicable section)**
 - (1) Testify or inform falsely;
 - (2) Withhold any testimony, information, document or thing;
 - (3) Elude legal process summoning (him/her) to testify or supply evidence;

or

- (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) has been legally summoned.

In order for you to find the defendant guilty of violating this statute, the State must prove beyond a reasonable doubt each and every one of the following elements:

- (1) that the defendant believed that an official proceeding or investigation was pending or about to be instituted; and
- (2) that the defendant purposely attempted to induce or otherwise knowingly caused a witness or informant to:

[INSERT APPROPRIATE SECTION]

- (1) Testify or inform falsely;
 - (2) Withhold any testimony, information, document or thing;
 - (3) Elude legal process summoning (him/her) to testify or supply evidence;
- or**
- (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) had been legally summoned.

The first element that the State must prove beyond a reasonable doubt is that defendant believed that an official proceeding or investigation was pending or about to be instituted. This means that the State must prove beyond a reasonable doubt that defendant knew of an official proceeding or that an investigation was pending or was aware of facts that would lead a

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reasonable person to believe that an official action was pending or about to be instituted.¹

"Official proceeding" is defined as:

a proceeding heard or which may be heard before any legislative, judicial, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with any such proceedings.

The second element that the State must prove beyond a reasonable doubt is that the defendant purposely attempted to induce or otherwise knowingly caused a [witness] [informant] to:

[INSERT APPROPRIATE SECTION]

- (1) Testify or inform falsely;
- (2) Withhold any testimony, information, document or thing;
- (3) Elude legal process summoning (him/her) to testify or supply evidence; or
- (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) had been legally summoned.

A person acts knowingly with respect to the nature of (his/her) conduct or the attendant circumstances if (he/she) is aware that (his/her) conduct is of that nature, or that such circumstances exist, or (he/she) is aware of a high probability of their existence. [A person acts knowingly with respect to a result of (his/her) conduct if (he/she) is aware that it is practically certain that (his/her) conduct will cause such a result].² "Knowingly," "with knowledge" or equivalent terms have the same meaning.

Knowledge is a condition of the mind that cannot be seen and can only be determined by inferences drawn from the defendant's conduct, words or acts. It is not necessary for the State to prove the existence of such a mental state by direct evidence such as a statement by the defendant that (he/she) had a particular knowledge. It is within the power of the jury to find that the proof of knowledge has been furnished beyond a reasonable doubt by inferences which you

¹ State v. D.A., 191 N.J. 158, 170 (2007).

² In State v. Speth, 323 N.J. Super. 67, 87 (App. Div. 1999), the Court held that the "practically certain" portion of the definition of knowledge "is not an element of the offense and is incompatible with the crime of witness tampering, as it would put undue weight on whether or not defendant's attempt was likely to succeed." But see footnote 3 infra.

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may draw from the nature of the acts and circumstances surrounding the conduct of the defendant as they have been presented in the evidence you have heard and seen in this case.

The second element also requires the State to prove beyond a reasonable doubt that defendant purposely³ attempted to induce or otherwise knowingly caused a [witness] [informant] to:

[INSERT APPROPRIATE SECTION]

- (1) Testify or inform falsely;
- (2) Withhold any testimony, information, document or thing;
- (3) Elude legal process summoning (him/her) to testify or supply evidence; or
- (4) Absent (himself/herself) from any proceeding or investigation to which (he/she) had been legally summoned.

[INSTRUCT WHEN ATTEMPTED TAMPERING IS CHARGED]

The State contends that defendant purposely attempted to tamper with [name of witness/informant] by [describe criminal act(s) alleged].

Before I explain the definition of an attempt, let me explain an important difference between an attempt and causing a [witness][informant] to _____. Although it is possible to cause a [witness][informant] to _____ with knowledge, to be guilty of an attempt the defendant must act with purpose. In other words, the defendant must have the purpose to induce or cause a [witness][informant] to _____, in order to be guilty of attempting it.⁴

³ In *State v. Crescenzi*, 224 N.J. Super. 142, 147 (App. Div. 1988), the Court noted that because this statute uses the word "attempt" after "knowingly," it is worthy of note that the inchoate offense of attempt, under N.J.S.A. 2C:5-1, incorporates a requirement for *purposeful* action or omission. The trial judge appropriately included this requirement in her charge" (emphasis in original). Two other published opinions take issue with this interpretation of the "knowingly attempts" element. See *State v. Mendez*, 345 N.J. Super. 498, 509 n. 6 (App. Div. 2001), affirmed on other grounds 175 N.J. 201 (2002); *Speth*, 323 N.J. Super. at 87-88. The New Jersey Supreme Court has not yet resolved these competing interpretations of the statute. See *Mendez*, 175 N.J. at 211. However, that Court has ruled, after *Crescenzi* but before the other cases cited, that if a trial court instructs a jury "that it [can] find defendant guilty of attempted [criminal conduct] on anything less than purposeful conduct, ... the charge conflicts with the statutory definition of 'attempt' [and] also constitutes a logical impossibility." *State v. Rhett*, 127 N.J. 3, 7 (1993). In response to these conflicting authorities, the Committee has decided that the best way to avoid this legal or "logical impossibility" is to remove the word "knowingly" from its place before the word "attempt" and place it before the words "cause a witness or informant" to commit acts that unquestionably can be committed "knowingly." Note that the amendments to this statute enacted on September 10, 2008, resolve this problem by removing the word "attempts" from subsection a and replacing the phrase it is contained in with "knowingly engages in conduct which a reasonable person would believe would cause...."

⁴ *State v. Rhett*, 127 N.J. 3, 6-7 (1992); *State v. Robinson*, 136 N.J. 476, 485-86 (1994).

The law provides that a person is guilty of an attempt to commit a crime if the person:⁵

[Select the appropriate section]

[(1) Attempt - Impossibility]

Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;

[or]

[(2) Attempt - When Causing a Particular Result is an Element of the Crime]

Does or omits to do anything with the purpose of causing [result] without further conduct on (his/her) part.

[or]

[(3) Attempt-Substantial Step]

Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in the course of conduct planned to culminate in (his/her) commission of the crime.

Thus, in order to find the defendant guilty of a criminal attempt, the State must prove two elements beyond a reasonable doubt:

[Select the appropriate section]

[(1) Attempt - Impossibility]

The first element is that the defendant acted purposely. A defendant acts purposely with respect to the nature of (his/her) conduct or a result thereof if it is (his/her) conscious object to engage in conduct of that nature or to cause such a result. A person act purposely with respect to attendant circumstances if (he/she) is aware of the existence of such circumstances or (he/she) believes or hopes that they exist.

Purpose is a condition of the mind that cannot be seen and can only be determined by inferences drawn from the defendant's conduct, words or acts. It is not necessary for the State to prove the existence of such a mental state by direct evidence such as a statement by the defendant that [he/she] had a particular purpose. It is within the power of the jury to find that the

⁵ Because all attempts must be purposeful, and because other portions of the statute include the requirement of purpose, the language in N.J.S.A. 2C:5-1a, "acting with the kind of culpability otherwise required for the commission of the crime," should not be charged.

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proof of purpose has been furnished beyond a reasonable doubt by inferences which you may draw from the nature of the acts and circumstances surrounding the conduct of the defendant as they have been presented in the evidence you have heard and seen in this case.

The second element is that the defendant engaged in conduct which would constitute the crime of _____ had the facts been as a reasonable person would have believed them to be.

[Here define the crime allegedly attempted if it has not been defined already, or refer jurors to the definition previously charged.]

If the accused purposely engaged in conduct that would constitute the crime of _____ had the facts been as a reasonable person would have believed them to be, you should consider that conduct as evidence of guilt of attempt to commit _____. It does not matter that the defendant failed to accomplish (his/her) intended result because the facts were not as a reasonable person would have believed them to be; it is no defense that the defendant could not succeed in reaching (his/her) intended result because of circumstances unknown to (him/her). However, there cannot be an attempt to commit a crime unless the attempt, if completed, would have constituted the crime.⁶

[or]

[(2) When Causing a Particular Result is an Element of the Crime.]

First, that the defendant had the purpose to cause [here state the result that is an element of the alleged attempted crime]. A defendant acts purposely with respect to the nature of (his/her) conduct or a result thereof if it is (his/her) conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if (he/she) is aware of the existence of such circumstances or (he/she) believes or hopes that they exist.

Purpose is a condition of the mind that cannot be seen and can only be determined by inferences drawn from the defendant's conduct, words or acts. It is not necessary for the State to prove the existence of such a mental state by direct evidence such as a statement by the

⁶ Final Report of the New Jersey Criminal Law Revision Commission, Vol. II: Commentary, pp.114-115, quoting from State v. Moretti, 52 N.J. 182, 186-90 (1968). N.J.S.A. 2C:5-1a(1) rejects outright the defense of impossibility.

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defendant that [he/she] had a particular purpose. It is within the power of the jury to find that the proof of purpose has been furnished beyond a reasonable doubt by inferences which you may draw from the nature of the acts and circumstances surrounding the conduct of the defendant as they have been presented in the evidence you have heard and seen in this case.

The second element is that the defendant did or omitted to do anything to cause [state the result which is an element] without further conduct or action on (his/her) part. Where the accused has done all that (he/she) believes necessary to cause [state the result which is an element], you should consider that as evidence of guilt of an attempt to commit_____.

[or]

[(3) Substantial Step]

First, that the defendant had the purpose to committing the crime of _____. A defendant acts purposely with respect to the nature of (his/her) conduct or a result thereof if it is (his/her) conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if (he/she) is aware of the existence of such circumstances or (he/she) believes or hopes that they exist.

Purpose is a condition of the mind that cannot be seen and can only be determined by inferences drawn from the defendant's conduct, words or acts. It is not necessary for the State to prove the existence of such a mental state by direct evidence such as a statement by the defendant that [he/she] had a particular purpose. It is within the power of the jury to find that the proof of purpose has been furnished beyond a reasonable doubt by inferences which you may draw from the nature of the acts and circumstances surrounding the conduct of the defendant as they have been presented in the evidence you have heard and seen in this case.

The second element is that the defendant purposely did or omitted to do anything, which, under the circumstances as a reasonable person would believe them to be, is an act or omission that is a substantial step in the course of conduct planned to culminate in (his/her) commission of the crime. However, the step taken must strongly show the defendant's criminal purpose. That is, the step taken must be substantial and not just a very remote preparatory act, and must show that the accused has a firmness of criminal purpose.

[Charge Where Appropriate]

RENUNCIATION OF CRIMINAL PURPOSE

**[To be used when the defendant's conduct would otherwise constitute an attempt under
Section 2 or 3 above]**

As part of the defendant's denial of guilt, the defendant raised the defense of renunciation of criminal purpose.

The accused must prove, by a preponderance of the evidence, that (he/she) abandoned (his/her) effort to commit the crime or otherwise prevented its commission under circumstances that show a complete and voluntary decision to renounce (his/her) criminal purpose. The abandonment of the criminal effort must begin with the defendant and not be forced upon (him/her) by some outside event, such as police intervention.⁷ Renunciation of criminal purpose is not voluntary if the reason for it is that it seems more likely that defendant will be detected or caught, or the objective seems more difficult than it did at the beginning of the course of conduct. Renunciation is not complete if the defendant only decides to postpone the criminal conduct to a better time or to focus on another but similar objective or victim. If mere abandonment of the criminal effort is not enough to prevent the offense, then the defendant must have taken further and affirmative steps that actually prevented the commission of the offense.⁸

As I stated, the defendant must prove renunciation by a preponderance of the evidence. I previously explained that the State has the burden of proving every element of the crime(s) charged beyond a reasonable doubt. The burden of proving renunciation by a preponderance of the evidence is a lesser burden. It simply means that the defendant has the burden of establishing that the evidence supporting renunciation is more likely true than not. Another way to describe it is the greater weight of the believable evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses, but rather, the evidence that carries the greater convincing power in your minds. I remind you, however, that the burden of proving every element of the attempt to commit _____ as I have previously defined it is always on the State and never on the defendant.

⁷ Code Commentary at 124.

⁸ Id. at 125.

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If you find that the State has failed to prove any one of these elements beyond a reasonable doubt, then you must find the defendant not guilty of an attempt to commit_____. Also, if you find the State has proven each of these elements beyond a reasonable doubt, but that the defendant has established by a preponderance of the evidence that (he/she) renounced (his/her) criminal purpose, then you must find the defendant not guilty. However, if you find that the State has proven each of these elements beyond a reasonable doubt and the defendant has failed to establish renunciation by a preponderance of the evidence, then you must find the defendant guilty.

[CHARGE IN ALL CASES]

If the State has failed to prove any one or more of the elements as I have described them to you beyond a reasonable doubt, you must find the defendant not guilty of tampering with [witnesses] [informants]. If the State has proven every element beyond a reasonable doubt, you must find the defendant guilty of the crime of tampering with [witnesses] [informants].

[GRADING]

If you find that the State has proven defendant guilty beyond a reasonable doubt of this crime, then you must determine whether or not the State has proven beyond a reasonable doubt that the defendant employed force or threat of force. "Force" means any degree of physical power or strength used against another person, even though it entails no pain or bodily harm and leaves no mark.⁹ "Threat of force" means that the words or actions of the defendant must be of such a nature as to convey menace or fear of force to the ordinary person. The State contends that defendant (describe force or threat of force alleged).

If you find that the State has proven beyond a reasonable doubt that the defendant employed force or threat of force, then you must find [him/her] guilty of this form of tampering with [witnesses] [informants]. If, on the other hand, you find that the State has failed to prove this element beyond a reasonable doubt, you must find [him/her] not guilty of this form of tampering with [witnesses] [informants].

⁹ See Model Charge, N.J.S.A. 2C:15-1, Robbery in Second Degree and Model Charge, N.J.S.A. 2C:29-5, Escape; State v. Brannon, 178 N.J. 500, 510 (2004).