

1 **14-2801. Attempt to commit a felony; essential elements.**

2 For you to find the defendant guilty of an attempt to commit the crime of
3 _____¹ [as charged in Count _____]², the state must prove to your
4 satisfaction beyond a reasonable doubt each of the following elements of the crime:

5 1. The defendant intended to commit the crime of _____¹;

6 2. The defendant began to do an act which constituted a substantial part of the
7 _____¹ but failed to commit the _____¹;

8 3. This happened in New Mexico on or about the _____ day of
9 _____, _____.

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11

USE NOTES

12 1. Insert the name of the felony. A separate one of these instructions is required for
13 each of such felonies. The essential elements of the felony must be given immediately following
14 this instruction, unless they are set out in an instruction dealing with the completed offense. To
15 instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

16 2. Insert the count number if more than one count is charged.

17 [As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as
18 amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or
19 after December 31, 2020.]

20 **Committee commentary.** — *See* NMSA 1978, § 30-28-1 (1963).

21 This instruction sets forth the essential elements of an attempt to commit a felony. The
22 instruction should be given only when there is sufficient evidence to establish an attempted crime
23 which failed to be completed. In *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App. 1971),

1 *cert. denied*, 82 N.M. 534, 484 P.2d 754 (1971), the court rejected the defendant's claim that a
2 jury should always be instructed on attempt as a lesser offense, stating that when there is no
3 evidence of failure to complete the crime such an instruction presents a false issue.

4 The evidence must establish overt acts which show the intent to commit the felony. *See*,
5 *e.g.*, *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972) (attempted anal intercourse); *State*
6 *v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), *cert. denied*, 81 N.M. 140, 464 P.2d 559
7 (1970) (attempted forgery); *State v. Flowers*, 83 N.M. 113, 489 P.2d 178 (1971) (attempted
8 larceny). The overt acts must constitute a substantial part of the attempted felony. Mere preparation
9 does not suffice as an attempt.

10 The essential elements of the attempted felony must be given. In cases where multiple
11 attempts are charged the committee was of the opinion that a separate instruction should be given
12 for each attempt. A combination instruction on attempts to commit a felony is excessively
13 cumbersome and might tend to confuse a jury. Element 1 is included in the essential elements,
14 because attempt requires a specific intent to commit the felony.

15 There is no crime of attempt to commit a felony when the underlying charge upon which
16 the attempt is based has the element of negligence or recklessness, since the first element has an
17 intent requirement. *See* committee commentary following UJIs 14-210 NMRA and 14-211
18 NMRA, second degree murder, which refer to *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62,
19 172 P.3d 611.

20 [As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]