

### Application

Under ORS 161.405 an attempt crime requires an act that constitutes a "substantial step." The statute codifies the Model Penal Code's 'substantial step' test for distinguishing acts of preparation from an attempt. "In § 5.01(2), the Model Penal Code states that to be a substantial step the act must be 'strongly corroborative of the actor's criminal purpose[.]'" Commentary to the Oregon Criminal Code of 1971, § 54, at 49. Thus, defendant's conduct to constitute a "substantial step" must (1) advance the criminal purpose charged and (2) provide some verification of the existence of that purpose. Model Penal Code and Commentaries (Official Draft and Revised Comments), American Law Institute 352, § 5.01 (1985).

As discussed above, defendant's omission, specifically his failure to confess to possessing cocaine prior to the jail-house search, does not qualify as criminal conduct because defendant was under no legal duty to confess. ORS 161.095(1); ORS 161.085(3). Further, interpreting ORS 162.185(1)(a) to create such a duty would violate defendant's right to be free from self-incrimination.

Defendant's only other conduct was his knowing possession of cocaine. However, for this conduct to constitute an attempt at supplying contraband, it must evidence defendant's intent to take a substantial step toward introducing the contraband in to the jailhouse. Here, there is no evidence that defendant orchestrated his arrest so as to gain access to the jailhouse, as such defendant's knowing possession of cocaine does not constitute an act of attempted supplying contraband.

The failure to prove criminal conduct is reversible error. *State v. Laemoa*, 20 Or App 516, 527, 533 P2d 370 (1975) (child abandonment requires a voluntary act). The contraband here was introduced into the jail only because defendant was carried and forced into the jail by the state. This is insufficient to establish criminal liability. "A defendant must undertake some