Uniform Jury Instructions — Criminal

FOREWORD

Committee commentary. — At the direction of the supreme court, the court's committee on criminal procedure began a consideration of uniform jury instructions for criminal cases in 1972. According to the American Judicature Society, New Mexico has the distinction of being among the first to adopt mandatory, uniform jury instructions for criminal cases.

The staff work for the committee was handled by the institute of public law and services of the University of New Mexico School of Law. Helene Simson, deceased, served as the first reporter. Mark B. Thompson III succeeded her as reporter in 1973. Gary O'Dowd, director of the institute and Charles Daniels of the law faculty served as consultants. Justice LaFel E. Oman acted as liaison between the committee and the supreme court.

These rules could not have been completed without the financial assistance of the governor's council on criminal justice planning; the production assistance of Tina Peterson and Judy Jones; and the general assistance of members of the institute's secretarial staff and several students of the University of New Mexico School of Law.

Our sincere appreciation to perhaps the most forward-looking appellate court in the country for its support in the drafting of these instructions and its confidence in us by approving these instructions.

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General Use Note

Except for grand jury proceedings, when a uniform instruction is provided for the elements of a crime, a defense or a general explanatory instruction on evidence or trial procedure, the uniform instruction should be used without substantive modification or substitution. No instruction shall be given on a subject which a use note directs that no instruction be given. To avoid fundamental error, it is the duty of the court to properly instruct the jury on the law. Thus, an elements instruction may only be altered when the alteration is adequately supported by binding precedent or the unique circumstances of a particular case, and where the alteration is necessary in order to accurately convey the law to the jury. If the court determines that a uniform instruction must be altered, the reasons for the alteration must be stated in the record.

For a crime for which no uniform instruction on essential elements is provided, an appropriate instruction stating the essential elements must be drafted. However, all other applicable uniform instructions must also be given. For other subject matters not covered by a uniform instruction, the court may give an instruction that is brief, impartial, free from hypothesized facts, and otherwise similar in style to these instructions.

The printed version of these instructions varies the use of pronouns in referring to the defendant, witnesses, and victims. The masculine singular has generally been used throughout these instructions. Pronouns should be changed in the instructions read to the jury as the situation requires.

Many of the instructions contain alternative provisions. When the instructions are prepared for use, only the alternative or alternatives supported by the evidence in the case may be used. The word “or” should be used to connect alternatives, regardless of whether the word is bracketed in the printed version of the instruction.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — The organization of UJI Criminal attempts to follow the major chapter headings of the Criminal Code.

Use of UJI Criminal is required for all criminal prosecutions filed in the district court on or after its effective date, including prosecutions for crimes that do not yet have UJI essential elements instructions. The UJI general, defense, evidence, and concluding instructions must be used even if no essential elements instruction is provided. For the essential elements of crimes not contained in UJI, instructions that substantially follow the language of the statute or use equivalent language are normally sufficient. *See State v. Caldwell*, 2008-NMCA-049, ¶ 25, 143 N.M. 792, 182 P.3d 775 (citing *State v. Doe*, 1983-NMSC-096, ¶ 10, 100 N.M. 481, 672 P.2d 654); *State v. Rushing*, 1973-NMSC-092, ¶ 20, 85 N.M. 540, 514 P.2d 297 (“Instructions . . . are sufficient if they fairly and correctly state the applicable law.”).

Nevertheless, “[t]he trial court has a duty to instruct the jury on all questions of law essential for a conviction of the crime with which the defendant is charged.” *Jackson v.*

State, 1983-NMSC-098, ¶ 6, 100 N.M. 487, 672 P.2d 660. Thus, even where a UJI exists, if it is inadequate to convey the legal questions of the case or has been rendered obsolete by a change in the law, modification may be necessary to avoid fundamental error. *See State v. Cabezuela*, 2011-NMSC-041, ¶ 36, 150 N.M. 654, 265 P.3d 705.

Venue. — The elements instructions in UJI Criminal do not require the jury to find that the crime occurred within the county of venue. *See* Section 30-1-14 NMSA 1978. It has been a common practice to instruct the jury on venue in New Mexico. *See, e.g., Nelson v. Cox*, 1960-NMSC-005, 66 N.M. 397, 349 P.2d 118. However, any question of venue may be waived by proceeding to trial. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444. Consequently, the committee believed that requiring the jury to find venue facts was not necessary to a valid conviction and the prior practice was not continued.

The committee anticipates that in multiple defendant cases, it may be necessary to personalize the essential elements instructions to maintain correct identity of defendants and defenses.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-004, effective December 31, 2015, in the first sentence of the first paragraph, after the second occurrence of “uniform instruction”, deleted “must” and added “should”; in the second sentence of the first paragraph, deleted “In no event may an elements instruction be altered or an” and added “No”, after the first occurrence of “instruction”, added “shall be”; added the third and fourth sentences of the first paragraph; in the fifth sentence of the first paragraph, deleted “For any other matter”; in the third sentence of the second paragraph, after the second occurrence of “instruction”, deleted “which” and added “that”; in the second sentence of the fourth paragraph, after “alternative”, added “or alternatives”; in the committee commentary, after the third sentence of the second paragraph, deleted “*State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973)” and added citations to *State v. Caldwell* and *State v. Rushing*; added the third paragraph; and in the fourth paragraph, added vendor neutral citations for *Nelson v. Cox* and *State v. Shroyer*.

Cross references. — For the Criminal Code, *see* Section 30-1-1 NMSA 1978 et seq. and notes thereto.

I. GENERAL CONSIDERATION.

Test for determining when a jury instruction is appropriate. — Appellate courts will not use the term "slight evidence" when discussing the appropriate test for sufficiency of evidence to support the giving of jury instructions, but will consider whether there is

evidence sufficient to justify a reasonable jury determination as to whatever element is under consideration. *State v. Rudolfo*, 2008-NMSC-036, 144 N.M. 305, 187 P.3d 170.

Instruction on viewing of scene. — Where the jury viewed defendant's residence where sexual abuse of minor victim had occurred, the court did not err in refusing to instruct the jury about alterations to the arrangement of furnishings in the residence. *State v. Ruiz*, 2007-NMCA-014, 141 N.M. 53, 150 P.3d 1003, cert. denied, 2007-NMCERT-001.

Purpose of instruction is to enlighten jury, and an instruction which is confusing, rather than enlightening, is properly refused. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

The purpose of an instruction is to enlighten a jury. It should call to the jury's attention specific issues which must be determined and should contain only statements of law to be applied in the determination of such issues. *State v. Selgado*, 1966-NMSC-069, 76 N.M. 187, 413 P.2d 469.

Court of appeals not to abolish instruction. — The court of appeals is to follow precedents of the supreme court; it is not free to abolish instructions approved by the supreme court, although in appropriate situations it may consider whether the supreme court precedent is applicable. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

Party entitled to instruction where evidence supports theory of case. — A party is entitled to an instruction on his theory of the case only when there is evidence which will reasonably tend to support his theory. *State v. Rodriguez*, 1972-NMSC-048, 84 N.M. 60, 499 P.2d 378; *State v. Armstrong*, 1973-NMCA-081, 85 N.M. 234, 511 P.2d 560, cert. denied, 85 N.M. 228, 511 P.2d 554.

A jury may not be permitted to return a verdict of guilty for the commission of a particular crime when there is no evidence that such a crime was committed, and, thus, the only instructions which should be submitted to the jury are those that are based on legitimate evidence. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Instructions should be confined to issues upon which testimony was given at trial. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

The defendant is entitled to an instruction on his theory of the case if the evidence reasonably supports his theory. *State v. Selgado*, 1966-NMSC-069, 76 N.M. 187, 413 P.2d 469; *State v. Parker*, 1969-NMCA-056, 80 N.M. 551, 458 P.2d 803, cert. denied, 80 N.M. 607, 458 P.2d 859; *State v. Sweat*, 1972-NMCA-092, 84 N.M. 122, 500 P.2d 207; *State v. Mireles*, 1972-NMCA-105, 84 N.M. 146, 500 P.2d 431.

The court is not required to charge the jury on the defendant's theory of the case unless it is supported by substantial evidence. *State v. Mosley*, 1965-NMSC-081, 75 N.M. 348, 404 P.2d 304.

Where there is evidence presented which supports a defendant's theory of his defense which, if proved, would require acquittal, or a reduction in the degree of crime, it is error to refuse to instruct on such position. *State v. Ortega*, 1966-NMSC-185, 77 N.M. 7, 419 P.2d 219.

Court must instruct jury in degrees of crime charged when there is evidence in the case tending to sustain such degrees. *State v. Ulibarri*, 1960-NMSC-102, 67 N.M. 336, 355 P.2d 275.

Instruction which assumes that offense charged has been committed is erroneous. The same is true of an instruction which assumes issues for the jury such as the accused's guilt or that he committed the act charged in the indictment. *State v. Hatley*, 1963-NMSC-128, 72 N.M. 280, 383 P.2d 247.

Instructions should be read as a whole and where other instructions adequately cover the law, refusal to give a separate instruction is not error. *State v. Beal*, 1974-NMCA-054, 86 N.M. 335, 524 P.2d 198.

Instructions are to be considered as a whole and, applying this rule, particular expressions should be treated as qualified by the context of other instructions. *McBee v. Atchison, T. & S.F. Ry.*, 1969-NMCA-063, 80 N.M. 468, 457 P.2d 987.

Instruction must be considered in light of all other instructions given to see whether the vice of the erroneous instruction is perhaps tempered or modified. *State v. Hatley*, 1963-NMSC-128, 72 N.M. 280, 383 P.2d 247.

It is error to single out one instruction for undue emphasis. *State v. Lindwood*, 1968-NMCA-063, 79 N.M. 439, 444 P.2d 766.

Handwritten part of instruction valid. — The defendant's objection to the handwritten part of the instruction for the reason that it calls attention to the fact that he is charged with other sales or other crimes in the same information, and because the handwritten part calls attention to the fact that there are other counts in the information, was held invalid, as the handwritten portion was added to make the record clear as to which count had been tried. *State v. Herrera*, 1971-NMCA-024, 82 N.M. 432, 483 P.2d 313, cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161.

Instruction to be proper statement of law. — If error is to be claimed concerning a court's failure to give a requested instruction to a jury, such an instruction must be proper statement of the law. *State v. Wilson*, 1973-NMSC-093, 85 N.M. 552, 514 P.2d 603.

Instructions which substantially follow language of statute are sufficient. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and; 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970); *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

It is not error to refuse requested instruction which is misstatement of law. *State v. Dutchover*, 1973-NMCA-052, 85 N.M. 72, 509 P.2d 264; *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

Instructing jury by reference to indictment is improper. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

It would have been improper to instruct the jury by a reference to the indictment. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170.

Instructions are sufficient if, considered as a whole, they fairly present the issues and the applicable law. *State v. Rhea*, 1974-NMCA-030, 86 N.M. 291, 523 P.2d 26, cert. denied, 86 N.M. 281, 523 P.2d 16.

Where the instructions, when read and considered as a whole, fairly and correctly state the law applicable to the facts in this case, nothing more is required. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444; *State v. McFerran*, 1969-NMCA-084, 80 N.M. 622, 459 P.2d 148, cert. denied, 80 N.M. 731, 460 P.2d 261; *State v. Rushing*, 1973-NMSC-092, 85 N.M. 540, 514 P.2d 297.

Instructions given out of sequence proper under certain circumstances. — Although the rule provides the judge shall charge the jury before argument of counsel, this rule is not without exception. It is well recognized in New Mexico that instructions may properly be given out of sequence under certain circumstances. For example a so-called "shotgun" or supplemental instruction given after the jury had retired to their deliberations was approved in *Garcia v. Sanchez*, 1961-NMSC-075, 68 N.M. 394, 362 P.2d 779, and instructions in response to jury questions have likewise been approved. *State v. Lindwood*, 1968-NMCA-063, 79 N.M. 439, 444 P.2d 766.

Adoption of the rule providing for the instruction of the jury prior to the argument of counsel was not intended as an invariable rule to be administered in such a manner as to deprive the trial judge of his right to give additional instructions where the situation warrants such action. *State v. Lindwood*, 1968-NMCA-063, 79 N.M. 439, 444 P.2d 766.

And does not, of itself, establish prejudice. — The appellant has the burden of demonstrating that he was prejudiced by the claimed error, and the mere fact that an instruction is given out of the ordinary sequence, even in plain contravention of the statute, does not of itself establish prejudice. *State v. Lindwood*, 1968-NMCA-063, 79 N.M. 439, 444 P.2d 766.

Proper jury instruction prevents mistrial because of prejudicial juror response. — The denial of a mistrial was not error where the prejudicial response of a prospective juror to the questions posed by the court on voir dire was unexpended and unsolicited, the court promptly offer to admonish the jury panel to disregard the remark, the juror's statement was susceptible to being cured by an admonition or cautionary instruction, each juror was initially instructed, pursuant to this jury instruction, to exercise his judgment "without regard to any bias or prejudice that you may have," and the jury returned verdicts acquitting the defendant of two charges, evidencing the fact that they acted conscientiously and impartially. *State v. Gardner*, 1985-NMCA-084, 103 N.M. 320, 706 P.2d 862, cert. denied, 103 N.M. 287, 705 P.2d 1138.

Principal object of requiring judge to mark on instructions "given" or "refused" was to avoid any subsequent dispute or doubt as to what instructions were given, and where the instructions were refused and so marked by the judge with the statement of the grounds for refusal, there was a substantial compliance with the section. *Territory v. Baker*, 1887-NMSC-021, 4 N.M. 236, 13 P. 30.

II. ELEMENTS OF CRIME.

Failure to instruct on essential crime elements is jurisdictional. *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100.

A jury must be instructed on the essential elements of the crime charged, and failure so to do is fundamental error because the error is jurisdictional and thus not harmless. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

All elements need not be in same instruction. — Instructions are to be considered as a whole, and all elements of the offense need not be contained in one instruction. *State v. Puga*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075.

Instruction to be used without substantive modification. — When a uniform jury instruction is provided for the elements of a crime, generally that instruction must be used without substantive modification. *Jackson v. State*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

Error to alter uniform jury instruction on crime's elements. — When a uniform jury instruction is provided for the elements of a crime, it is error to alter the instruction. *State v. Jackson*, 1983-NMCA-007, 99 N.M. 478, 660 P.2d 120, *rev'd on other grounds*, 100 N.M. 487, 672 P.2d 660.

Time limitation instruction generally required. — Generally, the time limitation instruction is a necessary part of the instructions; however, where the uncontradicted evidence shows the offenses were committed within the time limitation, the instruction stating the time limitation is not a required instruction, but giving it is not error. *State v. Salazar*, 1974-NMCA-026, 86 N.M. 172, 521 P.2d 134.

Jury's consideration limited to date charged. — Although it is not error to instruct the jury that it must find that the crime occurred within the applicable statute of limitations, it is error not to limit the jury's consideration to the date charged in the information. *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

III. FAILURE TO INSTRUCT.

In the case of failure to instruct, correct written instruction must be tendered. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

The failure to instruct upon a specific defense cannot be complained of unless the defendant has tendered a proper instruction on the issue. *State v. Selgado*, 1966-NMSC-069, 76 N.M. 187, 413 P.2d 469; *State v. Ramirez*, 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986.

Oral request for written instruction avoids injustice. — While there was a failure to comply with the provisions requiring requested instructions to be in writing, an oral request served the purpose of the rule, where it served to alert the mind of the judge that he was about to fall into error and afford him an opportunity if necessary to correct it, to avoid the injustice which might otherwise result. *State v. Reed*, 1957-NMSC-009, 62 N.M. 147, 306 P.2d 640.

Requested instruction refused where covered by others. — A refusal by the trial court to give requested instructions on matters adequately covered by those given is not error. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Where the court's instructions fully covered the law of the case and the requested instructions tended to unduly emphasize the defendant's theory of the case, the court does not err in refusing the defendant's instructions. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

The instructions are to be considered as a whole and it is not error to refuse a requested instruction, even though it states a correct principal applicable to the case, if it has been covered by other instructions given. *State v. Ramirez*, 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986.

Where every element of the defendant's requested instruction was covered in the instruction given by the court, it was not error to refuse the requested instruction. *State v. McFerran*, 1969-NMCA-084, 80 N.M. 622, 459 P.2d 148, cert. denied, 80 N.M. 731, 460 P.2d 261; *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804; *State v. Mazurek*, 1975-NMCA-066, 88 N.M. 56, 537 P.2d 51.

Misleading instruction properly refused. — Where the defendant's requested instruction concerning the inherent improbability of evidence was not clear and did not

make plain to the jury how it could apply because it did not define the terms used in the instruction, the requested instruction was misleading and the trial court properly refused. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

The introduction of extraneous matter into instructions which may mislead the jury or divert its mind from a consideration of the evidence pertinent to the real issues tends to mislead the jury into the belief that these other issues are before it and may cause it to bring in an improper verdict. In such cases, the instructions are erroneous and prejudicial. *State v. Salazar*, 1954-NMSC-062, 58 N.M. 489, 272 P.2d 688.

IV. APPEALS.

Tender of instructions required. — Where the defendant had no objection to jury instructions given, and did not tender an instruction, he did not preserve the error for review. *State v. McAfee*, 1967-NMSC-139, 78 N.M. 108, 428 P.2d 647; *State v. Rodriquez*, 1970-NMSC-073, 81 N.M. 503, 469 P.2d 148; *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

Where no instructions were tendered by the appellant, those points relied upon for reversal for failure to instruct are not properly preserved for review. *State v. Gutierrez*, 1968-NMCA-090, 79 N.M. 732, 449 P.2d 334, cert. denied, 80 N.M. 33, 450 P.2d 633 (1969).

Where the defendant did not object to a faulty instruction, nor tender a correct written instruction, such error was not preserved for review and does not constitute fundamental error. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, and cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Where a defendant fails to comply with the rule that he point out the errors committed or fails to tender a proper instruction, he is precluded from contending that the court fell into error in making the instruction given. *State v. Smith*, 1947-NMSC-048, 51 N.M. 328, 184 P.2d 301; *State v. White*, 1954-NMSC-050, 58 N.M. 324, 270 P.2d 727.

Where the trial court fails to instruct on a certain subject, the tendering of a correct instruction is sufficient to preserve error; but to preserve error where the court has given an erroneous instruction, the specific vice must be pointed out to the trial court by a proper objection thereto and a correct instruction tendered. *Beal v. Southern Union Gas Co.*, 1960-NMSC-019, 66 N.M. 424, 349 P.2d 337.

Where the defendant did not submit a cautionary instruction in compliance with former Rule 51, N.M.R. Civ. P., the issue cannot be first raised on appeal. *State v. Paul*, 1972-NMCA-043, 83 N.M. 619, 495 P.2d 797.

Objection required. — Where no objection was made by the defendant to the giving of any certain instructions, he could not be heard to complain on appeal, even if the

appellate court were to concede there was error in the instructions as claimed. *State v. Lujan*, 1970-NMCA-087, 82 N.M. 95, 476 P.2d 65; *State v. Tucker*, 1974-NMCA-049, 86 N.M. 553, 525 P.2d 913, cert. denied, 86 N.M. 528, 525 P.2d 888.

The question of an alleged error in the instructions cannot be raised in the supreme court if the trial court's attention was not called thereto. *State v. Lopez*, 1942-NMSC-064, 46 N.M. 463, 131 P.2d 273.

Where there was neither a jurisdictional defect nor fundamental error in the instructions, nor was the asserted inadequacy called to the attention of the trial court, the asserted error was not preserved for review. *State v. Moraga*, 1971-NMCA-103, 82 N.M. 750, 487 P.2d 178; *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Where the defendant's complaint concerning the wording which submitted an issue was not raised in the trial court, no issue as to the awkward wording was presented to the trial court as required under former Rule 41, N.M.R. Crim. P. *State v. Whiteshield*, 1977-NMCA-103, 91 N.M. 96, 570 P.2d 927, cert. denied, 91 N.M. 4, 569 P.2d 414.

The failure to object to instruction waives any errors or defects in the instructions. *State v. Hatley*, 1963-NMSC-128, 72 N.M. 280, 383 P.2d 247; *State v. Minor*, 1968-NMSC-016, 78 N.M. 680, 437 P.2d 141; *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859; 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

A litigant may not sit by and see the trial court about to give an erroneous instruction and one that is contrary to his theory of the case without objecting and pointing out the vice thereof, and then claim error for failing to adopt his contrary instruction. This rule is the same in civil and criminal cases. *State ex rel. State Hwy. Comm'n v. Weatherly*, 1960-NMSC-048, 67 N.M. 97, 352 P.2d 1010.

Where the defendant failed to request in the trial court that the instructions be amplified or further define "intent" and "knowledge," he may not raise the issue as to additional instructions in the appellate court. *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916.

The defendant's contention that a handwritten notation violates that portion of former Rule 51(2)(g), N.M.R. Civ. P., which stated "no instruction which goes to the jury room shall contain any notation" was not presented to the trial court for its ruling and therefore was not before the appellate court for review. *State v. Herrera*, 1971-NMCA-024, 82 N.M. 432, 483 P.2d 313; 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971).

Motion for new trial. — Alleged errors in the trial court's instructions, not called to that court's attention by a motion for new trial, will not be considered on appeal. *Territory v. Harwood*, 1910-NMSC-029, 15 N.M. 424, 110 P. 556, 29 L.R.A. (n.s.) 504 (1910).

Requested instructions part of bill of exceptions. — Requested instructions which were refused in a criminal case should have been made a part of the record by the bill of exceptions. *United States v. Sena*, 1909-NMSC-022, 15 N.M. 187, 106 P. 383.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1242.

Duty in instructing jury in criminal prosecution to explain and define offense charged, 169 A.L.R. 315.

Propriety and effect, in criminal case, of use of alias of accused in instructions to jury, 87 A.L.R.2d 1217.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Additional instruction to jury after submission of felony case in accused's absence, 94 A.L.R.2d 270.

Propriety and effect of juror's discussion of evidence among themselves before final submission of criminal case, 21 A.L.R.4th 444.

Propriety of juror's tests or experiments in jury room, 31 A.L.R.4th 566.

Communication between court officials or attendants and jurors in criminal trial as ground for mistrial or reversal - post-Parker cases, 35 A.L.R.4th 890.

Juror's reading of newspaper account of trial in state criminal case during its progress as ground for mistrial, new trial, or reversal, 46 A.L.R.4th 11.

23A C.J.S. Criminal Law § 1194.

CHAPTER 1
General Instructions

Part A
General Explanatory Matters Before and During Trial

14-101. Explanation of trial procedure.[1]

Introduction of staff

I am Judge _____ (*name of trial judge*). My bailiff, who will escort you and assist in communicating with the court, is _____. My administrative assistant is _____. If you need anything during the trial [the bailiff] [or] the administrative assistant would be happy to help. The court [reporter]

[monitor] is _____. The court [reporter] [monitor] makes a record of everything said in court.[2] You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the trial, because ordinarily transcripts of the witnesses testimony will not be provided to you.

This is a criminal case commenced by the state against the defendant _____ (*name of defendant*). The defendant is charged with _____ (*common name of crime*) [in Count 1] [and _____ (*common name of crime*) in Count 2, etc.] of _____. [Each count is a separate crime.] The defendant is presumed to be innocent. The state has the burden to prove beyond a reasonable doubt that the defendant is guilty. What I will say now is an introduction to the trial of this case.

Introduction to preliminary instructions

As the trial begins, I have some instructions for you. These instructions, along with those previously given, are preliminary only and may be changed during or at the end of the trial. All of you must pay attention to the evidence. After you have heard all of the evidence I will read the final instructions of law to you. You will also receive a written copy of all instructions. You must follow the final instructions in deciding the case.[2]

Scheduling during trial

This trial is expected to last [until _____] [_____ days]. The usual hours of trial will be from _____ (a.m.) to _____ (p.m.) with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by _____ (a.m.). Please do not come back into the courtroom until you are called by the bailiff.[2]

Note taking permitted

You are allowed, but not required, to take notes during trial. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the trial. Listening and watching witnesses during their testimony will help you assess their appearance, behavior, memory and whatever else bears on their credibility. At each recess you must either leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your notes and return them to you when the trial resumes. When deliberations commence you will take your notes with you to the jury room. Ordinarily at the end of the case the notes will be collected and destroyed.[3]

Order of trial

A criminal trial generally begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during

the course of the trial can be of considerable assistance to you in understanding the evidence as it is presented at trial. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a verdict.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this case, which you must do solely upon the evidence received in court.

It is the duty of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper, and you must not hold such objection against the objecting party. I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account, among other things, the witness's ability and opportunities to observe, memory, manner or any bias or prejudice that the witness may have and the reasonableness of the testimony considered in light of all of the evidence of the case.

No ruling, gesture or comment I make during the course of the trial should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

Questions by jurors

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have an unanswered question after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write the question and your name down on a piece of your note paper and give it to the bailiff before the witness leaves the stand. I will decide whether or when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may prevent the question from being asked. If the question is not asked, please do not give it any further consideration, do not discuss it with the other jurors and please do not hold it against either side that you did not get an answer.

Conduct of jurors

There are a number of important rules governing your conduct as jurors during the trial. You must decide the case solely upon the evidence received in court. You must not consider anything you may have read or heard about the case outside the courtroom. During the trial and your deliberations, you must avoid news accounts of the trial, whether they be on radio, television, the internet or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the case.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else, including your family and friends, until you have returned a verdict and the case is at an end. I know that many of you use cell phones, the internet, and other tools of technology.

You are not to discuss or provide any information to anyone about this case through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this case until I have accepted your verdict and this case is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to sympathy, bias or prejudice. Therefore, until you retire to deliberate the case, you must not discuss this case or the evidence with anyone, even with each other, because you have not heard all the evidence, you have not been instructed on the law, and you have not heard the final arguments of the lawyers. If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

To minimize the risk of accidentally overhearing something that is not evidence in this case, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Although it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

Exclusion of witnesses

Witnesses, other than the parties, representatives of the state and expert witnesses will wait outside the courtroom until they are called to testify. Witnesses may not talk to other witnesses while waiting to testify. The lawyers are responsible for monitoring their own witnesses to assure that they do not enter the courtroom.][4]

The prosecuting attorney may now make an opening statement. The defendant's attorney may make an opening statement or may wait until later in the trial to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what the lawyer expects the evidence to show.

USE NOTES

1. For use after the jury is sworn and before opening statements. This instruction does not go to the jury room.

2. This section serves as a suggested guideline to the judge.

3. The court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations. The court must instruct court personnel not to read juror notes.

4. This paragraph is given if the rule was invoked in the presence of the jury. *See* Rule 11-615 NMRA of the Rules of Evidence for witnesses who may be excluded for the courtroom.

[As amended, effective January 1, 1994; July 1, 1998; August 1, 2001; January 20, 2005; as amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011; as amended by Supreme Court Order No. 21-8300-011, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Absent a requirement that instructions must be given prior to the introduction of evidence, the court has discretion to refuse to give any instructions until the traditional point in the trial. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972). *See* Rules of Criminal Procedure, Rule 5-607 NMRA - Order of trial. The

adoption of these instructions and the amendment to Rule 5-607 NMRA of the Rules of Criminal Procedure provides the mandatory requirement for some instructions at the start of the trial.

The adoption of preliminary instructions in New Mexico Uniform Jury Instructions-Civil provides the New Mexico precedent for these instructions. Giving the jury a legal and procedural framework prior to the presentation of the evidence has been suggested by various experts on criminal jury trials. See, e.g., Prettyman, Jury Instructions - First or Last?, 46 A.B.A.J. 1066 (1960); *cf.* American Bar Association, Standards Relating to Trial by Jury, §§ 3.1 and 4.6(d) (1968).

UJI 14-101 NMRA was amended in 1982 to include a general instruction to the jurors relating to the avoidance of news accounts of the trial during its progress. *See State v. Perea*, 95 N.M. 777, 626 P.2d 851 (Ct. App.), *cert. denied*, 96 N.M. 17, 627 P.2d 412 (1981).

[As amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-011, effective December 31, 2021, clarified certain preliminary trial procedures; in the section titled "Introduction of staff", added "You must pay close attention to the testimony even though there is a [reporter] [monitor] making a record of the trial, because ordinarily transcripts of the witnesses testimony will not be provided to you."; in the section titled "Order of trial", after "exhibits and any", added "stipulations or"; in the section titled "Questions by jurors", after "asked or answered, write", deleted "it" and added "the question and your name"; and in the section titled "Conduct of jurors", in the third undesignated paragraph, added "After the parties have made their closing statements, you will retire to deliberate.", and deleted "You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone or any other device that can access the internet through email, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by the way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook My Space, LinkedIn, or YouTube*).", completely rewrote the fourth undesignated paragraph, and in the fifth undesignated paragraph, added "It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to sympathy, bias or prejudice. Therefore, until", and deleted "It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to any sympathy, bias or prejudice."

The 2011 amendment, approved by Supreme Court Order No. 11-8300-005, effective March 25, 2011, added the second, third, and fourth paragraphs to the instructions on the conduct of jurors to admonish jurors to decide the case based only on the evidence presented at trial, not to conduct any independent research about the case or consult outside sources, not to talk about the case to fellow jurors until jury deliberations begin, and not to communicate with anyone about the case by any electronic device during trial or during jury deliberations and in the fifth paragraph, admonishes the jury not to discuss the case with any one until jury deliberations begin because until deliberations begin, the jury has not heard all the evidence, the court's instructions, and the argument of counsel for the parties.

The 2004 amendment, effective for cases filed on and after January 20, 2005, rewrote this jury instruction.

The 2001 amendment, effective August 1, 2001, in Use Note 3, added the proviso concerning good cause not to destroy jury notes, and added the instruction to court personnel not to read jury notes.

The 1998 amendment, effective for criminal cases filed on and after July 1, 1998, in the first paragraph, substituted "is" for "has been" in the first sentence, deleted "charge of a" in the second sentence, deleted "has pleaded 'not guilty' and" in the third sentence, and substituted "to prove" for "of proving the guilt of the defendant" and added "that the defendant is guilty" in the fourth sentence; in the second paragraph, substituted "Next" for "Then" in the second sentence; in the third paragraph, substituted "you may consider" for "will be admitted for your consideration"; in the fourth paragraph, substituted "hold such objection" for "be prejudiced" and deleted "because of such objections" in the first sentence, and substituted "it is" for "I conclude that it would be legally" and "the" for "such" in the second sentence; added the second sentence in the eighth paragraph; and in the ninth paragraph, inserted "and the court will provide you with note taking material if you wish to take them" in the first sentence, substituted "note taking" for "taking of notes" in the second sentence, and rewrote the third sentence.

The 1994 amendment, effective January 1, 1994, inserted the last sentence in the second paragraph, deleted "The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the lawyers" from the end of the third paragraph, deleted "You must rely upon your individual memories of the evidence in the case" from the end of the eighth paragraph, added the ninth paragraph which leaves it to the discretion of the trial judge as to whether or not jurors will be permitted to take notes, and inserted "[she]" following "[he]" in the thirteenth and fourteenth paragraphs.

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in the ninth paragraph, deleted "representing the various parties in the lawsuit" following "Ordinarily the attorneys" in the first sentence, substituted "hand it to me" for "hand it to the court" in the second sentence, "I must" for "the court must" in the next-to-last sentence, and "if I deem" for "if the court deems" in the last sentence;

and, in the last paragraph, substituted "what he expects the evidence to show" for "what he intends to prove".

I. GENERAL CONSIDERATION.

Mid-trial publicity. — When the trial court is alerted to mid-trial publicity, the court should conduct a three-step procedure. (1) The court should determine whether the publicity is inherently prejudicial by considering whether the publicity goes beyond the record or contains information that would be inadmissible at trial, how closely related the material is to matters at issue in the case, the timing of the publication during trial, and whether the material speculates on the guilt or innocence of the accused. The court should also consider the likelihood of juror exposure by looking at the prominence of the publicity, including the frequency of coverage, the conspicuousness of the story in the newspaper, and the profile of the media source in the local community; and the nature and likely effectiveness of the trial judge's previous instructions on the matter, including the frequency of instruction to avoid outside material, and how much time has elapsed between the trial court's last instruction and the publication of the prejudicial material. Any question as to the existence of prejudice should be resolved in favor of the accused. (2) If the publicity is inherently prejudicial, the court should, either on its own motion or on the motion of either party, canvass the jury as a whole to assess whether any of the jurors were actually exposed to the publicity. (3) If any of the jurors were actually exposed to the publicity, the court must conduct an individual voir dire of the juror to ensure that the fairness of the trial has not been compromised. *State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

Failure to canvass jury about mid-trial publicity was harmless error. — Where, on the second day of the defendants' trial for first degree murder, a small-town newspaper published an article that featured a banner headline that stated the defendant had plead guilty to racketeering and tampering with evidence charges arising from the same series of events as those involved in the defendant's murder trial, included information about the shooting and the victims the defendant was alleged to have shot, and contained statements from the prosecuting attorney implicating the defendant; the trial court frequently cautioned the jury to avoid news accounts of the trial, including a caution on the day before the article appeared; the trial court was not consulted about the article by defense counsel until two days after the article appeared; the trial court rejected defense counsel's request to voir dire the jury about their exposure to the article; defense counsel did not request that the jury be polled after the verdict to determine whether any juror was actually exposed to the article; most of the information in the article was placed before the jury during the trial; and the evidence of the defendant's guilt was overwhelming, any error that the trial court committed by rejecting the defendant's request to voir dire the jury was harmless. *State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844.

Jurors are to be informed as to the position occupied by the district attorney, as well as that occupied by defense counsel, and they are instructed as to the presumption of innocence with which the accused is clothed, the burden which the state must bear in

securing a conviction, that a verdict of conviction must find support in the facts as found by them from the evidence and that statements of counsel are not evidence. *State v. Polsky*, 1971-NMCA-011, 82 N.M. 393, 482 P.2d 257, cert. denied, 82 N.M. 377, 482 P.2d 241, and cert. denied, 404 U.S. 1015, 92 S. Ct. 688, 30 L. Ed. 2d 662 (1972).

Court of appeals will assume the jury followed the court's instruction based on this section. *State v. Stallings*, 1986-NMCA-086, 104 N.M. 660, 725 P.2d 1228.

II. EVIDENCE FOR CONSIDERATION.

Court cannot take judicial notice of facts. — Where the defendant cites neither medical nor legal authority to support a requested instruction, and further, a medical witness refuses to substantiate the defendant's theory proposed by the instruction, the court cannot take judicial notice of the fact and properly refuses the instruction. *State v. Lucero*, 1971-NMCA-015, 82 N.M. 367, 482 P.2d 70.

Magnifying glass in jury room proper. — Enhancement of the jury's visual acuity through use of a magnifying glass is not experimentation unless there is some indication that the magnification produced additional evidence. *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

III. CONDUCT OF JURY.

Violation of court's admonition not to discuss case not assumed. — The appellate court will not assume that the jury has violated the trial court's admonition not to discuss the case, absent proof or allegation of a violation. *State v. Doe*, 1983-NMCA-012, 99 N.M. 456, 659 P.2d 908.

Instruction against jurors visiting crime scene. — Trial court did not abuse its discretion in holding trial in courtroom of building where crime scene was located; any possible prejudice to defendant was cured by instructions to jury that they were not to visit the crime scene on their own. *State v. Hernandez*, 1998-NMCA-167, 126 N.M. 377, 970 P.2d 149, cert. denied, 126 N.M. 533, 972 P.2d 352.

IV. STATEMENTS BY COURT.

Statements about facts not in evidence. — Where defendant was convicted of first degree criminal sexual penetration of a minor and third degree criminal sexual contact of a minor; prior to trial defendant sought a psychological evaluation of the victim; at trial, defendant presented expert testimony about false reporting of child sexual abuse and the need to psychologically evaluate a child who makes a claim of abuse to minimize the possibility of false reporting; a juror asked the court whether the victim had been psychologically evaluated; the court informed the jury that issues related to testing and evaluations were subject to the jurisdiction of the court; and the court instructed the jury not to speculate regarding the existence or nonexistence of testing and evaluations,

the court's instruction to the jury was not erroneous. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92.

Court not to comment on evidence. — In a jury trial, the court must not in any manner comment upon the weight to be given certain evidence or indicate an opinion as to the credibility of a witness, but it is not error to advise a witness outside the presence of the jury of the consequences of perjury or to caution him about testifying truthfully, when the need arises because of some statement or action of the witness. *State v. Martinez*, 1982-NMCA-137, 99 N.M. 48, 653 P.2d 879.

Instruction may avoid prejudicial, evidentiary error. — The trial court can properly instruct or admonish the jury concerning an evidentiary matter in an effort to avoid prejudice. *State v. Hogervorst*, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

Admonition to jury generally cures prejudicial question. — There are instances where the asking of a question is so prejudicial that an admonition to the jury to disregard the question is insufficient to cure the prejudicial effect. Generally, however, when the question is not answered and the jury is admonished to disregard the question, any prejudicial effect is cured. *State v. McFerran*, 1969-NMCA-084, 80 N.M. 622, 459 P.2d 148, cert. denied, 80 N.M. 731, 460 P.2d 261.

Instruction that defendant on his own request may testify in his own behalf, but his failure to testify shall create no presumption against him, although it may be the subject of comment or argument, is not error. *State v. Sandoval*, 1966-NMSC-143, 76 N.M. 570, 417 P.2d 56.

Court statements during trial may be insufficient to rectify possible error. — The provision of this instruction concerning statements made by the court during trial is not sufficient to rectify the possibility of error resulting from irrelevant questions by the court that might influence the jury's verdict. *State v. Caputo*, 1980-NMCA-032, 94 N.M. 190, 608 P.2d 166.

Curative instruction held to have eradicated any prejudice which may have existed. *State v. Shoemaker*, 1981-NMCA-151, 97 N.M. 253, 638 P.2d 1098.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Unauthorized view of premises by juror or jury in criminal case as ground for reversal, new trial, or mistrial, 50 A.L.R.4th 995.

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

14-101A. Use of interpreter.[1]

No matter what language people speak, they have a right to have their testimony heard and understood. You are about to hear a trial in which a court-certified interpreter will interpret for one or more of the [witnesses]. The interpreter is required to remain

neutral. The interpreter is required to interpret what is spoken, or translate documents, between English and _____ (*specify other language*) accurately and fairly to the best of the interpreter's skill and judgment.

Some of you may speak or understand _____ (*specify other language*). Ordinarily because the court-certified interpreters must abide by an oath and with standards and the ethics of their profession, their interpretation is presumed to be accurate. However, if based on your understanding of _____ (*specify other language*), you firmly believe that the interpreter has incorrectly interpreted either a question or a witness's response to the question, you may give the bailiff a note before the witness leaves the stand stating your concern. I will decide whether and how to address your concern.

If I decide to leave the interpretation as expressed by the interpreter you must only consider the interpreter's English interpretation, even if you still disagree with the interpreter's interpretation. What the witness(es) may have said in _____ (*specify other language*), before the interpreter's interpretation, is not evidence and may not be used by you in any way in your deliberations.

You must evaluate the interpreted testimony as you would any other testimony. That is, you must not give interpreted testimony any greater or lesser weight than you would if the witness had spoken English.

Keep in mind that a person might speak some English without speaking it fluently. That person has the right to the services of an interpreter. Therefore, you shall not give greater or lesser weight to a person's interpreted testimony even if you think the witness speaks some English.

USE NOTES

1. This instruction is to be used whenever a witness interpreter is necessary. The instruction may be adapted for use with signed language or other types of interpreters.

[Adopted by Supreme Court Order No. 14-8300-022, effective for all cases pending or filed on or after December 31, 2014.]

14-102. Explanation; presentation of evidence.

The state will now present its evidence.

After the state has presented its evidence, the defendant may present evidence but is not required to do so because the burden is always on the state to prove the defendant's guilt beyond a reasonable doubt.

USE NOTES

For use before the introduction of any evidence. This instruction does not go to the jury room.

Committee commentary. — *See* committee commentary under UJI 14-101 NMRA.

ANNOTATIONS

Instructions need not be given before introduction of evidence. — This provision does not mean that instructions must be given in a criminal case before the introduction of evidence or at any time prior to completion of the evidence. *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial § 321 et seq.

23A C.J.S. Criminal Law §§ 1087, 1088.

14-103. Explanation; instructions.

You have heard all the evidence. It is now my duty to tell you the law that you must follow in this case.

USE NOTES

For use after the close of the evidence. This instruction does not go to the jury room.

Committee commentary. — *See* committee commentary under UJI 14-101 NMRA.

ANNOTATIONS

Both the defendant and the state have a duty to tender correct instructions to the trial court. *Jackson v. State*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

Duty to instruct on all essential questions. — The trial court has a duty to instruct the jury on all questions of law essential for a conviction of the crime with which the defendant is charged. *Jackson v. State*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 1077, 1079.

23A C.J.S. Criminal Law § 1186.

14-104. Explanation; closing argument.

Now the lawyers will argue the case. What is said in the arguments is not evidence. It is an opportunity for the lawyers to discuss the evidence and the law as I have instructed you. The state has the right to argue first; the defense may then argue; the state may then reply.

USE NOTES

For use before closing argument. This instruction does not go to the jury room. In a capital case it is proper for the state in its closing remarks to tell the jury that the state will not seek the death penalty.

Committee commentary. — *See* committee commentary under UJI 14-101 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 495, 496, 535 to 538, 540.

Right of accused to additional argument on matters covered by amended or additional instructions, 15 A.L.R.2d 490.

23A C.J.S. Criminal Law § 1089.

14-105. Explanation; exhibit admitted.[1]

I have admitted _____ *(name of exhibit)* into evidence as an exhibit [and you may examine it].[2]

With regard to this _____ *(name of exhibit)* and any other exhibits that may be admitted into evidence during the trial, you should consider it in determining the facts.

Just as with oral testimony, you may give any exhibit such weight and value as you think it deserves in helping you to decide what happened in this case.

USE NOTES

1. If requested, this instruction should be given at least once at the appropriate time. Otherwise, it may be used at the court's discretion. This instruction does not go to the jury room.

2. Use only if the exhibit is such that it can be passed to the jury.

Committee commentary. — *See* committee commentary under UJI 14-101 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1666.

23A C.J.S. Criminal Law § 1243.

14-106. Explanation; conference at bench.[1]

The lawyers will approach the bench so that we may discuss some matters out of your hearing.

It is the lawyers' duty to offer evidence they believe proper and to object to evidence they believe improper. It is my duty to decide what evidence finally will be admitted for your consideration.

It may be necessary for us to confer about this or other matters from time to time during the trial. You must not speculate about what we are discussing.

[You may talk among yourselves, but please do not discuss the case.][2]

USE NOTES

1. If requested, this instruction should be given at least once at the appropriate time. Otherwise, it may be used at the court's discretion. This instruction does not go to the jury room.

2. This bracketed sentence may be given solely at the discretion of the court.

Committee commentary. — *See* committee commentary under UJI 14-101 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial § 184.

Failure or refusal of state court judge to have record made of bench conference with counsel in criminal proceeding, 31 A.L.R.5th 704.

14-107. Explanation; jury excused.[1]

It is [again][2] necessary to excuse you from the courtroom for a short while so that the lawyers and I can discuss some matters out of your hearing.

You must not speculate about what we are saying. It is the lawyers' duty to offer evidence they believe proper and to object to evidence they believe improper. You may be sure that all the evidence that is proper for you to hear in this case will be presented to you. Our conference now is to insure that no errors are made in the conduct of this trial.

Please do not discuss the case.

USE NOTES

1. If requested, this instruction should be given at least once at the appropriate time. Otherwise, it may be used at the court's discretion. This instruction does not go to the jury room.

2. For use for subsequent excusals. It is not necessary to read the instruction verbatim every time the jury is excused.

Committee commentary. — *See* committee commentary under UJI 14-101 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1351.

14-108. Explanation; closing argument; improper argument on meaning of words contained in instructions but not defined.[1]

The [word] [language] _____[2] is not defined in the instruction because a definition was not considered to be necessary.

During your deliberation, if you have a question as to the meaning of the [word] [language], you may make a written request for a definition and I will give you one.[3]

USE NOTES

1. For use during closing argument when counsel misstates the law concerning the meaning of a word or words not defined in the instructions. It may be given orally during closing argument or in writing after closing arguments. It may be given at the request of a party objecting to the argument, and may be given on the court's own motion.

2. Indicate the word or language, the meaning of which is in dispute.

3. Upon receipt of a request from the jury, use a UJI definition instruction if one is appropriate. If there is no appropriate UJI definition, use a dictionary definition if it correctly states the law and resolves the dispute. Otherwise, draft an instruction.

Committee commentary. — This instruction is designed to correct erroneous or improper jury argument involving a misstatement of the law. The UJI avoids definitions of words or terms which have an ordinary or common meaning. The UJI style may result in erroneous or misleading argument, because counsel may vary the law of the case simply by arguing that a word or phrase has a different meaning.

The General Use Note prohibits the alteration of an essential elements instruction, but the giving of a definition upon request of the jury does not constitute such an alteration.

If the jury is not given a definition, it is liable to accept erroneous arguments of counsel as to the meaning of disputed words or phrases. This instruction in effect tells the jury

that counsel is misstating the law, and invites a request for a definition. Postponing the definition until it is requested will give the court ample time to select the correct definition, and will result in less interruption of the argument.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1116.

14-109. Explanation; cameras in courtroom.

Cameras are allowed in the courts of this state under certain guidelines. In order not to distract you, they will be located in designated areas of this courtroom. In the event any member of the jury is distracted by any member of the news media, you should immediately advise this court.

The news media has been instructed not to film this jury or any member of this jury whether in the courtroom or outside the courtroom.

The cameras may be allowed to photograph the testimony of certain witnesses and not others or only portions of the testimony of some witnesses. You are not to draw any inferences or conclusions whatsoever from this fact.

USE NOTES

If requested, this instruction may be given at least once at the appropriate time whenever cameras are present in the courtroom. Otherwise, it may be used in the court's discretion. This instruction does not go to the jury room.

Committee commentary. — *See* Canon 21-800 of the Code of Judicial Conduct for the guidelines for broadcasting, televising, photographing and recording of court proceedings.

In *Chandler v. Florida*, 449 U.S. 560, 574-5 (1981), the U.S. supreme court stated:

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter.

The justices concentrated much discussion on the psychological impact on the defendant, witness, attorneys and judges of having cameras in the courtroom. However, they concluded that this impact cannot be, in all cases, said to be strong enough to violate due process. There must be a specific showing that "the media's coverage of [the] case - printed or broadcast - compromised the ability of the jury to judge [the defendant] fairly." Id. at 581.

ANNOTATIONS

Cross references. — For disqualification of judge in proceedings where his impartiality might be questioned, *see* Code of Judicial Conduct, Rule 21-400 NMRA.

14-110. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 13-8300-042, former UJI 14-110 NMRA was recompiled and amended as 4-602 and 9-513 NMRA, effective for all cases pending or filed on or after December 31, 2013.

14-111. Supplemental jury questionnaire.

The court, in its discretion, may allow a case-specific juror questionnaire to be distributed to the jury panel to supplement the general questionnaire originally given to the panel. This procedure is not mandatory but may be helpful. A sample questionnaire is provided below, which must be altered to fit the individual case. Questionnaires are not to be used as a substitute for voir dire questioning. The questionnaires have several purposes:

1. They allow the jurors to provide some information privately in a less intimidating atmosphere.

2. The questionnaires give the court and the parties useful information about some mundane yet important topics (for example, the jurors' knowledge of witnesses) in an efficient manner. They thus free the attorneys to question about more substantive and interesting issues and to follow up on specific topics which are highlighted by the questionnaires.

3. Questionnaires help to detect some excuses for cause earlier in the process so that the court's time is used questioning those jurors who are more likely to sit in the case, rather than those who will ultimately be excused.

4. Supplemental questionnaires give the court and parties more specific information about question areas addressed in the general questionnaire which are of particular relevance to this case.

SAMPLE SUPPLEMENTAL JUROR QUESTIONNAIRE

To Prospective Jurors:

Please answer each of the following questions as fully and accurately as possible. There are no right or wrong answers. You should simply answer the questions honestly

and conscientiously. You must not discuss the questionnaire or the answers with anyone else.

Your answers will be given to the parties or their attorneys in the case for which you are being considered as a juror. If you do not understand a question or do not have enough room to give adequate explanation to your answer, please use the last page for additional information. This questionnaire is to be answered as though you were in court answering questions.

The case for which you are being questioned is entitled *State of New Mexico v. John Jones* in which the State alleges that Mr. Jones committed the crimes of (1) driving while under the influence of intoxicating liquor and (2) vehicular homicide. This is a brief statement of the charges against Mr. Jones but this and the following statements are not evidence. Mr. Jones is presumed innocent and the truth, if any, of the charges against him must be proved by the prosecution beyond a reasonable doubt.

The incidents which are relevant to the case occurred on or about June 1, 1991 on the 100 block of Central Avenue in Albuquerque. At that time Wanda Smith, 25, from Albuquerque, was a passenger in Mr. Jones' car and was killed as a result of a one vehicle accident. Also riding in the automobile were Sandra Johnson and Jose Garcia. All of the passengers in the car were students at the University of New Mexico.

Your candor in answering these questions is appreciated.

Thank you for your cooperation.

NAME: _____

1. The possible witnesses in this case include:

   (See attached list)

   Do you know or have you heard of any of these prospective witnesses? Yes No

   If yes,

   which witnesses do you know?

   _____

   what is your relationship to the witness?

   or what have you heard?

   _____

2. Have you heard of the incidents or persons involved in this case in any way, including through radio, television, newspapers, the internet, discussion with friends or otherwise? Yes No

If yes,

what have you heard?

_____

what is the source of your information?

_____

3. Mr. Jones is represented by (attorneys for defendant). Do you know or have you heard of the attorneys in this case? Yes No

If yes,

which do you know? _____

how do you know? _____

what have you heard? _____

What is your feeling about sitting on a case in which these attorneys are involved?

_____

4. The State of New Mexico is represented by

_____

(names of prosecuting attorneys). Do you know or have you heard of these attorneys? Yes No

If yes,

which do you know? _____

how do you know? _____

what have you heard? _____

What is your feeling about sitting on a case in which these attorneys are involved?

_____

Have you had any contact whatsoever with the Bernalillo County District Attorney's office? Yes No

If yes, explain _____

5. Have you had any contact whatsoever with the Albuquerque Police Department? Yes No

If yes,

what has been your contact?

_____

what is your feeling about the members of the Albuquerque Police Department?

_____

6. Do you, your relatives or close associates belong to any organizations which take an official position on the use of alcohol? (MADD, SADD, certain churches, etc.) Yes No

_____

7. Do you drink alcohol? Yes No

How often? _____ What are your feelings about the use of alcohol?

_____

8. Have you ever known anyone who was arrested for driving while intoxicated (DWI)? Yes No

Explain: _____

9. Have you, your relatives, or close associates become familiar, through work, training, or study, with the effects of alcohol? Yes No

If so, please explain:

_____

10. Have you ever taken any courses which addressed the effects of alcohol? Yes No

Explain: _____

11. What is your knowledge, education, or training about blood alcohol levels as shown by a blood test or breath test? Please explain:

_____

12. Do you drive an automobile regularly? Yes No

What kind of car(s) do you drive?

_____

13. Have you ever been in an automobile accident? Yes No

Was anyone injured or killed? Please explain:

_____

14. How well do you feel the court system deals with crime?

_____

How well do you feel the court system deals with alcohol related crimes?

_____

15. What are your favorite movies that you've seen within the last few years?

_____

16. From what brief description you've been given, is this a case in which you would like to serve as a juror? Yes No

Why or why not? _____

17. Please list any other information you think would be important for the court to know. Also, list here any information which you did not have room to give earlier.

If you do not understand particular questions, please list those questions.

_____

_____

_____

I SWEAR OR AFFIRM THAT THE ABOVE INFORMATION IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF

_____ _____

Signature Date

[Adopted, effective January 1, 1995; as amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009.]

ANNOTATIONS

The 2008 amendment, as approved by Supreme Court Order No. 08-8300-060, effective February 2, 2009, in the third sentence of the first paragraph changed "A sample questionnaire is provided below, which would be altered to fit an individual case" to "A sample questionnaire is provided below, which must be altered to fit the individual case"; and in numbered item 2 of the "SAMPLE SUPPLEMENTAL JUROR QUESTIONNAIRE", added "the internet".

14-112. Stipulation of fact.

The state and the defense have stipulated that _____ *(set forth stipulated fact)*. A stipulation is an agreement that a certain fact is true. You should regard such agreed facts as true.

USE NOTES

This instruction should be given at the time the stipulated fact is admitted into evidence. This instruction does not go to the jury room.

[Approved, effective January 1, 1999.]

14-113. Stipulation of testimony.

The parties have agreed that if called as a witness, _____ *(name of witness)* would have given the following testimony: _____ *(set forth stipulated testimony)*. You must accept as true the fact that the witness would have given that testimony. However, it is for you to determine the effect or weight to be given that testimony.

USE NOTES

This instruction should be given at the time the stipulated testimony is admitted into evidence. This instruction does not go to the jury room.

[Approved, effective January 1, 1999.]

14-114. Recess instruction.

During recess, do not discuss this case with other jurors or with any other person, or allow anyone to discuss the case with you or in your presence.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in this case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I know that many of you use cell phones, the internet, and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone or any other device that can access the internet, through email, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, and YouTube*).

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, or any device that can access the internet; the internet, any internet service, or any text or instant messaging service; or

any internet chat room, or by way of any other social networking websites, such as _____ (*insert current examples of social networking sites, such as Facebook, My Space, LinkedIn, YouTube, or Twitter*), to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.

Avoid any publicity this case may receive. Do not read, listen to or watch any news accounts of this trial.

Do not express any opinion about the case or form any fixed opinion until the case is finally submitted to you for your decision.

USE NOTES

This instruction may be given at recesses and at the end of each day of the trial. After the initial reading, the court may abbreviate the instruction as necessary.

[Approved, effective October 15, 2002; as amended by Supreme Court Order No. 11-8300-005, effective March 25, 2011.]

Committee commentary. — This instruction is not mandatory. It is a summary of several admonitions contained in the explanation of trial procedure, UJI 14-101 NMRA.

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-005, effective March 25, 2011, added the second, third, and fourth paragraphs to admonish jurors to decide the case based only on the evidence presented at trial, not to conduct any independent research about the case or consult outside sources, not to talk about the case to fellow jurors until jury deliberations begin, and not to communicate with anyone about the case by any electronic device during trial or during jury deliberations.

14-118. Expert witnesses.

An expert witness is a witness who, by knowledge, skill, experience, training or education, has become expert in any subject. An expert witness may be permitted to state an opinion as to that subject.

You should consider each expert opinion and the reasons stated for the opinion, giving them such weight as you think they deserve. You may reject an opinion entirely if you conclude that it is unsound.

USE NOTES

This instruction may be given at the time the expert testifies or it may be given with the closing instructions or it may be used both times. UJI Criminal 14-5050 NMRA may be given when a lay witness gives an opinion.

[Approved, effective November 1, 2003.]

Committee commentary. — *See* the committee commentary to UJI Criminal 14-5050 NMRA.

Part B
Voir Dire; Oath

14-120. *Voir dire* of jurors by court.

LADIES AND GENTLEMEN:

This is a criminal case in which the defendant(s) _____ [is] [are][2] charged with _____[3] *(offense charged)*. If chosen as jurors, you will decide whether _____ *(name of defendant)* is not guilty or guilty. _____ *(name of defendant)* is presumed innocent. The burden is on the state to prove guilt beyond a reasonable doubt.

At this time you will be asked some questions. You should remember that there are no right or wrong answers to these questions. The best answer is the most honest answer. If you would prefer not to answer any question in front of other people, please tell us and we will address your concern privately.

You have previously given answers on a questionnaire given you by the court clerk. You may also add to your answers to those questions if your memory is refreshed about those questions here in open court.[4]

[Though not required, before the attorneys ask questions, the court might ask preliminary questions. For example:

1. The state is represented by _____ *(name of attorney)*. How many of you are familiar with _____ *(name of attorney)*? [What is your attitude about sitting on the case in which _____ *(name of attorney)* is representing one of the parties?][5]

2. The defendant is represented by _____ *(name of attorney)*. How many of you are familiar with _____ *(name of attorney)*? [What is your attitude about sitting on the case in which _____ *(name of attorney)* is representing one of the parties?][5]

3. The defendant is _____ *(name of defendant)*. How many of you are familiar with _____ *(name of defendant)*? What is your attitude about sitting on this case given your familiarity with _____ *(name of defendant)*?[5]

4. Without saying what you have seen or heard, how many of you have seen or heard anything about this case from any source whatsoever, including news media, radio, television, internet, or from any other person? *(Those jurors who have received information should be questioned privately.)*[5]

5. It is estimated that this case will last _____ *(length of trial)*. Do any of you feel that you would be caused an undue hardship by sitting in this case for that time? [What is your hardship? What would be your attitude if chosen to sit in the case?][6]

6. Is there any other reason that any of you feel you should not sit on this case?

The attorneys may question the jurors.][7]

USE NOTES

1. For use before jury selection. The court may wish to address a group of prospective jurors about preliminary issues such as hardship excuses before the parties address the jurors. The parties might address the jurors in smaller groups or individually as to more sensitive issues. Sample questions have been provided above. This instruction does not go to the jury room.

2. Use only the applicable bracketed alternative.

3. Fill in the charge as stated on the charging document.

4. There are three basic sources of information used by the court in jury selection:

a. the standard jury questionnaires given to all prospective jurors which contain basic demographic information;

b. case specific supplemental questionnaires which are given to the prospective jurors in the case in question;

c. *voir dire* questioning. The questioning by the attorneys is generally used for inquiry concerning the jurors' attitudes and opinions about case-related issues *(for example, burden of proof, self defense, alcohol use, etc.)* and as follow-up to specific information highlighted by the questionnaires *(for example, a juror's knowledge of a witness)*.

5. It will sometimes be necessary to ask follow-up questions outside the hearing of the other prospective jurors. This is to avoid giving factual information to other jurors that they would not otherwise know and which might affect their view of the case.

6. If the answer to the question is yes, the bracketed additional questions may be given.

7. This instruction is an example of *voir dire* introduction, but the *voir dire* examination should be tailored to the particular needs of a specific case. The court should be sensitive to several factors about *voir dire*:

a. the size of group questioned as to a particular topic;

b. which party proceeds first;

c. the types of questions asked;

d. the length of time required for particular question areas.

These factors will depend on a number of considerations:

a. the type of case tried;

b. the sensitivity of issues. For example sexual matters, publicity or knowledge of parties might give reason for individual *voir dire*;

c. the age, experience, intelligence, education, ability to articulate or timidity of a particular juror;

d. the degree of seriousness of the case;

e. the information gathered in juror questionnaires;

f. the party seeking to exclude a juror.

[As amended, effective January 1, 1995; October 15, 2002; as amended by Supreme Court Order No. 08-8300-60, effective February 2, 2009.]

Committee commentary. — This instruction is based on the voir dire used in federal courts and is included for guidance in conducting the voir dire in criminal cases. These questions may be asked of the jurors as a group in order to save time.

ANNOTATIONS

The 2008 amendment, as approved by Supreme Court Order No. 08-8300-060, effective February 2, 2009, in the first word of Subparagraphs a, b and c of Paragraph 4 of the "USE NOTE", changed capital letters to lower-case letters.

The 2002 amendment, effective October 15, 2002, substituted "us" for "me and the parties" following "please tell" in the second sentence of the second paragraph.

The 1995 amendment, effective January 1, 1995, rewrote the instruction, rewrote Use Note 1, substituted "charging document" for "indictment or information" in Use Note 3, and added Use Notes 4, 5, 6, and 7.

14-121. Individual voir dire; death penalty cases; single jury used.[1]

In New Mexico there are two possible penalties for a person who has been convicted of [an intentional deliberate first degree][2] murder. Those penalties are life imprisonment or death. New Mexico has a two-phase trial in those cases in which the death penalty may be imposed. The same jury is used for both phases.

The first phase is called the innocence-guilt phase. In this phase the jury decides whether the state has proven the defendant guilty beyond a reasonable doubt. In making this decision the jury cannot consider the consequences of its verdict or any possible sentence. If the accused is found not guilty of first degree murder, the proceedings are ended for the jury. But if the defendant is found guilty of [an intentional deliberate first degree][2] murder, the same jury is brought back for a second phase of the trial called the sentencing phase. At that time the jury may hear more evidence and will hear legal instructions and arguments of counsel. The jury then decides the penalty of life in prison or death.

In this case, _____ (*name of defendant*), has pleaded not guilty and is presumed to be innocent. The state has the burden of proving _____ (*name of defendant*) guilty beyond a reasonable doubt. I am going to ask you some questions concerning your views about possible penalties for someone convicted of [an intentional deliberate first degree][2] murder. When I speak of murder, I mean a killing of a human being which is intentional, not justifiable and not legally excusable. Murder does not include killings of people which are accidental, which are committed in self-defense or for which there is some other legal defense. In other words, these questions refer only to persons who have intentionally and illegally killed another human being.

Asking these questions is a procedural requirement and the fact that you are asked questions about possible penalties does not reflect on _____'s (*name of defendant*) innocence or guilt in any way because _____ (*name of defendant*) is presumed to be innocent. In fact, these questions do not refer to this case specifically, but to your views in general. If you do not understand a question, please let me know and we will clarify the question.

1. What is your attitude about penalties for persons convicted of [an intentional premeditated first degree][2] murder?

2. Do you feel that the death penalty is the appropriate penalty for all persons convicted of [an intentional deliberate first degree][2] murder?

3. Do you feel that the death penalty is appropriate for some, but not all, persons convicted of [an intentional deliberate first degree][2] murder?

4. Do you feel that the death penalty is never an appropriate penalty for people convicted of [an intentional deliberate first degree][2] murder?

5. After answering the above questions, please tell us more about your views and why you answered as you did.[3]

USE NOTES

1. For use only in cases where the death penalty may be imposed. This instruction may be used when the same jury is used for the innocence-guilt and sentencing phases of the trial. When the defendant has exercised the option to have two separate juries, one for the innocence-guilt phase and an independent jury for the sentencing phase, UJI 14-121A NMRA shall be used. These questions are not mandatory.

2. Set forth or describe the type of murder charged which may result in the imposition of the death penalty.

3. The attorneys may now question the juror. If the answer to question 2 is yes, the defendant's attorney may question first as to the juror's attitudes. If the juror's answer to question 3 is yes, the court may alternate between the prosecuting attorney and the defendant's attorney as to who questions the prospective juror first. If the answer to question 4 is yes, the prosecuting attorney may question first about the juror's attitudes.

[As amended, effective January 1, 1995; as amended by Supreme Court Order No. 09-8300-043, effective November 30, 2009, for all new and pending cases.]

Committee commentary. — The questions included for use in cases where the death penalty may be imposed are based on requirements set forth in *Witherspoon v. Illinois*, 391 U.S. 510, rehearing denied, 393 U.S. 898 (1968). *Witherspoon* specifies that a venireperson cannot be excluded from serving on a jury in a case where the death penalty may possibly be imposed unless the venireperson is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. 510 at 522. Both questions need not be asked. If the venireperson answers the first question in the negative, it is not necessary to ask the second question, and the venireperson may be excused. If the answer is in the affirmative, the second question must be asked.

The venireperson may then be excused only if the second question is answered in the affirmative.

ANNOTATIONS

The 2009 amendment, approved by Supreme Court Order No. 09-8300-043, effective November 30, 2009, in the title, added "single jury used" and in the second paragraph, at the end of the fifth sentence, added "called the sentencing phase".

The 1995 amendment, effective January 1, 1995, inserted "Individual" in the instruction heading, rewrote the instruction, rewrote Use Notes 2 and 3, and deleted former Use Note 4, relating to further voir dire held outside the presence of the panel.

Alternative sentencing procedure in death penalty cases. — The Supreme Court amended UJI 14-121 NMRA, effective November 30, 2009, to provide the option of using two separate juries, one to determine innocence or guilt and one to determine sentencing, for all new and pending death penalty cases in district court alleging crimes committed before July 1, 2009, in order to address concerns regarding the death penalty system in New Mexico in the remaining death penalty cases. *In re Death Penalty Sentencing Jury Instructions*, 2009-NMSC-053, 147 N.M. 301, 222 P.3d 674.

Exclusion of jurors. — The trial court does not err in excusing jurors for cause when their beliefs on capital punishment could lead them to ignore their oath as jurors. *State v. Simonson*, 1983-NMSC-075, 100 N.M. 297, 669 P.2d 1092.

Qualifying jurors for possible death penalty at beginning of trial not reversible error. — Qualifying the jurors for a possible death penalty at the beginning of trial rather than waiting until after a determination of guilt is not reversible error. In fact, this is the only reasonable manner in which voir dire can be conducted. *State v. Hutchinson*, 1983-NMSC-029, 99 N.M. 616, 661 P.2d 1315.

The trial court complied with this instruction by prohibiting defense counsel from referring prospective jurors specifically to "the case we are dealing with now" and, at the same time, allowing counsel for both sides considerable latitude in asking generalized, hypothetical questions. *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

14-121A. Individual voir dire; death penalty cases; two juries used.[1]

In New Mexico there are two possible penalties for a person who has been convicted of [an intentional deliberate first degree][2] murder. Those penalties are life imprisonment or death. New Mexico has a two-phase trial in those cases in which the death penalty may be imposed.

The first phase is called the innocence-guilt phase. In this phase the jury decides whether the state has proven the defendant guilty beyond a reasonable doubt. In

making this decision the jury cannot consider the consequences of its verdict or any possible sentence. If the defendant is found guilty of [an intentional deliberate first degree][2] murder, a second jury is selected for a second phase of the trial called the sentencing phase. At that time the sentencing jury may hear more evidence and will hear legal instructions and arguments of counsel. The sentencing jury then decides the penalty of life in prison or death.

I am going to ask you some questions concerning your views about possible penalties for someone convicted of [an intentional deliberate first degree][2] murder. When I speak of murder, I mean a killing of a human being which is intentional, not justifiable and not legally excusable. Murder does not include killings of people which are accidental, which are committed in self-defense or for which there is some other legal defense. In other words, these questions refer only to persons who have intentionally and illegally killed another human being.

Asking these questions is a procedural requirement and the fact that you are asked questions about possible penalties does not reflect on whether _____ (*name of defendant*) should be sentenced to death or life in prison. In fact, these questions do not refer to this case specifically, but to your views in general. If you do not understand a question, please let me know and we will clarify the question.

1. What is your attitude about penalties for persons convicted of [an intentional premeditated first degree][2] murder?

2. Do you feel that the death penalty is the appropriate penalty for all persons convicted of [an intentional deliberate first degree][2] murder?

3. Do you feel that the death penalty is appropriate for some, but not all, persons convicted of [an intentional deliberate first degree][2] murder?

4. Do you feel that the death penalty is never an appropriate penalty for people convicted of [an intentional deliberate first degree][2] murder?

5. After answering the above questions, please tell us more about your views and why you answered as you did.[3]

USE NOTES

1. For use only in cases where the death penalty may be imposed. This instruction may be used when two separate juries are used for the innocence-guilt and sentencing phases of the trial. This instruction may be used for the sentencing jury but shall not be used for the trial jury. When one jury is used for both the innocence-guilt phase and the sentencing phase, UJI 14-121 NMRA shall be used. These questions are not mandatory.

2. Set forth or describe the type of murder charged which may result in the imposition of the death penalty.

3. The attorneys may now question the juror. If the answer to question 2 is yes, the defendant's attorney may question first as to the juror's attitudes. If the juror's answer to question 3 is yes, the court may alternate between the prosecuting attorney and the defendant's attorney as to who questions the prospective juror first. If the answer to question 4 is yes, the prosecuting attorney may question first about the juror's attitudes.

[Adopted by Supreme Court Order No. 09-8300-043, effective November 30, 2009, for all new and pending cases.]

Committee commentary. — The questions included for use in cases where the death penalty may be imposed are based on requirements set forth in *Witherspoon v. Illinois*, 391 U.S. 510, rehearing denied, 393 U.S. 898 (1968). *Witherspoon* specifies that a venireperson cannot be excluded from serving on a jury in a case where the death penalty may possibly be imposed unless the venireperson is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." 391 U.S. 510 at 522. Both questions need not be asked. If the venireperson answers the first question in the negative, it is not necessary to ask the second question, and the venireperson may be excused. If the answer is in the affirmative, the second question must be asked. The venireperson may then be excused only if the second question is answered in the affirmative.

14-122. Oath to jurors on qualification and voir dire examination.

Do you swear or affirm to answer truthfully the questions asked by the judge or the attorneys concerning your qualifications to serve as a juror in this case, under penalty of law?

Committee commentary. — This oath or affirmation or any other oath or affirmation which generally complies with the requirements of Rule 11-603 NMRA of the Rules of Evidence must be administered prior to qualification of jurors and voir dire examination.

ANNOTATIONS

Cross references. — For Uniform Law on Notarial Acts, *see* Sections 14-14-1 to 14-14-11 NMSA 1978.

14-123. Oath to impaneled jury.

Do you swear or affirm that you will arrive at a verdict according to the evidence and the law as contained in the instructions of the court?

Committee commentary. — This oath or affirmation or any other oath or affirmation which generally complies with the requirements of Rule 11-603 of the Rules of Evidence must be administered with other pretrial instructions.

ANNOTATIONS

Cross references. — For Uniform Law on Notarial Acts, *see* Sections 14-14-1 to 14-14-11 NMSA 1978.

Time at which to administer. — Although jury was not sworn until after they rendered the verdict, and although the exact words of this Uniform Jury Instruction were not followed, the jury clearly understood its responsibility because of the voir dire procedures and jury instructions. *State v. Arellano*, 1998-NMSC-026, 125 N.M. 709, 965 P.2d 293.

Purposeful failure to inform court of absence of oath. — Failure to swear the jury could not be grounds for a reversal of defendant's conviction, where defendant's counsel knew of the failure to swear the jury but, as a tactical maneuver, purposely did not bring it to the court's attention. *State v. Arellano*, 1998-NMSC-026, 125 N.M. 709, 965 P.2d 293.

Law reviews. — For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

Part C
Definitions

14-130. "Possession" defined.[1]

A person is in possession of _____ *(name of object)* when, on the occasion in question, he knows what it is, he knows it is on his person or in his presence and he exercises control over it.

[2][Even if the object is not in his physical presence, he is in possession if he knows what it is and where it is and he exercises control over it.]

[Two or more people can have possession of an object at the same time.]

[A person's presence in the vicinity of the object or his knowledge of the existence or the location of the object is not, by itself, possession.]

USE NOTES

1. This instruction is designed to be used in any case where "possession" is an element of the crime and is in issue.

2. One or more of the following bracketed sentences may be used depending on the evidence.

Committee commentary - Definitions in general. — The committee worked on the premise that part of the "overkill" syndrome in New Mexico jury instruction practice was the use of numerous legal terms which required additional instructions to explain the terms. These uniform instructions, to the extent possible, avoid using terms which have to be defined. Some terms had to be defined; if the definition applies only to a specific crime or within a category of crimes, the definition is found in the elements chapter. Where a term has an ordinary or common meaning, a definition need not be given. *See State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971). If the jury asks for a definition and no definition is provided in UJI, a dictionary definition may be given.

This part of Chapter One will contain the definitions of words which are used in more than one category of instructions. The committee recognizes that experience under the UJI Criminal may indicate that additional definitions should be included and this section will be expanded accordingly.

Possession defined. — This instruction will probably be used most often in property and drug cases. The basic possession definition was derived from the following New Mexico decisions: *State v. Mosier*, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971); *State v. Maes*, 81 N.M. 550, 469, P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970); *State v. Romero*, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968); *State v. Favela*, 79 N.M. 490, 444 P.2d 1001 (Ct. App. 1968); *State v. Giddings*, 67 N.M. 87, 352 P.2d 1003 (1960).

The bracketed paragraphs all deal in some way with the problem of constructive possession. The definitive decision relied on by the committee for the concept of constructive possession was that of *Amaya v. United States*, 373 F.2d 197 (10th Cir. 1967). *Amaya* was cited with approval in State v. Montoya, 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973). *See also State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972). For recent compilations of cases dealing with possession of narcotics where the defendant did not have exclusive possession of the premises or vehicle, see Annot., 57 A.L.R.3d 1319 (1974) and Annot., 56 A.L.R.3d 948 (1974). *See also State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974); *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974); *State v. Bidegain*, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part, 88 N.M. 466, 541 P.2d 971 (1975).

Unless the statute requires possession of a certain amount of a prohibited substance, [e.g. Section 30-31-23 B(2) & (3) NMSA 1978] possession of any amount is prohibited. *See State v. Grijalva*, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973).

ANNOTATIONS

Insufficient evidence. — The state’s evidence that the defendant had an ongoing connection with the house where methamphetamine residue was seized and that

clothing appropriate to the defendant's gender was present in a bedroom in which the methamphetamine residue was discovered did not give rise to reasonable inferences that defendant knew of the presence of the methamphetamine residue and exercised control over it in order to establish that the defendant had constructive possession of the methamphetamine residue where the evidence also established that the defendant's access to the house was not exclusive, other individuals had access to the areas of the house where the methamphetamine residue was discovered, and the methamphetamine was present in trace amounts and concealed from view in a private area of the house. *State v. Maes*, 2007-NMCA-089, 142 N.M. 276, 164 P.3d 975.

Proximity to gun present in car alone does not constitute possession. *State v. Garcia*, 2005-NMSC-017, 138 N.M 1, 116 P.3d 72.

Sufficient evidence to support inference of knowledge. — Where defendant placed his beer bottle under the seat of the car in a position right next to the gun, such that it would be hard for anyone not to be aware of the gun, and upon getting out of the car, he acted in a manner that arguably showed a consciousness of guilt, and finally, defendant was sitting on the ammunition clip that matched the gun, there was sufficient evidence to support an inference of knowledge of the gun. *State v. Garcia*, 2005-NMSC-017, 138 N.M 1, 116 P.3d 72.

Sufficient evidence that defendant knowingly possessed child pornography. — Where defendant was charged with sexual exploitation of children, and at trial admitted that he searched for and intentionally downloaded numerous videos from the internet which contained child pornography, that he viewed the child pornography for "research purposes", and that he deleted videos of child pornography by moving them to his recycle bin on his computer, and where child pornography videos were found in defendant's recycle bin, there was sufficient evidence to prove that defendant knew the charged images were on his computer and that he exercised control over the images; there was sufficient evidence to permit a reasonable jury to conclude beyond a reasonable doubt that defendant intentionally possessed child pornography. *State v. Santos*, 2017-NMCA-075, cert. denied.

Definitions not given when word has ordinary meaning. The instructions are drafted using words with ordinary meanings to avoid the "overkill" syndrome of previous practice. *State v. Torres*, 1983-NMCA-009, 99 N.M. 345, 657 P.2d 1194.

Ingestion not possession. — The definition of possession found in this rule specifically provides that possession occurs when the thing possessed is "on" the person not "in" the person. Accordingly, in a prosecution for possession of cocaine, the only way that a positive drug test was relevant was as circumstantial evidence that the defendant possessed the drug at the time of the ingestion. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom.*, *State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

Waiver of failure to give instruction. — The defendant waives any claim of error predicated upon the court's failure to give this instruction where he initially tenders an instruction defining "possession," then later withdraws it. In order to assert error based on the denial of an instruction for a definition, the defendant must make a clear and unequivocal request therefor. *State v. Aragon*, 1982-NMCA-173, 99 N.M. 190, 656 P.2d 240.

The trial court did not fundamentally err by failing to give a portion of the constructive possession jury instruction. — Where defendant was charged with being a felon in possession of a firearm after taking a gun inside a Las Cruces club, and where the jury was instructed, with respect to the definition of “possession”, on the first two supplemental statements set forth in UJI 14-130 NMRA, but the district court did not include the third supplemental statement regarding proximity to the object, fundamental error did not occur, because definitional instructions are not always essential, there was other evidence unrelated to defendant’s physical proximity to the gun from which the jury could have reasonably concluded that defendant possessed the gun, and the jury was further instructed that defendant could only be found to be in possession of something if he both knows what the object is and exercises control over it. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

14-131. "Great bodily harm" defined.

Great bodily harm means an injury to a person which [creates a high probability of death][1] [or] [results in serious disfigurement] [or] [results in loss of any member or organ of the body] [or] [results in permanent or prolonged impairment of the use of any member or organ of the body].

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

Committee commentary. — This instruction was derived from the statutory definition of great bodily harm. *See* Section 30-1-12A NMSA 1978. In *State v. Hollowell*, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969), the court held that choking the victim created a "high probability of death." In *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966), forcibly tattooing the victim with India ink was held to involve great bodily harm; presumably this constitutes "serious disfigurement," although it was not so characterized by the court. In *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971), the court held that evidence that the victim was hit in the eye with a fist by the defendant and never regained sight showed a "permanent or protracted loss or impairment of the function of a member or organ of the body."

ANNOTATIONS

Cross references. — For definition of "great bodily harm", *see* Section 30-1-12A NMSA 1978.

No great bodily harm found. — A defendant's requested instruction that "the force used by the defendant would not ordinarily create a substantial risk of death or great bodily harm," was inappropriate where there was no evidence that the victim suffered great bodily harm. *State v. Lara*, 1990-NMCA-075, 110 N.M. 507, 797 P.2d 296.

Sufficient evidence of great bodily harm. — Where defendant was convicted of causing great bodily injury by vehicle following a collision in which defendant's vehicle, while traveling on a state road, crossed the center lane and struck a group of motorcyclists, there was sufficient evidence to support a finding of "prolonged impairment" where the victim testified that she experienced severe bruising, road rash, and bruised ribs as a result of the collision, that the bruising and road rash covered her right side, that she was unable to work for approximately a month, that for the first two weeks, she was unable to move because of the extreme pain resulting from her bruised ribs and that she still experiences pain resulting from the bruised ribs. *State v. Cordova*, 2016-NMCA-019, cert. granted, 2015-NMCERT-008.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

14-132. Unlawfulness as an element.[1]

In addition to the other elements of _____ (*name of offense*) [as charged in Count _____],[2] the state must prove beyond a reasonable doubt that the act was unlawful.

> For the act to have been unlawful it must have been done [without consent and[3]]:[4]
>
> [with the intent to arouse or gratify sexual desire]
>
> [or]
>
> [to intrude upon the bodily integrity or personal safety of _____ (*name of victim*)]
>
> [or]
>
> [_____ (*other unlawful purpose*)].
>
> _____ (*name of offense*) does not include a [touching][5] [penetration] [confinement] [_____ (*relevant act*)] for purposes of [reasonable medical treatment][5] [nonabusive (parental care) (or) (custodial care)] [lawful arrest, search or confinement] [_____ (*other lawful purpose*)].

USE NOTES

1. This instruction is intended to aid the court and the parties in preparing an instruction when the statutory definition of the offense includes the term "unlawful" and an issue is raised as to the lawfulness of the defendant's act. The examples in the second and third paragraphs address offenses that include the term "unlawful" as part of the definition of the offense. These offenses include certain assault and battery offenses, sex offenses and false imprisonment or kidnapping offenses. The examples suggested in the bracketed language have been taken from controlling cases addressing particular offenses and are not applicable to every case.

If the defendant is a psychotherapist who is accused of unlawfully touching a patient, *see* Subsection B of Section 30-9-12 NMSA 1978 for lawful touchings by a psychotherapist. *See* Section 30-9-10 NMSA 1978 for the definitions of patient and psychotherapist.

This instruction is not intended to be all inclusive. Appropriate language should be tailored in specific cases.

If this instruction is given, add to the essential elements instruction of the offense charged, "The defendant's act was unlawful".

This instruction need not be given if the unlawfulness element is included in another instruction such as self-defense or defense of another. *See* UJI 14-5181 to 14-5184 NMRA if the issue of "lawfulness" involves self-defense or defense of another.

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

3. If the bracketed "without consent and" is given, one of the three alternatives that follows must be given. One or more of the three alternatives may be given without the bracketed "without consent and".

4. Use only applicable bracketed alternative or alternatives. If the evidence raises a particular issue of lawfulness that is not addressed in these alternatives, supply appropriate descriptive language in the blanks provided.

5. Use only applicable bracketed alternative or alternatives.

[As amended, effective January 20, 2005.]

Committee commentary. — A number of New Mexico statutes, primarily those involved with various kinds of touchings of others, include as an element of the offense the term "unlawful", in recognition of the fact that it is difficult to define in each criminal statute the exact line in every case between the kinds of conduct that may be considered societally acceptable and even necessary, such as parental care, medical procedures, law enforcement activities, etc., and those which are punishable. *See, e.g.,*

Territory v. Miera, 1 N.M. 387 (1866); *State v. Osborne*, 111 N.M. 654, 808 P.2d 624 (1991). If the defendant "introduces some evidence of lawfulness, the court is under a duty to instruct on the state's burden to provide unlawfulness beyond a reasonable doubt". *State v. Johnson*, 1996 NMSC-075, 122 N.M. 696, 930 P.2d 1148 (1996) (following *State v. Parish*, 118 N.M. 39, 42, 878 P.2d 988, 991 (1994) and reversing conviction for aggravated assault for failure to instruct the jury on the defense of citizen's arrest.)

As *Miera*, 1 N.M. 387 pointed out, the term "unlawful" was an essential element of the offense of aggravated assault. The indictment was dismissed for failure to contain the allegation.

“There are many strikings which are not unlawful, and so are not offenses which the law has punished; such as parents correcting their children, or an executive officer executing the sentence of a court upon a person convicted of a crime. So, too, one man may lawfully beat, bruise and wound another in the necessary defense of himself, wife or child. By using the word 'unlawfully' in the statute, the legislature intended to discriminate between acts of violence which may be lawful and those which are not.”

1 N.M. at 388.

In *Osborne*, the Supreme Court held that it was an error to fail to instruct the jury on the definition of "unlawful" as a distinct element of the offense of criminal sexual contact of a minor. As the court noted, "the legislature set out unlawfulness as a distinct component of the offenses described in the CSCM and CSPM statutes." 111 N.M. at 659.

“There are any number of circumstances where such a touching [of the intimate parts] is not merely 'excusable or justifiable' but entirely innocent, such as a touching for the purposes of providing reasonable medical treatment, nonabusive parental or custodial care, or, in some circumstances, parental or custodial affection. The necessity of establishing an excuse or justification for an act should not be imposed upon a defendant until the state has established that conduct has occurred which, under common standards of law and morality, may be presumed criminal.”

111 N.M. at 660.

Even where a touching has been done in a rude, insolent or angry manner, as with the simple battery statute, Section 30-3-4 NMSA 1978, the legislature has required unlawfulness as a separate element before the touching is a criminal offense. This would avoid the unfair imposition of criminal liability on an insolent hairdresser, a rude doctor or an angry police officer whose touchings are for noncriminal purposes. If the battery is of a peace officer, the Supreme Court has held that to prove that the conduct was "unlawful" the state must prove that the officer was injured, that the conduct threatened the officer's safety or that the conduct meaningfully challenges the officer's authority. *See State v. Padilla*, 122 N.M. 92, 920 P.2d 1046 (1997).

Former UJI 14-984 NMRA, defining "unlawful" for the crime of criminal sexual penetration or contact has been merged into this instruction and 14-984 NMRA has been withdrawn. There is no current instruction explicitly applicable to the various offenses in which unlawfulness is a separate and distinct element. The committee concluded that the best way to address this problem was to promulgate a general definitional instruction which should be used for appropriate offenses and tailored to the appropriate factual issues in each case. This will avoid having to create separate definitions of unlawfulness for each offense in which it is an element.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, inserted the bracketed "[without consent]" at the beginning of the second paragraph, and inserted "search" after "arrest," and before "or confinement" at the end of the essential elements. The 2004 amendment also added the second paragraph of Use Note 1 and Use Note 3 providing when "without consent" is to be given.

Cross references.— For lawful touching of a patient by a psychotherapist, *see* Subsection B of Section 30-9-12 NMSA 1978

For the definitions of "patient" and "psychotherapist", *see* Section 30-9-10 NMSA 1978.

When parent's behavior in discipling child falls within the parental privilege, the act is not unlawful. *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174, 117 P.3d 980.

Essential elements of second-degree criminal sexual penetration in the commission of a felony. — If unlawfulness is at issue, then lack of consent is an essential element of criminal sexual penetration perpetrated in the commission of a felony. *State v. Samora*, 2016-NMSC-031.

In defendant’s trial for second-degree criminal sexual penetration perpetrated in the commission of a felony (CSP-felony), where the jury instruction at issue reflected UJI 14-132 NMRA, except that it failed to include the bracketed phrase “without consent,” which would have clarified that any sexual contact between the victim and defendant had to be non-consensual for the jury to determine that defendant’s act was unlawful, it was fundamental error to omit the element of consent from the jury instructions that were relevant to CSP-felony, because unlawfulness was at issue and the jurors may have been confused or misdirected as to whether defendant could have still acted unlawfully if the victim had consented to sex. *State v. Samora*, 2016-NMSC-031.

Defendant, charged with battery against a household member, was entitled to an instruction on unlawfulness. — Where defendant was convicted of battery against a household member, based on evidence that defendant pushed his girlfriend to the ground after she pushed him away from the door to prevent him from entering their apartment and that defendant backed his car into his girlfriend, making contact with her arm, when she did not move away while defendant was trying to exit the parking lot, and

where, at trial, defendant argued that his use of force was justified as a reasonable response to his girlfriend's initial use of force and that his conduct was justified or excused because his girlfriend committed the crime of deprivation of property of a household member, the trial court erred in denying defendant's requested instruction on unlawfulness, because, as an essential element of the crime of battery against a household member, if there was some evidence that excused or justified defendant's conduct, which is to say if the essential element of unlawfulness was contested, the court had a duty to instruct the jury on the state's burden to prove unlawfulness beyond a reasonable doubt. *State v. Smith*, 2021-NMSC-025, *aff'g* A-1-CA-34765, mem. op. (Dec. 16, 2019) (nonprecedential).

Consent is not a defense when the victim is a statutorily defined child. — The consent of a statutorily defined child is legally irrelevant to the unlawfulness element of criminal sexual penetration. *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where the victim was fourteen years of age; defendant was forty-six years of age; the victim voluntarily agreed to have sex with defendant; and defendant was charged with criminal sexual penetration in the second degree and criminal sexual penetration in the fourth degree, the state did not improperly instruct the grand jury on the unlawfulness element for the charges when the state omitted language that the act must have been done "without consent" of the victim, because the consent of a statutorily defined child is legally irrelevant to the unlawfulness element of both charges. *State v. Moore*, 2011-NMCA-089, 150 N.M. 512, 263 P.3d 289, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Consent defense in criminal sexual penetration cases. — Effective for cases filed after January 20, 2005, the Supreme Court has approved instructions for the defense of consent in criminal sexual penetration cases that are analogous to the defense of self-defense. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. granted, 2005-NMCERT-008.

14-133. "Negligence" and "recklessness"; defined.[1]

For you to find that the defendant [acted][2] [recklessly] [with reckless disregard] [negligently] [was negligent] [_____][3] in this case, you must find that the defendant acted with willful disregard of the rights or safety of others and in a manner which endangered any person or property.[4]

USE NOTES

1. For use when "negligence", "reckless", "recklessly", "knew or should have known" or similar term or phrase is an element of the crime charged. This instruction should not be given with any elements instruction which already adequately defines the concept of a defendant's criminal negligence set forth by the Supreme Court. *See for*

example State v. Yarborough, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131 and *Santillanes v. State,* 115 N.M. 215, 849 P.2d 358 (1993).

2. Use only applicable alternative.

3. Set forth the term or terms used in the elements instruction (or statute if no elements instruction exists) for criminal negligence if the previous alternatives are not used in the essential elements instruction of a "criminal negligence" offense.

4. If the statutory offense identifies some injury other than to a person or the property of others, set forth statutory language.

[Adopted, effective January 1, 1999.]

Committee commentary. — This instruction was taken from the definition set forth in *State v. Yarborough,* 1996-NMSC-068, P20, 122 N.M. 596, 930 P.2d 131 and predecessor cases. This instruction should be used when the offense involves criminal negligence and the essential elements instruction, or other instruction to be used with the essential elements instruction, does not define the term "reckless", "negligence" or similar term. See *Santillanes v. State,* 115 N.M. 215, 220, 849 P.2d 358, 363 (1993) citing with approval *Raton v. Rice,* 52 N.M. 326, 365, 199 P.2d 986, 987 (1949) (involuntary manslaughter) as follows:

When a crime is punishable as a felony, civil negligence ordinarily is an inappropriate predicate by which to define such criminal conduct.

Various courts have defined criminal negligence in slightly different ways. This instruction simplifies and standardizes the definition of criminal negligence.

14-134. "Proximate cause"; defined.[1]

In addition to the other elements of the crime of _____ *(name of crime)* as set forth in instruction number _____,[2] the state must also prove to your satisfaction beyond a reasonable doubt that:

1. _____ *(name of victim)* was _____ *(describe injury or harm)*;

2. The injury or harm was the foreseeable result of the defendant's act; and

3. The act of the defendant was a significant cause of the injury or harm.

The defendant's act was a significant cause of the injury or harm if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the injury or harm and without which the injury or harm would not have occurred.

[There may be more than one significant cause of the injury or harm. If the acts of two or more persons significantly contribute to the cause of the injury or harm, each act is a significant cause of the injury or harm.][3]

USE NOTES

1. This instruction should be used in cases in which causation is an issue. It is not to be used in homicide cases. *See* Instructions 14-251 and 14-252.

2. Insert here the number assigned by the court to the elements instruction for the named offense.

3. Use the bracketed language if there is evidence that the acts of more than one person contributed to the injury or harm to the victim.

[Approved, effective January 1, 2000.]

Committee commentary. — In response to the Supreme Court's decision in *State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143, the committee fashioned an instruction to be given when causation is a question of fact to be resolved by the jury. In *Munoz*, the Court set out the two elements for finding that the defendant's act was the proximate cause of a harm or injury: (1) that the defendant's act was a significant cause of the harm; and (2) that the harm or injury was a foreseeable result of the defendant's act. In addition, the instruction explains the concept of independent, intervening cause as suggested in the Munoz opinion.

Part D
General Instructions

14-140. Elements of uncharged crimes.

In addition to the other elements of _____ (*identify charged crime or crimes*), you must consider whether the defendant's acts related to the commission of _____ (*identify uncharged crime*). The defendant is not charged with _____ (*identify uncharged crime*). However, the law declares that to be a crime when:

1. [insert elements replacing references to "the defendant" with "a person" or "that person" as needed for clarity].

USE NOTES

This instruction must be used with every crime that incorporates another crime by reference—either by requiring the "intent to commit" another crime or by describing an act done with the purpose of committing another crime—unless the referenced crime is

separately charged and instructed. This instruction may omit the element specifying jurisdiction and date of offense or any other elements not relevant to consideration of the charged offense and whose inclusion would cause juror confusion. The phrasing of this instruction may be adapted to account for the particular context in which it is used.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — This instruction provides a template for instructing on the elements of an uncharged offense in a manner that informs the jury of the elements without giving the impression that the jury must find the defendant committed the uncharged offense. It is to be used any time the legal definition of an uncharged offense is necessary to determining the elements of a charged offense. *See, e.g., State v. Catt*, 2019-NMCA-013, ¶¶ 13-14, 435 P.3d 1255 ("[I]t is necessary that the jury is instructed on the essential elements of the alleged predicate acts upon which racketeering is based. . . . Because the instructions permitted the jury to convict Defendant for racketeering based on predicate offenses for which the jury had no elements, the instructions were erroneous."); *State v. Segura*, 2002-NMCA-044, ¶ 16, 132 N.M. 114, 45 P.3d 54 (reversal was "required because the district court and the State did not set out the initiatory crime of attempt in the jury instructions in a manner to insure all elements of the underlying crime were properly placed within the context of the initiatory crime of attempt"); *State v. Armijo*, 1999-NMCA-087, ¶¶ 3-4, 127 N.M. 594, 985 P.2d 764 (finding fundamental error where "[t]he district court instructed the jury on the elements of aggravated assault with intent to commit felony aggravated battery, but failed to instruct the jury on the essential elements of felony aggravated battery"); *State v. Gardner*, 1991-NMCA-058, ¶ 17, 112 N.M. 280, 814 P.2d 458 (in a prosecution for conspiracy to harbor a felon, "where defendant contests the charge and asserts that a felony has in fact not been committed . . . the defendant is entitled to have the jury instructed on the elements of the predicate felony or felonies the state alleges were committed").

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, completely rewrote the instruction and Use Notes, and added the committee commentary.

14-141. General criminal intent.[1]

In addition to the other elements of _____ *(identify crime or crimes),* the state must prove to your satisfaction beyond a reasonable doubt that the defendant acted intentionally when he committed the crime. A person acts intentionally when he purposely does an act which the law declares to be a crime [, even though he may not

know that his act is unlawful].[2] Whether the defendant acted intentionally may be inferred from all of the surrounding circumstances, such as the manner in which he acts, the means used, [and] his conduct [and any statements made by him].[2]

USE NOTES

1. This instruction must be used with every crime except for the relatively few crimes not requiring criminal intent or those crimes in which the intent is specified in the statute or instruction.

2. Use bracketed portion only if applicable.

Committee commentary. — The adoption of this mandatory instruction for all nonhomicide crimes requiring criminal intent supersedes cases holding that a general intent instruction is not required if the crime includes a specific intent. *See, e.g., State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088; *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916. The adoption of the instruction also supersedes dicta in *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, that a general criminal intent instruction is inconsistent with an instruction which contains the element of intent to do a further act or achieve a further consequence, the so-called specific intent element. *Compare Gunzelman*, 1973-NMSC-055, *with State v. Mazurek*, 1975-NMCA-066, 88 N.M. 56, 537 P.2d 51.

[Amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, in the committee commentary, added vendor neutral citations to the cases cited, and deleted a reference to “The Lazy Lawyer’s Guide to Criminal Intent in New Mexico”.

Applicability of instruction. — This instruction is a mandatory instruction adopted by the supreme court for use in all cases except crimes without the element of intent, first and second degree murder and voluntary manslaughter. *State v. Sheets*, 1980-NMCA-041, 94 N.M. 356, 610 P.2d 760 (decided prior to 1981 amendment).

Failure to give this instruction amounts to jurisdictional error which can be raised for the first time on appeal. *State v. Otto*, 1982-NMCA-149, 98 N.M. 734, 652 P.2d 756.

General intent instruction is not inconsistent with a specific intent instruction. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003.

Instruction not necessary for specific intent crime. — Trial court did not err in refusing to give this general intent instruction, where the crime with which defendant

was charged, escape from inmate-release program, was a specific intent crime. *State v. Tarango*, 1987-NMCA-027, 105 N.M. 592, 734 P.2d 1275, *overruled on other grounds*, *Zurla v. State*, 1990-NMSC-011, 109 N.M. 640, 789 P.2d 588.

General intent instruction. — Court did not err in giving general intent instruction in trial of defendant for conspiracy to commit trafficking by manufacture and possession of drug paraphernalia, which require specific intent. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006.

Failure to follow the Use Note for a uniform jury instruction is not jurisdictional error which automatically requires reversal. *State v. Doe*, 1983-NMSC-096, 100 N.M. 481, 672 P.2d 654.

The failure to give this instruction does not automatically require reversal solely because the Use Note provides that it must be given, when there was no tender of the proper instruction or objection to not giving the instruction. *State v. Doe*, 1983-NMSC-096, 100 N.M. 481, 672 P.2d 654.

A failure to follow a Use Note does not require automatic reversal. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003.

Jurisdictional error for a failure to instruct upon criminal intent can be avoided in two ways: (1) by defining criminal intent in terms of "conscious wrongdoing" or its equivalent; or (2) by instructing the jury substantially in terms of the section if it defines the requisite intent. *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100.

Instruction sufficiently covers conscious wrongdoing in the words "purposely does an act which the law declares to be a crime"; a separate reference to conscious wrongdoing is not required. *State v. Sheets*, 1980-NMCA-041, 94 N.M. 356, 610 P.2d 760.

Existence or nonexistence of general criminal intent is a question of fact for the jury, and the general intent instruction submitted the issue to the jury as a question of fact; no presumption was involved in the instruction given. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Intent is subjective and is almost always inferred from other facts in case, as it is rarely established by direct evidence. *State v. Frank*, 1979-NMSC-012, 92 N.M. 456, 589 P.2d 1047.

Intent to commit felony includes general criminal intent of purposeful act. — When one intends to commit a felony or theft under the burglary statute, one also has the general criminal intent of purposely doing an act, even though he may not know the act is unlawful. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

Jury must have more than the suggestion of necessity of criminal intent. It must be instructed on the essential element of a "conscious wrongdoing." *State v. Bachicha*, 1972-NMCA-141, 84 N.M. 397, 503 P.2d 1175.

Where intent is an essential element of the crime charged, the jury must be instructed on the intent involved. The instruction need not use the word "intent," but the words used must inform the jury of any intent which is an element of the crime charged. *State v. Puga*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075.

Mere mention of "intent" somewhere in instructions is not sufficient to avoid jurisdictional error for the failure to instruct on criminal intent. *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100.

Omission of words "when he purposely does an act which the law declares to be a crime" is not harmless and is reversible error. *State v. Curlee*, 1982-NMCA-126, 98 N.M. 576, 651 P.2d 111.

Ignorance of law no defense. — The bracketed language at the end of the second sentence of this instruction embodies the general rule that, for a general intent crime, ignorance of the law is no defense. *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

Giving this instruction in tax fraud case is not per se reversible error. *State v. Martin*, 1977-NMCA-049, 90 N.M. 524, 565 P.2d 1041), cert. denied, 90 N.M. 636, 567 P.2d 485, *overruled on other grounds*, *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

This instruction is required in prosecutions for false statements on tax returns. *State v. Sparks*, 1985-NMCA-004, 102 N.M. 317, 694 P.2d 1382.

If UJI 14-141 is given in a prosecution for making false statements on tax returns, there is no need for a separate instruction of willfulness. *State v. Sparks*, 1985-NMCA-004, 102 N.M. 317, 694 P.2d 1382.

This instruction and UJI 14-601 correctly state law applicable to larceny. *Lopez v. State*, 1980-NMSC-050, 94 N.M. 341, 610 P.2d 745.

Where defendant claims absence of intent due to intoxication, issue is for jury. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

But refusal of instructions on effect of intoxication does not deny defense. — The defendant's argument that since voluntary intoxication is not a defense to the existence of a general criminal intent, a general criminal intent is always conclusively presumed from the doing of the prohibited act and that conclusive presumptions are unconstitutional, thus, the refusal of requested instructions on the effect of intoxication

on the defendant's ability to form a general criminal intent denied the defendant the right to put on a defense, was patently meritless. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Matter of concerning the requisite intent is one of substantial public interest that should be decided by the New Mexico Supreme Court instructions. *State v. Puga*, 1973-NMCA-044, 84 N.M. 756, 508 P.2d 26, *aff'd*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075; *State v. Fuentes*, 1973-NMCA-045, 84 N.M. 757, 508 P.2d 27, *aff'd*, 1973-NMCA-069, 85 N.M. 274, 511 P.2d 760; *State v. Vickery*, 1973-NMCA-046, 84 N.M. 758, 508 P.2d 28, *aff'd*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962; *State v. Boyer*, 1973-NMCA-047, 84 N.M. 759, 508 P.2d 29.

Instruction properly given for violation of Imitation Controlled Substances Act, 30-31A-1 NMSA 1978. *State v. Castleman*, 1993-NMCA-019, 116 N.M. 467, 863 P.2d 1088.

Law reviews. — For article, "New Mexico Mens Rea Doctrines and the Uniform Criminal Jury Instructions," see 8 N.M.L. Rev. 127 (1978).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

For note, "Criminal - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1251, 1256, 1325, 1416.

23A C.J.S. Criminal Law § 1198.

CHAPTER 2
Homicide

Part A
First Degree Murder

14-201. Willful and deliberate murder; essential elements.

For you to find the defendant guilty of first degree murder by a deliberate killing [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ *(name of victim);*

2. The killing was with the deliberate intention to take away the life of _____ *(name of victim)* [or any other human being];[2]

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

A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.[3]

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use the bracketed phrase if the evidence shows that the defendant had a deliberate design to kill someone but not necessarily the victim.

3. If the jury is to be instructed on more than one degree of homicide, UJI 14-250 [withdrawn] must also be given.

Committee commentary. — *See* Section 30-2-1A NMSA 1978.

In New Mexico, evidence that the person killed is the same as the person named or indicated in the charge as having been killed is part of the proof of the corpus delicti. *State v. Vallo*, 81 N.M. 148, 464 P.2d 567 (Ct. App. 1970).

The instruction does not use the words "malice aforethought," "deliberation" or "premeditation" (previously defined as "express malice") because those concepts are included within the deliberate intention to take the life of a fellow creature. In *State v. Smith*, 26 N.M. 482, 194 P. 869 (1921), the supreme court held that the malice required for a willful and deliberate murder was something more than the ordinary, premeditated malice aforethought. A willful and deliberate murder requires express malice, the deliberate intention to unlawfully take away the life of a fellow creature, also known as intensified or first degree malice. See former Section 30-2-2A NMSA 1978; *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975); *State v. Smith*, supra, 26 N.M. at 491. *Smith* also makes it clear that express malice or deliberate intention is the specific intent required for first degree murder and is not required for common-law or second degree murder. Id. at 492.

Former Section 30-2-2A NMSA 1978 stated that express malice may be manifested by external circumstances capable of proof. *Smith* also noted that malice is normally inferred from the facts. *State v. Smith*, supra, 26 N.M. at 491-492. *See also, State v. Garcia*, 61 N.M. 291, 299 P.2d 467 (1956). Numerous New Mexico cases, *see, e.g.*, *State v. Duran*, 83 N.M. 700, 496 P.2d 1096 (Ct. App.), cert. denied, 83 N.M. 699, 496 P.2d 1095 (1972), have stated that malice may be "implied." It is believed that the courts mean that malice is inferred and not implied. *See* Perkins, "A Reexamination of Malice Aforethought," 43 Yale L.J. 537, 549 (1934); Oberer, "The Deadly Weapon Doctrine - Common Law Origin," 75 Harv. L. Rev. 1565, 1575 (1962).

The New Mexico Supreme Court in *State v. Smith*, supra, indicated that former 30-2-2B NMSA 1978 did not actually define implied malice but provided rules of evidence for implying malice as a matter of law. *State v. Smith*, supra, 26 N.M. at 492; *see also, Perkins*, supra, 43 Yale L.J. at 547; LaFave and Scott, Criminal Law 529-30 (1972). Malice may not be "implied," in the sense used in the statute, in a first degree murder case. *State v. Smith*, supra, 26 N.M. at 492; *State v. Ulibarri*, 67 N.M. 336, 339, 355 P.2d 275 (1960). "Express malice" is adequately covered by "deliberate intention." "Implied malice" is limited to second degree murder. It was previously defined by 30-2-2B NMSA 1978 to mean a "wicked and malignant heart" murder. This is now defined as second degree murder, acts creating a strong probability of death or great bodily harm. This legislative definition of second degree murder is the same as a "wicked and malignant heart" murder. *See Perkins*, supra at 769-770 and LaFave and Scott, supra at 529. Therefore, the 1980 amendments of the legislature did not change the intent required for either first degree or second degree murder.

If the state charges the special "transferred intent" first degree murder under Section 30-2-1A NMSA 1978 and there is evidence to submit that theory to the jury, then the bracketed provision explained in Use Note No. 2 should be given. It is not necessary to give any other transferred intent instruction.

Section 30-2-1 NMSA 1978 states second degree murder is a lesser included offense of first degree murder. In cases where the death penalty is a possibility, *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), requires that the jury be instructed on all lesser included offenses. In cases where there is evidence of what was formerly defined as "implied malice," UJI 14-210 must also be given. It should not be given when the only evidence presented is that the killing was willful, deliberate and premeditated. *See State v. Garcia* and *State v. Duran*, supra, for cases involving "implied" or "inferred" malice. Malice may be implied when the defendant used a gun or other deadly weapon and inferred when the defendant used excessive force or extreme brutality.

Murders by poison, torture or lying in wait are no longer included in the definition of first degree murder in Section 30-2-1A NMSA 1978, as amended by Laws 1980, Chapter 21, Section 1. The instructions for these offenses have been withdrawn and are not to be used for any such murders committed after May 14, 1980. It is still possible to

prosecute for first degree murder for such murders if the malice and deliberation required to prove first degree murder, previously supplied by the means, is found.

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-250 NMRA was withdrawn, effective December 31, 2020.

Former UJI Crim. 2.01, Murder by poison; essential elements, UJI Crim. 2.02, Murder by means of lying in wait; essential elements, and UJI Crim. 2.03, Murder by torture; essential elements, were withdrawn effective May 14, 1980, and are not applicable to murders committed after that date.

***Corpus delicti* rule.** — A defendant's extrajudicial statements may be used to establish the *corpus delicti* when the prosecution is able to demonstrate the trustworthiness of the confession and introduce some independent evidence of a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

Proof of *corpus delicti*. — Where defendant was charged with first-degree abuse of a child resulting in death; the child died without any physical signs of trauma; defendant confessed to suffocating the child with a blanket; the evidence confirmed the statements made by defendant in the confession; the evidence also showed that the child was in normal respiratory and cardiovascular health on the day prior to the child's death, the child had not been breathing before the child was taken to an emergency room even though there was no underlying medical condition that would kill the child, defendant made false statements to police and medical personnel about the child's medical record suggesting that defendant portrayed the child as chronically sick to cover up a crime, and the cause of death was consistent with a blockage to the mouth and nose, the *corpus delicti* of the crime was established because the evidence corroborated the trustworthiness of defendant's confession and independently showed that the child died from a criminal act. *State v. Wilson*, 2011-NMSC-001, 149 N.M. 273, 248 P.3d 315.

Instruction does not change elements of first-degree murder. — This instruction does not change the necessary elements to be proven for a conviction of first-degree murder, and it was not error to use it in advance of the effective date. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

Implied malice. — While malice may be implied, it is to be borne in mind that implied malice does not suffice to constitute murder in the first degree in this jurisdiction. *State v. Ulibarri*, 1960-NMSC-102, 67 N.M. 336, 355 P.2d 275.

Failure to refer to malice in homicide instructions was deliberate and not an inadvertent omission. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

Not error to use instructions before effective date. — It was not error for the trial court to use UJI Crim. before the effective date for their use, if the instructions used fairly and correctly stated the applicable law for the jury to follow in arriving at its verdict. *State v. Valenzuela*, 1976-NMSC-079, 90 N.M. 25, 559 P.2d 402.

Although UJI Crim. were to be used in criminal cases filed in the district court after September 1, 1975, there is nothing that precludes the use of such instructions prior to that date. *State v. Valenzuela*, 1976-NMSC-079, 90 N.M. 25, 559 P.2d 402.

Omission of element of unlawfulness. — Trial court did not commit fundamental error by omitting the element of unlawfulness from the elements instruction on deliberate-intent first-degree murder when the jury also received a separate proper instruction on self-defense. *State v. Cunningham*, 2000-NMSC-009, 128 N.M. 711, 998 P.2d 176.

And not error to refuse instructions which were cumulative. — Where the trial court instructed the jury as to the statutory definition of "murder in the first degree," in another instruction listed the essential elements thereof and instructed the jury that each of these elements must be proven to the jury's satisfaction beyond a reasonable doubt, defined each of the essential terms, such as "willfully," "express malice," "deliberation," etc.; and gave an instruction concerning the effect on the defendant's state of mind from intoxication, it was not error to refuse the defendant's requested instructions, which were merely cumulative of the court's instruction. *State v. Rushing*, 1973-NMSC-092, 85 N.M. 540, 514 P.2d 297.

Instruction on all offenses required prior to deliberation. — Even though the jury may be instructed to consider first-degree murder and make a determination before moving on to any lesser offenses, the jury must also be instructed on each of the crimes charged, and the elements of each, before deliberation ever begins. *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Substantial evidence of deliberate intention. — A deliberate intention refers to the state of mind of the defendant, is rarely subject to proof by direct evidence, and often must be inferred from all the facts and circumstances of the killing. *State v. Astorga*, 2015-NMSC-007.

Where law enforcement officer was murdered during a traffic stop, evidence established that defendant had a motive to kill the officer, wanting to avoid arrest because defendant knew that he was wanted on an outstanding warrant, that defendant initially complied with the officer when the officer pulled defendant’s vehicle over, that defendant then retrieved his gun while he waited for the officer to approach the vehicle, and when the officer neared the window, defendant fired the gun twice at the officer from point-blank range, that defendant, after the killing, made incriminating statements about having “blasted that cop,” there was substantial evidence of defendant’s deliberate intention to take away the life of the law enforcement officer. *State v Astorga*, 2015-NMSC-007.

Sufficient evidence of willful and deliberate murder. — In defendant's trial for first-degree murder for the killing of a police officer and aggravated fleeing, the state presented sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant manifested a deliberate intention to kill the officer, where the evidence established that during a traffic stop, the officer attempted to approach the vehicle when the vehicle suddenly accelerated out of a parking lot, and where defendant later brought the vehicle to a stop and waited for the pursuing officer to catch up, and when the officer approached the vehicle a second time, defendant fired his gun four times at the officer. Moreover, testimony from defendant's accomplice established that prior to the shooting, defendant moved his pistol from a hidden position into a firing position, that defendant stated that he would kill an officer to avoid going back to prison, and that defendant shot the officer twice, paused for a moment, and then shot the officer two more times, which was probative of deliberation and intent to kill. *State v. Romero*, 2019-NMSC-007.

Deliberate intent required for attempted first-degree murder. — Where defendant shot at officers to escape apprehension during prison break, there was insufficient evidence that defendant had formed a deliberate intent to kill as opposed to mere impulsive reactions; therefore, there was insufficient evidence to convict him for attempted first-degree murder. *State v. Hernandez*, 1998-NMCA-167, 126 N.M. 377, 970 P.2d 149, cert. denied, 126 N.M. 533, 972 P.2d 352.

Sufficient evidence of first-degree murder and attempted first-degree murder. — Where defendant was convicted of first-degree murder and attempted first-degree murder, and where the State presented evidence at trial that defendant spent the day before the murder with another man who had a motive to kill the victim, that defendant secured for himself and the other man a ride to the apartment complex where the victim lived, that defendant and the other man disappeared from sight before gunshots were heard, that defendant and the other man were seen running back to their vehicle before driving off, and that occupants of the vehicle testified that defendant smelled like burnt matches, which is similar to the smell of gunpowder, there was sufficient evidence to support a jury finding that defendant had the deliberate intent to kill the victim, that he helped in the planning of the crime, and that he actively participated in the actual attempt to kill the victim. *State v. Torres*, 2018-NMSC-013.

Where requisite deliberate intention jury issue. — Where a defendant relies upon the testimony of experts to support his defense that he was insane and that he had not formed the requisite deliberate intention, and where the trial judge determines that the question of the defendant's sanity is a jury issue, the court does not err in refusing to direct a verdict to the effect that the defendant could not have formed a deliberate intention. *State v. Dorsey*, 1979-NMSC-097, 93 N.M. 607, 603 P.2d 717.

Schizophrenia did not limit defendant's capacity to form deliberate intent to kill. — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration, based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that schizophrenia limited his capacity to form the deliberate intent required to sustain a first-

degree murder conviction, evidence that defendant took conscious steps to walk through his house to retrieve a knife, address the victim in a theatrical manner saying that he had a "present" for her, and finally manipulate her neck before stabbing her was sufficient for a rational jury to find beyond a reasonable doubt the essential facts required for conviction of first-degree, deliberate intent murder. *State v. Martinez*, 2021-NMSC-012.

Where evidence did not support instruction. — A defendant convicted of first-degree murder for killing the victim by striking her with a cinder block after allegedly raping her was entitled to a reversal of his conviction, even in the absence of objection by the defendant at trial, where the evidence supported the judge's instruction on willful, deliberate or premeditated killing, but did not support instructions on the theories of felony murder, murder by act dangerous to others, indicating depraved mind, or murder from deliberate and premeditated design unlawfully and maliciously to effect death of any human being (transferred intent). Such error was fundamental, since an intolerable amount of confusion was introduced into the case, and the defendant could have been convicted without proof of all the necessary elements. *State v. DeSantos*, 1976-NMSC-034, 89 N.M. 458, 553 P.2d 1265.

Prosecutor's misstatement of instruction not fundamental error. — The prosecutor's comment to the jury that if they found the murder was done "consciously, knowingly, intentionally, deliberately, with premeditation, however you want to call it" then they could find defendant guilty of first-degree murder did not amount to fundamental error. *State v. Armendarez*, 1992-NMSC-012, 113 N.M. 335, 825 P.2d 1245.

"Deliberate intention" subsumes concept of premeditation. — The word "deliberation" as used in the trial court's response to the jury's question regarding premeditation, and the phrase "deliberate intention" as defined in this instruction subsumed the statutory concept of premeditation. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Sufficient evidence of deliberate murder. — Where an altercation occurred between defendant and the victim; the victim was kneeling on the ground as defendant stood over the victim pointing a rifle at the victim’s head; the victim attempted to push the rifle away from the victim’s head twice and defendant repositioned the rifle so the rifle it pointed directly at the victim’s face; as defendant pointed the rifle at the victim, the victim was pleading with defendant; a witness testified that defendant fired four close range shots directly at the victim; there were five wounds in the victim’s body, four of which had penetrated the victim’s body; and within an hour after the shooting, defendant interacted with a witness who testified that defendant did not appear to be intoxicated and that defendant made a telephone call to tell someone that defendant would not be at work for a week because defendant was in a "heap of trouble", there was sufficient evidence for a jury to find that defendant acted with deliberate intent when defendant killed the victim. *State v. Largo,* 2012-NMSC-015, 278 P.3d 532.

Jury could reasonably find that defendant acted with deliberate intent because the physical evidence of the stabbing of the victim showed that the attack was part of a prolonged struggle and that the victim was stabbed multiple times as she tried to escape and because defendant later made statements that he had hurt, stabbed and murdered a woman. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Where the evidence at trial established that defendant threatened the victim during a confrontation the day prior to the murder and cell phone records revealed that defendant sought out the victim the same morning of the murder, that the victim suffered approximately ninety stab wounds during the attack, indicating that the attack upon victim spanned a prolonged period of time, and that defendant disposed of the murder weapon and clothes he wore during the attack, there was sufficient evidence of defendant's deliberate intent to murder the victim. *State v. Smith*, 2016-NMSC-007.

Sufficient evidence of first-degree deliberate murder. — There was sufficient evidence to allow a trier of fact to reasonably infer that the defendant killed the victim with the deliberate intention to take away her life, where the physical evidence containing a full DNA profile matching defendant was found on the victim's body in semen on her thigh and under the fingernails of her right hand, and also on the paver stone presumed to be the murder weapon, and where evidence of deliberation was established by evidence of a prolonged struggle and a large number of wounds to the victim. *State v. Thomas*, 2016-NMSC-024.

Insufficient evidence of deliberate murder. — Where defendant was charged with attempted first degree murder after attending a party that ended with one person dead and the victim seriously injured from multiple gunshot wounds; after arriving at the party, defendant waited outside the hall while defendant's friend went into the hall; defendant was carrying a revolver and the friend was carrying a semiautomatic pistol; when a fight erupted in the hall, defendant walked to the entrance of the hall; defendant's friend shot at the victim several times with the pistol; several witnesses, including the victim, testified that they did not see defendant during the fight; after the shooting started, defendant was seen running with the friend away from the fight as other people were firing at them; defendant returned home and hid the pistol; defendant's friends told the police that defendant had admitted shooting the victim, but at trial denied that defendant had admitted shooting the victim; there was no evidence that defendant had a motive to kill the victim; defendant had a concealed weapon permit; other guests at the party were also carrying weapons; and defendant lied to the police and told one friend not to talk about what happened, the evidence was insufficient to demonstrate that defendant acted willfully, deliberately, and with premeditated intent to kill the victim. *State v. Slade*, 2014-NMCA-088, cert. granted, 2014-NMCERT-008.

Where defendant and the victims had been drinking and taking drugs earlier in the day; while defendant and the victims were aimlessly driving around, drinking and taking more drugs, defendant, without any evidence of motive, shot and killed the driver; and when the passenger, who was sitting in the front seat, screamed and turned around to look at defendant, defendant shot and wounded the passenger; and although multiple shots

were fired in quick succession, each victim was shot only once, there was insufficient evidence of deliberation to support defendant's conviction for attempted first degree murder of the passenger. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

Law reviews. — For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 439, 501, 529, 534.

41 C.J.S. Homicide §§ 38, 337.

14-202. Felony murder; essential elements.

For you to find the defendant _____ (*name of defendant*) guilty of felony murder, which is first degree murder, [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*name of defendant*) [committed][2] [attempted to commit] the crime of _____[3] (*name of felony*) [under circumstances or in a manner dangerous to human life];[4]

2. _____ (*name of defendant*) caused[5] the death of _____ (*name of deceased*) during [the commission of][2] [the attempt to commit] _____ (*name of felony*);

3. _____ (*name of defendant*) intended to kill or knew that [his] [her] acts created a strong probability of death or great bodily harm;

[4. The defendant did not act as a result of sufficient provocation];[6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable alternative or alternatives.

3. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. Use bracketed phrase unless the felony is a first degree felony.

5. UJI 14-251 NMRA must also be used if causation is in issue.

6. This element is to be given only when provocation is an issue. In that circumstance UJI 14-221A NMRA, voluntary manslaughter; lesser included offense of felony murder, should be given.

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Felony murder consists of a second-degree murder committed in the course of a dangerous felony. NMSA 1978, § 30-2-1(A)(2) (1994); *see State v. Montoya*, 2013-NMSC-020, ¶ 15, 306 P.3d 426, *see also State v. Nieto*, 2000-NMSC-031, ¶¶ 13-14, 129 N.M. 688, 12 P.3d 442 (citing *State v. Campos*, 1996-NMSC-043, ¶ 17, 122 N.M. 148, 921 P.2d 1266).

See Section 30-2-1A(2). Proof of malice aforethought or deliberate intention is not required as an element of felony murder. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211. The defense of “inability to form specific intent” does not apply to the murder element of felony murder because felony murder does not include the element of deliberate intention to take the life of another. *See* UJI 14-5110 NMRA. However, the felony which forms the basis for the felony murder may include a specific intent and the defense could apply to that element. *See* UJI 14-5111 NMRA.

Before a defendant can be convicted of felony murder, he or she must be given notice of the precise felony involved in the charge. The notice may be in the indictment or information, or otherwise furnished to the defendant in sufficient time to enable the defendant to prepare a defense. *State v. Stephens*, 1979-NMSC-076, ¶ 10, 93 N.M. 458, 601 P.2d 428; *State v. Hicks*, 1976-NMSC-069, ¶ 8, 89 N.M. 568, 555 P.2d 689. Rule 5-303 NMRA of the Rules of Criminal Procedure for the District Courts would seem to indicate that the proper procedure may be to amend the indictment or information. The state must prove each element of the underlying felony [or attempt], otherwise it is improper to submit felony murder. *State v. DeSantos*, 1976-NMSC-034, ¶ 8, 89 N.M. 458, 553 P.2d 1265. Felony murder may be charged as part of an open count of murder by also charging the underlying felony. *Stephens*, 1979-NMSC-076, ¶ 11. However, when a jury convicts a defendant of both felony murder and the same felony upon which the felony murder conviction is predicated, the predicate felony is vacated because it is subsumed within the felony murder conviction. *State v. Torrez*, 2013-NMSC-034, ¶ 15, 305 P.3d 944.

"In New Mexico, the underlying felony must be a first degree felony, an inherently dangerous lesser degree felony, or a lesser degree felony committed under inherently dangerous circumstances." *State v. Smith*, 2001-NMSC-004, ¶ 12, 130 N.M. 117, 19 P.3d 254 (citing *State v. Harrison*, 1977-NMSC-038, ¶ 14, 90 N.M. 439, 564 P.2d 1321). There is a presumption of inherent dangerousness "in a felony murder case where the predicate felony is a first-degree felony, but not where the felony is of a lesser degree." *State v. Mora*, 1997-NMSC-060, ¶ 21, 124 N.M. 346, 950 P.2d 789, *overruled on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120, 164 P.3d 1. For lesser felonies, "both the nature of the felony and the circumstances surrounding its commission may be considered to determine whether it was inherently dangerous to human life." *Smith*, 2001-NMSC-004, ¶ 12. This is a factual matter "for the jury to decide in each case, subject to review by the appellate courts." *Id.*

In *Harrison*, the Court made it clear that New Mexico follows the general rule that the felony must be independent of or collateral to the homicide. 1977-NMSC-038, ¶ 9.

"[T]o charge felony murder for a killing in the commission of or attempt to commit a felony, the felony must be either a first degree felony (in which case the 'res gestae' test must be used) or the lesser degree felony must be inherently dangerous or committed under circumstances that are inherently dangerous." *State v. Ortega*, 1991-NMSC-084, ¶ 17, 112 N.M. 554, 817 P.2d 1196, *abrogated on other grounds by Frazier*, 2007-NMSC-032, ¶ 1. "[F]or the homicide to come within the res gestae, the felony and the homicide must be part of one continuous transaction and closely connected in point of time, place and causal connection. . . . [C]ausation must be the acts of defendant leading to the homicide without an independent force intervening." *State v. Martinez*, 1982-NMCA-053, ¶ 17, 98 N.M. 27, 644 P.2d 541 (citing *Harrison*, 1977-NMSC-038, ¶ 11). If there is sufficient evidence to raise the issue of causation, the question must be left to the jury under this instruction and the causation instruction, UJI 14-251 NMRA.

In a felony murder prosecution where the evidence supports a conviction for either second-degree murder or voluntary manslaughter, the felony murder essential elements jury instruction must include the defining requirement that the accused did not act in the heat of passion as a result of the legally adequate provocation that would reduce murder to manslaughter. *See Montoya*, 2013-NMSC-020, ¶ 3.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-25, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, December 31, 2021, revised the Use Notes, and revised the committee commentary; in Use Note 3, deleted "generally worded as follows: 'For you to find that the defendant committed or attempted to commit _____, the state must prove to your satisfaction beyond a reasonable doubt that _____' (add elements of the felony or attempt unless

they are set out in another essential elements instruction)" and added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2014 amendment, approved by Supreme Court Order No. 14-8300-005, effective December 31, 2014, added the element that the defendant did not act as a result of sufficient provocation; added Paragraph 4; and in the Use Note, added Paragraph 6.

The 1995 amendment, effective March 15, 1995, rewrote Paragraph 2, added Paragraph 3, and redesignated former Paragraph 3 as Paragraph 4 in the instruction.

Felony murder instruction parallels the statutory language and contains all the essential elements of the crime of felony murder. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds*, *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Requirement that defendant caused death. — Under this instruction the jury had to find, in order to convict the defendant of felony murder, that he caused the death of the victim. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Instructions must link felony and death of victim. — The giving of this instruction, in conjunction with UJI 14-251, defining "proximate cause," meets the requirement of establishing the causal link between the felony and the death of the victim. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Intervening cause precludes felony murder. — In a felony murder, the death must be caused by the acts of the defendant or his accomplice without an independent intervening force. *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

Failure to give unrequested proximate cause instruction not error. — The proximate cause instruction is only a definition or an amplification of the cause language of this instruction and as such the failure to give the proximate cause instruction when unrequested is not error. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds*, *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Effect of failure to instruct. — The Supreme Court will only affirm a conviction in which the trial court failed to instruct the jury on an essential element when, under the facts adduced at trial, that omitted element was undisputed and indisputable and no rational jury could have concluded otherwise. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

The trial court's failure to instruct the jury on the element of mens rea in the defendant's case did not give rise to fundamental error since the defendant's mens rea with respect to felony murder was conclusively established by his own testimony and was fully corroborated by the state's evidence; there was no evidence presented by either side that cast doubt on the fact that the defendant fired his rifle at the intended robbery

victim, knowing his act created a strong probability of death or great bodily harm and the outcome of the trial would most assuredly have been the same had the jury been instructed on the omitted mens rea element. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017.

Collateral felony must be inherently dangerous. — In a felony murder charge, involving a collateral lesser-degree felony, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous. In cases where the collateral felony is a first degree felony, the res gestae or causal relationship test shall be used. This instruction will have to be altered to conform with this decision. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Insufficient evidence that defendant committed the predicate felony of shooting at a dwelling. — Where defendant was convicted of felony murder predicated on the felony of shooting at a dwelling or occupied building, the evidence established that defendant and his companions targeted the victims in the course of a gunfight that took place in front of a dwelling, but did not shoot at or target the dwelling. Therefore, the evidence is not sufficient to support a conviction of felony murder predicated on the felony of shooting at a dwelling. *State v. Comitz*, 2019-NMSC-011.

Shooting at or from a motor vehicle may not serve as the predicate felony for felony murder. — Under the collateral felony rule, the predicate felony must be independent of or collateral to the homicide, and the predicate felony cannot be a lesser-included offense of second-degree murder. Shooting at or from a motor vehicle is an elevated form of aggravated battery, a lesser-included offense of second-degree murder, and thus cannot be used as a predicate for felony murder, so where defendant was convicted of first-degree felony murder, the underlying felony of which was shooting from a motor vehicle, defendant's felony murder conviction was vacated because the crime of shooting at or from a motor vehicle lacks an independent felonious purpose from that required under second-degree murder. *State v. Marquez*, 2016-NMSC-025.

New rule that shooting at or from a motor vehicle cannot be used as a predicate for felony murder applies retroactively. — In *State v. Marquez*, 2016-NMSC-025, the New Mexico Supreme Court determined that shooting at or from a motor vehicle is an elevated form of aggravated battery and thus cannot be used as a predicate for felony murder; shooting at or from a motor vehicle does not have a felonious purpose independent from the purpose of endangering the physical health of the victim because shooting from a motor vehicle must be accomplished with reckless disregard for the safety of a person. *Marquez* established a new substantive rule that narrowed the range of punishable conduct that could support a felony murder conviction, and therefore should be given retroactive effect. *Rudolfo v. Steward*, 2023-NMSC-013.

Retroactive application of new substantive rule established in *State v. Marquez*. — Where petitioner was convicted of first-degree murder under a general verdict at a trial in which the jury instructions contained two alternative theories for the jury to use as a basis for the first-degree murder conviction: felony murder predicated on shooting at

or from a motor vehicle and willful and deliberate murder, and where, on direct appeal, the New Mexico Supreme Court vacated petitioner's conviction for felony murder, holding that the crime of shooting at or from a motor vehicle may not serve as the predicate felony in support of a felony murder charge, and where, in a petition for habeas corpus, petitioner claimed that the Supreme Court's holding applies retroactively and that his conviction for willful and deliberate murder must also be vacated, the district court erred in denying petitioner's habeas petition, because a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate, and in this case it is impossible to determine whether the general verdict was based on the legally invalid theory of felony murder or on willful and deliberate murder. *Rudolfo v. Steward*, 2023-NMSC-013.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 498, 506, 534, 535.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

40 C.J.S. Homicide § 46.

14-203. Act greatly dangerous to life; essential elements.

The defendant is charged with first-degree murder by an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life. For you to find the defendant guilty [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe act of defendant*);

2. The defendant's act caused[2] the death of _____ (*name of victim*);

3. The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;

4. The defendant knew that the act was greatly dangerous to the lives of others;

5. This happened in New Mexico on or about the _____ day of _____, _____.

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, perverted, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14 251 NMRA must also be used if causation is in issue.

[As amended by Supreme Court Order No. 08 8300 060, effective February 2, 2009; as amended by Supreme Court Order No. 19 8300 016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — In New Mexico, depraved mind murder is classified as first-degree murder. *See* NMSA 1978, ' 30-2-1(A)(3) (1994). Depraved mind murder requires Aoutrageously reckless conduct performed with a depraved kind of wantonness or total indifference for the value of human life.@ *State v. Reed*, 2005-NMSC-031, & 24, 138 N.M. 365, 120 P.3d 447; *see State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922. A[O]ne way our courts have distinguished depraved mind murder is by the number of persons exposed to danger by a defendant=s extremely reckless behavior.@ *Reed*, 2005-NMSC-031, & 22; *see State v. Brown*, 1996-NMSC-073, & 14, 122 N.M. 724, 931 P.2d 69. Generally, in New Mexico, Adepraved mind murder convictions have been limited to acts that are dangerous to more than one person.@ *Reed*, 2005-NMSC-031, & 22. ASuch condemned behavior is required to be extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness: for example, shooting into a crowd, placing a time bomb in a public place, or opening the door of the lions= cage in the zoo.@ *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174. Other types of conduct that have been held to involve a Avery high degree of unjustifiable homicidal danger@ include Astarting a fire at the front door of an occupied dwelling, shooting into the caboose of a passing train or into a moving automobile necessarily occupied by human beings,@ and Adriving a car at very high speeds along a main street.@ 2 Wayne R. LaFave, *Substantive Criminal Law* ' 14.4, at 440 (2d ed. 2003). LaFave cites additional examples imaginable, including Athrowing stones from the roof of a tall building onto the busy street below@ and Apiloting a speedboat through a group of swimmers.@ *Id*. at 441.

AIn addition to the number of people endangered, [New Mexico] has construed depraved mind murder as requiring proof that the defendant had >subjective knowledge= that his act was greatly dangerous to the lives of others.@ *Reed*, 2005-NMSC-031, & 23; *see State v. McCrary*, 1984-NMSC-005, & 9, 100 N.M. 671, 675

P.2d 120. AThe required mens rea element of >subjective knowledge= serves as proof that the accused acted with a >depraved mind= or >wicked or malignant heart= and with utter disregard for human life.@ *Brown*, 1996-NMSC-073, & 16. A>[T]he legislature intended the offense of depraved mind murder to encompass an intensified malice or evil intent.=@ *Reed*, 2005-NMSC-031, & 24 (quoting *Brown*, 1996-NMSC-073, & 15). A[O]ne way to distinguish depraved mind murder from manslaughter when an underlying act involves extremely reckless conduct is by identifying an element of viciousness . . . .@ *Reed*, 2005-NMSC-031, & 24 (citing Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 60 (3d ed.1982)). AObviously, mere negligence or recklessness will not do.@ *Reed*, 2005-NMSC-031, & 23.

Therefore, this instruction sets forth a subjective test for depraved mind murder. AThe defendant must know his act is greatly dangerous to the lives of others.@ *Johnson*, 1985-NMCA-074, & 11. But, A[a] defendant does not have to actually know that his victim will be injured by his act.@ *Ibn Omar-Muhammad*, 1985-NMSC-006, & 21; *see also McCrary*, 1984-NMSC-005, && 9-10. In *McCrary*, the defendant had attended a carnival in Hobbs and felt he was cheated out of sixty-four dollars. *Id*. & 2. He and a co-defendant claimed that they decided to get revenge by shooting the tires of the carnival trucks. *Id*. They discharged about twenty-five shots into several tractor-trailers and cabs. Not a single tire was shot. *Id*. & 11. The victim was in a sleeper cab of one of the trucks and was killed by one of these bullets. *Id*. & 3. The Court stated, ADefendants did not have to actually know that [victim] was in the sleeper compartment. Rather, sufficient subjective knowledge exists if Defendants= conduct was very risky, and under the circumstances known to Defendants they should have realized this very high degree of risk.@ *Id*. & 9. The fact that no tires were shot and there were twenty-five bullet holes in the upper parts of the vehicles was substantial evidence of the defendants= knowledge of the risk. *Id*. & 11. The Court also pointed out the fact that the defendants contemplated slashing the tires but rejected it for fear of being caught, indicating that defendants had reason to know people were in the area. *Id*. The Court held that in light of the surrounding circumstances known to defendants, there was substantial evidence for a jury to find that defendants had subjective knowledge of the risk. *Id*. & 11.

The Supreme Court has held that Aa fact finder may consider evidence of extreme intoxication when determining whether a defendant possessed the requisite mental state of >subjective knowledge= for first-degree depraved mind murder.@ *See Brown*, 1996-NMSC-073, & 1.

Also note that the existence of an intent to kill a particular individual does not remove the act from this class of murder. *See State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128. In *Sena*, the defendant, a woman, and another man entered a bar through the front entrance. The woman was holding a drink and the doorman did not allow her to enter with the drink. A dispute arose and the defendant hit the doorman. The doorman then sprayed defendant with mace, hit him with a flashlight, and threw him out of the door. Within a few seconds the defendant returned with a gun. He then

opened fire on the doorman, who immediately turned and ducked. The defendant fired four or five times. The first shot hit the doorman in the face, but the other shots missed. One of these shots struck and killed an innocent bystander. The Court held, ABy firing at the doorman in a room containing other persons within the line of fire, [defendant] committed an act >greatly dangerous to the lives of others= which falls within the depraved mind theory. It is irrelevant whether he intended only to kill the doorman . . . .@ *Id*. & 9.

Additionally, it must also be unjustifiable for the defendant to take the risk. Here is an example:

> If [a defendant] speeds through crowded streets, thereby endangering other motorists and pedestrians, in order to rush a passenger to the hospital for an emergency operation, he may not be guilty of murder if he unintentionally kills, though the same conduct done solely for the purpose of experiencing the thrill of fast driving may be enough for murder.

2 LaFave, *supra*, ' 14.4, at 439. As said in a simpler way, Athe extent of the defendant=s knowledge of the surrounding circumstances and the social utility of his conduct@ are to be considered. *Id*.

[As amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, revised the committee commentary; and in Element 4, after “that”, deleted “his” and added “the”.

The 2008 amendment, as approved by Supreme Court Order No. 08-8300-060, effective February 2, 2009, added the second paragraph and replaced the committee commentary.

Elements of depraved mind murder. — The elements that are required to support a depraved mind murder conviction are that more than one person must be endangered by defendant’s act; defendant’s act must be intentional and extremely reckless; defendant must possess subjective knowledge that defendant’s act was greatly dangerous to the lives of others; and the act must encompass an intensified malice and evil intent. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

Sufficient evidence of depraved mind murder. — Where defendant drove a truck at approximately 80 miles per hour for approximately one mile on a four-lane suburban street during the middle of a weekday, striking and injuring a jogger on the street’s raised median, then driving onto a sidewalk and striking and killing a second pedestrian;

all the while speeding and weaving in and out of traffic, including into oncoming traffic, almost colliding with other vehicles, until defendant crossed all four lanes of the street and finally crashed into a boulder on the raised median, the evidence was sufficient to support defendant's conviction of depraved mind murder. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

Indicators of a depraved mind. — The four indicators of a depraved mind are as follows: (1) more than one person was endangered by the defendant's act, (2) the defendant's act was intentional and extremely reckless, (3) the defendant had subjective knowledge that his act was greatly dangerous to the lives of others, and (4) the defendant's act encompassed an intensified malice or evil intent. *State v. Candelaria*, 2019-NMSC-004.

In defendant's trial for depraved mind murder, there was sufficient evidence to support the conviction where defendant fired a gun at a vehicle occupied by four people, striking and killing an eight-year-old child sitting in the backseat of the vehicle, and where the evidence presented at trial established that defendant admitted firing two shots at the vehicle and that defendant knew that there were multiple people in the vehicle, and from the evidence presented the jury could have reasonably come to the conclusion that defendant acted intentionally, that shooting at a vehicle full of people qualifies as outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life, that defendant's act of shooting at the vehicle was greatly dangerous to the life of more than one person, and that defendant had subjective knowledge of the risk he posed to the lives of those in the vehicle. *State v. Candelaria*, 2019-NMSC-004.

Extreme risk suggests subjective knowledge that acts were greatly dangerous. — Where defendants fired at a truck they presumed was empty, killing the victim inside, subjective knowledge that their acts were greatly dangerous to the lives of others is present if those acts were very risky and, under the circumstances known to them, the defendants should have realized this very high degree of risk. *State v. McCrary*, 1984-NMSC-005, 100 N.M. 671, 675 P.2d 120.

Intent to kill particular victim. — A murder committed by an act which indicates a depraved mind is a first-degree murder and the existence of an intent to kill a particular individual does not remove the act from this class of murder. *State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128.

Instruction held improper. — Where defendant was charged with depraved mind murder involving a motor vehicle and the trial court instructed the jury that to find defendant guilty of first degree murder, the jury had to find that defendant drove defendant's vehicle erratically and recklessly for a long distance striking the victims, the jury instruction misstated the law on depraved mind murder because the instruction did not require the jury to find that defendant's conduct was extremely reckless. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

Instruction on depraved mind murder which set out an objective standard of knowledge of the risk, stating that "defendant should have known that his act was greatly dangerous to the lives of others" rather than subjective standard that "defendant knew that his act was greatly dangerous . . .," was improper, entitling defendant to reversal of murder conviction and new trial. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

Vehicular homicide by reckless conduct is lesser included offense of depraved mind murder by vehicle. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

Sole difference between instructions in this rule and UJI 14-210 NMRA rests with the requirement in the depraved mind murder instruction that the jury find defendant's act indicated a depraved mind without regard for human life, for which the jury receives no further definition or guidance. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

Law reviews. — For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 76.

Part B
Second Degree Murder

14-210. Second degree murder; voluntary manslaughter lesser included offense; essential elements.[1]

For you to find the defendant guilty of second degree murder [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that [his] [her] acts created a strong probability of death or great bodily harm[4] to _____ (*name of victim*) [or any other human being][3];

3. The defendant did not act as a result of sufficient provocation;[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.[4]

USE NOTES

1. This instruction is to be given only when provocation is an issue.

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

3. Use this bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following UJI 14-220 NMRA, voluntary manslaughter; lesser included offense.

4. The following instructions must also be given after UJI 14-220 NMRA, voluntary manslaughter, lesser included offense:

UJI 14-141 NMRA, general criminal intent;

UJI 14-131 NMRA, definition of great bodily harm;

UJI 14-222 NMRA, definition of sufficient provocation; and

UJI 14-250 NMRA [withdrawn], jury procedure for various degrees of homicide.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary to UJI 14-211 NMRA for a discussion of instructions on second degree murder.

Essential Element Number 3, providing for the jury to consider the issue of provocation, is consistent with the requirements of *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Parties must be aware that an attempt to commit reckless or unintentional murder is "a crime that does not exist." *State v. Carrasco*, 2007-NMCA-152, ¶ 7, 143 N.M. 62, 172 P.3d 611. Therefore, to avoid potential confusion, if the charge of attempt to commit second degree murder proceeds to a jury, the instructions should be drafted to take into account the holding below from *Carrasco* and the specific facts of the case.

Attempt to commit a felony is the commission of "an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." NMSA 1978, § 30-28-1 (1963). It is a specific intent crime. *Jernigan*, 2006-NMSC-003, ¶ 18, 139 N.M. 1, 127 P.3d 537. Attempted second degree murder, however, is not a valid crime in all circumstances because second degree murder can be committed either intentionally or unintentionally. *See Johnson*, [1985-NMCA-074, ¶¶ 10-20,] 103 N.M. at 368-70, 707 P.2d at 1178-80. When second degree murder is committed as a general intent crime, it

requires that the defendant kill the victim with the knowledge that the defendant's acts "create a strong probability of death or great bodily harm." Section 30-2-1(B). As a general intent crime, it does not require an intent to kill; a reckless killing satisfies the statutory requirements.

Carrasco, 2007-NMCA-152, ¶ 7.

The mens rea constitutes a subjective rather than objective knowledge requirement. *State v. Suazo*, 2017-NMSC-011, ¶¶ 22-25, 390 P.3d 674 (rejecting the notion that prior precedent supported an objective "should have known" mens rea (citing *State v. Brown*, 1996-NMSC-073, ¶ 16, 122 N.M. 724, 931 P.2d 69)). *Suazo* held that a second-degree murder conviction requires more than "that a defendant should have known of the risk of his or her conduct without anything more, because that is essentially a civil negligence standard." *Id*. ¶ 23. Furthermore, it would blur the line between second-degree murder and involuntary manslaughter. *Id*. ¶ 24.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-250 NMRA was withdrawn, effective December 31, 2020. The bracketed material was added by the compiler and is not part of the rule.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, in Element 2, after "[his]", added "[her]", and in the committee commentary, added the last paragraph relating to the mens rea for second-degree murder.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added "NMRA" after the UJI citations in the Use Note; and in the committee commentary, after the second sentence, added the new language.

Cross references. — For second degree murder, *see* Section 30-2-1B NMSA 1978.

Defective jury instruction cured by other instructions. — Where defendant was charged with second degree murder; the jury was instructed on both second degree murder and, as a lesser-included offense, voluntary manslaughter; the second degree murder instruction, which was given pursuant to UJI 14-211 NMRA, did not contain language stating that defendant "did not act as a result of sufficient provocation"; and the instruction on voluntary manslaughter, which was given pursuant to UJI 14-220 NMRA, contained an instruction on the element negating sufficient provocation, the deficiency in the second degree murder instruction was corrected by the voluntary manslaughter instruction and there was no fundamental error. *State v. Swick*, 2010-

NMCA-098, 148 N.M. 895, 242 P.3d 462, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Court of appeals has no authority to review claim that instruction is erroneous. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170.

And bound by supreme court order. — The court of appeals was bound by the supreme court order approving challenged instructions, UJI 14-210 and 14-211, and had no authority to set the instructions aside. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

Provocation and self-defense mutually exclusive. — The instructions on provocation and self-defense are each accurate and unambiguous; however, as applied to the facts of this case they are confusing. The defendant suggests that it is impossible to determine whether the jury understood that the claim of self-defense supersedes the element of provocation. Any confusion could have been eliminated if the jury had been told that it was required to find the defendant not guilty if his conduct met the definition of self-defense, regardless of if that same conduct could be found to be provocation. In the future, when a case presents similar circumstances, juries should be so instructed. *State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

Location of crime, as element of offense, may be proved by circumstantial evidence, and the defendant's confession, together with circumstantial evidence, supplied substantial evidence for the jury's verdict that the crime was committed in New Mexico, where the bodies were found, since if a choice exists between two conflicting chains of inference, that choice is for the trier of fact. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds*, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Failure to refer to malice in homicide instructions was deliberate and not an inadvertent omission. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

Giving provocation instruction was not fundamental error. — Even if the jury instruction setting forth the elements of second degree murder erroneously included a provocation element, elimination of the instruction would not have altered the jury's determination. The evidence overwhelmingly supported the conviction for intentional killing during the commission of a felony. Since the issue was not preserved below, the court only needs to find the instruction did not otherwise constitute fundamental error. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

Failure to give provocation instruction was fundamental error. — Where defendant was convicted of second-degree murder for stabbing and bludgeoning the victim; defendant maintained that the victim stabbed defendant before defendant stabbed the victim; police officers testified that defendant’s knife wound could have been defensive

in nature; although the trial court had determined that voluntary manslaughter was a lesser-included offense in the case, the trial court instructed the jury on voluntary manslaughter using UJI 14-211 NMRA, which omitted the element of sufficient provocation; and the trial court instructed the jury with UJI 14-220 NMRA, which states that the difference between second-degree murder and voluntary manslaughter was sufficient provocation, and UJI 14-221 NMRA which defines sufficient provocation, the omission of "without sufficient provocation" from the voluntary manslaughter instruction was fundamental error because the lack of sufficient provocation is an essential element of second-degree murder when the jury is instructed on voluntary manslaughter as a potential lesser-included offense, and because without being instructed on this element the jury had no way of knowing that the state had the burden of proving beyond a reasonable doubt that defendant acted without sufficient provocation in order to prove that defendant committed second-degree murder. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

Provocation at issue. — When provocation is at issue, an instruction on voluntary manslaughter must be given. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

The district court erred in modifying the mens rea element in the uniform jury instruction for second-degree murder. — In defendant's trial for second-degree murder, where defendant claimed that he did not know that his shotgun was loaded prior to shooting and killing his friend, the district court erred in accepting the state's modified jury instruction which changed the mens rea element for second-degree murder to "knew or should have known" that defendant's acts created a strong probability of death or great bodily harm to the victim, because adding "should have known" to the mens rea element was a misstatement of law, and when a jury instruction directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable. The second-degree murder statute's plain language and New Mexico's uniform jury instructions on second-degree murder require that the defendant possess knowledge of the probable consequences of his or her acts. *State v. Suazo*, 2017-NMSC-011.

Failure to give instruction not prejudicial. — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040.

In a prosecution for felony murder, giving of an unmodified form of this instruction on second-degree murder was sufficient without giving a general criminal intent instruction, which requires a higher level of criminal intent. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

Sole difference between instructions in UJI 14-203 NMRA and this rule rests with the requirement in the depraved mind murder instruction that the jury find defendant's act indicated a depraved mind without regard for human life, for which the jury receives no further definition or guidance. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

Evidence that defendant orchestrated the beating of the victim, that he used both his fists and a baseball bat to hit the victim, that the victim's condition worsened shortly thereafter, and that the victim died, permitted the jury to make a reasonable inference that the acts of the defendant constituted a significant cause of the victim's death and that there was no other independent event that broke the chain of events from the beating to the victim's death. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

Sufficient evidence of second degree murder. — Where defendant lived with the victim for approximately one and a half months before the victim disappeared; a few weeks later, the victim's decomposed body was discovered wrapped in a blue air mattress and sheets, and covered with a mattress in an alley approximately 500 feet from defendant's apartment; defendant's parent testified that the parent sent a blue air mattress and a set of sheets to defendant; grid marks on the air mattress resembled the grid marks of a shopping cart; there was a shopping cart at the scene; shopping carts were found in defendant's apartment; DNA found on a pair of jeans near the body provided a possible link between the body and defendant; and the victims' blood was found on the carpet in defendant's apartment, the evidence was sufficient to permit the jury to find defendant guilty of second degree murder. *State v. Schwartz*, 2014-NMCA-066, cert. denied, 2014-NMCERT-006.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 499.

41 C.J.S. Homicide §§ 64, 75.

14-211. Second-degree murder; voluntary manslaughter not lesser included offense; essential elements.[1]

For you to find the defendant guilty of second-degree murder [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that [his] [her] acts created a strong probability of death or great bodily harm[3] to _____ (*name of victim*) [or any other human being];[4]

3. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. This instruction is to be used only when second-degree murder is the lowest degree of homicide to be considered by the jury.

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

3. UJI 14-131 NMRA, the definition of great bodily harm, must be given.

4. Use this bracketed phrase when the intent was directed to someone other than the victim. In such a case, UJI 14-255 NMRA must also be given.

5. UJI 14-141 NMRA, general criminal intent, must also be given.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-2-1(B) (1994). Second-degree murder is committed when death results from acts which the defendant knew created a strong probability of death or great bodily harm. The second-degree murder statute is designed to discourage and punish the unlawful killing of people. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727.

Although murder in the second degree is a lesser included offense of the crime of murder in the first degree, an instruction on second-degree murder should not be given when the evidence only supports murder in the first degree. *See State v. Aguilar*, 1994-NMSC-046, ¶ 17, 117 N.M. 501, 873 P.2d 247.

Under New Mexico's statutory scheme, murder consists of two categories of intentional killings: those that are willful, deliberate, and premeditated; and those that are committed without such deliberation and premeditation but with knowledge that the killer's acts create a strong probability of death or great bodily harm. *State v. Garcia*,

1992-NMSC-048, 114 N.M. 269, 837 P.2d 862. The mens rea constitutes a subjective rather than objective knowledge requirement. *State v. Suazo*, 2017-NMSC-011, ¶¶ 22-25, 390 P.3d 674 (rejecting the notion that prior precedent supported an objective "should have known" mens rea (citing *State v. Brown*, 1996-NMSC-073, ¶ 16, 122 N.M. 724, 931 P.2d 69)). *Suazo* held that a second-degree murder conviction requires *more* than "that a defendant should have known of the risk of his or her conduct without anything more, because that is essentially a civil negligence standard." *Id*. ¶ 23. Furthermore, it would blur the line between second-degree murder and involuntary manslaughter. *Id*. ¶ 24.

Regarding transferred intent, to be guilty of second-degree murder, it is sufficient that the defendant have the necessary mens rea with respect to the individual toward whom the defendant's lethal act was directed; it is not necessary, however, that the defendant have this mens rea with respect to the actual victim of that act. *State v. Lopez*, 1996-NMSC-036, 122 N.M. 63, 920 P.2d 1017; *see also* UJI 14-251 NMRA.

Regarding evidence that permitted the jury to make a reasonable inference that the acts of the defendant constituted a significant cause of the victim's death and that there was no other independent event that broke the chain of events from the beating to the victim's death, *see State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, in Element 2, after "[his]", added "[her]", and in the committee commentary, in the third undesignated paragraph, added the last three sentences of the paragraph relating to the mens rea for second-degree murder.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-005, effective December 31, 2014, amended the committee commentary.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added "NMRA" after the UJI citations in the Use Note; and in the committee commentary, in the first sentence, changed "Section 30-2-1B NMSA 1978" to "NMSA 1978, § 30-2-1(B) (1994)"; in the fourth sentence, changed "30-2-1A(3) NMSA 1978" to "NMSA 1978, § 30-2-1(A)(3) (1994)"; in the fifth paragraph, changed "Section 30-2-1 NMSA 1978" to "NMSA 1978, § 30-2-1 (1980)"; in the sixth paragraph, changed "30-2-1 NMSA 1978" to "NMSA 1978, § 30-2-1 (1980)"; added the eighth paragraph; and added "NMRA" after the UJI citations throughout.

Failure to follow the Use Note for a uniform jury instruction is not jurisdictional error which automatically requires reversal. *State v. Doe*, 1983-NMSC-096, 100 N.M. 481, 672 P.2d 654 (failure to give Instruction 14-141, pursuant to Use Note 5 of this instruction).

The district court erred in modifying the mens rea element in the uniform jury instruction for second-degree murder. — In defendant's trial for second-degree murder, where defendant claimed that he did not know that his shotgun was loaded prior to shooting and killing his friend, the district court erred in accepting the state's modified jury instruction which changed the mens rea element for second-degree murder to "knew or should have known" that defendant's acts created a strong probability of death or great bodily harm to the victim, because adding "should have known" to the mens rea element was a misstatement of law, and when a jury instruction directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable. The second-degree murder statute's plain language and New Mexico's uniform jury instructions on second-degree murder require that the defendant possess knowledge of the probable consequences of his or her acts. *State v. Suazo*, 2017-NMSC-011.

Refusal to instruct on second degree murder. — Refusal by the trial court to give an instruction on second-degree murder is appropriate when the evidence simply did not support a finding of second-degree murder. There was no evidence that the killing was anything less than deliberate and intentional. *State v. Aguilar*, 1994-NMSC-046, 117 N.M. 501, 873 P.2d 247, cert. denied, 513 U.S. 859, 115 S. Ct. 168, 130 L. Ed. 2d 105, 513 U.S. 865, 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

14-212. Second degree murder; lesser included offense felony murder; voluntary manslaughter not lesser included offense; essential elements.[1]

For you to find the defendant guilty of second degree murder [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that his acts created a strong probability of death or great bodily harm[3] to _____ (*name of victim*) [or any other human being];[4]

3. The defendant did not cause the death of _____ (*name of victim*) during [the commission of][5] [the attempt to commit] _____ (*name of felony*);

4. This happened in New Mexico on or about the _____ day of _____, _____.[6]

USE NOTES

1. This instruction is to be used only when second degree murder is the lowest degree of homicide to be considered by the jury.

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

3. UJI 14-131 NMRA, the definition of great bodily harm, must be given.

4. Use this bracketed phrase when the intent was directed to someone other than the victim. In such a case, UJI 14-255 NMRA must also be given.

5. Use applicable alternative or alternatives. The same alternative or alternatives should be used as provided in the felony murder instruction.

6. UJI 14-141 NMRA, general criminal intent, must also be given.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See State v. Montoya*, 2013-NMSC-020, 306 P.3d 426; *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88; Committee Commentary to UJI 14-211 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The district court erred in modifying the mens rea element in the uniform jury instruction for second-degree murder. — In defendant's trial for second-degree murder, where defendant claimed that he did not know that his shotgun was loaded prior to shooting and killing his friend, the district court erred in accepting the state's modified jury instruction which changed the mens rea element for second-degree murder to "knew or should have known" that defendant's acts created a strong probability of death or great bodily harm to the victim, because adding "should have known" to the mens rea element was a misstatement of law, and when a jury instruction directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable. The second-degree murder statute's plain language and

New Mexico's uniform jury instructions on second-degree murder require that the defendant possess knowledge of the probable consequences of his or her acts. *State v. Suazo*, 2017-NMSC-011.

14-213. Second degree murder; lesser included offense of felony murder; or voluntary manslaughter lesser included offense; essential elements.[1]

For you to find the defendant guilty of second degree murder [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that his acts created a strong probability of death or great bodily harm[4] to _____ (*name of victim*) [or any other human being][3];

3. The defendant did not cause the death of _____ (*name of victim*) during [the commission of][4] [the attempt to commit] _____ (*name of felony*)[5];

4. The defendant did not act as a result of sufficient provocation;[6]

5. This happened in New Mexico on or about the ___ day of _____, ___.[6]

USE NOTES

1. This instruction is to be given only when provocation is an issue.

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

3. Use this bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following UJI 14-220 NMRA, voluntary manslaughter; lesser included offense.

4. Use applicable alternative or alternatives. The same alternative or alternatives should be used as provided in the felony murder instruction.

5. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

6. The following instructions must also be given after UJI 14-220 NMRA, voluntary manslaughter, lesser included offense:

UJI 14-141 NMRA, general criminal intent;

UJI 14-131 NMRA, definition of great bodily harm;

UJI 14-222 NMRA, definition of sufficient provocation; and

UJI 14-250 NMRA, jury procedure for various degrees of homicide.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88; Committee Commentary to UJI 14-212 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, revised the Use Notes; in Element 3, added Use Note designation "5"; in Elements 4 and 5, changed Use Note designation "5" to "6"; and in the Use Notes, added a new Use Note 5 and redesignated the succeeding Use Note accordingly.

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-250 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The district court erred in modifying the mens rea element in the uniform jury instruction for second-degree murder. — In defendant's trial for second-degree murder, where defendant claimed that he did not know that his shotgun was loaded prior to shooting and killing his friend, the district court erred in accepting the state's modified jury instruction which changed the mens rea element for second-degree murder to "knew or should have known" that defendant's acts created a strong probability of death or great bodily harm to the victim, because adding "should have known" to the mens rea element was a misstatement of law, and when a jury instruction directs the jury to find guilt based upon a misstatement of the law, a finding of juror misdirection is unavoidable. The second-degree murder statute's plain language and New Mexico's uniform jury instructions on second-degree murder require that the defendant possess knowledge of the probable consequences of his or her acts. *State v. Suazo*, 2017-NMSC-011.

Part C
Voluntary Manslaughter

14-220. Voluntary manslaughter; lesser included offense.[1]

For you to find the defendant guilty of voluntary manslaughter, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that his acts created a strong probability of death or great bodily harm[2] to _____ (*name of victim*) [or any other human being][3];

3. The defendant acted as a result of sufficient provocation;

4. This happened in New Mexico on or about the _____ day of _____, _____.

The difference between second degree murder and voluntary manslaughter is sufficient provocation. In second degree murder the defendant kills without having been sufficiently provoked, that is, without sufficient provocation. In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, that is, as a result of sufficient provocation. Sufficient provocation reduces second degree murder to voluntary manslaughter.[4]

USE NOTES

1. This instruction should immediately follow the second degree murder instruction.

2. UJI 14-131 NMRA, the definition of "great bodily harm," must be given following this instruction.

3. Use the bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following this instruction.

4. UJI 14-222 NMRA, the definition of sufficient provocation, must be given following this instruction.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-2-3A. Manslaughter is an intentional homicide which is committed under adequate legal provocation. *See generally*, LaFave & Scott, Criminal Law 572 (1972). Perkins, Criminal Law 923 (2d ed. 1969). *See State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594; *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, *cert. denied*, 81 N.M. 668, 472 P.2d 382.

For cases discussing provocation, *see State v. Kidd*, 1971-NMSC-056, 24 N.M. 572, 175 P. 772. As a matter of law, mere words are not sufficient to establish provocation. *State v. Nevares*, 1932-NMSC-007, ¶ 12, 36 N.M. 41, 7 P.2d 933. *See generally*, Perkins, supra at 61.

There must be evidence that the defendant acted immediately or soon after the provocation. In *State v. Trujillo*, 1921-NMSC-111, 27 N.M. 594, 203 P. 846, the defendant was tried for murder, convicted of voluntary manslaughter and the conviction was reversed on appeal. The evidence showed a quarrel between the defendant and deceased some three and one half hours before the time the deceased could have reached the place where he was later found dead. There was no witness to the killing and the defense was alibi. The supreme court held that there was clearly no evidence of a sudden quarrel or heat of passion and that the district court should not have submitted manslaughter to the jury.

Voluntary manslaughter is a lesser included offense to second degree murder only if there is sufficient evidence to show provocation. *See State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, *cert. denied*, 393 U.S. 1028 (1968), *abrogated on other grounds by State v. Holly*, 2009-NMSC-004, 145 N.M. 513, 201 P.3d 844; *State v. Burrus*, 1934-NMSC-036, 38 N.M. 462, 35 P.2d 285. The voluntary manslaughter instruction should not be given when the evidence would not support a finding of manslaughter. *State v. Trujillo*, supra; *State v. Nevares*, supra. It is reversible error to submit voluntary manslaughter when the evidence does not warrant the instruction, and no objection is necessary to preserve the error. If there is insufficient evidence of provocation and the defendant is convicted of voluntary manslaughter, he is entitled to be discharged, even though he made no objection to submission of voluntary manslaughter. *Smith v. Smith*, 1979-NMSC-085, 89 N.M. 770, 558 P.2d 39.

This instruction made no change in the law of New Mexico. The burden of proof is on the state (once there is enough evidence of provocation to raise the issue and warrant the submission of voluntary manslaughter along with second degree murder) and the measure of proof is beyond a reasonable doubt.

The New Mexico statute reduces second degree murder to voluntary manslaughter if the homicide is “committed upon a sudden quarrel or in the heat of passion.” In *State v. Smith*, 1976-NMCA-048, 89 N.M. 777, 558 P.2d 46, *rev'd on other grounds*, 89 N.M. 770, 558 P.2d 39 (1976), the court stated that “proof of provocation beyond a reasonable doubt is not required for a conviction of voluntary manslaughter.” The court pointed out, by way of dicta, that the state has the burden of proving that the defendant did not act as a result of sufficient provocation in order to prove the material elements of second degree murder. It did not decide which of the parties has the burden of proving sufficient provocation in order to establish the elements of voluntary manslaughter. The committee has found no New Mexico appellate court opinion which resolves the issue of proving sufficient provocation to establish voluntary manslaughter.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-005, effective December 31, 2014, added the element that the defendant acted as a result of sufficient provocation; and added Paragraph 3.

I. GENERAL CONSIDERATION.

Manslaughter not invariably included in murder. — Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit this instruction to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Failure to refer to malice in homicide instructions was deliberate and not an inadvertent omission. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

No error in manslaughter finding where no objection to instruction. — Where the trial court fully and completely instructed the jury on first and second degree murder, as well as voluntary manslaughter, and no objection was made to these instructions as given by the court, there is no error in finding defendant guilty of manslaughter when charged with murder. *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Instruction on voluntary manslaughter should be given when there is sufficient evidence to sustain conviction on the charge. *State v. Benavidez*, 1980-NMSC-097, 94 N.M. 706, 616 P.2d 419; *State v. Montano*, 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887; *State v. Maestas*, 1981-NMSC-006, 95 N.M. 335, 622 P.2d 240; *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

In order to warrant an instruction on voluntary manslaughter, there must be some evidence in the record which would support such an instruction, and which would support a conviction for voluntary manslaughter. State v. Garcia, 1980-NMSC-141, 95 N.M. 260, 620 P.2d 1285.

Defendant is entitled to instruction on voluntary manslaughter as a lesser included offense of murder in the first degree if there is evidence to support, or tending to support, such an instruction. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Error to submit issue of manslaughter where no such issue is involved. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds*, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

"Unlawfulness" and self-defense. — It is the element of unlawfulness that is negated by self-defense. When self-defense or the defense of others is at issue, the absence of such justification is an element of the offense. The instruction, derived from this instruction, was simply erroneous in neglecting to instruct on the element of unlawfulness after the self-defense evidence had been introduced. *State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

Jury to be instructed on elements of each crime before deliberations begin. — Even though the jury is instructed to consider first degree murder and make a determination before moving on to any lesser offenses, the jury must be instructed on each of the crimes charged, and the elements of each, before deliberation ever begins; assuming that there is evidence of provocation, the jury should be given the choice of finding that the defendant committed voluntary manslaughter; failure to do so is not harmless and is prejudicial. *State v. Benavidez*, 1980-NMSC-097, 94 N.M. 706, 616 P.2d 419.

When erroneous manslaughter instruction harmless. — In light of the instructions by the trial court that the jury was first to determine whether defendant was guilty of second degree murder (of which defendant was convicted) and that guilt of voluntary manslaughter was to be considered only if it was determined that defendant was not guilty of second degree murder, any error in the voluntary manslaughter instruction was harmless. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

Failure to give instruction not prejudicial. — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040.

Court of appeals was bound by supreme court order approving challenged instructions, UJI 14-210 and 14-211, and had no authority to set the instructions aside. *State v. Scott*, 1977-NMCA-024, 90 N.M. 256, 561 P.2d 1349, cert. denied, 90 N.M. 637, 567 P.2d 486.

II. PROVOCATION.

Provocation as element of voluntary manslaughter. — Although not willing to rule unequivocally either that provocation is or is not an "element" of voluntary manslaughter, there must be some evidence that the killing was committed upon a sudden quarrel or in the heat of passion in order for a conviction of voluntary manslaughter to stand; in this sense, provocation is a part of voluntary manslaughter. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

To convict someone of voluntary manslaughter, the jury must have evidence that there was a sudden quarrel or heat of passion at the time of the commission of the crime in order, under the common-law theory, to show that the killing was the result of provocation sufficient to negate the presumption of malice. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Viewing evidence in light most favorable to giving an instruction on voluntary manslaughter, defendant presented sufficient evidence to support an attempted voluntary manslaughter instruction. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

Under limited circumstances, where attempted second-degree murder is offered as a greater-included offense and sufficient provocation is at issue in the trial, attempted voluntary manslaughter is a crime in New Mexico. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

Sudden anger or heat of passion and provocation must concur to make a homicide voluntary manslaughter. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

Provocation and disclosure may occur at different times. — A homicide defendant's testimony that he was provoked to shoot the victim after learning from his wife that the victim, her father, had sexually molested her was sufficient evidence to support submitting the defendant's requested jury instruction on the lesser-included offense of voluntary manslaughter, notwithstanding the fact that the victim did not convey the provocative information to the defendant. Although the victim must be the source of the provocation to reduce a murder charge to voluntary manslaughter, the provocation and the disclosure of the events constituting the provocation may occur at different times. *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303.

Defendant has burden to come forward with evidence establishing sufficient provocation in order to be entitled to an instruction on voluntary manslaughter. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

Evidence of provocation required for instruction. — Defendant in first-degree murder prosecution was not entitled to voluntary manslaughter instruction where there

was no evidence of provocation on the part of victim. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

Defendant was entitled to an imperfect self-defense instruction based on sufficient provocation. — Where Defendant was accused of murder following an attempted robbery, and where, at trial, the district court instructed the jury on the essential elements of first-degree murder and the lesser included offense of second-degree murder, and where the district court granted Defendant's request for jury instructions on self-defense and defense of another, but refused to instruct the jury on whether the shooting was an act of "imperfect self-defense," which would have allowed the jury to determine whether the killing, even if it was not legally justified as an act of self-defense or defense of another, amounted to voluntary manslaughter, the district court erred by prohibiting Defendant from presenting his imperfect self-defense theory to the jury by way of a voluntary manslaughter instruction, because viewing the evidence in the light most favorable to giving the instruction, a rational jury could have found that Defendant acted based on sufficient provocation when the undisputed facts established that, after the attempted robbery, the victim drew a gun, pointed it at Defendant, pursued Defendant to his car, and held him at gunpoint while demanding that Defendant get out of the car. The evidence could have allowed the jury to find that Defendant intended to retreat from the victim, that the victim held the car door open while angrily yelling commands and using profanity, and that Defendant retrieved a gun from the car and ultimately fired it at the victim because Defendant was afraid that the victim would shoot him, and further find that even if Defendant's conduct was unreasonable, the victim's conduct would adversely impact the ability of an ordinary person of average disposition to reason and exercise self-control, amounting to sufficient provocation. *State v. Chavez*, 2022-NMCA-007, *cert. granted*.

Jury to be instructed on elements of each crime before deliberations begin. — Even though the jury is instructed to consider first-degree murder and make a determination before moving on to any lesser offenses, the jury is to be instructed on each of the crimes charged, and the elements of each, before deliberation ever begins: assuming that there is evidence of provocation, the jury should be given the choice of finding that the defendant committed voluntary manslaughter; failure to do so is not harmless and is prejudicial. *State v. Benavidez*, 1980-NMSC-097, 94 N.M. 706, 616 P.2d 419.

Evidence may be circumstantial. — If there is enough circumstantial evidence to raise an inference that the defendant was sufficiently provoked to kill the victim, he is entitled to an instruction on manslaughter. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

Victim must be source of defendant's provocation. — In order to reduce murder to manslaughter, the victim must have been the source of the defendant's provocation. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

Defendant may not originate provocation. — If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked; in such a case, the circumstances show that he acted with malice aforethought, and the offense is murder. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280.

Provocation must be such as affects ability of ordinary person to reason. — Evidence of provocation sufficient to reduce a charge of second-degree murder to voluntary manslaughter must be such as would affect the ability to reason and cause a temporary loss of self control in an ordinary person of average disposition. *State v. Jackson*, 1983-NMCA-007, 99 N.M. 478, 660 P.2d 120, *rev'd on other grounds*, 100 N.M. 487, 672 P.2d 660.

Provocation must concur with sudden anger or heat of passion, such that an ordinary person would not have cooled off before acting. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Words alone inadequate provocation. — Words alone, however scurrilous or insulting, will not furnish adequate provocation to make a homicide voluntary manslaughter. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62; *State v. Montano*, 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887.

Although words alone, however scurrilous or insulting, will not furnish adequate provocation to require the submission of a voluntary manslaughter instruction, if there is evidence to raise the inference that by reason of actions and circumstances the defendant was sufficiently "provoked," as defined in 30-2-3A NMSA 1978 or in UJI 14-222, then the jury should be given the voluntary manslaughter instruction. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Informational words may constitute provocation. — Informational words, as distinguished from mere insulting words, may constitute adequate provocation; thus, the substance of the informational words spoken, the meaning conveyed by those informational words, the ensuing arguments and other actions of the parties, when taken together, can amount to provocation. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Exercise of legal right, no matter how offensive, is no provocation as lowers the grade of a homicide from murder to manslaughter. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280; *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298; *State v. Fero*, 1987-NMSC-008, 105 N.M. 339, 732 P.2d 866, *aff'd*, 1988-NMSC-053, 107 N.M. 369, 758 P.2d 783.

Transference of heat of passion not allowed. — The weight of authority is against allowing transference of one's passion from the object of the passion to a related bystander. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

Issue of self-defense found not raised. — Evidence that the defendant had been instructed by his employer to recover a stolen truck containing contraband from those who had it (the decedents) or to kill them if they refused under threat of death from the employer did not raise an issue of self-defense, which requires the preservation of one's self from attack; no sudden quarrel, heat of passion or sufficient provocation was shown and thus the trial court did not err in refusing to give instructions on manslaughter. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds*, *City of Albuquerque v. Haywood*, 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Provocation a jury question. — Generally, it is for the jury to determine whether there is sufficient provocation under an appropriate instruction on voluntary manslaughter. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 532.

41 C.J.S. Homicide § 75.

14-221. Voluntary manslaughter; no murder instruction; essential elements.[1]

For you to find the defendant guilty of voluntary manslaughter [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ *(name of victim);*

2. The defendant knew that his acts created a strong probability of death or great bodily harm[3] to [him] _____ *(name of victim)* [or any other human being][4];

3. The defendant acted as a result of sufficient provocation;[5]

4. This happened in New Mexico on or about the _____ day of _____, _____.[6]

USE NOTES

1. This instruction is to be used if the defendant has been charged only with voluntary manslaughter or if voluntary manslaughter is the highest degree of homicide given to the jury.

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

3. UJI 14-131, the definition of great bodily harm, must be given.

4. Use the bracketed phrase when the intent to kill or do great bodily harm was directed to someone other than the victim. UJI 14-255 must also be given.

5. UJI 14-222, the definition of sufficient provocation, must also be given.

6. UJI 14-141, General criminal intent, must also be given.

Committee commentary. — The difference between second degree murder and voluntary manslaughter is that voluntary manslaughter requires sufficient provocation. *State v. Gaitan*, 2002-NMSC-007, ¶ 11, 131 N.M. 758, 42 P.3d 1207. As explained in the commentary to UJI 14-220 NMRA, manslaughter is essentially second degree murder committed under sufficient provocation. To make a case of manslaughter, the state must prove all of the essential elements of second degree murder plus the additional element of sufficient provocation.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-005, effective December 31, 2014, amended the committee commentary.

Cross references. — For voluntary manslaughter, *see* Section 30-2-3A NMSA 1978.

Failure to give instruction not prejudicial. — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 56.

41 C.J.S. Homicide § 389.

14-221A. Voluntary manslaughter; lesser included offense of felony murder.[1]

For you to find the defendant guilty of voluntary manslaughter, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant killed _____ (*name of victim*);

2. The defendant knew that his acts created a strong probability of death or great bodily harm[2] to _____ (*name of victim*) [or any other human being];[3]

3. The defendant did not cause the death of _____ (*name of victim*) during [the commission of][4] [the attempt to commit] _____ (*name of felony*);[5]

4. The defendant acted as a result of sufficient provocation;

5. This happened in New Mexico on or about the ___ day of _____, _____.

The difference between second degree murder and voluntary manslaughter is sufficient provocation. In second degree murder the defendant kills without having been sufficiently provoked, that is, without sufficient provocation. In the case of voluntary manslaughter the defendant kills after having been sufficiently provoked, that is, as a result of sufficient provocation. Sufficient provocation reduces second degree murder to voluntary manslaughter.[6]

USE NOTES

1. This instruction should immediately follow the second degree murder instruction as lesser included offense of felony murder.

2. UJI 14-131 NMRA, the definition of “great bodily harm,” must be given following this instruction.

3. Use the bracketed phrase when the intent was directed to someone other than the victim. UJI 14-255 NMRA must also be given following this instruction.

4. Use applicable alternative or alternatives. The same alternative or alternatives should be used as provided in the previous murder instructions.

5. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

6. UJI 14-222 NMRA, the definition of sufficient provocation, must be given following this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Element 3, added Use Note designation “5”; in Element 5, changed Use Note designation “5” to “6”; and in the Use Notes, added a new Use Note 5 and redesignated the succeeding Use Note accordingly.

14-222. Sufficient provocation; defined.

"Sufficient provocation" can be any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions. The provocation must be such as would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition. The "provocation" is not sufficient if an ordinary person would have cooled off before acting.

Committee commentary. — In defining sufficient provocation, the court in *State v. Kidd*, 24 N.M. 572, 175 P. 772 (1917) stated:

All that is required is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment, or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, and to exclude malice, and to render the defendant incapable of cool reflection.

In *State v. Trujillo*, 27 N.M. 594, 203 P. 846 (1921), the court pointed out that "[no] mere words, however opprobrious or indecent, are deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter." In *State v. Nevares*, 36 N.M. 41, 7 P.2d 933 (1932), the court pointed out that:

Mere sudden anger or heat of passion will not reduce the killing from murder to manslaughter. There must be adequate provocation. The one without the other will not suffice to effect the reduction in the grade of the offense. The two elements must concur.

And words alone, however scurrilous or insulting, will not furnish the adequate provocation required for this purpose.

The test of whether the provocation was adequate must be determined by considering whether it would have created the passion offered in mitigation in the ordinary man of average disposition. If so, then it is adequate and will reduce the offense to manslaughter.

The phrase "heat of passion" includes a killing in circumstances which arouse anger, fear, rage, sudden resentment, terror or other extreme emotions. Such killings are held to be upon "sufficient provocation." *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (1976), *rev'd on other grounds*, 89 N.M. 770, 558 P.2d 39 (1976).

Examples of fact situations which support a conviction of manslaughter include cases where: the defendant and deceased draw their guns and fire at each other through a closed door, and it is unknown who fired first, *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934); the defendant feared that the deceased was attempting to get a gun with which to shoot the defendant, and the defendant acts to prevent the deceased from getting his gun, *State v. Wright*, 38 N.M. 427, 34 P.2d 870 (1934); and the defendant was suddenly, and without warning, partially pulled from the seat of his car, by the deceased who could not be seen by the defendant, and defendant reacted by firing a gun, *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968).

Examples of provocative acts are: the finding of a wife by her husband in the act of adultery with a paramour; the seduction of the defendant's infant daughter; the rape of a close female relative of the defendant; the murder or injury of a close relative of the defendant; the act of sodomy with the defendant's young son; a killing to prevent the rape of the defendant's wife. Perkins, Criminal Law (2d ed.) p. 65.

Examples of sufficient heat of passion in other jurisdictions include: shooting of mistress by defendant who was aroused to heat of passion by a series of events over a considerable period of time, *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958); knifing by defendant during fist fight where defendant has a depressed skull which caused him to fear that a blow to his head could cause blindness or death, *People v. Otwell*, 61 Cal. Rptr. 427 (Ct. App. 1967); shooting of man defendant's wife found with where the wife's illicit activities had been suspected by defendant over a long period of time, *Baker v. People*, 114 Colo. 50, 160 P.2d 983 (1945); shooting by defendant of father-in-law upon learning deceased had raped defendant's wife while defendant on business trip, *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929); shooting of deceased after deceased accosted defendant and defendant's father with a pistol and slightly wounded them both, *Sanders v. State*, 26 Ga. App. 475, 106 S.E. 314 (Ct. App. 1921);

shooting by defendant of brother where evidence showed series of events [acts] by brother provided "pent-up anger" which defendant relieved by shooting after brother made statement which further aroused defendant, *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967).

"Heat of passion" may be based upon a series of events over a considerable period of time which would arouse a person to an extreme emotion when an otherwise dispassionate event occurs. *See State v. Benavidez*, 94 N.M. 706, 616 P.2d 419 (1980).

An example of sufficient provocation arising from a "sudden quarrel" is the shooting of a person, who had been drinking extensively and had become angered at the defendant to such an extent as to knock a hole in defendant's wall, when, upon being requested to leave, he looked threateningly at defendant and started to rise from his chair. *State v. Montano*, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

An example of lack of sufficient provocation is presented in *State v. Farris*, 95 N.M. 96, 619 P.2d 541 (1980) where the deceased, who was the wife of defendant and whose boyfriend had previously threatened defendant, poked defendant in the chest and called him names prior to his shooting her.

ANNOTATIONS

Provocation supporting conviction for voluntary manslaughter is an act committed under the influence of an uncontrollable fear of death or great bodily harm, caused by the circumstances, but without the presence of all the ingredients necessary to excuse the act on the ground of self-defense. *State v. Melendez*, 1982-NMSC-039, 97 N.M. 738, 643 P.2d 607.

Provocation a jury question. — Generally, it is for the jury to determine whether there is sufficient provocation under an appropriate instruction on voluntary manslaughter. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Defendant was entitled to an imperfect self-defense instruction based on sufficient provocation. — Where Defendant was accused of murder following an attempted robbery, and where, at trial, the district court instructed the jury on the essential elements of first-degree murder and the lesser included offense of second-degree murder, and where the district court granted Defendant’s request for jury instructions on self-defense and defense of another, but refused to instruct the jury on whether the shooting was an act of “imperfect self-defense,” which would have allowed the jury to determine whether the killing, even if it was not legally justified as an act of self-defense or defense of another, amounted to voluntary manslaughter, the district court erred by prohibiting Defendant from presenting his imperfect self-defense theory to the jury by way of a voluntary manslaughter instruction, because viewing the evidence in the light most favorable to giving the instruction, a rational jury could have found that Defendant acted based on sufficient provocation when the undisputed facts established that, after the attempted robbery, the victim drew a gun, pointed it at

Defendant, pursued Defendant to his car, and held him at gunpoint while demanding that Defendant get out of the car. The evidence could have allowed the jury to find that Defendant intended to retreat from the victim, that the victim held the car door open while angrily yelling commands and using profanity, and that Defendant retrieved a gun from the car and ultimately fired it at the victim because Defendant was afraid that the victim would shoot him, and further find that even if Defendant's conduct was unreasonable, the victim's conduct would adversely impact the ability of an ordinary person of average disposition to reason and exercise self-control, amounting to sufficient provocation. *State v. Chavez*, 2022-NMCA-007, *cert. granted*.

A series of events as provocation. — Where defendant's spouse had a series of affairs with the victim; defendant kidnapped the victim and killed the victim; the trial court instructed the jury on voluntary manslaughter; defendant tendered an instruction defining sufficient provocation that added the language that "A series of events over a considerable period of time may constitute sufficient provocation" to the instruction according to UJI 14-222 NMRA; and the trial court refused defendant's tendered instruction and instructed the jury according to UJI 14-222 NMRA, the trial court's instruction did not rule out the notion that sufficient provocation could arise from events occurring over a period of time and could not have confused or misled the jury. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-002.

Provocation and self-defense mutually exclusive. — The instructions on provocation and self-defense are each accurate and unambiguous; however, as applied to the facts of this case they are confusing. The defendant suggests that it is impossible to determine whether the jury understood that the claim of self-defense supersedes the element of provocation. Any confusion could have been eliminated if the jury had been told that it was required to find the defendant not guilty if his conduct met the definition of self-defense, regardless of if that same conduct could be found to be provocation. In the future, when a case presents similar circumstances, juries should be so instructed. *State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

Exercise of legal right, no matter how offensive, is not adequate provocation to reduce homicide from murder to manslaughter. *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

Words alone generally not adequate provocation. — Although words alone, however scurrilous or insulting, will not furnish adequate provocation to require the submission of a voluntary manslaughter instruction, if there is evidence to raise the inference that by reason of actions and circumstances the defendant was sufficiently "provoked," as defined in 30-2-3A NMSA 1978 or in this instruction, then the jury should be given the voluntary manslaughter instruction. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

But informational words may constitute provocation. — Informational words, as distinguished from mere insulting words, may constitute adequate provocation; thus, the substance of the informational words spoken, the meaning conveyed by those

informational words, the ensuing arguments and other actions of the parties, when taken together, can amount to provocation. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Provocation must concur with sudden anger or heat of passion. *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Provocation must concur with sudden anger or heat of passion, such that an ordinary person would not have cooled off before acting. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Provocation and disclosure may occur at different times. — A homicide defendant's testimony that he was provoked to shoot the victim after learning from his wife that the victim, her father, had sexually molested her was sufficient evidence to support submitting the defendant's requested jury instruction on the lesser-included offense of voluntary manslaughter, notwithstanding the fact that the victim did not convey the provocative information to the defendant. Although the victim must be the source of the provocation to reduce a murder charge to voluntary manslaughter, the provocation and the disclosure of the events constituting the provocation may occur at different times. *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303.

What constitutes sufficient cooling time depends upon the nature of the provocation and the facts of each case, and is a question for the jury. *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Actions of police officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation. *State v. Martinez*, 1982-NMCA-020, 97 N.M. 540, 641 P.2d 1087.

Failure to give instruction not prejudicial. — Where the defendant was acquitted of the charges of first-degree murder and voluntary manslaughter and was convicted solely of the lesser included offense of involuntary manslaughter, the defendant did not show any prejudice by the court's failure to give requested instructions on provocation, voluntary manslaughter and second-degree murder. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040.

Instructions not confusing. — Where jury was instructed that, if defendant was sufficiently provoked to kill another, he might be guilty of voluntary manslaughter and sufficient provocation was defined, in part, as fear, and where defendant testified that he was afraid when shots were fired at him, there was no reason for the jury to be confused by the instruction. *State v. Melendez*, 1982-NMSC-039, 97 N.M. 738, 643 P.2d 607.

Insufficient evidence of provocation. — Where defendant, who was walking along a ditch with friends, encountered the victim; defendant’s friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to

fatally stab the victim; defendant was convicted of second degree murder; defendant argued that the district court should have instructed the jury on voluntary manslaughter because defendant was provoked by the instigation of the fight by defendant's friends, defendant perceived the victim to be a member of a rival gang that was responsible for a stabbing attack on defendant's friend that occurred within the preceding weeks, and the victim's reaction to the attack provoked defendant's response, defendant failed to establish sufficient provocation to support a voluntary manslaughter instruction. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Part D
Involuntary Manslaughter

14-230. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated June 17, 1997, this instruction, relating to involuntary manslaughter based on an unlawful act not amounting to a felony, was withdrawn effective for cases filed in the district courts on and after August 1, 1997.

14-231. Involuntary manslaughter; essential elements.[1]

For you to find the defendant guilty of involuntary manslaughter [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of defendant)* _____ *(describe defendant's act);*

2. _____ *(name of defendant)* should have known of the danger involved by _____'s *(name of defendant)* actions;

3. _____ *(name of defendant)* acted with a willful disregard for the safety of others;

4. _____'s *(name of defendant)* act caused the death of _____ *(name of victim);*

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is used in all involuntary manslaughter prosecutions.

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

[As amended, effective August 1, 1997.]

Committee commentary. — *See* Section 30-2-3B NMSA 1978. *See generally* LaFave & Scott, Criminal Law 586-94 (1972). Manslaughter committed by a lawful act done in an unlawful manner or without due caution and circumspection requires a showing of criminal negligence, i.e., conduct which is reckless, wanton or willful. *State v. Grubbs,* 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Except for vehicular homicide cases, there does not appear to be any negligent-act manslaughter case reported in New Mexico. In *State v. Sisneros,* 42 N.M. 500, 82 P.2d 274 (1938), the court held that a charge of death resulting from reckless driving was an example of a lawful act done in an unlawful manner. This example no longer has any direct bearing since vehicular homicide caused by reckless driving must be charged under the vehicular homicide statute. *See* UJI 14-240 and commentary. *See State v. Lujan,* 76 N.M. 111, 412 P.2d 405 (1966); *State v. Blevins,* 40 N.M. 367, 60 P.2d 208 (1936).

State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960), indicates that involuntary manslaughter as well as voluntary manslaughter may be a lesser included offense to a charge of murder. *See also* N.M. Laws 1937, ch. 199, § 1, as discussed in the commentary to UJI 14-210.

See Section 30-2-3B NMSA 1978. This instruction should be used in all involuntary manslaughter prosecutions whether the death was caused by a lawful act or an "unlawful" act. Both require a showing of an underlying unlawful act. *State v. Yarborough,* 122 N.M. 596, 930 P.2d 131; *State v. Kirby,* 122 N.M. 609, 930 P.2d 144 (1996); *State v. Abeyta,* 120 N.M. 233, 901 P.2d 164 (1995).

Vehicular homicide caused by reckless driving must be charged under the vehicular homicide statute, Section 66-8-101 NMSA 1978. *Yarborough, supra.*

ANNOTATIONS

The 1997 amendment, effective August 1, 1997, rewrote Paragraphs 2 and 3 and made stylistic changes in Paragraphs 1 and 4, and added Use Note 1 and redesignated the existing Use Note as Use Note 2.

Where there is sufficient evidence of both criminal negligence and accident, it is proper to grant an involuntary manslaughter instruction. *State v. Skippings*, 2011-NMSC-021, 150 N.M. 196, 258 P.3d 1008.

Sufficient evidence of criminal negligence. — Where defendant and the victim engaged in an argument that escalated into a physical confrontation; when the victim and defendant became entangled, defendant sought to extricate defendant from the victim and forced the victim off of defendant; the victim landed on the asphalt roadway, cracking the victim's skull; the victim died from the injury; and there was evidence to support the view that defendant engaged in the dispute and behaved in a fashion that exposed the victim to danger without intending the victim's death, defendant was entitled to an involuntary manslaughter instruction. *State v. Skippings*, 2011-NMSC-021, 150 N.M. 196, 258 P.3d 1008.

The *mens rea* for involuntary manslaughter is criminal negligence. — An involuntary manslaughter jury instruction is proper only when the evidence presented at trial permits the jury to find the defendant had a mental state of criminal negligence when engaging in the act causing the victim's death. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

Evidence of excessive self-defense and accident are not a substitute for evidence of criminal negligence. — The confluence of evidence of imperfect self-defense with evidence of accidental shooting is not a substitute for evidence of the criminal negligence mental state required for an involuntary manslaughter conviction, because if the homicide is accidental, defendant acted without a criminally culpable state of mind in performing a lawful act unintentionally killing the victim, and if the homicide occurred as a result of imperfect self-defense, defendant acted intentionally in self-defense and the use of excessive force rendered the killing lawful, whereas, an involuntary manslaughter instruction is proper only where there is evidence of an unintentional killing and a *mens rea* of criminal negligence. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

Evidence did not support instruction on involuntary manslaughter. — Where the evidence most favorable to defendant showed that defendant was sitting in a car; the victim approached the car and held a gun to defendant's head; defendant grabbed the gun and it discharged; defendant gained control of the gun and fired it at the victim; and defendant then drove away without realizing that the victim had been shot, the evidence failed to establish a mental state of criminal negligence, which is required to support a jury instruction on involuntary manslaughter. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

Evidence supported instruction on involuntary manslaughter. — Where defendant shot and killed an intruder that failed to identify himself while pounding on defendant's front door at 1:30 a.m., an instruction on involuntary manslaughter was warranted because a reasonable jury could have determined that defendant was either criminally negligent because firing a gun at the door while someone was on the other side of it

was a willful disregard of the rights or safety of others and endangered that unknown intruder, that defendant unintentionally killed the intruder based on defendant's theory that he fired a warning shot, or that defendant committed the lawful act of self-defense and unintentionally killed the victim without due caution or circumspection. *State v. Cardenas*, 2016-NMCA-042, cert. denied.

Sufficiency of the evidence assessed against the elements of the crime charged. — Where defendant was charged with involuntary manslaughter, and where the jury was instructed on the essential elements of involuntary manslaughter, but the jury instruction contained an additional element not contained in the uniform jury instruction, the additional element did not become an essential element under the statute, because the sufficiency of the evidence is assessed against the elements of the crime charged. Therefore, where the defendant did not dispute that he was properly charged with the statutory elements for involuntary manslaughter, that he was given a meaningful opportunity to defend himself against those charges, or that the evidence was sufficient to convict him of the statutory elements of involuntary manslaughter, defendant was properly convicted of involuntary manslaughter. *State v. Carpenter*, 2016-NMCA-058.

Lesser-included offense of second degree murder. — Where the defendant caused an accident by driving without headlights, speeding and running a stop sign and where the defendant was charged with second degree murder for shooting the driver of the other vehicle in the accident, the car accident was not a sufficient provocation for the fatal shooting to establish the provocation required for an involuntary manslaughter instruction. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Instruction should have been given where defendant was not contending imperfect self defense, i.e. that he used excessive force while otherwise lawfully defending himself, but his contention was that he was always in the lawful exercise of self defense and that unusual circumstances caused the victim to die as a result of that lawful exercise, for which the jury might find him culpable. *State v. Romero*, 2005-NMCA-060, 137 N.M. 456, 112 P.3d 1113, cert. granted, 2005-NMCERT-005.

Involuntary manslaughter statute excludes all cases of intentional killing, and includes only unintentional killings by acts unlawful, but not felonious, or lawful, but done in an unlawful manner, or without due caution and circumspection; the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170.

Inflicting beating is an unlawful act, and, accordingly, there was no basis for an instruction on involuntary manslaughter by lawful act, nor was there any basis for an instruction on manslaughter by unlawful act not amounting to a felony. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

Instruction on negligent self-defense improperly denied. — Since the defendant could be viewed as in a position where his safety or the safety of his friend was threatened and, if, in an attempt to protect himself or ward off the attackers, the defendant inadvertently shot the victim, then his actions could be viewed as being the commission of a lawful act of self-defense committed in an unlawful manner or without due caution and circumspection, such that an instruction on involuntary manslaughter based on negligent self-defense should have been given. *State v. Arias*, 1993-NMCA-007, 115 N.M. 93, 847 P.2d 327, *overruled on other grounds*, *State v. Abeyta*, 1995-NMSC-051, 120 N.M. 233, 901 P.2d 164.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 499, 534.

Test or criterion of term "culpable negligence," "criminal negligence," or "gross negligence," appearing in statute defining or governing manslaughter, 161 A.L.R. 10.

41 C.J.S. Homicide § 88 et seq.

Part E
Vehicle Homicide

14-240. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 17-8300-012, 14-240 NMRA, relating to homicide or great bodily injury by vehicle, essential elements, was withdrawn effective for all cases pending or filed on or after December 31, 2017. For provisions of former form, *see* the 2017 NMRA on *NMOneSource.com*.

14-240A. Injury to pregnant woman by vehicle; essential elements.

For you to find the defendant guilty of causing injury to a pregnant woman by vehicle [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2]

   [while under the influence of intoxicating liquor[3]];[4]

   [while under the influence of _____, a drug];[5]

[in a reckless manner];[6]

2. The defendant thereby caused[7] _____ *(name of victim)* to suffer a [miscarriage[8]][4] [or] [stillbirth[8]].

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

3. Instruction 14-243, the definition of under the influence of intoxicating liquor, must be given if this element is given.

4. Use only applicable alternative or alternatives.

5. Instruction 14-245, the definition of under the influence of a drug, must be given if this element is given.

6. Instruction 14-241, the definition of driving in a reckless manner, must be given if this element is given.

7. If causation is in issue, Instruction 14-251, the definition of causation, must be given.

8. If requested, Instruction 14-246, the definition of miscarriage or stillbirth, may be given.

[Adopted, effective May 1, 1997.]

ANNOTATIONS

Cross references. — For injury to pregnant woman by vehicle, *see* Section 66-8-101.1 NMSA 1978.

14-240B. Homicide by vehicle; driving under the influence; essential elements.

For you to find the defendant guilty of causing death by driving under the influence [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2]

[while under the influence of intoxicating liquor[3];][4]

[while under the influence of _____, a drug[5];]

2. The defendant's driving while under the influence of [liquor][4] [or] [drugs] caused[6] the death of _____ (*name of victim*);

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If they are in issue, *see* Section 66-1-4.11 NMSA 1978, for the definition of a motor vehicle and UJIs 14-4511 and 14-4512 for definitions of "operating" and "actual physical control."

3. UJI 14-243 NMRA, the definition of under the influence of intoxicating liquor, must be given if this element is given.

4. Use only applicable alternative or alternatives.

5. UJI 14-245 NMRA, the definition of under the influence of a drug, must be given if this element is given.

6. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must be given.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 66-8-101 (2016).

Section 66-8-101 was amended in 2016 to create greater penalties for death caused by driving under the influence of alcohol or drugs ("DUI") than for death caused by reckless driving. *See* 2016 N.M. Laws, ch. 16, § 1 (eff. July 1, 2016). In so doing, the statute retains an internal enhancement for prior DUI convictions applicable only to DUI violations of Section 66-8-101. *See* § 66-8-101(F). The new version of the statute also separates the penalty provision for great bodily harm by any means.

Because the penalties now differ based on method and resulting harm, the theories can no longer be instructed as alternatives within a single elements instruction or a general verdict form, as the chosen alternative theories must be unanimous to incur heightened penalties. *Compare State v. Godoy*, 2012-NMCA-084, ¶ 6, 284 P.3d 410 ("[W]here alternative theories of guilt are put forth under a single charge, jury unanimity is required

only as to the verdict, not to any particular theory of guilt.") *with Apprendi v. New Jersey*, 530 U.S. 466 (2000) (requiring jury findings of facts necessary to elevate punishment). Thus, the Committee has separated UJI 14-240 into three separate instructions. If multiple theories are pursued, separate instructions and verdict forms must be submitted. *See also* UJI 14-6012 NMRA (Multiple verdict forms; lesser included offenses).

Our Supreme Court has made clear that "[t]he mental state required for vehicular homicide is that of conscious wrongdoing." *State v. Omar-Muhammad*, 1985-NMSC-006, ¶ 20, 102 N.M. 274, 694 P.2d 922 (citing *State v. Jordan*, 1972-NMCA-033, 83 N.M. 571, 494 P.2d 984 (homicide or great bodily injury by vehicle is not a strict liability crime and requires a mens rea element, "a mental state of conscious wrongdoing")). "Conscious wrongdoing has been defined as the purposeful doing of an act that the law declares to be a crime." *Id.* "Thus, the mental state required for vehicular homicide (conscious wrongdoing) requires only that a defendant purposefully engage in an unlawful act." *Id.* This mens rea is defined by UJI 14-141, General criminal intent. If homicide or great bodily harm by vehicle are charged under a DUI theory, the corresponding instructions must be provided. *See* Use Note 2.

The use of a vehicle to commit a homicide may under certain circumstances result in a charge of murder if the mens rea for murder is present. *See, e.g., State v. Montoya*, 1963-NMSC-098, 72 N.M. 178, 381 P.2d 963; *see generally*, Annot., 21 A.L.R.3d 116 (1968).

Driving under the influence must be the direct and proximate cause of the death when the homicide is based on that provision. *See State v. Neal*, 2008-NMCA-008, 143 N.M. 341, 176 P.3d 330; *State v. Sisneros*, 1938-NMSC-049, ¶ 14, 42 N.M. 500, 82 P.2d 274. *State v. Myers*, 1975-NMCA-055, 88 N.M. 16, 536 P.2d 280.

The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. *See State v. Yarborough*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131, *aff'g*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

In a prosecution for depraved mind murder, if there is evidence of the use of drugs or alcohol which could have impaired the defendant's ability to drive "to the slightest degree", in addition to the depraved mind murder instructions, the jury must also be instructed on vehicular homicide. *See Omar-Muhammad*, 1987-NMSC-043.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The charges of party to the crime of homicide by vehicle and great bodily harm by a vehicle do not require physical control over a vehicle. *State v. Marquez*, 2010-NMCA-

064, 148 N.M. 511, 238 P.3d 880, cert. granted, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Party to the crime of homicide by vehicle and great bodily harm by a vehicle. — Where defendant and defendant's friend were drinking together in a bar; the friend became so intoxicated that the bar refused service; defendant and the friend were refused service at another bar; defendant bought a twelve-pack of beer and suggested that the friend drive them in the friend's vehicle so that they could continue to party; the friend's vehicle rear-ended a van that resulted in the death of two and great bodily injury of five occupants of the van; seven open beer cans were found in the friend's vehicle; the friend had a breath alcohol content of .19; and defendant stated that defendant knew the friend was intoxicated at the time of the accident, and that defendant should have taken the friend's keys away, although defendant did not have physical control over the friend's vehicle, defendant was guilty of homicide by a vehicle and of great bodily injury by a vehicle while driving a vehicle under the influence of alcohol. *State v. Marquez*, 2010-NMCA-064, 148 N.M. 511, 238 P.3d 880, cert. granted, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

***Corpus delicti* of vehicular homicide may be proved by circumstantial evidence.** — Where defendant was charged with vehicular homicide, and where the state sought to establish the *corpus delicti* of vehicular homicide purely from circumstantial evidence and without any expert testimony, and where the state presented circumstantial evidence that defendant was not in the lawful operation of the vehicle, based on his admission that he was in the vehicle, that blood found on the driver's side matched defendant's DNA, and that defendant had a blood alcohol content of .06 and had methamphetamine in his system, along with evidence that the decedent was alive in the vehicle prior to the accident and was found by officers after the accident with visible signs of trauma, the district court erred in dismissing the charges based on its finding that an expert was required as a matter of law to prove cause of death, because the circumstantial evidence to be presented by the state was sufficient to establish the *corpus delicti* of vehicular homicide. *State v. Platero*, 2017-NMCA-083, cert. denied.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 324 et seq.

Alcohol-related vehicular homicide: nature and elements of offense, 64 A.L.R.4th 166.

61A C.J.S. Motor Vehicles § 668.

14-240C. Homicide by vehicle; reckless driving; essential elements.

For you to find the defendant guilty of causing death by reckless driving [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2] in a reckless manner[3];

2. The defendant's reckless driving caused[4] the death of _____ (*name of victim*);

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If it is in issue, *see* Section 66-1-4.11 NMSA 1978, for the definition of a motor vehicle.

3. UJI 14-241 NMRA, the definition of driving a motor vehicle in a reckless manner, must be given.

4. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must be given.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 66-8-101 (2016). *See* commentary for UJI 14-240 NMRA.

If a reckless driving theory is pursued, in addition to the general intent to drive, "[the jury] must find that [the defendant] drove with willful disregard of the rights or safety of others and in a manner which endangered any person or property." *State v. Yarborough*, 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131 (rejecting ordinary negligence shown by "careless driving" for vehicular homicide liability).

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

This instruction and UJI 14-241 adequately instruct the jury on reckless driving even though they fail to instruct the jury on willful and wanton conduct. *State v. Blakley*, 1977-NMCA-088, 90 N.M. 744, 568 P.2d 270.

Willful and wanton conduct instruction omitted. — The prior practice of instructing on willful and wanton conduct was not considered to be helpful and was deliberately omitted from UJI 14-241 and this instruction. *State v. Blakley*, 1977-NMCA-088, 90 N.M. 744, 568 P.2d 270.

Substantial evidence of reckless driving while willfully disregarding the rights and safety of others. — Where a motorist, who was attempting to merge into the right lane of the highway, reported that defendant passed the motorist on the right side at a high speed; the police stopped defendant; defendant admitted that defendant had been driving eighty miles per hour; the officers gave defendant a verbal warning, told defendant to slow down before defendant hurt someone, and told defendant to follow the forty-five mile per hour speed limit which would decrease to thirty-five miles per hour; approximately two minutes after the traffic stop and one to one and one-half miles from the traffic stop, defendant collided with a vehicle that was crossing the highway, killing the passenger; defendant was driving in the left lane and could have avoided the collision by steering left into the oncoming traffic lane; instead, defendant veered to the right toward the other vehicle; the driver of the other vehicle testified that defendant appeared to be laughing as defendant veered into the other vehicle; and defendant was driving between fifty-four and fifty-nine miles per hour in a thirty-five mile per hour speed zone, there was substantial evidence that defendant was driving recklessly when defendant willfully disregarded the rights and safety of others. *State v. Munoz*, 2014-NMCA-101.

***Corpus delicti* of vehicular homicide may be proved by circumstantial evidence.** — Where defendant was charged with vehicular homicide, and where the state sought to establish the *corpus delicti* of vehicular homicide purely from circumstantial evidence and without any expert testimony, and where the state presented circumstantial evidence that defendant was not in the lawful operation of the vehicle, based on his admission that he was in the vehicle, that blood found on the driver's side matched defendant's DNA, and that defendant had a blood alcohol content of .06 and had methamphetamine in his system, along with evidence that the decedent was alive in the vehicle prior to the accident and was found by officers after the accident with visible signs of trauma, the district court erred in dismissing the charges based on its finding that an expert was required as a matter of law to prove cause of death, because the circumstantial evidence to be presented by the state was sufficient to establish the *corpus delicti* of vehicular homicide. *State v. Platero*, 2017-NMCA-083, cert. denied.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 324 et seq.

Alcohol-related vehicular homicide: nature and elements of offense, 64 A.L.R.4th 166.

61A C.J.S. Motor Vehicles § 668.

14-240D. Great bodily injury by vehicle; essential elements.

For you to find the defendant guilty of causing great bodily injury[1] by vehicle [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3]

   [while under the influence of intoxicating liquor[4]][5] [or]

   [while under the influence of _____, a drug][6] [or]

   [in a reckless manner];[7]

2. The defendant's [driving while under the influence of [liquor][5] [or] [drugs]] [or] [reckless driving] caused[8] the great bodily injury[1] to _____ (*name of victim*);

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

USE NOTES

1. The definition of great bodily harm, UJI 14-131 NMRA, must be given with the word "injury" substituted for "harm."

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

3. If they are in issue, *see* Section 66-1-4.11 NMSA 1978, for the definition of a motor vehicle and UJIs 14-4511 and 14-4512 for definitions of "operating" and "actual physical control."

4. UJI 14-243 NMRA, the definition of under the influence of intoxicating liquor, must be given if this element is given.

5. Use only applicable alternative or alternatives.

6. UJI 14-245 NMRA, the definition of under the influence of a drug, must be given if this element is given.

7. UJI 14-241 NMRA, the definition of driving a motor vehicle in a reckless manner, must be given.

8. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must be given.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 66-8-101 (2016).

See commentary for UJI 14-240 NMRA. The penalties for great bodily harm by vehicle are the same for all alternative means, except that conviction by means of DUI is subject to enhancements for prior DUI convictions. *See* § 66-8-101(F).

If a reckless driving theory is pursued, in addition to the general intent to drive, "[the jury] must find that [the defendant] drove with willful disregard of the rights or safety of others and in a manner which endangered any person or property." *State v. Yarborough*, 1996-NMSC-068, ¶ 20, 122 N.M. 596, 930 P.2d 131 (rejecting ordinary negligence shown by "careless driving" for vehicular homicide liability).

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The charges of party to the crime of homicide by vehicle and great bodily harm by a vehicle do not require physical control over a vehicle. *State v. Marquez*, 2010-NMCA-064, 148 N.M. 511, 238 P.3d 880, cert. granted, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Party to the crime of homicide by vehicle and great bodily harm by a vehicle. — Where defendant and defendant's friend were drinking together in a bar; the friend became so intoxicated that the bar refused service; defendant and the friend were refused service at another bar; defendant bought a twelve-pack of beer and suggested that the friend drive them in the friend's vehicle so that they could continue to party; the friend's vehicle rear-ended a van that resulted in the death of two and great bodily injury of five occupants of the van; seven open beer cans were found in the friend's vehicle; the friend had a breath alcohol content of .19; and defendant stated that defendant knew the friend was intoxicated at the time of the accident, and that defendant should have taken the friend's keys away, although defendant did not have physical control over the friend's vehicle, defendant was guilty of homicide by a vehicle and of great bodily injury by a vehicle while driving a vehicle under the influence of alcohol. *State v. Marquez*, 2010-NMCA-064, 148 N.M. 511, 238 P.3d 880, cert. granted, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

***Corpus delicti* of vehicular homicide may be proved by circumstantial evidence.** — Where defendant was charged with vehicular homicide, and where the state sought to establish the *corpus delicti* of vehicular homicide purely from circumstantial evidence

and without any expert testimony, and where the state presented circumstantial evidence that defendant was not in the lawful operation of the vehicle, based on his admission that he was in the vehicle, that blood found on the driver's side matched defendant's DNA, and that defendant had a blood alcohol content of .06 and had methamphetamine in his system, along with evidence that the decedent was alive in the vehicle prior to the accident and was found by officers after the accident with visible signs of trauma, the district court erred in dismissing the charges based on its finding that an expert was required as a matter of law to prove cause of death, because the circumstantial evidence to be presented by the state was sufficient to establish the *corpus delicti* of vehicular homicide. *State v. Platero*, 2017-NMCA-083, cert. denied.

Law reviews. — For article, "Unintentional Homicides Caused by Risk-Creating Conduct: Problems in Distinguishing Between Depraved Mind Murder, Second Degree Murder, Involuntary Manslaughter, and Noncriminal Homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 324 et seq.

Alcohol-related vehicular homicide: nature and elements of offense, 64 A.L.R.4th 166.

61A C.J.S. Motor Vehicles § 668.

14-241. Homicide by vehicle; "driving in a reckless manner"; defined.

For you to find that the defendant operated a motor vehicle in a reckless manner, you must find that the defendant drove with willful disregard of the safety of others and at a speed or in a manner that endangered or was likely to endanger any person.

USE NOTES

This instruction must be given immediately after UJI Criminal 14-240 or 14-240A if driving in a reckless manner is an issue.

[As amended, effective August 1, 1997.]

Committee commentary. — The 1997 amendments to this instruction simplify while retaining the essential meaning of Section 66-8-113 NMSA 1978.

ANNOTATIONS

The 1997 amendment, effective August 1, 1997, substituted "Homicide by vehicle; 'driving in a reckless manner'" for "Vehicle homicide; reckless driving" in the instruction heading, substituted "operated a motor vehicle in a reckless manner" for "was driving recklessly", substituted "at a speed or in a manner that endangered or was likely to

endanger" for "[at a speed] [or] [in a manner] which [endangered] [or] [was likely to endanger]", deleted "or property" following "person" at the end of the instruction, and rewrote Use Note 1 and deleted former Use Note 2 relating to use of the applicable alternative.

Cross references. — For reckless driving, *see* Section 66-8-113 NMSA 1978.

UJI 14-240 and this instruction adequately instruct the jury on reckless driving even though they fail to instruct the jury on willful and wanton conduct. *State v. Blakley*, 1977-NMCA-088, 90 N.M. 744, 568 P.2d 270.

Willful and wanton conduct instruction omitted. — The prior practice of instructing on willful and wanton conduct was not considered to be helpful and was deliberately omitted from UJI 14-240 and this instruction. *State v. Blakley*, 1977-NMCA-088, 90 N.M. 744, 568 P.2d 270.

Vehicular homicide by reckless conduct is lesser included offense of depraved mind murder by vehicle. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

Substantial evidence of reckless driving while willfully disregarding the rights and safety of others. — Where a motorist, who was attempting to merge into the right lane of the highway, reported that defendant passed the motorist on the right side at a high speed; the police stopped defendant; defendant admitted that defendant had been driving eighty miles per hour; the officers gave defendant a verbal warning, told defendant to slow down before defendant hurt someone, and told defendant to follow the forty-five mile per hour speed limit which would decrease to thirty-five miles per hour; approximately two minutes after the traffic stop and one to one and one-half miles from the traffic stop, defendant collided with a vehicle that was crossing the highway, killing the passenger; defendant was driving in the left lane and could have avoided the collision by steering left into the oncoming traffic lane; instead, defendant veered to the right toward the other vehicle; the driver of the other vehicle testified that defendant appeared to be laughing as defendant veered into the other vehicle; and defendant was driving between fifty-four and fifty-nine miles per hour in a thirty-five mile per hour speed zone, there was substantial evidence that defendant was driving recklessly when defendant willfully disregarded the rights and safety of others. *State v. Munoz*, 2014-NMCA-101.

Sufficient evidence to support a jury finding that defendant disregarded the rights and safety of others. — Where defendant lost control of his vehicle as he was driving through Cloudcroft, New Mexico and struck an oncoming car causing serious injuries to the two passengers of the oncoming vehicle, and where defendant was charged and convicted of one count of great bodily harm by vehicle due to reckless driving, one count of driving on the wrong side of the road, and one count of speeding, and where defendant challenged the sufficiency of the evidence regarding recklessness, claiming that his only transgression was to drive too fast, which is insufficient to prove he acted in

a reckless manner, there was sufficient evidence for a rational jury to find that defendant disregarded the rights and safety of others and drove in a reckless manner where the evidence established that defendant encountered numerous signs warning drivers of the danger of the road ahead, that the curvy road only had two lanes with no passing lane, and a mountain on one side of the road with a guardrail on the other to prevent vehicles from going over the drop-off, that it was dark outside, and that defendant disregarded these signs and conditions and accelerated to almost twice the speed limit. *State v. Doyal*, 2023-NMCA-015, *cert. denied*.

No error in denying defendant's requested jury instruction on speeding. — Where defendant lost control of his vehicle as he was driving through Cloudcroft, New Mexico and struck an oncoming car causing serious injuries to the two passengers of the oncoming vehicle, and where defendant was charged with one count of great bodily harm by vehicle due to reckless driving, one count of driving on the wrong side of the road, and one count of speeding, and where, at trial, defendant requested a jury instruction that informed the jury that speeding alone is insufficient to constitute recklessness, the trial court did not err in denying defendant's requested instruction, because the court instructed the jury that to find that defendant operated a motor vehicle in a reckless manner, it must find that defendant drove with a willful disregard of the safety of others and at a speed likely to endanger any person. The two elements in the instruction made it clear to the jury that something besides speeding was required to convict the defendant. *State v. Doyal*, 2023-NMCA-015, *cert. denied*.

No error in denying defendant's requested jury instruction on conscious wrongdoing. — Where defendant lost control of his vehicle as he was driving through Cloudcroft, New Mexico and struck an oncoming car causing serious injuries to the two passengers of the oncoming vehicle, and where defendant was charged with one count of great bodily harm by vehicle due to reckless driving, one count of driving on the wrong side of the road, and one count of speeding, and where, at trial, defendant requested a jury instruction that modified UJI 14-241 NMRA, contending that UJI 14-241 failed to present to the jury the element of "conscious wrongdoing" as required by case law, the district court did not err in denying defendant's requested instruction, because UJI 14-241 required the State to prove a state of mind beyond civil negligence, one where defendant acted with a conscious disregard of the safety of others and that the State must prove beyond a reasonable doubt that defendant acted intentionally when he committed the crime. Considered together, the two instructions fairly and accurately presented the law. *State v. Doyal*, 2023-NMCA-015, *cert. denied*.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 312 et seq.

61A C.J.S. Motor Vehicles § 668.

14-242. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated May 2, 1989, this instruction, relating to statutory presumptions regarding intoxication, was withdrawn effective after August 1, 1989.

14-243. Vehicle homicide; "under the influence of intoxicating liquor"; defined.

A person is under the influence of intoxicating liquor when as a result of drinking such liquor the person is less able, to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public.

USE NOTES

This instruction may be given immediately after UJI Criminal 14-240 or 14-240A.

[Adopted July 1, 1980; UJI Criminal Rule 2.63 NMSA 1978; UJI 14-243 SCRA; as amended, August 1, 1989; May 1, 1997.]

Committee commentary. — On May 1, 1997 this instruction was split into two instructions, UJI 14-243 and 14-245, to be consistent with Sections 66-8-101 and 66-8-102 NMSA 1978 and UJI Criminal 14-4502. Subsection A of Section 66-8-102 NMSA 1978 does not contain a definition of "under the influence of intoxicating liquor" while Subsection B of Section 66-8-102 NMSA 1978 does contain a definition of "under the influence of any drug".

The definition of driving "under the influence of intoxicating liquor" was taken from *State v. Dutchover,* 85 N.M. 72, 73, 509 P.2d 264, 265 (Ct. App. 1973). *See also State v. Omar-Muhammad,* 105 N.M. 788, 792, 737 P.2d 1165 (1987); *State v. Scussel,* 117 N.M. 241, 243, 871 P.2d 5 (Ct. App. 1994); *State v. Harrison,* 115 N.M. 73, 846 P.2d 1082 (Ct. App.), cert. denied, 114 N.M. 720, 845 P.2d 814 (1993); *State v. Myers,* 88 N.M. 16, 19, 536 P.2d 280, 283 (Ct. App. 1975); and *Boone v. State,* 105 N.M. 223, 226, 731 P.2d 366, 369 (1986).

ANNOTATIONS

The 1997 amendment, effective May 1, 1997, deleted "[under the influence of a drug] [under the combined influence of intoxicating liquor and a drug]" following the first occurrence of "liquor", substituted "the person" for "[and] [using a drug] he", and substituted "the person" for "himself" at the end, and added "or 14-240A" at the end of Use Note 1 and deleted former Use Note 2 relating to the deleted alternatives.

The 1989 amendment, effective for cases filed in the district courts on or after August 1, 1989, in the Use Note, substituted present Item 1 for former Item 1, which read "This instruction may be given at the request of either party".

Cross references. — For driving while under the influence of intoxicating liquor, *see* Section 66-8-102 NMSA 1978.

Finding of impairment by alcohol proper. — Where based on the evidence of impairment demonstrated to the people who saw defendant right after the accident, his evasiveness about his drinking and his initial refusal to submit to a warrant ordering a blood test, the evidence contradicting his claim about swerving to avoid an animal, the alcohol in his blood four hours after the accident, and the police officers' opinions, a rational jury could easily have found beyond a reasonable doubt that defendant was impaired by alcohol. *State v. Montoya*, 2005-NMCA-078, 137 N.M. 713, 114 P.3d 393, cert. denied, 2005-NMCERT-006.

Instruction in murder trial. — District court, in a murder trial, committed reversible error in refusing to instruct the jury on the lesser included offense of vehicular homicide, where the evidence of the defendant's use of marijuana the night before and the morning of the killing could have supported a conviction of vehicular homicide while under the influence of drugs. *State v. Omar-Muhammad*, 1987-NMSC-043, 105 N.M. 788, 737 P.2d 1165.

14-244. Vehicle homicide; great bodily harm; resisting, evading or obstructing a police officer; essential elements.

For you to find the defendant guilty of causing [death] [or] [great bodily harm][1] while operating a vehicle and resisting, evading or obstructing an officer of this state as charged in Count _____,[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was operating a motor vehicle;

2. A uniformed police officer in a marked police vehicle signaled the defendant to stop the motor vehicle;

3. The defendant was aware the officer had signaled (him) (her) to stop;

4. The defendant willfully failed to stop the vehicle;

5. The defendant's failure to stop the vehicle caused[3] the [death] [or] [great bodily harm][4] of _____ (*name of victim*);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only applicable alternative or alternatives. If defendant is charged with causing great bodily harm by vehicle, the definition of "great bodily harm", UJI 14-131, must also be given.

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

3. If causation is in issue, UJI 14-251, the definition of causation, must also be used.

4. Use the bracketed alternatives that are applicable.

[Adopted, effective July 1, 1993.]

ANNOTATIONS

Cross references. — For great bodily harm by vehicle, *see* Section 66-8-101F NMSA 1978.

14-245. Vehicle homicide; "under the influence of a drug"; defined.

A person is under the influence of a drug when as a result of using a drug the person is incapable of safely driving a vehicle.

USE NOTES

This instruction may be given immediately after UJI Criminal 14-240.

[Adopted, effective May 1, 1997.]

ANNOTATIONS

Cross references. — For driving while under the influence of drugs, *see* Section 66-8-102 NMSA 1978.

14-246. Injury to pregnant woman; "miscarriage" or "stillbirth"; defined.

A "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth and which is not an induced abortion, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception.

A "stillbirth" means the death of a fetus prior to the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy and which is not an induced abortion; and death is manifested by the fact that after the expulsion or extraction the fetus does not breathe spontaneously or show any other evidence of life such as heartbeat, pulsation of the umbilical cord or definite movement of voluntary muscles.

USE NOTES

Upon request the applicable definition may be given immediately after UJI Criminal 14-240A.

[Adopted, effective May 1, 1997.]

ANNOTATIONS

Cross references. — For injury to pregnant woman by vehicle, *see* Section 66-8-101.1 NMSA 1978.

Part F
General Homicide Instructions

14-250. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-250 NMRA, relating to jury procedure for various degrees of homicide, was withdrawn effective December 31, 2020. For provisions of former instruction, *see* the 2019 NMRA on *NMOneSource.com*.

14-251. Homicide; "proximate cause"; defined.[1]

In addition to the other elements of the crime of _____ (*name of crime*) as set forth in instruction number _____,[2] the state must also prove to your satisfaction beyond a reasonable doubt that

1. The death was a foreseeable result of _____;[3]

2. The act of the defendant was a significant cause of the death of _____ (*name of victim*). The defendant's act was a significant cause of death if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the death and without which the death would not have occurred.

[There may be more than one significant cause of death. If the acts of two or more persons significantly contribute to the cause of death, each act is a significant cause of death.][4]

USE NOTES

1. For use only if causation is in issue. *See also* UJI 14-252 if there is evidence that the negligence of another person may have caused the death or great bodily injury.

2. Insert here the number assigned by the court to the elements instruction for the named offense.

3. Describe the act alleged to be the cause of the death.

4. Use the bracketed language if there is evidence that the acts of more than one person contributed to the death of the victim.

[As amended, effective, January 1, 2000; as amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — In response to the Supreme Court's decision in *State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143, the committee prepared UJI 14-134 to be given when causation is a question of fact to be resolved by the jury. In *Munoz*, the Court set out the two elements for finding that the defendant's act was the proximate cause of a harm or injury: (1) that the defendant's act was a significant cause of the harm; and (2) that the harm or injury was a foreseeable result of the defendant's act.

The bracketed phrase relating to more than one cause of death is based on *Poore v. State*, 94 N.M. 172, 174, 608 P.2d 148, 150 (1980) and should be used when supported by the evidence.

See generally LaFave & Scott, Criminal Law 246-67 (1972). In *Territory v. Yarberry*, 2 N.M. 391, 455-56 (1883), the Court noted that the district court properly refused an instruction requiring the jury to find that one of the two codefendants, both of whom apparently shot the victim, had inflicted the fatal wounds.

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-012, effective December 31, 2017, in Element 1, after "foreseeable result of", deleted "the defendant's act", and after the last undesignated sentence in brackets, changed the Use Note designation from "3" to "4", and in the Use Notes, added a new Use Note 3 and redesignated former Use Note 3 as Use Note 4.

The 1999 amendment, effective for cases filed on and after January 1, 2000, added present Paragraph 1; designate the second paragraph as Paragraph 2; in Paragraph 2, substituted "was a significant cause of" for "caused" in the first sentence; inserted "defendant's act was a significant cause of dath if it was" for "The cause of a death is and act", and substituted "uninterrupted by and outside event, resulted in" in the second sentence; in the undesignated Paragraph following Paragraph 2, inserted "significant"

and "significantly" and made minor stylistic changes; rewrote Use Note 1, added Use Note 2, renumbered Use Note 2 as Use Note 3.

Proximate cause issue does not shift burden of proof to defendant. — General principles of criminal law do not require that a defendant's conduct be the sole cause of the crime. Instead, it is only required that the result be proximately caused by, or the "natural and probable consequence of," the accused's conduct. Thus, as the causation instruction given in this case clearly states, the State has the burden of proving beyond a reasonable doubt that the defendant's actions caused the deaths and great bodily harm, in the sense that his unlawful acts, "in a natural and continuous chain of events," produced the deaths and the great bodily harm. This instruction does not instruct the jury to convict the defendant if he is at fault only to an insignificant extent. Accordingly, the vehicular homicide statute does not unconstitutionally shift the burden of proof and the trial court did not err in giving jury instructions that tracked the statute. *State v. Simpson*, 1993-NMSC-073, 116 N.M. 768, 867 P.2d 1150.

Instructions must link felony and death of victim in felony murder. — The giving of UJI 14-202, outlining the essential elements of felony murder, in conjunction with this instruction, meets the requirement of establishing the causal link between the felony and the death of the victim. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Failure to give unrequested instruction with felony-murder instruction not error. — This instruction is only a definition or an amplification of the cause language of the felony murder instruction and, as such, the failure to give this instruction when unrequested is not error. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds*, *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Jury to be particularly instructed on defenses. — The defendant in a criminal case should be accorded some semblance of liberality in having the jury instructed with particularity as to his defenses that are supported by the evidence; this is the reason for adopting both this instruction and UJI 14-252, regarding negligence of the deceased. *Poore v. State*, 1980-NMSC-035, 94 N.M. 172, 608 P.2d 148.

Failure to adequately instruct jury results in prejudicial error. — The harm or prejudice that in fact resulted to a homicide defendant was prejudicial error where the jury was instructed with this instruction but not UJI 14-252, regarding negligence of the deceased, when UJI 14-252 was the only instruction which affirmatively set out defendant's theory of the case. *Poore v. State*, 1980-NMSC-035, 94 N.M. 172, 608 P.2d 148.

Additional instruction not required. — In a prosecution for first degree murder, failure to give an additional instruction regarding the acts of two or more persons contributing to cause of death was not a fundamental error, since it did not relate to an essential element of the crime. *State ex rel. Haragan v. Harris*, 1998-NMSC-043, 126 N.M. 310, 968 P.2d 1173.

Failure to define phrase "outside event," as used in definition of proximate cause, did not result in fundamental error. — Where Defendant was charged with aggravated DWI and vehicular homicide after he crashed his truck, while drunk, into the victim as the victim was attempting to cross the street in a motorized wheelchair, and where Defendant argued that his conviction should be reversed because the phrase "outside event," as used in the uniform jury instruction defining proximate cause is ambiguous and should have been defined for the jury, the failure to define "outside event" did not result in fundamental error because "outside event" has a common meaning and a reasonable jury would understand the meaning of the phrase in the context of the given instruction. *State v. Garcia*, 2022-NMCA-008, *cert. denied*.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 506.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 A.L.R. 921.

40 C.J.S. Homicide § 6.

14-252. Homicide; negligence of deceased or third person.

The State must prove beyond a reasonable doubt that the defendant's act was a significant cause of the death of _____ (*name of victim*). An issue in this case is whether the negligence of a person other than the defendant may have contributed to the cause of death. Such contributing negligence does not relieve the defendant of responsibility for an act that significantly contributed to the cause of the death so long as the death was a foreseeable result of the defendant's actions.

However, if you find the negligence of a person other than the defendant was the only significant cause of death or constitutes an intervening cause that breaks the foreseeable chain of events, then the defendant is not guilty of the offense of _____ (*name of offense*).

USE NOTES

For use in conjunction with UJI 14-251 NMRA when there is evidence of negligence by another person. This instruction may be modified and used as appropriate in non-homicide cases.

[As amended, effective January 1, 2000; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See State v. Munoz*, 1998-NMSC-041, 126 N.M. 371, 970 P.2d 143; *State v. Romero*, 1961-NMSC-139, ¶ 10, 69 N.M. 187, 365 P.2d 58 (contrasting contributory negligence in civil and criminal cases and holding "if the culpable negligence of the defendant is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the

injury or not." (internal quotation marks and citation omitted)); *State v. Myers*, 1975-NMCA-055, 88 N.M. 16, 536 P.2d 280 (requiring proof that defendant's conduct is a proximate cause of death for vehicular homicide conviction).

Munoz clarified that a victim's own negligence does not negate the defendant's culpability so long as the defendant is a "significant link" in the causal chain and acknowledged the difference between but-for and proximate causes. *Munoz*, 1998-NMSC-041, ¶¶ 19-22. Because there can be more than one "significant cause" of death, this instruction, along with the "proximate cause" definition in UJI 14-251 NMRA, explains the role of third-party negligence in criminal cases, which may negate a defendant's culpability if it is an intervening event that breaks the causal chain. *See* UJI 14-251 ("The defendant's act was a significant cause of death if it was an act which, in a natural and continuous chain of events, uninterrupted by an outside event, resulted in the death . . . ."). *Cf*. UJI 13-306 NMRA ("An intervening cause interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission.").

The defendant is entitled to an instruction on the theory of the case if there is evidence to support it. *See State v. Benavidez*, 1980-NMSC-097, 94 N.M. 706, 616 P.2d 419; *State v. Lujan*, 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, ¶ 9, 98 N.M. 786, 653 P.2d 162.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added language clarifying that a defendant is not guilty of the charged offense if the jury finds that the negligence of a person other than the defendant constituted an intervening cause that breaks the foreseeable chain of events, made certain technical amendments, and revised the committee commentary; in the first paragraph, after "(*name of victim*).", deleted "Evidence has been presented that" and added "An issue in this case is whether"; and in the second paragraph, after "cause of death", added "or constitutes an intervening cause that breaks the foreseeable chain of events".

The 1999 amendment, effective for cases filed on and after January 1, 2000, rewrote the instruction and the Use Note.

Victim's negligence deemed defense only where accident's sole cause. — The defense that the victim was negligent has value only if it establishes that the victim's negligence was the sole cause of the accident. *State v. Maddox*, 1983-NMCA-023, 99 N.M. 490, 660 P.2d 132.

Jury to be particularly instructed on defenses. — The defendant in a criminal case should be accorded some semblance of liberality in having the jury instructed with particularity as to his defenses that are supported by the evidence, this is the reason for adopting both UJI 14-251, defining "proximate cause," and this instruction. *Poore v. State*, 1980-NMSC-035, 94 N.M. 172, 608 P.2d 148.

Failure to adequately instruct jury results in prejudicial error. — The harm or prejudice that in fact resulted to a homicide defendant was prejudicial error where the jury was instructed with UJI 14-251, defining "proximate cause," but not this instruction, when this instruction was the only instruction which affirmatively set out defendant's theory of the case. *Poore v. State*, 1980-NMSC-035, 94 N.M. 172, 608 P.2d 148.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 21, 22.

Negligent homicide as affected by negligence or other misconduct of the decedent, 67 A.L.R. 922.

40 C.J.S. Homicide § 5.

14-253. Withdrawn.

ANNOTATIONS

Withdrawals. — The instruction pertaining to homicide; effect of improper medical treatment, was withdrawn effective January 1, 2000.

14-254. Withdrawn.

ANNOTATIONS

Withdrawals. — The instruction pertaining to homicide; unlawful injury accelerating death, was withdrawn effective January 1, 2000.

14-255. Intent to kill one person; another killed.

When one intends to kill or injure a certain person, and by mistake or accident kills a different person, the crime, if any, is the same as though the original intended victim had been killed. In such a case, the law regards the intent as transferred from the original intended victim to the actual victim.

USE NOTES

Insert this instruction immediately after the instruction on the elements of the crime. This instruction is not necessary if the state has charged and introduced evidence of the crime of first degree murder by a deliberate design to effect the death of any human

being. In that event, the bracketed phrase described in Use Note No. 2 of UJI 14-201 supplies the necessary "transferred intent" instruction.

Committee commentary. — As indicated in the use note, this instruction is not necessary for instructing on first degree murder resulting from a deliberate design to effect the death of any human being. *See* former 30-2-1A(5) NMSA 1978 (Laws 1963, ch. 303, § 2-1). This instruction can be used for other first degree murder or for second degree murder. *See State v. Ochoa*, 61 N.M. 225, 297 P.2d 1053 (1956), and *State v. Wilson*, 39 N.M. 284, 46 P.2d 57 (1935). *See generally* LaFave & Scott, Criminal Law 252-53 (1972).

ANNOTATIONS

Voluntary manslaughter. — The trial court did not err in refusing to give defendant's requested instruction on transferred intent for voluntary manslaughter. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 498, 506, 534, 535.

Homicide by unlawful act aimed at another, 18 A.L.R. 917.

40 C.J.S. Homicide § 39.

CHAPTER 3
Assault and Battery

Part A
Assault

14-301. Assault; attempted battery; essential elements.

For you to find the defendant guilty of assault [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

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

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.00 NMSA 1978; UJI 14-301 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-3-1(A) and (B). Although assault is a petty misdemeanor, instructions on assault are included in the Uniform Jury Instructions - Criminal because they may be given to the jury as a necessarily included offense to an aggravated assault. *See, e.g., State v. Mitchell*, 1939-NMSC-007, ¶ 9, 43 N.M. 138, 87 P.2d 432; *Chacon v. Territory*, 1893-NMSC-024, ¶ 4, 7 N.M. 241, 34 P. 448.

There are three separate instructions on assault for use depending on the evidence. If the evidence supports the theory of assault by attempted battery, UJI 14-301 is to be given; if the evidence supports the theory of assault by a threat or by menacing conduct, UJI 14-302 is to be given; if the evidence supports both theories, UJI 14-303 is to be given.

An assault by an attempted battery requires an intent to commit the battery. *See generally* NMSA 1978, § 30-28-1. Proof of the intent to commit a battery may require an actual possibility or present ability to carry out the attempt. *See* Perkins, *Criminal Law* 121 (2d ed. 1969); LaFave & Scott, Criminal Law 609-10 (1972). UJI 14-301 and UJI 14-303 contain the elements of statutory battery to accurately define the attempted act constituting assault. *See* NMSA 1978, § 30-3-4; UJI 14-2801 NMRA.

Assault by threat or menacing conduct (UJI 14-302 and UJI 14-303) was probably derived from the tort theory of assault and was made a crime on the theory that any menacing conduct which might result in a breach of the peace should be a punishable offense. *See* Perkins, *supra*, at 116-18. Unlike the attempted battery, this type of assault may be committed without any present ability or the actual possibility of committing a battery. *See* Perkins, *supra*, at 121. This concept of assault is most often used as the supporting assault element for certain types of aggravated assaults. *See also* LaFave & Scott, *supra*, at 611.

The statute contains a third type of assault, one committed by the use of insulting language toward another or by impugning the honor, delicacy, or reputation of another. *See* § 30-3-1(C). The elements of this type of assault have never been included in the UJI assault instructions, for three reasons. First, there are serious free speech implications that must be considered in using this form of the offense. *See e.g., State v. Wade*, 1983-NMCA-084, 100 N.M. 152, 667 P.2d 459. Second, the offense is a rarity in actual practice. Third, the elements of this offense would not be used to support an aggravated assault; therefore, this type of assault would not be a necessarily included offense. If the state seeks to prove a simple assault by insulting language, etc., a special instruction must be drafted.

[As amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, revised the committee commentary; in the committee commentary, made technical changes and deleted a reference to “The Lazy Lawyer’s Guide to Criminal Intent in New Mexico”.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008 effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery, defined “battery”, and revised the committee commentary; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”, after Element 1, added the next sentence defining “battery”; in Element 2, after “The defendant”, deleted “intended to touch or apply force to _____ (name of victim) by _____” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; and deleted Element 3 and redesignated former Element 4 as Element 3.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in the sentence numbered 1, deleted "[but failed]" and added "touch or apply force to", and changed the phrase "*(describe act and name victim)*" to "*(name of victim)* by"; in the sentence numbered 2, added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; and in the Use Note deleted former paragraph 2; redesignated former paragraph 3 as present paragraph 2 and substituted "ordinary" for "laymen's"; and added present paragraph 3.

Cross references. — Section 30-3-1(A) NMSA 1978; Section 30-3-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 3.

6A C.J.S. Assault and Battery § 65.

14-302. Assault; threat or menacing conduct; essential elements.

For you to find the defendant guilty of assault [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner;[2]

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.01 NMSA 1978; UJI 14-302 SCRA; as amended, effective January 15, 1998.]

Committee commentary. — *See* committee commentary following UJI 14-301. The essence of the crime is to place the victim in fear of a battery.

This instruction has been modified to include the element of "unlawful". If there is some other issue of unlawfulness, such as self-defense, an appropriate instruction must also be given and this instruction modified. *See* UJI 14-5181 to 14-5184 for self-defense or defense of another and UJI 14-132.

ANNOTATIONS

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, rewrote the paragraph numbered 2 and in the Use Note rewrote number 2.

Cross references. — For assault, *see* Section 30-3-1 NMSA 1978.

Lesser included instruction denied where there was no evidence tending to reduce the offense charged. — While lesser offenses necessarily may be included, it is only where there is some evidence tending to reduce the offense charged to a lesser degree or grade that a refusal to instruct as to included offenses is error. *State v. Saiz*, 1972-NMCA-122, 84 N.M. 191, 500 P.2d 1314.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 28.

6A C.J.S. Assault and Battery § 65.

14-303. Assault; attempted battery; threat or menacing conduct; essential elements.[1]

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

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner;[4]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[4] and

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of two of the types of assault in Section 30-3-1 NMSA 1978; one type involves attempted battery and the other involves an unlawful act, a threat or menacing conduct which causes another to reasonably believe he is about to be touched or have force applied to him. If the evidence supports both of these theories of assault, use this instruction.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.02 NMSA 1978; UJI 14-303 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* the committee commentaries following UJI 14-132 and UJI 14-301 NMRA.

The UJI 14-301 and 14-302 NMRA pattern is used throughout Chapters 3 and 22 of these instructions.

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008 effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery, and defined "battery"; in the first alternative type of assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against", after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and deleted Element 3.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in the first paragraph numbered 1 deleted "[but failed]" and substituted "*(name of victim)* by" for "*(describe act and name of victim)*"; designated the third sentence as "2", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name of victim)*"; designated the fourth sentence as "3"; designated the fifth sentence as "1" and added "*unlawful conduct*" after "*describe*"; designated the sixth sentence as "2" and rewrote it; designated the seventh sentence

as "3"; redesignated the previous sentence numbered "2" as "4"; in Use Note 1 deleted "struck", added "an unlawful act" and "touched or have force applied to him."; deleted previous Use Note number 3; redesignated previous Use Note 4 as 3 and substituted "ordinary" for "laymen's"; and added present Use Note 4.

Cross references. — For assault, *see* Section 30-3-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 28.

6A C.J.S. Assault and Battery § 65.

14-304. Aggravated assault; attempted battery with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

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

3. The defendant used a [_____];[4] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[5]];[6]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

5. UJI 14-131, the definition of “great bodily harm”, must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.03 NMSA 1978; UJI 14-304 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* Section 30-3-2A NMSA 1978. *See* commentary to UJI 14-301 NMRA, UJI 14-302 NMRA and UJI 14-303 NMRA. An aggravated assault by use of a deadly weapon requires only a general criminal intent. *State v. Manus*, 93 N.M. 95, 99, 597 P.2d 280 (1979); *State v. Mascarenas*, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974). Under New Mexico law, an aggravated assault does not include an intent to do physical harm or bodily injury. *State v. Cruz*, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974). *See also United States v. Boone*, 347 F. Supp. 1031 (D.N.M. 1972).

An aggravated assault by use of a deadly weapon may typically occur when the defendant points a gun at the victim, thereby causing the victim to reasonably believe that he is in danger of receiving a battery. *See State v. Anaya*, 79 N.M. 43, 439 P.2d 561 (Ct. App. 1968). However, the crime may also be committed by an assault by attempted battery with a deadly weapon. *State v. Woods*, 82 N.M. 449, 483 P.2d 504 (Ct. App. 1971). The distinction between the two types of assault which support an assault with a deadly weapon charge may be the ability of the defendant to actually inflict the battery. The first type, merely putting the person in apprehension, may occur with the use of an unloaded weapon whereas the second type, the attempted battery, would require a loaded weapon. *See* Perkins, *Criminal Law 121* (2d ed. 1969).

Following the general theory that every battery includes an assault, an assault with a deadly weapon conviction may be upheld even though the evidence establishes that the victim was shot and severely wounded. *See State v. Brito*, 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969). *See generally* Perkins, *supra* at 127-30. An injury inflicted on the victim by use of the deadly weapon is an aggravated battery. *See State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974).

A deadly weapon may be those items listed as deadly weapons as a matter of law in Section 30-1-12B NMSA 1978. If the weapon is not listed in the statute, the jury must find as a matter of fact that the weapon used was a deadly weapon. *See State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861; *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154; *State v. Gonzales*, 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973); *State v. Conwell*, 36 N.M. 253, 13 P.2d 554 (1932).

The statute provides that the defendant may either "strike at" or "assault" the victim with a deadly weapon. The committee believed that the concept of "striking at" was included within the concept of "assault by attempted battery" and consequently did not include the "striking at" language in this instruction.

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with a deadly weapon, and defined “battery”; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”, after Element 1, added the next sentence defining battery; in Element 2, after “The defendant”, deleted “acted in a rude, insolent or angry manner[3]” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; and deleted Element 4 and redesignated former Element 5 as Element 4.

The 1999 amendment, effective February 1, 2000, rewrote element 3 which read: "The defendant used .....;*4*" and, in the Use Note, rewrote Paragraph 4 to correspond to the amendment of element 3, and inserted Paragraphs 5 and 6.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in sentence 1, deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name of victim)*"; redesignated former sentence 2 as present sentence 4, adding "touch or apply force" and substituting "*(name of victim)*" for "*(describe act and name of victim)*"; redesignated former sentence 3 as present sentence 2; redesignated former sentence 4 as present sentence 3; deleted former Use Note 2; redesignated former Use Note 3 as present Use Note 2, substituting "ordinary" for "laymen's"; and added present Use Note 3.

Cross references. — For aggravated assault, *see* Section 30-3-2(A) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 53.

Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon, 92 A.L.R.2d 635.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 A.L.R.5th 823.

6A C.J.S. Assault and Battery § 78.

14-305. Aggravated assault; threat or menacing conduct with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct)*;

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner;[2]

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. The defendant used a [_____][3] [deadly weapon. The defendant used a _____ *(name of object)*. A _____ *(name of object)* is a deadly weapon only if you find that a _____ *(name of object)*, when used as a weapon, could cause death or great bodily harm[4]];[5]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

3. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

4. UJI 14-131, the definition of "great bodily harm", must also be given.

5. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.04 NMSA 1978; UJI 14-305 SCRA; as amended, effective January 15, 1998; February 1, 2000.]

Committee commentary. — *See* committee commentary following UJI 14-302 NMRA for a discussion on the element of "lawfulness". *See also* the committee commentary to UJI 14-304 NMRA.

ANNOTATIONS

The 1999 amendment, effective February 1, 2000, rewrote element 4 which read: "The defendant used .....;*4*" and, in the Use Note, rewrote Paragraph 3 to correspond to the amendment of element 4, and inserted Paragraphs 4 and 5.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in sentence 1 inserted "*unlawful act*"; rewrote sentence 2; and rewrote Use Note 2.

Cross references. — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

Giving of instruction in aggravated battery prosecution not error. — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery and, accordingly, trial court did not err in instructing jury on aggravated assault, simple battery and simple assault, as well as aggravated battery, where indictment charged only aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

Failure to give instruction not error, absent prejudice to defendant. — Where the giving of this instruction as requested would have avoided guilty verdicts on multiple charges of aggravated assault and aggravated battery that merged under the evidence, the failure to give the instruction was not error in the absence of prejudice to the defendant. *State v. Gallegos*, 1978-NMCA-114, 92 N.M. 370, 588 P.2d 1045, cert. denied, 92 N.M. 353, 588 P.2d 554.

Failure to instruct that weapon used was a deadly weapon amounted to fundamental error. — Where defendant was charged with aggravated assault with a deadly weapon for threatening his neighbor with a small kitchen knife, and the weapon used was not an object specifically listed as a deadly weapon in 30-1-12(B) NMSA 1978, the State's failure to instruct the jury that the object used is a deadly weapon if it could cause death or great bodily harm amounted to fundamental error. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd on other grounds*, 2018-NMSC-028.

Sufficient evidence of aggravated assault. — Where co-defendant held a knife at the victim's throat and told the victim that he was going to kill him, the facts were sufficient to support the jury's finding that a reasonable person in the victim's position would believe that his bodily integrity was threatened by co-defendant's use of the knife. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

Sufficient evidence of aggravated assault. — Where defendant was convicted of three counts of aggravated assault for unlawfully assaulting or striking at another with a deadly weapon, there was sufficient evidence to support the convictions where the evidence presented at trial established that defendant admitted to police that he discharged his firearm twice in the air and twice at a vehicle that he knew to be occupied by multiple people, because the evidence was such that the jury could have

concluded that defendant's act of shooting at the occupied vehicle caused the occupants of the vehicle to believe defendant was about to intrude on their bodily integrity or personal safety. *State v. Candelaria*, 2019-NMSC-004.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 53.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

6A C.J.S. Assault and Battery § 78.

14-306. Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[4]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[4]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant used a [_____][5] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[6]];[7] and

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of two of the types of assault in Section 30-3-1 NMSA 1978; one type involves attempted battery and the other involves a threat or menacing conduct which causes another to reasonably believe he is about to be struck. If the evidence supports both of these theories of assault, use this instruction.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131, the definition of "great bodily harm", must also be given.

7. This alternative is given only if the object used is not a "deadly weapon" which is specifically listed in Section 30-1-12B NMSA 1978.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.05 NMSA 1978; UJI 14-306 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* committee commentary following UJI 14-304 NMRA.

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with a deadly weapon, and defined "battery"; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against", after Element 1, added the next sentence defining "battery"; deleted Element 2 and redesignated former Element 3 as Element 2; and in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery".

The 1999 amendment, effective February 1, 2000, rewrote element 4 which read: "The defendant used .....;[4]" and, in the Use Note, rewrote Paragraph 5 to correspond to the amendment of element 4, and inserted Paragraphs 6 and 7.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in the sentence numbered 1, deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; designated the former sixth line as 2; designated the former seventh line as 3, added "touch or apply force to", substituted "*(name of victim)* by" for "*(describe act and name victim)*" and deleted "and"; designated the former eighth line as 1 and added "unlawful act"; designated the former ninth line as 2 and rewrote the line; designated the former eleventh line as 3; redesignated the line formerly numbered 2 as present number 4 and added "and"; redesignated the line formerly designated 3 as present number 5; deleted former Use Note 3; renumbered former Use Note 4 as present Use Note 3 and substituted "ordinary" for "laymen's"; and added present Use Note 4.

Cross references. — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 54.

6A C.J.S. Assault and Battery § 78.

14-307. Aggravated assault in disguise; essential elements.

For you to find the defendant guilty of aggravated assault in disguise [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe unlawful act, threat or menacing conduct);*

2. The defendant's conduct caused _____ *(name of victim)* to believe the defendant was about to intrude on _____'s *(name of victim)* bodily integrity or personal safety by touching or applying force to _____ *(name of victim)* in a rude, insolent or angry manner;[2]

3. A reasonable person in the same circumstances as _____ *(name of victim)* would have had the same belief;

4. At the time _____ *(name of defendant)* was [wearing a _____][3] [or][4] [disguised] for the purpose of concealing _____'s *(name of defendant)* identity;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

3. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use either or both alternatives.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.06 NMSA 1978; UJI 14-307 SCRA; as amended, effective January 15, 1998.]

Committee commentary. — *See* Section 30-3-2(B) NMSA 1978. The committee believed that an assault in disguise would of necessity be the threat or menacing conduct type which gives a reasonable person the belief that he is about to receive a battery. No New Mexico cases interpreting this particular type of assault were found by the committee's reporter.

ANNOTATIONS

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in the line designated 1 added "*unlawful act*"; rewrote the lines designated 2 and 4; and rewrote Use Notes 2 and 4.

Cross references. — For aggravated, *see* Section 30-3-2 NMSA 1978.

14-308. Aggravated assault; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to commit _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner[4].

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

3. The defendant also intended to commit the crime of _____;[1]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.07 NMSA 1978; UJI 14-308 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Although the statute uses the term "unlawfully", that term has not been added to this instruction as it is covered by the addition of "unlawfully" when lawfulness is an issue. *See* Use Note 4.

See NMSA 1978, § 30-3-2(C) (1963). The felony intended must be other than a violent felony as defined in NMSA 1978, § 30-3-3 (1977). *See* UJIs 14-311, 14-312 and 14-313 NMRA and commentary if the felony intended is a violent felony.

At common law, an assault with intent to commit a felony was considered merely an attempt to commit the felony. *See* Perkins, Criminal Law 133 (2d ed. 1969). Aggravated battery and aggravated assault are lesser included offenses of the crime of attempted murder. *See State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731 (aggravated battery is a lesser included offense of attempted murder); and *State v. DeMary*, 1982-NMSC-144, ¶¶ 9-13, 99 N.M. 177, 655 P.2d 1021 (aggravated assault is a lesser included offense of aggravated battery).

Because it requires an act coupled with an intent to commit a further act, this is a specific intent crime.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, revised the Use Notes, and revised the committee commentary; and in Use Note 1, added “To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.”

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, defined “battery” and revised the committee commentary; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”, after Element 1, added the next sentence defining “battery”; deleted Element 2 and redesignated the succeeding elements accordingly; in Element 2, after “The defendant”, deleted “intended to touch or apply force to _____ (name of victim) by _____[3]” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; and in Element 3, after “defendant”, added “also”.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; redesignated former element 2 as present element 3 and added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; redesignated former element 3 as present element 2; in Use Note 1 added "or felonies" in the first sentence and in the second deleted "the" and added "each"; deleted former Use Note 3; redesignated former Use Note 4 as present use note 3, substituting "ordinary" for "laymen's"; and added present Use Note 4.

Cross references. — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

14-309. Aggravated assault; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to commit _____[1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (describe unlawful act, threat or menacing conduct);

2. The defendant’s conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____’s (*name of victim*) bodily integrity or

personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[3]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. The defendant intended to commit the crime of _____;[1]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony. If there is more than one felony, insert the names of the felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.08 NMSA 1978; UJI 14-309 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary for UJI 14-308 NMRA.

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 1, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 added "*unlawful act*"; rewrote element 2; in Use Note 1 added "If there is more than one felony, insert name of the" and made stylistic changes; and rewrote Use Note 3.

Cross references. — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

Instruction on felony aggravated assault. — The trial court committed reversible error when it instructed the jury on the elements of aggravated assault with intent to commit felony aggravated battery, but then failed to instruct on the essential elements of

felony aggravated battery and, instead, instructed on the essential elements of misdemeanor aggravated battery. *State v. Armijo*, 1999-NMCA-087, 127 N.M. 594, 985 P.2d 764.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

14-310. Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements.[1]

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

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

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

OR

1. The defendant intentionally _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[5]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____;[2]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. This instruction combines the essential elements in UJI 14-308 NMRA and UJI 14-309 NMRA.

2. Insert the name of the felony. If there is more than one felony, insert the names of the felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.09 NMSA 1978; UJI 14-310 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary for UJI 14-308 NMRA.

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 2, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, and defined "battery"; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Element 2 and redesignated former Element 3 as Element 2; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____(name of victim) by _____[4]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and in the second alternative type of aggravated assault, in Element 4, after "The defendant", added "also".

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; designated the former sixth line as 2; designated the former fifth line as 3 and added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*";

designated the former seventh line as 1 and added "intentionally" and "unlawful act"; designated former line eight as 2 and rewrote the line; designated former line ten as 3; redesignated former element 2 as 4 and former element 3 as 5; rewrote Use Note 1; in Use Note 2 added "If there is more than one felony, insert the names of the" and made stylistic changes; deleted former Use Note 4; redesignated former Use Note 5 as present Use Note 4 and substituted "ordinary" for "laymen's"; and added Use Note 5.

Cross references. — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

14-311. Aggravated assault; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to [kill] [or][1] [commit _____[2]] [as charged in Count _____]3, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____[4];

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner[5].

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

3. The defendant also intended to [kill] [or][1] [commit _____[2]] on _____ (*name of victim*);

4. This happened in New Mexico on or about the ___ day of _____, _____.

USE NOTES

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.10 NMSA 1978; UJI 14-311 SCRA; as amended, effective September 1, 1988; January 15, 1998; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* NMSA 1978, § 30-3-3 (1977). *See also* committee commentaries to UJIs 14-301 and 14-304 NMRA.

UJIs 14-311, 14-312, and 14-313 NMRA are used only where the assault is accompanied by an intent to commit mayhem, rape, robbery or burglary. The statute provides for an assault with intent to kill or with intent to commit any murder. The courts have had problems in developing a distinction between the two types of intent. In *State v. Melendrez*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768, the Court determined that an assault with intent to kill was different from an assault with intent to murder. The basis for the distinction was that an assault with intent to kill may be committed without malice, whereas an assault with intent to murder required malice aforethought. This distinction no longer is viable under the current murder statute, NMSA 1978, § 30-2-1 (1994), which no longer incorporates the malice concept. Assault with intent to commit murder therefore no longer is different from assault with intent to kill.

In *State v. Rogers*, 1926-NMSC-028, 31 N.M. 485, 247 P. 828, the court held that a depraved-mind murder, which does not require intent to kill, could not form the basis for an assault with intent to murder. *See also State v. Cowden*, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972 (conviction of both assault with intent to commit a violent felony, murder, NMSA 1978, § 30-3-3 (1977), and for aggravated battery with a deadly weapon, NMSA 1978, § 30-3-5(C) (1969)); *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, revised the Use Notes, and revised the committee commentary;

and in Use Note 2, added “To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.”

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a violent felony, and defined “battery”; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”; after Element 1, added the next sentence defining “battery”; deleted Element 2 and redesignated the succeeding elements accordingly; in Element 2, after “The defendant”, deleted “intended to touch or apply force to _____ (name of victim) by _____[4]” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; and in Element 3, after “The defendant”, added “also”.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 deleted "[but failed]", added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; redesignated former element 3 as present element 2; redesignated former element 2 as present element 3 and added "touch or apply force to" and substituted "*(name of victim)* by" for "*(describe act and name victim)*"; in element 4 added "*(name of victim)*"; in Use Note 1 deleted "murder" after "violent felony, i.e." and deleted the former fourth sentence which read "For murder, see second degree murder, UJI ; deleted former Use Note 4; redesignated former Use Note 5 as present Use note 4 and substituted "ordinary" for "laymen's"; and added present Use Note 5.

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in Item 2 in the Use Note, in the second sentence, substituted "criminal sexual penetration" for "rape", and substituted the present sixth sentence for the former sixth sentence, which read "For rape, see UJI .

Cross references. — For aggravated assault, *see* Section 30-3-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

14-312. Aggravated assault; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault with intent to [kill] [or][1] [commit _____][2] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[4]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. The defendant intended to [kill] _____ (*name of victim*)] [or][1] [commit _____[2] on _____ (*name of victim*)];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

3. Insert the count number if more than one count is charged.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.06 NMSA 1978; UJI 14-307 SCRA; as amended, effective September 1, 1988; January 15, 1998; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary to UJI 14-308 NMRA and UJI 14-311 NMRA.

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 2, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1, broadened the description of the defendant's conduct; rewrote element 2; added a date requirement in 4; deleted the references to murder in Use Note 2; and rewrote Use Note 4.

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in Item 2 in the Use Note, in the second sentence, substituted "criminal sexual penetration" for "rape", and substituted the present sixth sentence for the former sixth sentence, which read "For rape, see UJI .

Cross references. — For assault with intent to commit felony, *see* Section 30-3-3 NMSA 1978.

Instruction improper. — Where defendant was convicted of assault with intent to commit a violent felony against the adult child of the victim whom defendant shot and killed; defendant fired shots into a house that was occupied by the victim's adult child and others; and the jury was instructed that for it to find defendant guilty of assault with intent to commit a violent felony on the victim's adult child, the jury had to find that defendant intended to kill the victim's child or any other person or commit murder or mayhem on the victim's adult child or any other person, the instruction misstated the law regarding assault with intent to commit a violent felony, and because the jury instruction allowed the jury to convict defendant of assaulting the victim's adult child on the ground that defendant intended to commit a violent felony against the victim, not the victim's adult child, the jury may have convicted defendant of crime that did not exist. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

14-313. Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements.[1]

For you to find the defendant guilty of aggravated assault with intent to [kill] [or][2] [commit _____[3]] [as charged in Count _____[4]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[6]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to [kill] [or][2] [commit _____[3]] on _____ (*name of victim*);

5. This happened in New Mexico on or about the ___ day of _____, _____.

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-311 NMRA and UJI 14-312 NMRA, for use when the two forms of the offense are charged in the alternative.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony; *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

4. Insert the count number if more than one count is charged.

5. Use ordinary language to describe the touching or application of force.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.06 NMSA 1978; UJI 14-307 SCRA; as amended, effective September 1, 1988; January 15, 1998; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary — This instruction combines UJI 14-311 NMRA and UJI 14-312 NMRA. *See* committee commentary for UJI 14-311 NMRA.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, revised the Use Notes, and revised the committee commentary; and in Use Note 3, added “To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.”

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a violent felony, and defined “battery”; in the first alternative type of aggravated assault, in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”; after Element 1, added the next sentence defining “battery”; deleted “Element 2 and redesignated former Element 3 as Element 2; in Element 2, after “The defendant”, deleted “intended to touch or apply force to _____ (name of victim) by _____[5]” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; and in Element 4, after “The defendant”, added “also”.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, rewrote element 1 to eliminate the bracketed material dealing with attempt, specifically set out the requirement of "touch or apply force" and changed the blank to cover "*name of victim*" only; designated the former third line following the colon as element 2; designated the former second line following the colon as element 3 and specifically set out the requirement of "touch or apply force" and changed the blank to cover "*name of victim*" only; designated the former fourth line following the colon as 1 and broadened the scope of coverage of the description; combined the former fifth and sixth lines following the colon into one element, designated it as 2 and specifically set out the requirement that the victim believe the defendant was about intrude on the victim's safety or bodily integrity; redesignated the former second element as 4 and added the date requirement; redesignated the former third element as 5; rewrote Use Note 1; deleted references to murder in Use Note 3; deleted former Use Note 5; redesignated former Use Note 6 as 5 and substituted "ordinary" for "laymen's"; and added present Use Note 6.

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in Item 3 in the Use Note, in the second sentence, substituted "criminal sexual penetration" for "rape", and substituted the present sixth sentence for the former sixth sentence, which read "For rape, see UJI .

Cross references. — For assault with intent to commit felony, *see* Section 30-3-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 48.

6A C.J.S. Assault and Battery § 72.

14-314. "Mayhem"; defined; essential elements for aggravated assault.

Mayhem consists of intentionally and violently depriving another person of the use of a member or organ of that person's body, making that person less able to fight.

USE NOTES

To be used with UJI 14-311, 14-312, 14-313, 14-2207, 14-2208 and 14-2209.

[As amended, effective January 15, 1998.]

Committee commentary. — New Mexico no longer has a statutory crime of mayhem. The Act of February 15, 1854 (see Code 1915, Section 1476) included the expanded concept of mayhem known in England as the Coventry Act. *See generally* Perkins, Criminal Law 185 (2d ed. 1969). *See State v. Hatley,* 72 N.M. 377, 384 P.2d 252 (1963); *State v. Trujillo,* 54 N.M. 307, 224 P.2d 151 (1950); *State v. Raulie,* 40 N.M. 318, 59 P.2d 359 (1936). The mayhem statute was repealed in 1963. *See* N.M. Laws 1963, Ch. 303, Section 30-1.

It has been suggested by some authorities that the crime of aggravated battery replaces mayhem. *See, e.g.,* LaFave & Scott, Criminal Law 615 (1972). The New Mexico Courts have not specifically held that aggravated battery replaces mayhem. In *State v. Ortega,* 77 N.M. 312, 422 P.2d 353 (1966), the Supreme Court affirmed the conviction for aggravated battery where the defendant had forcibly tattooed the victim with a needle. The Court held that this was sufficient evidence of great bodily harm as defined in Section 30-1-12A NMSA 1978 and that the statute defining great bodily harm "in effect" covers the crime of mayhem.

Because New Mexico no longer has a statutory crime of mayhem, the committee believed that the common-law crime of mayhem should be used for assault with intent to commit mayhem, if the courts determine that the assault crime survived the 1963 repeal of the underlying substantive offense. *See* Section 30-1-3 NMSA 1978. The

definition used in UJI 14-314 follows the common-law definition of mayhem. *See State v. Martin,* 32 N.M. 48, 250 P. 842 (1926). *See also* Perkins, *supra* at 185.

ANNOTATIONS

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, rewrote the instruction to make it gender neutral.

Compiler's notes. — Section 1476, Code 1915, referred to in the second sentence in the first paragraph of the committee commentary, was compiled as Section 40-30-1, 1953 Comp., before being repealed.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 57.

Mayhem as dependent on part of body injured and extent of injury, 16 A.L.R. 955, 58 A.L.R. 1320.

56 C.J.S. Mayhem §§ 2, 3, 10.

14-315. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated June 16, 1988, this instruction, defining "rape", was withdrawn effective for cases filed in the district courts on or after September 1, 1988.

14-316. Recompiled.

ANNOTATIONS

Recompilations. — UJI 14-316, relating to shooting at a dwelling or occupied building, was recompiled as UJI 14-340 NMRA in 1996.

14-317. Recompiled.

ANNOTATIONS

Recompilations. — UJI 14-317, relating to shooting at a dwelling or occupied building, was recompiled as UJI 14-341 NMRA in 1996.

14-318. Criminal damage to property; household member; essential elements.

For you to find the defendant guilty of criminal damage to property of a household member [household member's interest in excess of $1,000.00][1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally[3] damaged [real] [personal] [community] [or] [jointly owned][4] property of _____ (*name of victim*);

2. The defendant intended to [intimidate] [threaten] [or] [harass][4] (*name of victim*);

[3. The defendant did not have the _____'s (*name of victim*) permission to damage the property];[5]

[4. The damage to the _____'s (*name of victim*) interest in the property was more than $1,000.00];[1]

5. _____ (*name of victim*) was a household member of the defendant;[6]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Bracketed language is to be used if the amount of damage to the household member's interest in the property exceeds $1,000.00. If the bracketed language is used UJI 14-1510 must also be given.

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

3. UJI 14-141 NMRA, general criminal intent, must also be given.

4. Use only the applicable bracketed element established by the evidence.

5. Use this alternative only if sufficient evidence has been introduced to raise an issue of permission.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — This instruction pertains to criminal damage to property of a household member. *See* NMSA 1978, Section 30-3-18 (2009). Therefore, the instruction is not implicated by the Court of Appeals' holding in *State v. Earp*, 2014-NMCA-059, ¶ 1 (holding that an equitable owner in a residential property cannot be

charged with criminally damaging that property under NMSA 1978, Section 30-15-1 (1963)).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-319. Deprivation of property; household member; essential elements.

For you to find the defendant guilty of deprivation of property of a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally[2] deprived _____ (*name of victim*) of the use of [separate] [community] [or] [jointly owned][3] personal property of _____ (*name of victim*);

2. The defendant intended to [intimidate] [threaten][3] _____ (*name of victim*);

3. _____ (*name of victim*) was a household member of the defendant;[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-141 NMRA, general criminal intent, must also be given.

3. Use only the applicable bracketed element established by the evidence.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — The replacement cost of irreparable items is an appropriate measure of the value of the items. *See State v Cobrera*, 2013-NMSC-012, 300 P.3d 729.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Part B
Battery

14-320. Battery; essential elements.

For you to find the defendant guilty of battery [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally touched or applied force to _____ *(name of victim)* by _____;[2]

2. The defendant acted in a rude, insolent or angry manner;[3]

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.50 NMSA 1978; UJI 14-320 SCRA; as amended, effective January 15, 1998.]

Committee commentary. — *See* Section 30-3-4 NMSA 1978. Battery is a necessarily included offense of aggravated battery offenses. *See State v. Duran,* 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

The 1998 amendments added the word "intentionally" to the first element and made other clarifying amendments. Use Note 3 was added to explain how to modify this instruction if there is an issue of the unlawfulness of an act. *See* UJI 14-4581 to UJI 14-4584 [UJI 14-5181 to 14-5184]. *See State v. Padilla,* 122 N.M. 92, 920 P.2d 1046 (1997) (it is fundamental error to fail to instruct on unlawfulness of the act unless "that element is undisputed (i.e., by concession it is not at issue) and indisputable (i.e., the jury undoubtedly would have so found)" citing *State v. Orosco,* 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992) and *State v. Osborne,* 111 N.M. 654, 661-62, 808 P.2d 624, 831-32 (1991).

ANNOTATIONS

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 specifically set out the requirement of intentional touching or application of force, limited the first blank line to the victim's name and added a second blank line for the name of the perpetrator; substituted "ordinary" for "laymen's" in Use Note 2; and added Use Note 3.

Battery under Section 30-3-4 NMSA 1978 is a lesser included offense of aggravated battery upon a peace officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Battery upon a police officer. — If there is a factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Subsection A of 30-22-24 NMSA 1978 includes as unlawful only those acts that physically injure officers, that actually harm officers by jeopardizing their safety, or that meaningfully challenge their authority; an instruction that the state must prove the defendant acted in a rude, insolent or angry manner clearly did not describe the element of harm to the safety or authority of the officers, and was fundamental error. *State v. Padilla*, 1997-NMSC-022, 123 N.M. 216, 937 P.2d 492.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 5, 37.

6A C.J.S. Assault and Battery § 127.

14-321. Aggravated battery; without great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery without great bodily harm [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ *(name of victim)* by _____;[2]

2. The defendant intended[3] to injure _____ *(name of victim)* [or another][4];

3. The defendant caused _____ *(name of victim)*

[painful temporary disfigurement]

[OR][5]

[a temporary loss or an impairment of the use of _____ *(name of organ or member of the body)*];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184.

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

5. Use only the applicable bracketed element established by the evidence.

[Adopted, effective October 1, 1976; UJI Criminal Rule 3.51 NMSA 1978; UJI 14-321 SCRA; as amended, effective January 15, 1998.]

Committee commentary. — *See* Subsections A and B of Section 30-3-5 NMSA 1978. *See also* commentaries to UJI 14-320 and 14-322 NMRA. This misdemeanor instruction was included in UJI because it is a necessarily included offense to third degree felony aggravated battery. *See State v. Chavez,* 82 N.M. 569, 484 P.2d 1279 (Ct. App.), *cert. denied,* 82 N.M. 562, 484 P.2d 1272 (1971).

This instruction and UJI 14-322 and 14-323 provide distinct and separate instructions for the crime of aggravated battery. It is error to give the jury types of aggravated battery not supported by the evidence. *State v. Urban,* 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

See State v. Cowden, 121 N.M. 703, 917 P.2d 972 (Ct.App. 1996) (conviction of both assault with intent to commit a violent felony, murder, Section 30-3-3 NMSA 1978 and for aggravated battery with a deadly weapon, Section 30-3-5(C) NMSA 1978); and *State v. Fuentes,* 119 N.M. 104, 104, 888 P.2d 986, 986 (Ct.App. 1994).

ANNOTATIONS

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 specifically set out the requirement of touching or applying force, and added a blank line for the name of the perpetrator; clarified the meaning of "member" in element 3; substituted "ordinary" for "laymen's" in Use Note 2; added present Use Note 3; redesignated former Use Note 3 as present Use Note 4; and redesignated former Use Note 4 as present Use Note 5.

Instruction defining aggravated battery was not a necessary instruction where the trial court instructed the jury as to the material elements of the aggravated battery charge. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 51.

6A C.J.S. Assault and Battery § 80.

14-322. Aggravated battery; with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery with a deadly weapon [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ *(name of victim)* by _____[2] with a [_____][3] [deadly weapon. The defendant used a _____ *(name of instrument or object)*. A _____ *(name of instrument or object)* is a deadly weapon only if you find that a _____ *(name of object)*, when used as a weapon, could cause death or great bodily harm[4]];[5]

2. The defendant intended[6] to injure _____ *(name of victim)* [or another];[7]

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

4. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

5. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

7. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

[Adopted, effective October 1, 1976; UJI Criminal Rule 3.52 NMSA 1978; UJI 14-322 SCRA; as amended, effective January 15, 1998; February 1, 2000.]

Committee commentary. — *See* Section 30-3-5A and 30-3-5C NMSA 1978. *See also* commentary to UJI 14-320.

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

An aggravated battery requires an intent to injure. *State v. Vasquez*, 83 N.M. 388, 492 P.2d 1005 (Ct. App. 1971). The intent to injure is a classic specific intent which may be inferred from the conduct of the defendant in the surrounding circumstances and may also be negated by voluntary intoxication or mental disease or defect. *State v. Valles*, 84 N.M. 1, 498 P.2d 693 (Ct. App. 1972). The intent to injure may be directed towards several persons and it is not necessary to identify the specific person to whom the intent was directed in order to "transfer" the intent to the eventual victim. *State v. Mora*, 81 N.M. 631, 471 P.2d 201 (Ct. App. 1970), *cert. denied*, 81 N.M. 668, 472 P.2d 382 (1970).

See State v. Cowden, 121 N.M. 703, 917 P.2d 972 (Ct.App. 1996) (conviction of assault with intent to commit a violent felony, murder, Section 30-3-3 NMSA 1978 and aggravated battery with a deadly weapon, Section 30-3-5C NMSA 1978).

ANNOTATIONS

The 1999 amendment, effective February 1, 2000, rewrote element 1 which read: "The defendant touched or applied force to _____ (name of victim) by _____[2] with _____ (deadly weapon)[3]" and, in the Use Note, rewrote Paragraph 3 to correspond to the amendment of element 1, inserted Paragraphs 4 and 5 and redesignated former Paragraphs 5 and 5 as present Paragraphs 6 and 7.

Unlawfulness required. — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was

erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another. *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Failure to give instruction not error, absent prejudice to defendant. — Where the giving of this instruction as requested would have avoided guilty verdicts on multiple charges of aggravated assault and aggravated battery that merged under the evidence, the failure to give the instruction was not error in the absence of prejudice to the defendant. *State v. Gallegos*, 1978-NMCA-114, 92 N.M. 370, 588 P.2d 1045, cert. denied, 92 N.M. 353, 588 P.2d 554.

Ambiguous instruction. — Instruction which created an ambiguity as to whether the judge or the jury decided if a brick wall was a "deadly weapon" constituted reversible error. *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861, cert. denied, 126 N.M. 533, 972 P.2d 352, cert. denied, 127 N.M. 390, 981 P.2d 1208.

Baseball bat as deadly weapon. — In a prosecution for aggravated battery with a deadly weapon, the question of whether a baseball bat was a deadly weapon should have been left to the jury; however, the error is not fundamental and must be preserved for appeal. *State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

When object used is a per se deadly weapon. — Where object used in aggravated battery is listed as a deadly weapon under Section 30-1-12(B) NMSA 1978, the jury is not required to find that the object could cause death or bodily harm. *State v. Murillo*, 2015-NMCA-046.

Where defendant, who used a switchblade knife in a fight, was charged and convicted of aggravated battery with a deadly weapon, and claimed that he was denied due process because the jury should have been instructed that a knife is a deadly weapon only if there is a finding that the switchblade, when used as a weapon, could cause death or great bodily harm, the New Mexico court of appeals held that because switchblade knives are specifically listed as deadly weapons in Section 30-1-12(B) NMSA 1978, the jury was not required to find that a switchblade knife could cause death or bodily harm. *State v. Murillo*, 2015-NMCA-046.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 53.

6A C.J.S. Assault and Battery §§ 75, 76.

14-323. Aggravated battery; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ *(name of victim)* by _____;[2]

2. The defendant intended[3] to injure _____ *(name of victim)* [or another];[4]

3. The defendant [caused great bodily harm[5] to _____ *(name of victim)*] [or][6] [acted in a way that would likely result in death or great bodily harm[5] to _____ *(name of victim)*];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 .

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

5. The definition of great bodily harm, UJI 14-131 NMRA, must also be given.

6. Use only the applicable bracketed element established by the evidence.

[Adopted effective October 1, 1976; UJI Criminal Rule 3.53 NMSA 1978; UJI 14-323 SCRA; as amended, effective January 15, 1998.]

Committee commentary. — *See* Subsections A and B of Section 30-3-5 NMSA 1978. *See also* commentaries to UJI 14-320 and 14-322 NMRA.

ANNOTATIONS

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, in element 1 specifically set out the requirement of touching or applying force and added a blank line for the name of the perpetrator; substituted "ordinary" for "laymen's" in Use Note 2; and added present Use Note 3, redesignating all Use Notes thereafter.

Giving aggravated assault instruction in aggravated battery prosecution. — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery and, accordingly, trial court did not err in instructing jury on aggravated assault, simple battery and simple assault, as well as aggravated battery, where indictment charged only aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 51.

6A C.J.S. Assault and Battery § 80.

Part C
Harassment and Stalking

14-330. Harassment; essential elements.

For you to find the defendant guilty of harassment as [charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant maliciously pursued a pattern of conduct that was intended to [annoy] [seriously alarm] [or] [terrorize][2] _____ *(name of victim)*;

2. A reasonable person would have suffered substantial emotional distress as a result of the defendant's actions;

3. The defendant's conduct served no lawful purpose;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed alternatives.

[Adopted, effective February 1, 1995.]

ANNOTATIONS

Cross references. — For harassment, *see* Section 30-3A-2 NMSA 1978.

14-331. Stalking; essential elements.

For you to find the defendant guilty of stalking [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly pursued a pattern of conduct by, on more than one occasion, [directly or indirectly] [or] [using a third party[2]][3] engaging in any of the following acts:

[(a) following _____ (*name of person*)]

[(b) monitoring _____ (*name of person*)]

[(c) placing _____ (*name of person*) under surveillance]

[(d) threatening _____ (*name of person*)]

[(e) communicating [to] [or] [about] _____ (*name of person*)];[3]

[2. In pursuing the pattern of conduct the defendant was not acting within the scope of [lawful employment] [or] [constitutionally protected activity,]][3][4]

3. [Although some of the acts constituting the pattern of conduct were directed at other people, the] [The][3] overall pattern of conduct was directed at _____ (*name of victim*);

4. The defendant intended

[to place _____ (*name of victim*) in reasonable apprehension of [death] [bodily harm] [sexual assault] [confinement or restraint]]

[or]

[to cause _____ (*name of victim*) to reasonably fear the [death] [bodily harm] [sexual assault] [confinement or restraint] of _____ (*name(s) of other individual(s)*)].[3, 5]

5. This happened in New Mexico [between] [on or about] the _____ day of _____, _____ [and the _____ day of _____, _____].[3, 6]

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use when the evidence establishes that one or more third parties committed the acts constituting the pattern of conduct.

3. Use only the applicable bracketed alternatives.

4. Insert when there is any evidence the defendant acted with lawful authority, as defined in Section 30-3A-3(B)(1) NMSA 1978.

5. The victim may be afraid for the victim, other individuals, or both.

6. The pattern of conduct must involve more than one occasion, but may or may not occur on more than one date.

[Adopted, effective February 1, 1995; as amended, effective July 1, 1998; as amended by Supreme Court Order No. 21-8300-010, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — *See* NMSA 1978, § 30-3A-3 (2009) (changing essential elements of stalking and defining "lawful authority"); NMSA 1978, § 30-3A-4 (1997) (providing specific exemptions to the provisions of the Harassment and Stalking Act for picketing and public demonstrations arising out of labor disputes and for peace officers in performance of their duties). These exemptions were not repealed or changed when the 2009 amendments added the more general definitions of lawful authority.

The Committee believes that UJI 14-132 NMRA (Unlawfulness as an element) is a general instruction not directly applicable to the stalking statute, which has a specific definition of "lawful authority" as "within the scope of lawful employment or constitutionally protected activity." Section 30-3A-3(B)(1). The original 1997 exceptions to the stalking statute are specific, affirmative, categorical exceptions to what otherwise is unlawful conduct.

By inserting "without lawful authority" into the 2009 revision of Section 30-3A-3, the Legislature appears to have both expanded the range of conduct and, when there is evidence on the issue, made proof of acting without lawful authority an element of the offense—not an affirmative defense to be raised by the defendant. An unlawfulness instruction is not required "when there is *no evidence* of lawful behavior, and hence the element omitted from the instructions was not factually in issue[.]" *State v. Peterson*, 1998-NMCA-049, ¶ 10, 125 N.M. 55, 956 P.2d 854 (internal quotation marks and citation omitted) (emphasis added). Similarly, where there is no evidence regarding the scope of the defendant's employment or constitutionally protected activity, there is no requirement to give the bracketed second element.

The individual, enumerated acts constituting the pattern of conduct need not be directed at the victim; it is the overall pattern of conduct which must reasonably affect the victim. *See, e.g.*, *Best v. Marino*, 2017-NMCA-073, ¶¶ 2, 3 n.2, 404 P.3d 450 (affirming district court's determination that the respondent had committed stalking by, in relevant part,

“posting of statements and photographs related to Petitioner on (1) Respondent’s own website; (2) Respondent’s own Facebook and other social media pages; and (3) third-party controlled Facebook and other social media pages”). For example, a defendant stalking his former partner might use a third party to place the victim’s children under surveillance and follow them and later indirectly communicate to the victim by having a different third party send her the following text: “Those are cute twins you have going to Sunshine Elementary. It would be a shame if a car ran over them as they were walking home along Elm Street.”

Because the essential element of a “pattern of conduct” requires two or more of the enumerated acts on more than one occasion, the acts which must be proven may occur on more than one date. The Committee believes that due process and double jeopardy require that the dates encompassing all of the acts constituting the alleged pattern should be presented to the jury.

[Adopted by Supreme Court Order No. 21-8300-010, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-010, effective December 31, 2021, completely rewrote the instruction elements, revised the Use Notes, and added the committee commentary; after the introductory clause, deleted former Elements 1 through 3 and added new Elements 1 through 5; and in the Use Notes, added a new Use Note 2 and redesignated former Use Note 2 as Use Note 3, and deleted former Use Notes 4 and 5, and redesignated former Use Notes 5 through 7 as Use Notes 4 through 6, respectively.

The 1998 amendment, effective for cases filed on or after July 1, 1998, in Subparagraph 1, substituted "would cause a reasonable person to feel frightened, intimidated or threatened" for "posed a credible threat*2* to _____ *(name of victim)*"; in Subparagraph 1(a), inserted "in a place"; in Subparagraph 1(b), substituted "being" for "remaining" and substituted "a" for "_____, other"; renumbered Subparagraph 3 as 2 and added "[or] [to cause a reasonable person to fear for the person's safety or the safety of a household member*5*;]; renumbered Subparagraph 4 as 3; and in the Use Notes, deleted Use Note 2 and renumbered to others accordingly, and added Use Note 5.

Cross references. — For stalking, *see* Section 30-3A-3 NMSA 1978.

14-332. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 14-8300-005, UJI 14-332 NMRA, the instruction given for when the term "household member" was used in UJI

14-331 NMRA, was withdrawn effective December 31, 2014. For provisions of former instruction, *see* the 2014 NMRA on *NMOneSource.com.*

14-333. Aggravated stalking; essential elements.

For you to find the defendant guilty of aggravated stalking [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (name of defendant) committed the crime of stalking;[2]

2. At the time of the offense:

   [_____ (name of defendant) knowingly violated a permanent or temporary order of protection issued by a court (and the victim did not also violate the court order);][3]

   [or]

   [_____ (name of defendant) violated a court order setting conditions of release and bond;]

   [or]

   [_____ (name of defendant) was in possession of a [_____][4]

   [_____ (name of object) with the intent to use it as a weapon and a _____ (name of object), when used as a weapon, is capable of inflicting death or great bodily harm[5]][6];

   [or]

   [the victim was less than sixteen years of age;]

3. This happened in New Mexico [between] [on or about] the _____ day of _____, _____ [and the _____ day of _____, _____].[3]

USE NOTES

1. Insert the count number if more than one is charged.

2. Unless the court has instructed on the essential elements of the crime of stalking, these essential elements must be given immediately after this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Use only applicable alternative.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12(B) NMSA 1978. If the object used is not listed in Section 30-1-12(B) NMSA 1978 as a weapon, the second alternative is given.

5. UJI 14-131 NMRA, the definition of “great bodily harm”, must also be given.

6. Use this alternative only if the “weapon” is not one that is specifically listed in Section 30-1-12(B) NMSA 1978.

[Approved, effective July 1, 1998; as amended, effective Jan. 10, 2002; as amended by Supreme Court Order No. 21-8300-010, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-010, effective December 31, 2021, added new Element 3, and in Use Note 2, added “To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.”

The 2001 amendment, effective January 10, 2002, in Element 2 in the third option, substituted "[_____][4] [_____ *(name of object)* with the intent to use it as a weapon and a _____ *(name of object)*, when used as a weapon, is capable of inflicting death or great bodily harm[5]][6]" for "[deadly weapon]" and added Use Notes 4 through 6.

Cross references. — For aggravated stalking, *see* Section 30-3A-3.1 NMSA 1978.

Possession of "deadly weapon". — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of 30-1-12B NMSA 1978, the jury must be instructed (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

14-334. Violation of a [temporary] order of protection.

For you to find the defendant guilty of violating a [temporary][1] order of protection [as charged in Count ___][2], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. A [temporary][1] order of protection was filed in cause number _____;[3]

2. The [temporary][1] order of protection was valid on the _____ day of _____, _____;

3. The defendant knew about the [temporary][1] order of protection;

4. The defendant knowingly violated the [temporary][1] order of protection by _____[4];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only if applicable.

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

3. This instruction is applicable to "an order of protection that is issued pursuant to the Family Violence Protection Act or entitled to full faith and credit." NMSA 1978, § 40-13-6(D).

4. Insert the manner in which defendant violated the order of protection.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — A violation must be knowing in two ways: a defendant must know (1) of the restraining order and (2) the underlying facts that constitute the violation, such as "the presence of the protected party within the protected zone." *State v. Ramos*, 2013-NMSC-031, ¶¶ 26, 28, 305 P.3d 921. As the instruction notes, "a restrained party has knowledge of the order when he receives personal service of the order of protection." *Id.* ¶ 26. Failure to read the contents of the order is not a defense, as knowledge of the contents will be imputed as a matter of law. *Id.* ¶ 27. Although a knowing violation does not require "that the party must act with a conscious or willful desire to defy the protective order," general intent and knowledge are "separate, not synonymous, elements," and both must be found. *Id.* ¶ 28.

New Mexico courts must enforce tribal protection orders and orders from courts of other states as provided in 18 U.S.C. § 2265 and NMSA 1978, Section 40-13-6(D). Under 18 U.S.C. § 2265, a protection order from another jurisdiction must be given full faith and credit if (1) the issuing court had jurisdiction under the laws of its state or tribe, and (2) the person subject to the order had notice and an opportunity to be heard.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Part D
Shooting at Dwelling or Occupied Building; Shooting at or from Motor Vehicle

14-340. Shooting at inhabited dwelling or occupied building; no death or great bodily harm; essential elements.

For you to find the defendant guilty of shooting at an [inhabited dwelling[1]][2] [occupied building] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm at [a dwelling][2] [an occupied building];

2. The defendant knew that the building was [a dwelling][2] [occupied];

[3. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. If this alternative is given, UJI 14-1631 NMRA, the definition of "dwelling", must be given. When used with this instruction, UJI 14-1631 NMRA should be modified to delete the word "house".

2. Use only applicable alternative or alternatives.

3. Insert the count number if more than one count is charged.

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[14-316 SCRA 1986, adopted, effective March 15, 1995.]

ANNOTATIONS

Cross references. — For shooting at dwelling or occupied building, *see* Section 30-3-8 NMSA 1978.

Compiler's notes. — In 1996, this instruction, formerly compiled as UJI 14-316, was recompiled by the compiler to provide for additional contiguous instructions.

Evidence sufficient. — Where defendant fired two gunshots into a house; the bullets found in the house matched those fired from defendant's handgun; the trajectory of the bullets indicated that the shooter was aiming directly at the house; defendant had expressed hostility towards one of the occupants of the house whom defendant knew was in the house; after defendant fired into the house, defendant aimed the gun downward and shot and killed the victim; the trajectory of the bullets that entered the body of the victim was different from the trajectory of the bullets that entered the house, there was sufficient evidence to support defendant's conviction for shooting at a dwelling. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

Knowledge of occupation is not an element of shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Evidence sufficient to prove conspiracy to commit shooting at a dwelling. — Where defendant's friends asked defendant for a ride from a party; one of the friends suggested that they go "do some shootings"; defendant agreed to the plan and drove to the location of a trailer selected by the friend; the friend exited defendant's vehicle and fired three shots at the trailer; the owner of the trailer had recently moved from the trailer, but kept some possessions in the trailer and parked two vehicles in front of the trailer; and defendant claimed that defendant had no reason to know that the trailer was occupied at the time of the shooting, the evidence was sufficient to prove that defendant had the requisite intent to agree and the intent to commit shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

14-340A. Shooting at dwelling or occupied building; resulting in injury; essential elements.

For you to find the defendant guilty of causing injury by shooting at a [dwelling][1] [occupied building] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm at [a dwelling[3]][1] [an occupied building];

2. The defendant knew that the building was [a dwelling][1] [occupied];

3. The defendant caused injury to _____ (*name of victim*);

[4. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[4]

5. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. Use only applicable alternative or alternatives.

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

3. If this alternative is given, UJI 14-1631 NMRA, the definition of dwelling, must be given. When used with this instruction, UJI 14-1631 NMRA should be modified to delete the word “house.”

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-341. Shooting at dwelling or occupied building; resulting in death or great bodily harm; essential elements.

For you to find the defendant guilty of causing [death] [or] [great bodily harm][1] by shooting at a [dwelling][1] [occupied building] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm at [a dwelling[3]][1] [an occupied building];

2. The defendant knew that the building was [a dwelling][1] [occupied];

3. The defendant caused[4] [the death of][1] [or] [great bodily harm to][5] _____ *(name of victim)*;

[4. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[6]

5. This happened in New Mexico on or about the _____ day of _____, _____.[7]

USE NOTES

1. Use only applicable alternative or alternatives.

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

3. If this alternative is given, UJI 14-1631 NMRA, the definition of dwelling, must be given. When used with this instruction, UJI 14-1631 NMRA should be modified to delete the word "house".

4. If causation is in issue, UJI 14-251 NMRA, the definition of causation, must also be given.

5. If this alternative is given, the definition of "great bodily harm", UJI 14-131 NMRA, must also be given.

6. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

7. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[14-317 SCRA 1986, adopted, effective March 15, 1995.]

ANNOTATIONS

Cross references. — For shooting at dwelling or occupied building, *see* Section 30-3-8 NMSA 1978.

Compiler's notes. — In 1996, this instruction, formerly compiled as UJI 14-317, was recompiled by the compiler to provide for additional contiguous instructions.

14-342. Shooting at or from a motor vehicle; no injury; essential elements.

For you to find the defendant guilty of shooting [at][1] [from] a motor vehicle [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm [at][1] [from] a motor vehicle with reckless disregard[3] for another person;

[2. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[4]

3. This happened in New Mexico on or about the _____ day of _____ , _____ .[5]

USE NOTES

1. Use only applicable alternative or alternatives.

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

3. A definition of "reckless disregard" must be given after this instruction. The definition of "reckless disregard" in UJI 14-1704 NMRA, "negligent arson", should be modified by substituting the term "with reckless disregard" for the word "recklessly".

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted, effective January 1, 1996.]

ANNOTATIONS

Cross references. — For shooting at or from a motor vehicle, *see* Section 30-3-8(B) NMSA 1978.

Compiler's notes. — This instruction was approved as UJI 14-318. It was recompiled in 1996 as UJI 14-342 to provide for additional contiguous instructions.

14-343. Shooting at or from a motor vehicle; injury; essential elements.

For you to find the defendant guilty of shooting [at][1] [from] a motor vehicle [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm [at][1] [from] a motor vehicle with reckless disregard[3] for another person;

2. The defendant caused injury to _____ (*name of victim*);

[3. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. Use only applicable alternative or alternatives.

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

3. A definition of “reckless disregard” must be given after this instruction. The definition of “reckless disregard” in UJI 14-1704 NMRA, “negligent arson”, should be modified by substituting the term “with reckless disregard” for the word “recklessly”.

4. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

5. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted, effective January 1, 1996; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-005, effective December 31, 2014, required that the defendant cause injury to the victim; in Subparagraph 2, added “The defendant caused injury to” and after “(name of victim)”, deleted “was injured by the shooting”.

Cross references. — For shooting at or from a motor vehicle, *see* Section 30-3-8(B) NMSA 1978.

Compiler's notes. — This instruction was approved as UJI 14-319. It was recompiled in 1996 as UJI 14-343 to provide for additional contiguous instructions.

14-344. Shooting at or from motor vehicle; resulting in great bodily harm; essential elements.

For you to find the defendant guilty of shooting [at] [from][1] a motor vehicle resulting in great bodily harm [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant willfully shot a firearm [at][1] [from] a motor vehicle with reckless disregard[3] for another person;

2. The shooting caused great bodily harm[4] to _____ *(name of victim);*

[3. The defendant was not a law enforcement officer engaged in the lawful performance of duty];[5]

4. This happened in New Mexico on or about the _____ day of _____ , _____.[6]

USE NOTES

1. Use only applicable alternative or alternatives.

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

3. A definition of "reckless disregard" must be given after this instruction. The definition of "reckless disregard" in UJI 14-1704 NMRA, "negligent arson", should be modified by substituting the term "with reckless disregard" for the word "recklessly".

4. The definition of "great bodily harm", UJI 14-131 NMRA, must also be given.

5. This element may be given if there is an issue as to whether or not the defendant was a law enforcement officer engaged in the lawful enforcement of duty.

6. UJI 14-141 NMRA, general criminal intent, must be given after this instruction.

[Adopted, effective January 1, 1996.]

ANNOTATIONS

Cross references. — For shooting at or from a motor vehicle, *see* Section 30-3-8(B) NMSA 1978.

Compiler's notes. — This instruction was approved as UJI 14-320. It was recompiled in 1996 as UJI 14-344 to provide for additional contiguous instructions, and because of an existing UJI 14-320.

Shooting at or from a motor vehicle may not serve as the predicate felony for felony murder. — Under the collateral felony rule, the predicate felony must be independent of or collateral to the homicide, and the predicate felony cannot be a lesser-included offense of second-degree murder. Shooting at or from a motor vehicle is an elevated form of aggravated battery, a lesser-included offense of second-degree murder, and thus cannot be used as a predicate for felony murder, so where defendant was convicted of first-degree felony murder, the underlying felony of which was shooting from a motor vehicle, defendant’s felony murder conviction was vacated because the crime of shooting at or from a motor vehicle lacks an independent felonious purpose from that required under second-degree murder. *State v. Marquez*, 2016-NMSC-025.

New rule that shooting at or from a motor vehicle cannot be used as a predicate for felony murder applies retroactively. — In *State v. Marquez*, 2016-NMSC-025, the New Mexico Supreme Court determined that shooting at or from a motor vehicle is an elevated form of aggravated battery and thus cannot be used as a predicate for felony murder; shooting at or from a motor vehicle does not have a felonious purpose independent from the purpose of endangering the physical health of the victim because shooting from a motor vehicle must be accomplished with reckless disregard for the safety of a person. *Marquez* established a new substantive rule that narrowed the

range of punishable conduct that could support a felony murder conviction, and therefore should be given retroactive effect. *Rudolfo v. Steward*, 2023-NMSC-013.

Retroactive application of new substantive rule established in *State v. Marquez*. — Where petitioner was convicted of first-degree murder under a general verdict at a trial in which the jury instructions contained two alternative theories for the jury to use as a basis for the first-degree murder conviction: felony murder predicated on shooting at or from a motor vehicle and willful and deliberate murder, and where, on direct appeal, the New Mexico Supreme Court vacated petitioner's conviction for felony murder, holding that the crime of shooting at or from a motor vehicle may not serve as the predicate felony in support of a felony murder charge, and where, in a petition for habeas corpus, petitioner claimed that the Supreme Court's holding applies retroactively and that his conviction for willful and deliberate murder must also be vacated, the district court erred in denying petitioner's habeas petition, because a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate, and in this case it is impossible to determine whether the general verdict was based on the legally invalid theory of felony murder or on willful and deliberate murder. *Rudolfo v. Steward*, 2023-NMSC-013.

14-351. Assault upon a [school employee] [health care worker]; attempted battery; essential elements.

For you to find the defendant guilty of an assault on a _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[4]

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

3. At the time _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

4. The defendant knew _____ (*name of victim*) was a _____;[1]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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

3. Use ordinary language to describe the touching or application of force.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery, and defined "battery"; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and deleted Element 5 and redesignated former Element 6 as Element 5.

14-352. Assault on a [school employee] [sports official] [health care worker]; threat or menacing conduct; essential elements.

For you to find the defendant guilty of an assault on a _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner[3];

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. At the time, _____ (*name of victim*) was a _____[1] and was performing duties of a _____[1];[4]

5. The defendant knew _____ (*name of victim*) was a _____.[1]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-353. Assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct; essential elements.

For you to find the defendant guilty of an assault on a _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[4]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[4]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

5. The defendant knew _____ (*name of victim*) was a _____;[1]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

5. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery, and defined "battery"; in the first alternative type of assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and deleted Element 3.

14-354. Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a _____[2] by use of a deadly weapon [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

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

3. The defendant used a [_____][6] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[7]];[8]

4. At the time, _____ (*name of victim*) was a _____[2] and was performing the duties of a _____[2];[9]

5. The defendant knew _____ (*name of victim*) was a _____;[2]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-355 NMRA, then UJI 14-356 NMRA should be given instead of this instruction.

2. Insert type of specially protected worker - school employee, sports official, or health care worker.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

7. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

8. This alternative is given only if the object used is not specifically listed in NMSA 1978, Section 30-1-12(B).

9. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with a deadly weapon, defined "battery", and revised the Use Note; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after "Element 1, added the next sentence defining "battery"; added new Elements 2 and 3 and redesignated former Elements 2 and 3 as Elements 4 and 5, respectively; deleted former Elements 4, 5, and 6 and redesignated former Element 7 as Element 6; in the Use Note, deleted Use Note 5, relating to "school employee" and "sports official", and redesignated former Use Notes 6 through 9 as Use Notes 5 through 8, respectively; and added new Use Note 9.

14-355. Aggravated assault on a [school employee] [sports official] [health care worker]; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a _____[2] by use of a deadly weapon [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[4]

3. At the time, _____ (*name of victim*) was a _____[2] and was performing duties of a _____[2];[5]

4. The defendant knew _____ (*name of victim*) was a _____.[2]

5. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

6. The defendant used a [_____][6] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[7]];[8]

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-354 NMRA, then UJI 14-356 NMRA should be given instead of this instruction.

2. Insert type of specially protected worker - school employee, sports official, or health care worker.

3. Insert the count number if more than one count is charged.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA;

5. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

6. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

7. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

8. This alternative is given only if the object used is not specifically listed in NMSA 1978, Section 30-1-12(B).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

"Use" of a deadly weapon in the context of assault with a deadly weapon construed. — A defendant *uses* a deadly weapon to commit assault where a defendant makes *facilitative use* of the deadly weapon. Facilitative use of a deadly weapon may be found if (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used by the defendant to facilitate the commission of the assault. *State v. Zachariah G.*, 2022-NMSC-003, ***aff'g*** 2021-NMCA-036.

Sufficient evidence of assault on a school employee with a deadly weapon. — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish the BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year old shot you?". There was sufficient evidence to satisfy the essential element that the child *used* the deadly weapon where the evidence supported findings that a deadly weapon was present, that the principal knew or had reason to know from the child's words and actions that the child had a BB gun when the child threatened him, and that the presence of the weapon was intentionally used by the child to facilitate the commission of an assault on the principal. Based on the child's verbal threats that took advantage of the presence of the BB gun, it was reasonable for the jury to determine that the child's conduct caused the principal to reasonably believe that he was in danger of receiving an immediate battery, and thus the child *used* the deadly weapon to facilitate the assault. *State v. Zachariah G.*, 2022-NMSC-003, ***aff'g*** 2021-NMCA-036.

Sufficient evidence of aggravated assault with a deadly weapon on a school employee. — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, pursuant to § 30-3-9 NMSA 1978, there was sufficient evidence to support the adjudication where, although the child did not brandish or retrieve a BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the school principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year-old shot you?". A reasonable juror could have determined that the child threatened the principal with the gun and that the BB gun was instrumental to the child's assault because the child's menacing and threatening questions instilled fear in the principal while the gun was bulging from the child's pants and of which the child knew the principal was aware. *State v. Zachariah G.*, 2021-NMCA-036, cert. granted.

14-356. Aggravated assault on a [school employee] [sports official] [health care worker]; attempted battery; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a _____[2] by use of a deadly weapon [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[5]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant used a [_____][6] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[7]];[8]

5. At the time, _____ (*name of victim*) was a _____[2] and was performing the duties of a _____[2];[9]

6. The defendant knew _____ (*name of victim*) was a _____;[2]

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. This instruction combines the elements of UJI 14-354 NMRA and UJI 14-355 NMRA. If the evidence supports both of the theories of assault set forth in UJIs 14-354 and 14-355, use this instruction.

2. Insert type of specially protected worker - school employee, sports official, or health care worker.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

7. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

8. This alternative is given only if the object used is not specifically listed in NMSA 1978, Section 30-1-12(B).

9. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozi*e, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with a deadly weapon, and defined "battery"; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Element 2 and redesignated former Element 3 as Element 2; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[4]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery".

14-358. Aggravated assault on a [school employee] [health care worker]; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] with intent to commit _____[2] [as charged in Count ___[3]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner[5].

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

3. The defendant also intended to commit the crime of _____;[2]

4. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1,6];

5. The defendant knew _____ (*name of victim*) was a _____;[1]

6. This happened in New Mexico on or about the ___ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

2. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

6. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 1, after "school employee", deleted "sports official", and in Use Note 2, deleted "See UJI 14-140 NMRA" and added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, defined "battery", and revised the Use Notes; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Elements 2 through 4 and redesignated former Elements 5 and 6 as Elements 2 and 3; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[4]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; in Element 3, after "The defendant", added "also"; added new Elements 4 and 5 and redesignated former Element 7 as Element 6; and in the Use Notes, deleted Use Note 5, relating to "school employee" and "health care worker", and redesignated former Use Note 6 as Use Note 5, and added new Use Note 6.

14-359. Aggravated assault on a [school employee] [health care worker]; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] with intent to commit _____[2] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of victim*) was a _____[1] and was performing duties of a _____[1];[4]

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[5]

5. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

6. The defendant intended to commit the crime of _____;[2]

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

2. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, see UJIs 14-5181 to 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 1, after "school employee", deleted "sports official", and in Use Note 2, deleted "See UJI 14-140 NMRA" and added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

14-360. Aggravated assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] with intent to commit _____[2] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[5]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____;[2]

5. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[6]

6. The defendant knew _____ (*name of victim*) was a _____;[1]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

2. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

6. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 2, deleted "*See* UJI 14-140 NMRA" and added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, defined "battery", and revised the Use Notes; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Elements 2 through 4 and redesignated former Element 5 as Element 2; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[4]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; in the second alternative type of aggravated assault, deleted Elements 2 and 3 and redesignated former Elements 4, 5, and 6 as Elements 2, 3, and 4, respectively; in Element 2, deleted Use Note reference "6" and added Use Note reference "5"; added new Elements 5 and 6; in the Use Notes, deleted Use Note 5, relating to "school employee" and "health care worker", and redesignated former Use Note 6 as Use Note 5, and added new Use Note 6.

14-361. Assault on a [school employee] [health care worker]; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] with intent to [kill] [or][2] [commit _____][3] [as charged in Count _____],[4] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

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

3. At the time _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[7]

4. The defendant knew _____ (*name of victim*) was a _____;[1]

5. The defendant also intended to [kill] [or][2] [commit _____][3] on _____ (*name of victim*);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

4. Insert the count number if more than one count is charged.

5. Use ordinary language to describe the touching or application of force.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, see UJIs 14-5181 to 14-5184 NMRA.

7. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 3, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery with the intent to kill or commit a violent felony, defined "battery", and revised the Use Notes; after the heading, in the introductory sentence, inserted an opening bracket prior to "kill" and after "kill" added a closing bracket and "[or][2] [commit _____[3]]"; after "[as charged in Count _____]", deleted the Use Note reference "2" and added the Use Note reference "4"; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against", and after "(name of victim) by _____", deleted Use Note reference "3" and added Use Note reference "5"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; in Element 3, after the semicolon, deleted Use Note reference "5" and added Use Note reference "7"; deleted Element 5 and redesignated former Elements 6 and 7 as Elements 5 and 6, respectively; in Element 5, after "The defendant", added "also", inserted an opening bracket prior to "kill" and after "kill" added a closing bracket, and "[or][2] [commit _____[3]] on"; in the Use Notes, added new Use Notes 2 and 3, and redesignated former Use Notes 2 and 3 as Use Notes 4 and 5, respectively, deleted Use Note 4, relating to "school employee" and "health care worker", and redesignated former Use Note 5 as Use Note 6; and added new Use Note 7.

14-362. Assault on a [school employee] [health care worker]; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] with intent to kill [as charged in Count _____[2]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of victim*) was a _____[1] and was performing duties of a _____[14];

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[3]

5. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

6. The defendant intended to kill _____ (*name of victim*);

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as

required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, added a new Use Note 3 and redesignated the succeeding Use Notes accordingly.

14-363. Assault on a [school employee] [health care worker]; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a _____[1] with intent to [kill] [or][2] [commit _____[3]] [as charged in Count ___[4]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[6]

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

OR

1. The defendant _____ (describe unlawful act, threat or menacing conduct);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[6]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to [kill] [or][2] [commit _____[3]] on _____ (*name of victim*);

5. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1,7];

6. The defendant knew _____ (*name of victim*) was a _____;[1]

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee or health care worker.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. Insert the count number if more than one count is charged.

5. Use ordinary language to describe the touching or application of force.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

7. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 3, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2020 amendment, approved by Supreme Court Order No. 20-8300-012, effective December 31, 2020, in the first paragraph, after "commit the crime of", deleted "batter" and added "battery".

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery with the intent to kill or commit a violent felony, defined "battery", and revised the Use Notes; after the heading, in the introductory sentence, after "intent to", inserted an opening bracket prior to "kill" and after "kill" added a closing bracket and "[or][2] [commit _____[3]], after "[as charged in Count ____]", deleted Use Note reference "2" and added Use Note reference "4"; in the first alternative type of assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against", and after "(name of victim) by _____", deleted Use Note reference "3" and added Use Note reference "5"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; deleted Element 4 and 5; in the second alternative type of assault, deleted Elements 2 and 3 and redesignated former Elements 4, 5, and 6 as Elements 2, 3, and 4, respectively; in Element 2, after "angry manner", deleted Use Note reference "4" and added Use Note reference "6"; in Element 4, after "The defendant", added "also", inserted an opening bracket prior to "kill" and after "kill", added a closing bracket and "[or] [commit _____[3]] on"; added new Elements 5 and 6; in the Use Notes, added new Use Notes 2 and 3, and redesignated former Use Notes 2 and 3 as Use Notes 4 and 5, respectively, deleted Use Note 4, relating to "school employee" and "health care worker", and redesignated former Use Note 5 as Use Note 6, and added new Use Note 7.

14-365. Battery upon a [school employee] [sports official] [health care worker]; essential elements.

For you to find the defendant guilty of a battery upon a _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally touched or applied force to _____ (*name of victim*) by _____;[3]

2. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant acted in a rude, insolent or angry manner;[4]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. Use ordinary language to describe the touching or application of force.

4. “School employee” is defined in NMSA 1978, Section 30-3-9(A). “Sports official” is defined in NMSA 1978, Section 30-3-9.1(A). “Health care worker” is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker’s duties, an instruction may need to be drafted.

5. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-366. Aggravated battery on a [school employee] [sports official] [health care worker]; without great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery on a _____[1] without great bodily harm [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ (*name of victim*) by _____;[3]

2. The defendant intended to injure _____ (*name of victim*);[4]

3. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[5]

4. The defendant knew _____ (*name of victim*) was a _____;[1]

[5. _____'s (*name of victim*) injury was not likely to cause death or great bodily harm];[6]

6. The defendant caused _____ (*name of victim*) [painful temporary disfigurement] [or][7] [a temporary loss or impairment of the use of _____ (*name of organ or member of the body*)];

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

5. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

6. Use bracketed phrase if this is an issue. UJI 14-131 NMRA, the definition of "great bodily harm" must be given if this phrase is used.

7. Use only the applicable bracketed element established by the evidence.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-367. Aggravated battery on a [school employee] [sports official] [health care worker] with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery on a _____[1] with a deadly weapon [as charged in Count ____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ (*name of victim*) by _____[3] with a [_____][4] [deadly weapon. A

_____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[5]];[6]

2. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1];[7]

3. The defendant knew _____ (*name of victim*) was a _____;[1]

4. The defendant intended[8] to injure _____ (*name of victim*);

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. Use ordinary language to describe the touching or application of force.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

5. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

6. This alternative is given only if the object used is not specifically listed in NMSA 1978, Section 30-1-12(B).

7. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

8. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-368. Aggravated battery on a [school employee] [sports official] [health care worker]; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery on a _____[1] [as charged in Count ____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ (*name of victim*) by _____[3];

2. At the time, _____ (*name of victim*) was a _____[1] and was performing the duties of a _____[1]; [4]

3. The defendant knew _____ (*name of victim*) was a _____[1].

4. The defendant intended to injure _____ (*name of victim*);[5]

5. The defendant

[caused great bodily harm[6] to _____ (*name of victim*)]

[or][7]

[acted in a way that would likely result in death or great bodily harm5 to _____ (*name of victim*)];

6. This happened in New Mexico on or about the ____ day of _____ , _____.

USE NOTES

1. Insert type of specially protected worker - school employee, sports official, or health care worker.

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

3. Use ordinary language to describe the touching or application of force.

4. "School employee" is defined in NMSA 1978, Section 30-3-9(A). "Sports official" is defined in NMSA 1978, Section 30-3-9.1(A). "Health care worker" is defined in NMSA 1978, Section 30-3-9.2(A). If there is an issue as to whether or not the victim was a specially protected worker, a definition instruction similar to UJI 14-2216 NMRA must be given. If there is an issue as to whether the victim was within the lawful discharge of the worker's duties, an instruction may need to be drafted.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

6. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

7. Use only the applicable bracketed element(s) established by the evidence.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — Though NMSA 1978, Sections 30-3-9, 30-3-9.1 and 30-3-9.2 do not specifically require that the defendant be aware that the victim is a specially protected worker, the New Mexico Court of Appeals held that such knowledge is required for health care workers (Section 30-3-9.2) in *State v. Valino*, 2012-NMCA-105, 287 P.3d 372. This was an extension of the same requirement for peace officers as required by *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119. As the statutes for the other specially protected workers are essentially identical to that for health care workers, the Committee believes it is a natural extension to include the knowledge requirement for all such workers.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-370. "Household member"; defined.

"Household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom the person has or had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member.

"Continuing personal relationship" means a dating or intimate relationship.

USE NOTES

This instruction is given if the term "household member" is used.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — This instruction sets out the definition of household member as contained in NMSA 1978, Section 30-3-11. In 2010, the Legislature amended Section 30-3-11 deleting "or family member, including a relative" and adding "parent," "grandparent," and "grandparent-in-law." In 2008, the Legislature amended Section 30-3-11, by defining a "continuing personal relationship." *See State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295 (holding that the minor child of the accused does not fit within the definition of household member); *but see State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540 (holding that the definition of household member includes adult children of the accused and that there is no requirement of cohabitation or shared residence).

In the double jeopardy context, conviction for crimes with the "household member" element provides for a unique legislative intent from the lesser included offense for non-household members. For example, robbery and battery of a household member convictions, although relying on unitary conduct, do not result in double jeopardy because both offenses are elementally distinct. *See State v. Gutierrez*, 2012-NMCA-095, ¶¶ 12-16, 286 P.3d 608, cert. denied, 2012-NMCERT-008 (No. 30,439 Aug. 13, 2012). The Court of Appeals made clear that "The distinct policy directives and subject matter of robbery and battery against a household member, and their rare occurrence together, persuade us that the legislature intended these crimes to be punished separately, even when they occur as part of the same criminal transaction." Id. ¶ 18.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-371. Assault; attempted battery; "household member"; essential elements.

For you to find the defendant guilty of assault against a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

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

3. _____ (*name of victim*) was a household member of the defendant;[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery, and defined "battery"; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[2]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and deleted Element 3 and redesignated former Elements 4 and 5 as Elements 3 and 4, respectively.

14-372. Assault; threat or menacing conduct; "household member"; essential elements.

For you to find the defendant guilty of assault against a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[2]

2. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[3]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. _____ (*name of victim*) was a household member of the defendant;[4]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-373. Assault; attempted battery; threat or menacing conduct; "household member"; essential elements.[1]

For you to find the defendant guilty of assault against a household member [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

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

OR

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[3]

2. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[4]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. _____ (*name of victim*) was a household member of the defendant;[5]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of two of the types of assault in NMSA 1978, Section 30-3-13.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery, and defined "battery"; in the first alternative type of assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and deleted Element 3.

14-374. Aggravated assault; attempted battery with a deadly weapon; "household member"; essential elements.

For you to find the defendant guilty of aggravated assault against a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[2]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[3]

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

3. The defendant used a [_____][4] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[5]];[6]

4. _____ (*name of victim*) was a household member of the defendant;[7]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the

issue of “lawfulness” involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12B.

5. UJI 14-131 NMRA, the definition of “great bodily harm”, must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12B.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery, and defined “battery”; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”; after Element 1, added the next sentence defining “battery”; in Element 2, after “The defendant”, deleted “acted in a rude, insolent, or angry manner[3]” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; deleted Element 4 and redesignated former Elements 5 and 6 as Elements 4 and 5, respectively.

14-375. Aggravated assault; threat or menacing conduct with a deadly weapon; “household member”; essential elements.

For you to find the defendant guilty of aggravated assault by use of a deadly weapon [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[2]

2. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____’s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[3]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. The defendant used a [_____][4] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[5]];[6]

5. _____ (*name of victim*) was a household member of the defendant;[7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA. Use ordinary language to describe the touching or application of force.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12B.

5. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12B.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-376. Aggravated assault; attempted battery; threat or menacing conduct with a deadly weapon; "household member"; essential elements.[1]

For you to find the defendant guilty of aggravated assault by use of a deadly weapon against a household member [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

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

OR

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[3]

2. The defendant's conduct caused _____ (*name of victim*) to believe that the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[4] and

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant used a [_____][5] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[6]];[7]

5. _____ (*name of victim*) was a household member of the defendant;[8]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of two of the types of aggravated assault against a household member in NMSA 1978, Section 30-3-13.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the

issue of “lawfulness” involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12B.

6. UJI 14-131 NMRA, the definition of “great bodily harm”, must also be given.

7. This alternative is given only if the object used is not a “deadly weapon” which is specifically listed in Section 30-1-12B.

8. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery, and defined “battery”; in the first alternative type of aggravated assault, in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”; after Element 1, added the next sentence defining “battery”; deleted Element 2 and redesignated former Element 3 as Element 2; in Element 2, after “The defendant”, deleted “intended to touch or apply force to _____ (name of victim) by _____[3]” and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”.

14-378. Aggravated assault; attempted battery with intent to commit a felony; “household member”; essential elements.

For you to find the defendant guilty of aggravated assault with intent to commit _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

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

3. The defendant also intended to commit the crime of _____;[1]

4. _____ (*name of victim*) was a household member of the defendant;[5]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

3. Use ordinary language to describe the touching or application of force.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 1, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, and defined "battery"; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Element 2 and redesignated former Elements 3 through 6 as Elements 2 through 5, respectively; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[3]"

and added “began to do an act which constituted a substantial part of the battery but failed to commit the battery”; and in Element 3, after “The defendant”, added “also”.

14-379. Aggravated assault; threat or menacing conduct with intent to commit a felony; “household member”; essential elements.

For you to find the defendant guilty of aggravated assault with intent to commit _____[1] [as charged in Count _____[2]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);[3]

2. The defendant’s conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____’s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[4]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. The defendant intended to commit the crime of _____;[1]

5. _____ (*name of victim*) was a household member of the defendant;[5]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

3. Use ordinary language to describe the touching or application of force.

4. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 1, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

14-380. Aggravated assault; attempted battery; threat or menacing conduct with intent to commit a felony; "household member", essential elements.[1]

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

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

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

OR

1. The defendant intentionally _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent or angry manner;[5]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____;[2]

5. _____ (*name of victim*) was a household member of the defendant;[6]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction combines the essential elements in UJI 14-378 NMRA and UJI 14-379 NMRA.

2. Insert the name of the felony. If there is more than one felony, insert the names of the felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 2, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, and defined "battery"; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Element 2 and redesignated former Element 3 as Element 2; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[4]" and added "began to do an act which constituted a substantial

part of the battery but failed to commit the battery"; and in Element 4, after "The defendant", added "also".

14-381. Assault; attempted battery with intent to commit a violent felony; "household member"; essential elements.

For you to find the defendant guilty of assault with intent to [kill] [or][1] [commit _____][2] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of victim*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent or angry manner.[5]

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

3. The defendant also intended to [kill] [or][1] [commit _____][2] on _____ (*name of victim*);

4. _____ (*name of victim*) was a household member of the defendant;[6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault against a household member with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery, or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second, or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 2, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery with intent to kill or commit a violent felony, and defined "battery"; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Element 2 and redesignated former Elements 3 through 6 as Elements 2 through 5, respectively; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[4]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and in Element 3, after "The defendant", added "also".

14-382. Assault; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements.

For you to find the defendant guilty of assault with intent to [kill] [or][1] [commit _____][2] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[4]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

4. The defendant intended to [kill] _____ (*name of victim*) [or][1] [commit _____[2] on _____ (*name of victim*)];

5. _____ (*name of victim*) was a household member of the defendant;[5]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault against a household member with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery, or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second, or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

3. Insert the count number if more than one count is charged.

4. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

5. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 2, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

14-383. Assault; attempted battery; threat or menacing conduct with intent to commit a violent felony; "household member"; essential elements.[1]

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

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*); _____ (*name of victim*) by _____;[5]

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

OR

1. The defendant _____ (*describe unlawful act, threat, or menacing conduct*);

2. The defendant's conduct caused _____ (*name of victim*) to believe the defendant was about to intrude on _____'s (*name of victim*) bodily integrity or personal safety by touching or applying force to _____ (*name of victim*) in a rude, insolent, or angry manner;[6]

3. A reasonable person in the same circumstances as _____ (*name of victim*) would have had the same belief;

AND

4. The defendant also intended to [kill] [or][2] [commit _____][3] on _____ (*name of victim*);

5. _____ (*name of victim*) was a household member of the defendant;[7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-381 NMRA and UJI 14-382 NMRA, for use when the two forms of the offense are charged in the alternative.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault against a household member with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery, or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second, or third degree, *see* UJIs 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA.

4. Insert the count number if more than one count is charged.

5. Use ordinary language to describe the touching or application of force.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJIs 14-5181 to 14-5184 NMRA.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 3, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

The 2020 amendment, approved by Supreme Court Order No. 20-8300-012, effective December 31, 2020, corrected a typographical error in the numbering of the elements.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of assault by attempted battery with the intent to kill or commit a violent felony; in the first alternative type of assault, deleted Element 2 and redesignated former Element 3 as Element 2, in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of victim) by _____[5]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; and in Element 4, after "The defendant", added "also".

14-390. Battery; "household member" essential elements.

For you to find the defendant guilty of battery against a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally touched or applied force to _____ (*name of victim*) by _____;[2]

2. The defendant acted in a rude, insolent, or angry manner;[3]

3. _____ (*name of victim*) was a household member of the defendant;[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

ANNOTATIONS

Sufficient evidence of battery against a household member. — Where defendant was charged with criminal sexual penetration of a minor and battery against a household member, and where the State relied on testimony elicited from the victim that defendant kicked and pushed her and that defendant is her uncle, there was sufficient evidence to prove beyond a reasonable doubt that defendant intentionally touched or applied force to the victim in a rude, insolent or angry manner and that the victim was a household member. *State v. Garcia*, 2019-NMCA-056, cert. denied.

14-391. Aggravated battery; without great bodily harm; "household member"; essential elements.

For you to find the defendant guilty of aggravated battery without great bodily harm against a household member [as charged in Count _____],[1] the state must prove to

your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ (*name of victim*) by _____;[2]

2. The defendant intended[3] to injure _____ (*name of victim*) [or another];[4]

3. The defendant caused _____ (*name of victim*)

[painful temporary disfigurement]

[OR][5]

[a temporary loss or an impairment of the use of _____ (*name of organ or member of the body*)];

4. _____ (*name of victim*) was a household member of the defendant;[6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

5. Use only the applicable bracketed element established by the evidence.

6. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-392. Aggravated battery; with a deadly weapon; "household member"; essential elements.

For you to find the defendant guilty of aggravated battery with a deadly weapon against a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ (*name of victim*) by _____[2] with a [_____][3] [deadly weapon. The defendant used a _____ (*name of instrument or object*). A _____ (*name of instrument or object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[4]];[5]

2. The defendant intended[6] to injure _____ (*name of victim*) [or another];[7]

3. _____ (*name of victim*) was a household member of the defendant;[8]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12B.

4. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

5. This alternative is given only if the object used is not specifically listed in Section 30-1-12B.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

7. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

8. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-393. Aggravated battery; great bodily harm; "household member"; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm against a household member [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant touched or applied force to _____ (*name of victim*) by _____;[2]

2. The defendant intended[3] to injure _____ (*name of victim*) [or another];[4]

3. The defendant [caused great bodily harm[5] to _____ (*name of victim*)] [or][6] [acted in a way that would likely result in death or great bodily harm[5] to _____ (*name of victim*)];

4. _____ (*name of victim*) was a household member of the defendant;[7]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of "lawfulness" involves self defense or defense of another, *see* UJI 14-5181 NMRA to UJI 14-5184 NMRA.

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

5. The definition of great bodily harm, UJI 14-131 NMRA, must also be given.

6. Use only the applicable bracketed element established by the evidence.

7. Definition of a household member should be given, *see* UJI 14-370 NMRA.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

CHAPTER 4
Kidnapping

14-401. False imprisonment; essential elements.

For you to find the defendant guilty of false imprisonment [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [restrained][2] [confined] _____ *(name of victim)* against [his] [her] will;

2. The defendant knew that [he] [she] had no authority to [restrain][2] [confine] _____ *(name of victim)*;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable alternative or alternatives.

[As amended, effective September 1, 1994.]

Committee commentary. — *See* Section 30-4-3 NMSA 1978. This instruction sets forth the essential elements of false imprisonment. False imprisonment is distinguished from kidnapping in that it requires confinement or restraint against the will with knowledge of lack of authority, but it does not require an intent to hold for ransom, as a hostage or to service. *State v. Clark*, 80 N.M. 340, 455 P.2d 844 (1969). If kidnapping by holding to service is charged, false imprisonment is a necessarily included offense. *State v. Armijo*, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

ANNOTATIONS

The 1994 amendment, effective September 1, 1994, made gender neutral changes in Item 1 and 2 in the instruction.

Cross references. — For false imprisonment, *see* Section 30-4-3 NMSA 1978.

14-402. Criminal use of ransom; essential elements.

For you to find the defendant guilty of criminal use of ransom [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [received][2] [possessed] [concealed] [disposed of] [money][2] [_____ *(describe property)* which had been delivered for ransom.[3]

2. At the time the defendant [received][2] [possessed] [concealed] [disposed of] the [money][2] [_____ *(describe property)* [he] [she] knew or believed that it was ransom.

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable alternative or alternatives.

3. The definition of "ransom," UJI 14-406 NMRA, must be given after this instruction.

[As amended, effective September 1, 1994.]

Committee commentary. — *See* Section 30-4-2 NMSA 1978. This instruction sets forth the elements of the offense of criminal use of ransom. The statute requires that the money or property has been delivered for ransom and does not include transfers of money or property prior to delivery to the kidnapper or his agent. While a thief cannot be guilty of receiving (by acquiring) stolen property, *see* UJI 14-1650 NMRA, a kidnapper may be guilty of criminal use of ransom.

ANNOTATIONS

The 1994 amendment, effective September 1, 1994, made gender neutral changes in Item 2 in the instruction.

Cross references. — For criminal use of ransom, *see* Section 30-4-2 NMSA 1978.

14-403. Kidnapping; first degree; essential elements.

For you to find the defendant guilty of [first degree][1] kidnapping [as charged in Count _____[2]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [took][3] [or] [restrained] [or] [confined] [or] [transported] _____ (*name of victim*) by [force][3] [or] [intimidation] [or] [deception] [by _____ (*describe conduct*)];[4]

[2. The defendant's act was unlawful];[5]

3. The defendant intended:

[to hold _____ (*name of victim*) for ransom[6]][3]

[OR]

[to hold _____ (*name of victim*) as a [hostage][3] [or] [shield] against _____ 's (*name of victim*) will

[OR]

[to inflict [death][3] [or] [physical injury] [or] [a sexual offense] on _____ (*name of victim*)]

[OR]

[to [make _____ (*name of victim*) _____ (*name specific act*)][3] [or] [keep _____ (*name of victim*) from _____ (*name specific act*)][3] against _____'s (*name of victim*) will, for the purpose of _____ (*identify benefit to defendant*)];[7]

4. The [taking][3] [or] [restraint] [or] [confinement] [or] [transportation] of _____ (*name of victim*) was not slight, inconsequential, or merely incidental to the commission of another crime (*or name of offense*)];[8]

5. [The defendant did not voluntarily free _____ (*name of victim*) in a safe place];[3]

[OR]

[The defendant inflicted physical injury upon _____ (*name of victim*) during the course of the kidnapping];

[OR]

[The defendant inflicted a sexual offense upon _____ (*name of victim*) during the course of the kidnapping];

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Only identify the degree if second-degree kidnapping is being instructed as a lesser-included offense. UJI 14-6002 NMRA [withdrawn], "Necessarily included offense," along with UJI 14-403A NMRA, "Kidnapping second degree," should be given.

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

3. Use applicable alternative or alternatives.

4. If a secondary offense is also charged that was committed during the course of the kidnapping, use ordinary language to describe the taking, restraint, or confinement by force, intimidation, or deception. A description of precisely what conduct constituted this actus reus assists reviewing courts to distinguish crimes committed near in time. *See State v. Montoya*, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820 (finding double jeopardy violation because "[w]e are unable to determine from the record whether the jury found that the kidnaping [sic] was accomplished by the truck's confinement of Victim's vehicle or by Defendant's restraint of Victim inside the vehicle. The jury instruction supported either theory of kidnaping [sic]."); *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238 ("We conclude … that the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime.").

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is instructed, UJI 14-132 NMRA, "Unlawfulness as an element," must be given after this instruction.

6. The definition of "ransom," UJI 14-406 NMRA, should be given after this instruction.

7. Holding to service requires that the kidnapping's purpose be to make the victim perform some act or forgo performing an act, to the effect of conferring an independent assistance or benefit to the perpetrator of the crime, or another. *See* Committee commentary.

8. Use the bracketed element if the evidence raises a genuine issue of incidental conduct, whether or not a secondary offense is simultaneously charged. *See Trujillo*, 2012-NMCA-112; *see also* Committee commentary. If a particular crime is identifiable, the name of the offense may be used, and unless the court has instructed on the essential elements of that offense, these elements must be given in a separate

instruction immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended, effective September 1, 1994; August 1, 1997; as amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* NMSA 1978, § 30-4-1. This instruction is for the crime of first-degree felony kidnapping. Previously, first and second-degree kidnapping relied on a single elements instruction, and the differentiating elements were instructed only through special interrogatories, leaving the court to determine the appropriate offense degree. Because this approach may lead to confusion in differentiating first and second-degree kidnapping, separate instructions were created for first and second-degree kidnapping that incorporate the distinguishing findings as essential elements. *See, e.g., State v. Dominguez*, 2014-NMCA-064, ¶¶ 13-19, 327 P.3d 1092 (noting that only second-degree kidnapping could be imposed if the interrogatories were not given, but relying on the jury's guilty verdict for separately charged sex offense to satisfy the finding that a sex offense was inflicted during the kidnapping) (citing *State v. Gallegos*, 2009-NMSC-017, ¶ 13, 146 N.M. 88, 206 P.3d 993).

In clarifying New Mexico's rejection of "incidental restraint" as a basis for kidnapping, the Court of Appeals evaluated and functionally applied various tests from other jurisdictions. *See State v. Trujillo*, 2012-NMCA-112, ¶¶ 31-39, 289 P.3d 238, *cert. quashed* 2015-NMCERT-003. Without adopting one specific test, the Court found the various tests informative and applied them to the facts in turn in order to evaluate whether the restraint in *Trujillo* was incidental to the crime of battery. *Id*. The Court applied a totality of the circumstances test including the following factors:

1. whether the conduct is necessary to the commission of another crime;

2. whether the conduct carried some significance independent of another crime in that it could make that crime substantially easier to commit or substantially lessen the risk of detection;

3. whether the conduct substantially increased the risk of harm to the victim, or was particularly terrifying or dangerous;

4. whether the defendant took, restrained, confined, or transported the victim for a longer period of time or to a greater degree than that which is necessary to commit another crime;

5. whether the defendant acted with a purpose or intent beyond the commission of another crime.

Id.; *see also State v. Tapia*, 2015-NMCA-048, ¶¶ 28-36, 347 P.3d 738 (applying *Trujillo* factors to reverse kidnapping convictions).

Element 5 provides the findings differentiating second and first-degree kidnapping. If more than one alternative for Element 5 is given, the jury need only find Element 5 satisfied and unanimity as to theory is not required to uphold the verdict. *Cf. State v. Salazar*, 1997-NMSC-044, ¶¶ 32-42, 123 N.M. 778, 945 P.2d 996 (affirming general verdict for first-degree murder without requiring unanimity as to theory of deliberate intent or depraved mind); Rule 5-611 NMRA.

In addition to the lesser-included offense of second-degree kidnapping, false imprisonment may be a lesser-included offense of kidnapping. *See State v. Fish*, 1985-NMCA-036, ¶ 17, 102 N.M. 775, 701 P.2d 374 (holding that a failure to instruct on false imprisonment as a necessarily included lesser offense of kidnapping required reversal, where there was some evidence that the defendant lacked the intent necessary for kidnapping); *State v. McGuire*, 1990-NMSC-067, ¶ 29, 110 N.M. 304, 795 P.2d 996 (noting with approval that trial court gave "an instruction on false imprisonment as a lesser included offense of kidnapping").

While false imprisonment requires subjective knowledge that the restraint is unauthorized, kidnapping requires a specific intent to do a further act, thereby distinguishing the crime of kidnapping from the crime of false imprisonment. *See* NMSA 1978, § 30-4-4; *State v. Sotelo*, 2013-NMCA-028, ¶ 12, 296 P.3d 1232; *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844. Subsequent Court of Appeals cases have reaffirmed the "intent" distinction making false imprisonment a lesser included offense of kidnapping. *See, e.g., Fish*, 1985-NMCA-036 (holding that a failure to instruct on false imprisonment as a necessarily included lesser offense of kidnapping required reversal, where there was some evidence that the defendant lacked the intent necessary for kidnapping); *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152 (both offenses require confining or restraining, and the difference is whether the defendant had the specific intent to hold for service against the victim's will).

Previous versions of the instruction did not include the optional "unlawfulness" element, despite Section 30-4-1 requiring that "taking, restraining, transporting or confining" be done unlawfully. Recognizing that parents have a natural and legal right to the custody of their children, in the context of custodial interference, *see* NMSA 1978, Section 30-4-4, *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134, held the mere fact that a parent had taken his infant daughter to Texas with intent to keeping her there for a protracted period was insufficient to show that he knew that he had no legal right to do so. If unlawfulness is at issue for kidnapping purposes, Use Note 4 requires its instruction and definition.

In *State v. Vernon*, 1993-NMSC-070, 116 N.M. 737, 867 P.2d 407, the Supreme Court held "that the 'hold to service' element of kidnapping requires that the victim be held against his or her will to perform some act, or to forego performance of some act, for the benefit of someone or something." *Vernon* further clarified that when a victim is moved

to facilitate a murder, “no ‘service’ is performed by the victim ... because the victim does not confer any independent assistance or benefit to the perpetrator of the crime.” *Id*. That conduct is nevertheless covered by the alternative intent theory of kidnapping “with intent[] ... to inflict death.” *See* § 30-4-1(A)(4); *State v. Baca*, 1995-NMSC-045, 120 N.M. 383, 902 P.2d 65 (recognizing that the 1995 amendment to Section 30-4-1 added alternative of specific intent “to inflict death.”).

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases filed or pending on or after December 31, 2015.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-6002 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 8, added “To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.”

The 2015 amendment, approved by Supreme Court Order No. 15-8300-004, effective December 31, 2015, substantially rewrote the instruction to create separate instructions for first-degree kidnapping and second-degree kidnapping (UJI 14-403A NMRA) and to clarify language to reflect New Mexico precedent, which is explained in the revisions to the Use Note and the committee commentary.

The 1997 amendment, effective August 1, 1997, deleted "no great bodily harm" following "kidnapping" in the instruction heading, inserted "[transported]" and "[intimidation] [or]" in Paragraphs 1, rewrote Paragraph 2, added Use Note 1 and redesignated the following Use Notes accordingly, and deleted former Use Note 4 relating to giving UJI 14-405 defining "hold for service".

The 1994 amendment, effective September 1, 1994, made gender neutral changes in two places in Item 2 in the instruction and substituted "this alternative is given" for "sexual molestation is in issue" in Use Note 4.

Cross references. — For kidnapping, *see* Section 30-4-1 NMSA 1978.

Proof in kidnapping by deception. — Proof of the victim's state of mind is not essential to prove kidnapping by deception. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267.

Refusal to give a requested instruction defining "hostage" is no error, because "hostage" is not a technical term; the jurors can properly apply the common meaning of "hostage" and the application of the common meaning did not prejudice the defendant. *State v. Carnes*, 1981-NMCA-126, 97 N.M. 76, 636 P.2d 895.

Evidence that defendant used his truck to block the victim from leaving defendant's property; that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim; and, that defendant was angry and immediately became involved in the beating of the victim when the other defendants arrived, permitted the jury to conclude that the defendant held the victim so that the victim could be physically beaten. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

Omission of the incidental restraint limitation in the kidnapping instruction was not error. — Where defendant was tried before a jury on charges of criminal sexual penetration in the first degree, kidnapping in the first degree, armed robbery, aggravated burglary and criminal sexual contact, and where defendant claimed that it was fundamental error not to include the incidental restraint limitation to kidnapping in the essential elements instruction on kidnapping, the jury was properly instructed because a finding on whether the restraint of the victim resulting in the kidnapping was slight, inconsequential, or merely incidental to the commission of another crime was not required in this case where any restraint incidental to the sexual assaults was separate and distinct from the restraint that defendant used to complete the kidnapping. *State v. Sena*, 2020-NMSC-011, *rev'g in part* 2018-NMCA-037, 419 P.3d 1240.

Sufficient evidence of kidnapping by intimidation. — Where defendant was convicted of kidnapping, and where defendant claimed that the state failed to present sufficient evidence of kidnapping because there was no proof that he restrained the victim with the intent to inflict a sexual offense because the primary evidence of kidnapping occurred after the sexual offense, evidence that, prior to the sexual offense, defendant threatened the victim with a knife, ordered her to take off her pajamas, allowed her to travel from the bedroom to the restroom only, followed her to the restroom and masturbated while she used the restroom, and ultimately ordered her to return to the bedroom where the sexual assault occurred, was sufficient for a jury to reasonably conclude that defendant restricted or confined the victim using intimidation when he threatened her life using a knife, and the jury could then infer from defendant's actions that he restrained her while intending to inflict a sexual offense on her. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

Failure to instruct on incidental restraint resulted in fundamental error. — Where defendant was convicted of criminal sexual penetration, kidnapping, armed robbery, aggravated burglary, and criminal sexual contact, and where defendant claimed that the district court's kidnapping instruction was erroneous because it omitted an essential element of the crime when it failed to instruct the jury that any restraint of the victim must have been more than incidental, the erroneous instruction resulted in fundamental error, because kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other felonies and the omission of incidental restraint from the jury instructions could have resulted in the jury convicting defendant based upon a deficient understanding of the legal meaning of restraint as an essential element of kidnapping. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

Insufficient evidence of kidnapping where conduct was incidental to killing. — In defendant's trial for murder and kidnapping, there was insufficient evidence to support defendant's conviction for kidnapping where the evidence showed that the victim was assaulted in a parking lot, dragged to the edge of the lot behind a trash can where the victim was struck again at least once and where she was later found. In this case, any restraint occurred during the commission of one continuous attack that ended in murder, and the legislature did not intend to punish as kidnapping conduct that is merely incidental to another crime. *State v. Thomas*, 2016-NMSC-024.

Failure to give UJI 14-6018 [withdrawn] NMRA. — Where defendant entered the victim's house; defendant pulled a gun, put the gun to the victim's head, and told the victim that defendant planned to rape the victim; defendant threatened to kill the victim's child if the victim did not comply; defendant raped the victim; a jury convicted defendant of kidnapping in the first degree and second-degree criminal sexual penetration; the district court gave the jury UJI 14-403 NMRA, the kidnapping jury instruction, but did not give the jury UJI 14-6018 [withdrawn], the special verdict form asking the jury to find whether defendant committed a sexual offense against the victim; and the district court modified defendant's conviction for first degree kidnapping to second degree kidnapping because the jury did not find, pursuant to the special verdict form, that defendant committed a sexual offense against the victim, the district court erred in modifying defendant's conviction for first degree kidnapping because the jury independently found that defendant had committed a sexual offense against the victim. *State v. Dominguez*, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

Failure to provide use instructions for special verdict forms. — Where defendant's spouse had a series of affairs with the victim; defendant entered the estranged spouse's apartment, confronted the victim with a gun, bound the victim with duct tape, and after defendant and the victim had a conversation, defendant cut the duct tape from the victim and drove the victim to defendant's motel where defendant killed the victim; defendant subsequently kidnapped the spouse; defendant was charged with first degree kidnapping; because defendant claimed that defendant voluntarily released the victim in a safe place without inflicting physical harm, the trial court provided the jury with special verdict forms asking Questions 1 and 2 according to UJI 14-6018 NMRA [withdrawn]; the trial court inadvertently failed to provide the use instructions that precede the special verdict questions; at trial, defendant did not object to the failure to provide the instructions; the prosecutor discussed the special verdict forms in closing argument and explained that the jury would decide whether defendant voluntarily freed the victim; the questions on the special verdict forms were self-explanatory; and the jury understood the forms well enough to distinguish between the kidnapping of the victim and the spouse because the jury found that defendant had not voluntarily freed the victim but had voluntarily freed the spouse; the failure to provide the jury with the use instructions did not constitute fundamental error. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-002.

14-403A. Kidnapping; second degree; essential elements.

For you to find the defendant guilty of [second degree][1] kidnapping [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [took][3] [or] [restrained] [or] [confined] [or] [transported] _____ (*name of victim*) by [force][3] [or] [intimidation] [or] [deception] [by _____ (*describe conduct*)];[4]

[2. The defendant's act was unlawful];[5]

3. The defendant intended:

[to hold _____ (*name of victim*) for ransom[6]][3]

[OR]

[to hold _____(*name of victim*) as a [hostage][3] [or] [shield] against _____ 's (*name of victim*) will]

[OR]

[to inflict [death][3] [or] [physical injury] [or] [a sexual offense] on _____ (*name of victim*)]

[OR]

[to [make _____ (*name of victim*) _____ (*name specific act*)][3] [or] [keep _____ (*name of victim*) from _____ (*name specific act*)] against _____ 's (*name of victim*) will for the purpose of _____ (*identify benefit to defendant*)];[7]

[4. The [taking][3] [or] [restraint] [or] [confinement] [or] [transportation] of _____ (*name of victim*) was not slight, inconsequential, or merely incidental to the commission of another crime (*or name of offense*)];[8]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Only identify the degree if second-degree kidnapping is being instructed as a lesser-included offense of first-degree kidnapping. UJI 14-6002 NMRA, "Necessarily included offense," along with UJI 14-403 NMRA, "Kidnapping, first degree," should be given.

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

3. Use applicable alternative or alternatives.

4. If a secondary offense is also charged that was committed during the course of the kidnapping, use ordinary language to describe the taking, restraint, or confinement by force, intimidation, or deception. A description of precisely what conduct constituted this actus reus assists reviewing courts to distinguish crimes committed near in time. *See State v. Montoya*, 2011-NMCA-074, 150 N.M. 415, 259 P.3d 820 (finding double jeopardy violation because "[w]e are unable to determine from the record whether the jury found that the kidnaping [sic] was accomplished by the truck's confinement of Victim's vehicle or by Defendant's restraint of Victim inside the vehicle. The jury instruction supported either theory of kidnaping [sic]."); *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238 ("We conclude . . . that the Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime.").

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is instructed, UJI 14-132 NMRA, "Unlawfulness as an element," must be given after this instruction.

6. The definition of "ransom," UJI 14-406 NMRA, should be given after this instruction.

7. Holding to service requires that the kidnapping's purpose be to make the victim perform some act or forgo performing an act, to the effect of conferring an independent assistance or benefit to the perpetrator of the crime, or another.

8. Use the bracketed element if the evidence raises a genuine issue of incidental conduct, whether or not a secondary offense is simultaneously charged. *See Trujillo*, 2012-NMCA-112; *see also* Committee commentary to UJI 14-403 NMRA. If a particular crime is identifiable, the name of the offense may be used, and unless the court has instructed on the essential elements of that offense, these elements must be given in a separate instruction immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* Committee commentary to UJI 14-403 NMRA.

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-6002 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 8, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

14-404. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated June 17, 1997, this instruction, relating to the essential elements of kidnapping resulting in great bodily harm, was withdrawn effective for cases filed in the district courts on or after August 1, 1997.

14-405. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated June 17, 1997, this instruction, defining hold for service, was withdrawn effective for cases filed in the district courts on or after August 1, 1997.

14-406. Ransom; definition.

Ransom is [money][1] [property] [things of value] which has been paid or demanded for the return of a kidnapped person.

USE NOTES

1. Use applicable alternative or alternatives.

CHAPTER 5
(Reserved)

CHAPTER 6
Crimes Against Children and Dependents

14-601. Contributing to delinquency of minor; essential elements.

For you to find the defendant guilty of contributing to the delinquency of a minor [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____;[2]

2. This [caused][3] [encouraged] _____ *(name of child)* to:[3]

   [commit the offense of _____[4]][3]

[OR]

   [refuse to obey the reasonable and lawful commands or directions of (his)[3] (her) (parent)[3] (parents) (guardian) (custodian) (teacher) (a person who had lawful authority over _____ *(name of child)*)][3]

[OR]

   [conduct (himself)[3] (herself) in a manner injurious to (his)[3] (her) (the) (morals)[3] (health) (welfare) (of _____ *(name of child)*[5])];[3]

3. _____ *(name of child)* was under the age of 18;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Describe act or omission of the defendant.

3. Use only the applicable alternative or alternatives.

4. Identify the offense and give the essential elements. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

5. Name of other person whose morals, health or welfare were injured or endangered by the delinquent child as a result of the defendant's acts or omissions.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — In *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949), the supreme court of New Mexico held that the offense of contributing to the delinquency of a minor (Laws 1943, Chapter 36, Section 1) was not unconstitutionally

vague, as a juvenile delinquent was defined by Laws 1943, Chapter 40, Section 1 for purposes of juvenile court jurisdiction. *State v. McKinley* was followed in *State v. Leyba*, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969) and *State v. Favela*, 91 N.M. 476, 576 P.2d 282 (1978).

In *State v. Leyba*, the court of appeals looked to Laws 1955, Chapter 205, Section 8 for the definition of juvenile delinquent for purposes of juvenile court jurisdiction. In *State v. Favela*, supra, the New Mexico Supreme Court held that "although the Children's Code in 1972 narrowed the definition of a delinquent act committed by a child that definition did not extend, amend, change or become incorporated into Section 40A-6-3, supra (Section 30-6-3 NMSA 1978)."

It is assumed that the legislature in enacting the Criminal Code in 1963 intended that the definition of juvenile delinquent for purposes of juvenile court jurisdiction be used in interpreting Section 30-6-3 NMSA 1978. Laws 1955, Chapter 205, Section 8(a) granted jurisdiction to the juvenile court over juveniles as follows:

Section 8. The juvenile court shall have exclusive original jurisdiction in proceedings:

a. concerning any juvenile under the age of eighteen years living or found within the county:

(1) who has violated any law of the state, or any ordinance or regulation of a political subdivision thereof;

(2) or, who by reason of habitually refusing to obey the reasonable and lawful commands or directions of his or her parent, parents, guardian, custodian, teacher or any person of lawful authority, is deemed to be habitually uncontrolled, habitually disobedient or habitually wayward;

(3) or, who is habitually truant from school or home;

(4) or, who habitually deports himself as to injure or endanger the morals, health or welfare of himself or others.

Intent is not an element of the crime of contributing to the delinquency of a minor. *State v. Gunter*, 87 N.M. 71, 529 P.2d 297 (Ct. App.), cert. denied, 87 N.M. 48, 529 P.2d 274 (1974), cert. denied, 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975). Therefore, UJI 14-141 need not be given.

For an adult to be guilty of the criminal offense of contributing to the delinquency of a minor, it is not necessary for the juvenile to be a delinquent. It is only necessary that the actions of the defendant cause or tend to cause or encourage the delinquency of the juvenile. *See* Section 30-6-3 NMSA 1978. Mere presence of the defendant at the time a juvenile is engaged in a delinquent act is insufficient. *State v. Grove*, 82 N.M. 679, 486 P.2d 615 (Ct. App. 1971). But *see People v. Miller*, 145 Cal. App. 2d 473, 302 P.2d 603

(1956) (presence of minor during fornication held sufficient to sustain conviction; child need not be a participant).

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 4, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

Cross references. — For contributing to delinquency of a minor, *see* Section 30-6-3 NMSA 1978.

For the Children's Code, *see* Section 32A-1-1 NMSA 1978 et seq.

For the Criminal Code, *see* Section 30-1-1 NMSA 1978 et seq.

Compiler's notes. — Laws 1943, ch. 36, § 1, referred to in the first sentence in the first paragraph of the committee commentary, was compiled as 13-8-18, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1.

Laws 1943, ch. 40, § 1, referred to in the first sentence in the first paragraph of the committee commentary, was compiled as 13-8-9, 1953 Comp., before being repealed by Laws 1955, ch. 505, § 57.

Laws 1955, ch. 205, § 8, referred to in the second and third paragraphs of the committee commentary, was compiled as 13-8-26, 1953 Comp., before being repealed by Laws 1972, ch. 97, § 71.

Time as essential element. — Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

Knowledge as essential element. — In order to convict defendant of contributing to the delinquency of a minor for causing or encouraging the minor to refuse to obey the reasonable and lawful command or direction of the minor's parent, parents, guardian, custodian, or person who has lawful authority over the minor, the state must prove that defendant knew or by the exercise of reasonable care should have known of such command or direction. *State v. Romero*, 2000-NMCA-029, 128 N.M. 806, 999 P.2d 1038.

Instruction sufficient. — In this case the jury was instructed to find the defendant guilty of contributing to the delinquency of a minor if his acts encouraged each of the girls in question to conduct herself in a manner injurious to her morals, health or welfare. The language of the instruction substantially followed the statute and used

language equivalent to the meaning of "delinquent" as that term is used in the statute. *State v. Henderson*, 1993-NMSC-068, 116 N.M. 537, 865 P.2d 1181, *overruled in part on other grounds*, *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

Sufficient evidence of contributing to the delinquency of a minor. — Where defendant was charged with criminal sexual penetration of a minor and contributing to the delinquency of a minor, and where the State relied on testimony elicited from the victim that defendant pinned her to the floor, with her arms above her head and her legs under his, while defendant's son sat on the victim's chest and sexually assaulted her by putting his penis in her mouth, and that defendant's son was approximately fourteen years old, there was sufficient evidence to prove beyond a reasonable doubt that defendant caused or encouraged his son to engage in fellatio with the victim, and that doing so caused or encouraged the delinquency of defendant's son. *State v. Garcia*, 2019-NMCA-056, cert. denied.

14-602. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 15-8300-001, UJI 14-602 NMRA, relating to essential elements of child abuse, intentional act or negligently "caused", great bodily harm, was withdrawn effective for all cases filed or pending on or after April 3, 2015. For provisions of former instruction, *see* the 2015 NMRA on *NMOneSource.com.*

14-603. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 15-8300-001, UJI 14-603 NMRA, relating to essential elements of child abuse, negligently "permitting" child abuse, with or without great bodily harm, was withdrawn effective for all cases filed or pending on or after April 3, 2015. For provisions of former instruction, *see* the 2015 NMRA on *NMOneSource.com*.

14-604. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 15-8300-001, UJI 14-604 NMRA, relating to essential elements of child abuse, intentionally or negligently "caused", without great bodily harm or death, was withdrawn effective for all cases filed or pending on or after April 3, 2015. For provisions of former instruction, *see* the 2015 NMRA on *NMOneSource.com*.

14-605. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 15-8300-001, UJI 14-605 NMRA, relating to essential elements of child abuse, negligently "permitting" child abuse, without great bodily harm, was withdrawn effective for all cases filed or pending on or after April 3, 2015. For provisions of former instruction, *see* the 2015 NMRA on *NMOneSource.com*.

14-606. Abandonment of a child resulting in great bodily harm or death.

For you to find _____ (*name of defendant*) guilty of abandonment of a child resulting in great bodily harm, [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) was a [parent][2] [guardian] [or] [custodian] of _____ (*name of child*);

2. _____ (*name of defendant*) intentionally[3] [left][2] [or] [abandoned] _____ (*name of child*);

3. As a result of _____ (*name of defendant*) [leaving][2] [or] [abandoning] _____ (*name of child*), _____ (*name of child*) was without proper parental care and control necessary to prevent harm to _____ (*name of child*);

4. At the time that _____ (*name of defendant*) [left][2] [or] [abandoned] _____ (*name of child*), the circumstances exposed _____ (*name of child*) to a risk of harm;

[5. _____ (*name of defendant*) had the ability to provide proper parental care and control necessary for _____'s (*name of child*) well-being];[4]

6. _____'s (*name of defendant*) failure to provide proper parental care and control necessary for _____'s (*name of child*) well-being resulted in [the death of][2] [great bodily harm to[5]] _____ (*name of child*);

7. _____ (*name of child*) was under the age of eighteen (18);

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

USE NOTES

1. Insert the count number if more than one count is charged. If the jury is to be instructed on first-degree murder for the same offense, UJI 14-250 NMRA [withdrawn] must also be given.

2. Use only applicable alternative or alternatives.

3. The definition of "intentionally," UJI 14-626 NMRA, must also be given immediately after this instruction.

4. Use the bracketed element if the defendant's ability to provide the proper parental care and control necessary for the child's well-being is at issue.

5. If this alternative is given, the definition of "great bodily harm," UJI 14-131 NMRA, must also be given.

[Approved, effective October 1, 1993; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-6-1(B) (2009).

The 2018 amendments to this instruction modify the essential elements of abandonment of a child resulting in great bodily harm in light of the ruling in *State v. Stephenson*, 2017-NMSC-002, 389 P.3d 272. In *Stephenson*, the Supreme Court held that NMSA 1978, § 30-6-1(B) (2009), criminalizes the intentional leaving or abandoning of a child, but only under circumstances where, at the time the parent, guardian, or custodial adult left the child, the child was exposed to a risk of harm. *Stephenson*, 2017-NMSC-002, ¶ 16. In *Stephenson*, the Supreme Court reversed the defendant's conviction for abandonment of her child, finding that the evidence adduced at trial was insufficient to show that, at the time the defendant locked her son in his room at bedtime, he was exposed to harm. The committee added Paragraph 4 to this instruction to reflect the Supreme Court's conclusion that "the Legislature did not intend to criminalize conduct creating 'a mere possibility, however remote, that harm may result' to a child." *Id*. ¶ 28 (quoting *State v. Graham*, 2005-NMSC-004, ¶ 9, 137 N.M. 197, 109 P.3d 285).

The Supreme Court in *Stephenson* also held that there are two possible legal theories under Section 30-6-1(B). *Stephenson*, 2017-NMSC-002, ¶ 14. The state may prove either that the defendant "abandoned" the child or that the defendant "left" the child. *Id*. This is consistent with the Court's ruling that "abandonment" and "leaving" are legally distinct from one another. *Id*. ¶¶ 14, 16 ("We conclude that a principled distinction exists between 'leaving' and 'abandoning,' and therefore, to avoid rendering either word

superfluous, each word must be construed consistent with the Legislature's intent, which was to create independent theories of criminal culpability for both 'leaving' and 'abandoning.'").

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-250 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, modified the essential elements of abandonment of a child resulting in great bodily harm, revised the Use Notes, and added the committee commentary; in Element 1, after "[parent]", added Use Note reference "2", and after "[custodian]", deleted "Use Note reference "2"; in Element 3, after "control necessary", deleted "for" and added "to prevent harm to", and after "(name of child)", deleted "well being"; added Element 4 and redesignated former Elements 4 through 7 as Elements 5 through 8, respectively; in Element 5, after "well-being]", added Use Note reference "4"; in Element 6, after "[in the death of]", added Use Note reference "2", and after "[great bodily harm]", deleted Use Note references "4" and "2" and added Use Note reference "5"; in Element 7, after "age of", added "eighteen"; in Use Note 2, after "applicable", added "alternative or", in Use Note 3, after "UJI", changed "14-610" to "14-626"; and added Use Note 4 and redesignated former Use Note 4 as Use Note 5.

Cross references. — For abandonment of a child, *see* Section 30-6-1 NMSA 1978.

14-607. Abandonment of a child without great bodily harm or death.

For you to find _____ (*name of defendant*) guilty of abandonment of a child which did not result in death or great bodily harm, [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) was a [parent][2] [guardian] [or] [custodian] of _____ (*name of child*);

2. _____ (*name of defendant*) intentionally[3] [left][2] [or] [abandoned] _____ (*name of child*);

3. As a result of _____ (*name of defendant*) [leaving][2] [or] [abandoning] _____ (*name of child*), _____ (*name of child*) was without proper parental care

and control necessary to prevent harm to _____ (*name of child*);

4. At the time that _____ (*name of defendant*) [left][2] [or] [abandoned] _____ (*name of child*), the circumstances exposed _____ (*name of child*) to a risk of harm;

[5. _____ (*name of defendant*) had the ability to provide proper parental care and control necessary for _____'s (*name of child*) well-being];[4]

6. _____ (*name of child*) was under the age of eighteen (18);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged. If the jury is to be instructed on first-degree murder for the same offense, UJI 14-250 NMRA [withdrawn] must also be given.

2. Use only applicable alternative or alternatives.

3. The definition of "intentionally," UJI 14-626 NMRA, must also be given immediately after this instruction.

4. Use the bracketed element if the defendant's ability to provide the proper parental care and control necessary for the child's well-being is at issue.

[Approved, effective October 1, 1993; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary for UJI 14-606 NMRA.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-250 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, modified the essential elements of abandonment of a child without great bodily harm, revised the Use Notes, and added the committee commentary; in Element 1, after "[parent]", added Use Note reference "2", and after "[custodian]", deleted "Use Note reference "2"; in Element 3, after "[leaving]", added Use Note reference "2", after "control necessary", deleted "for" and added "to prevent harm to", and after "(*name of child*)", deleted "well-being"; added Element 4 and redesignated former Elements 4 through 6 as Elements 5 through 7, respectively; in Element 5, after "well-being]", added Use Note reference "4", and in Element 6, after "age of", added "eighteen"; in Use Note 2, after "applicable", added "alternative or", in Use Note 3, after "UJI", changed "14-610" to "14-626", and added Use Note 4.

Cross references. — For abandonment of a child, *see* Section 30-6-1 NMSA 1978.

14-610. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 15-8300-001, UJI 14-610 NMRA, relating to essential elements of child abuse, "intentional", defined, was withdrawn effective for all cases filed or pending on or after April 3, 2015. For provisions of former instruction, *see* the 2015 NMRA on *NMOneSource.com*.

14-611. Chart.

SECTION 30-6-1 NMSA 1978
ABUSE OF A CHILD

Harm to child	**Age of child**	***Mens rea* of defendant**	**UJI**
No death or great bodily harm	Under 18	Intentional or reckless disregard	14-612
Great bodily harm	Under 18	Intentional or reckless disregard	14-615
Death	At least 12 but less than 18	Intentional or reckless disregard	14-621
	Under 12	Reckless disregard	14-622
	Under 12	Intentional	14-623
	Under 12 (step-down instruction)	N/A	14-625 [withdrawn]

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-625 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

14-612. Child abuse not resulting in death or great bodily harm; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse, [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*)];[4]

[OR]

[to be exposed to inclement weather];

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]];

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*);[6]

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare];[7]

5. _____ (*name of child*) was under the age of eighteen (18);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. This paragraph sets forth the minimum level of culpability required to sustain a conviction for child abuse. *Cf. State v. Consaul*, 2014-NMSC-030, ¶ 23, 332 P.3d 850 ("[T]he punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, negligently, or recklessly, is the same." (emphasis omitted)). In most cases, evidence that a defendant acted knowingly or intentionally will satisfy the standard set forth in this paragraph, and thus separate instructions for knowing and intentional conduct are not provided. *See State v. Montoya*, 2015-NMSC-010, ¶ 33, ___ P.3d ___ ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

7. Use this element only when there is evidence that the defendant permitted child abuse.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1. The child abuse instructions were substantially revised in 2015 to reflect amendments to the child abuse statute,

2005 N.M. Laws, ch. 59, § 1, and recent holdings of New Mexico's appellate courts *see, e.g., State v. Montoya*, 2015-NMSC-010, ___ P.3d ___; *State v. Consaul*, 2014-NMSC-030, 332 P.3d 850.

Reckless disregard

The New Mexico Supreme Court has held that recklessness is the minimum level of culpability required for the crime of child abuse. *See Consaul*, 2014-NMSC-030, ¶ 38. The Court stated:

[T]he Legislature did not mean to punish ordinary acts of negligence when it amended the child abuse statute to require proof of recklessness . . . The Legislature intended to punish acts done with a reckless state of mind consistent with its objective of punishing morally culpable acts and not mere inadvertence.

Id. ¶ 36. The third elements of UJIs 14-612, -615, and -621 NMRA are consistent with the recklessness standard set forth by the legislature. *Compare* UJI 14-612, ¶ 3, *with* NMSA 1978, § 30-6-1(A)(3) (defining criminal negligence as having knowledge of the danger involved and acting "with a reckless disregard for the safety or health of the child."). *See also Consaul*, 2014-NMSC-030, ¶ 37 ("Typical definitions of recklessness require an actor to consciously disregard a substantial and unjustifiable risk of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

Separate instructions

The punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, or with reckless disregard, is the same. *See Consaul*, 2014-NMSC-030, ¶ 23; Section 30-6-1(E) ("If the abuse results in great bodily harm to the child, the person is guilty of a first degree felony."). The same is true for child abuse not resulting in death or great bodily harm and for child abuse resulting in the death of a child at least twelve but less than eighteen years of age. *See* NMSA 1978, § 30-6-1(E) ("A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony and for second and subsequent offenses is guilty of a second degree felony."); § 30-6-1(F), (G) (providing that child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age, whether committed intentionally or with reckless disregard, is a first degree felony). As a result, UJIs 14-612, -615, and -621 require that the State prove that the defendant acted with a minimum of reckless disregard. Separate instructions for intentional child abuse, with the exception of abuse resulting in the death of a child under twelve, are not provided because evidence that the defendant's conduct was knowing or intentional will meet the reckless disregard standard. *See Montoya*, 2015-NMSC-010, ¶ 33 ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a

conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

Nevertheless, "child abuse . . . will sometimes also require separate jury instructions . . . [w]hen two or more different or inconsistent acts or courses of conduct are advanced by the State as alternative theories as to how a child's injuries occurred[.]" *Consaul*, 2014-NMSC-030, ¶ 23. "[T]he jury must make an informed and unanimous decision, guided by separate instructions, as to the culpable act the defendant committed and for which he is being punished." *Id*. Therefore, the child abuse instructions require the jury to agree on the conduct or course of conduct alleged to have been child abuse.

For a discussion of child abuse resulting in the death of a child under twelve years of age, see the commentary to UJI 14-622 NMRA.

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

ANNOTATIONS

Replacing language regarding element. — Where "knew or should have known" was an element that was omitted from the jury instruction, replacing "knew or should have known" with "willful" not only adequately addressed the omitted language, but benefited defendant because it increased the state's burden to prove defendant knew her actions constituted an unlawful act. *State v. Watchman*, 2005-NMCA-125, 138 N.M. 488, 122 P.3d 855, cert. denied, 2005-NMCERT-011.

Abuse of a child encompasses abuse by endangerment that results in emotional injury. — The crime of child abuse by endangerment may be based on evidence of a truly significant risk of serious harm to a child's emotional health, just as when a child's physical health is endangered. *State v. Galindo*, 2018-NMSC-021.

Where defendant was convicted of child abuse not resulting in death or great bodily harm to his thirteen-year-old daughter (Child), and where the State presented evidence that on the night defendant's infant daughter died, the Child found defendant kneeling on the floor, holding the baby's "purple, bluish" body and calling the Child to come and help him revive the baby, that defendant persisted in his frantic attempts to revive the baby, which included putting the baby's naked body in the kitchen sink and rubbing ice on her, performing CPR on her "very hard", biting her, splashing water on her in the shower and rubbing perfume on her body, and that defendant refused to let the Child go get help from relatives who lived nearby, and where the Child testified that the she felt shocked and scared, and that the baby's death made her feel "dead inside", defendant's conduct was sufficient to show that defendant exposed the Child to a truly significant risk of serious emotional harm, because in light of the other evidence that defendant sexually assaulted and violently abused the baby, resulting in her death, defendant's conduct drew the Child into the aftermath of defendant's crimes against the baby. The jury reasonably could have found that defendant endangered the Child's emotional

health by compelling her to witness and participate in the further abuse of the baby's lifeless body, as defendant tried to undo the effects of what he had already done to the baby. *State v. Galindo*, 2018-NMSC-021.

Insufficient evidence of recklessly permitting child abuse. — Where defendant was convicted of child abuse not resulting in death or great bodily harm to his thirteen-year-old daughter (Child) based on three alternative theories of abuse, including intentionally causing the Child to be placed in a situation that endangered her life or health, recklessly causing the Child to be placed in a situation that endangered her life or health, and recklessly permitting the Child to be placed in a situation that endangered her life or health, defendant's conviction for recklessly permitting the Child to be placed in a situation that endangered her life or health was not supported by sufficient evidence, because there was no evidence that anyone other than defendant inflicted the abuse against the Child, and "permitting" child abuse refers to the passive act of failing to prevent someone else, a third person, from inflicting the abuse. *State v. Galindo*, 2018-NMSC-021.

Sufficient evidence of child abuse resulting in death. — Where defendant was convicted of child abuse resulting in the death of his infant daughter, and where the State presented evidence that the baby died from blunt force trauma to her head, that the baby also suffered injuries to her groin area, and that the baby showed no signs of choking, and where defendant claimed that there was insufficient evidence that he acted intentionally and without justification because the evidence showed not that he meant to harm the baby, but that he was attempting to shock her into consciousness after he found her not breathing, the jury was free to reject defendant's version of events especially where there were inconsistencies between defendant's explanation of the baby's injuries and the medical evidence; the jury could have reasonably concluded that defendant acted intentionally and without justification. *State v. Galindo*, 2018-NMSC-021.

Insufficient evidence of child abuse by endangerment. — Where defendant was tried on multiple alternative theories of child abuse relating to injuries sustained by her son, and where the jury acquitted defendant under the State’s principle theory of child abuse, that she inflicted her son’s injuries, but convicted her under one of the State’s alternatives, that she recklessly permitted by endangerment each of her son’s injuries, there was insufficient evidence to support defendant’s convictions for child abuse by endangerment, because it was the State’s theory that defendant was guilty of permitting her son to be endangered because she allowed her boyfriend to abuse the child, but the State failed to provide any evidence of any act or omission by defendant establishing that she allowed her boyfriend to abuse the child, and in fact, the State attempted to convince the jury that the boyfriend did not harm the child, which was consistent with the State’s primary theory that defendant, rather her boyfriend, inflicted her son’s injuries but inconsistent with the alternative theory that defendant allowed her boyfriend to abuse the child. *State v. Leidy*, 2023-NMCA-073.

Insufficient evidence of permitting endangerment by medical neglect. — Where defendant was tried on multiple alternative theories of child abuse relating to injuries sustained by her son, and where the jury acquitted defendant under the State's principle theory of child abuse, that she inflicted her son's injuries, but convicted her under one of the State's alternatives, that she recklessly permitted by endangerment each of her son's injuries, there was insufficient evidence to support defendant's conviction for child endangerment by medical neglect, because under a medical neglect theory, the State had to put forth substantial evidence that defendant's neglect resulted in the child's great bodily harm, meaning that medical neglect was at least a significant cause of the child's great bodily injury, but there was no evidence presented that defendant's failure to seek treatment for the injuries resulted in great bodily harm to the child, and with regard to the count related to bruises on the child, the State presented no evidence suggesting that medical treatment was even necessary for the bruises. *State v. Leidy*, 2023-NMCA-073.

Insufficient evidence of endangerment based on DWI. — Where defendant was seated in the driver's seat of a vehicle with defendant's spouse in the middle, and defendant's four-year-old child on the passenger side of the vehicle; the vehicle was not running; defendant was holding the keys; open alcohol containers were on the floor and in the cup holders; defendant was intoxicated; defendant informed police officers that defendant was going to a local store; and defendant was convicted of DWI by actual physical control, there was insufficient evidence to support a conviction for felony child abuse by endangerment. *State v. Etsitty*, 2012-NMCA-012, 270 P.3d 1277, cert. denied, 2011-NMCERT-012.

Insufficient evidence of child abuse based on DWI. — Where police officers found defendant in the driver's seat of a van that was parked on a roadside; the van was not running; the keys were not in the ignition; both defendant and the passenger in the van were intoxicated and incapable of driving; the passenger's children were in the back seat; and the state did not rely on a theory of past driving, but on the theory that defendant might drive the van while impaired and place the children in a situation which endangered their lives and health, the evidence was insufficient to support defendant's conviction of child abuse. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Sufficient evidence of child abuse. — Where, in defendant's trial for first-degree murder and child abuse, the jury heard evidence that defendant fired a gun at the murder victim nine times at point-blank range, that the victim was seated in the front passenger seat of his vehicle, and that the victim's three children were sitting in the back seats of the vehicle in immediate proximity to their father, and where the jury heard evidence that although the victim was shot nine times, only five of the bullets were found inside his body, that several of the bullets defendant fired traveled through the victim and continued onward, one of which traveled through the driver's-side window in the second row of seats of the vehicle and one of which was recovered from the inside roof of the vehicle, there was sufficient evidence to support the jury's determination that defendant placed the three children in a situation that endangered their lives and that

defendant showed a reckless disregard for their safety and health. *State v. Ramirez*, 2018-NMSC-003.

Sufficient evidence of child abuse. — Where defendant fired two gunshots into a house in which a child, aged three weeks, was situated at the time of the shooting; the bullets found in the house matched those fired from defendant's handgun; and before the shooting, a witness told defendant that there was a newborn baby in the house, there was sufficient evidence to support defendant's conviction of negligent abuse of a child. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

A moving DWI is a sufficient factual basis for a child abuse by endangerment conviction. — The mere fact that defendant was driving a vehicle in which a child was a passenger while defendant was intoxicated, standing alone, is sufficient as a matter of law to support a conviction for child abuse by endangerment. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. granted, 2012-NMCERT-008.

Where defendant was driving a vehicle with defendant's nine-year-old child in the vehicle; defendant drove through an intersection without stopping at a stop sign and crashed into a ditch across the intersecting roadway; the child suffered minor injuries; defendant claimed he could not stop the vehicle because the brakes failed; and defendant was convicted of driving while intoxicated, defendant's moving DWI conviction alone was a sufficient factual basis to support defendant's conviction of child abuse by endangerment even if the DWI did not otherwise separately evince indicia of unsafe driving. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. granted, 2012-NMCERT-008.

14-615. Child abuse resulting in great bodily harm; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse resulting in great bodily harm, [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*)];[4]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]];

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*);[6]

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare];[7]

5. _____ (*name of defendant*)'s conduct resulted in great bodily harm[8] to _____ (*name of child*);

6. _____ (*name of child*) was under the age of eighteen (18);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. This paragraph sets forth the minimum level of culpability required to sustain a conviction for child abuse resulting in great bodily harm. *See State v. Consaul*, 2014-NMSC-030, ¶ 23, 332 P.3d 850 ("[T]he punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, negligently, or recklessly, is the same." (emphasis omitted)). In most cases, evidence that a defendant acted knowingly or intentionally will satisfy the standard set forth in this paragraph, and thus separate instructions for knowing and intentional conduct are not provided. *See State v. Montoya*, 2015-NMSC-010, ¶ 33, ___ P.3d ___ ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

7. Use this element only when there is evidence that the defendant permitted child abuse.

8. The definition of "great bodily harm," UJI 14-131 NMRA, must also be given.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

ANNOTATIONS

Sufficient evidence of child abuse. — Where defendant was charged with criminal sexual penetration of a minor and child abuse, and where the State relied on testimony elicited from the victim that defendant grabbed her forcefully by the arm, threw her onto the ground, and pushed and kicked her when she stood up, that she was fourteen years old, and that these events occurred in New Mexico two years earlier, there was sufficient evidence to prove beyond a reasonable doubt that defendant intentionally or with reckless disregard and without justification caused the victim to be placed in a situation which endangered her life or health. *State v. Garcia*, 2019-NMCA-056, cert. denied.

No specific intent to disregard one's obligations is involved in the concept of conscious disregard. — The critical inquiry is whether defendants' acts or omissions,

irrespective of whether they were knowingly committed, caused or permitted a child to be placed in a situation that may endanger the child's life or health or to be exposed to the inclemency of the weather, and a defendant acts recklessly within the meaning of § 30-6-1(D) NMSA 1978, when he or she disregards a substantial and justifiable risk of serious harm to the safety or health of a child. No specific intent to disregard one's obligations is involved in the concept of conscious disregard; the only intent involved is purposely engaging in conduct which implies a conscious disregard of one's obligations. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Sufficient evidence to support convictions for reckless child abuse. — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where defendants argued that there was insufficient evidence to support their convictions for reckless child abuse because the state failed to show that the defendants acted with a reckless disregard for the safety of the victims, that they did not know they left the victims unattended in the SUV, and therefore, they did not knowingly act or fail to act, there was sufficient evidence to support defendants' convictions because defendants knew the victims were originally in the SUV, defendants created the risk by failing to take the victims out of the SUV, and defendants disregarded that risk by leaving them there. Moreover, defendants' conduct while caring for the victims on the day in question, failing to follow CYFD policies on which they had been trained and failing to follow their own internal accountability procedures, demonstrated a conscious disregard for the safety of the victims. *State v. Taylor*, 2021-NMCA-033, cert. granted.

District court did not err in denying separate instruction on the definition of "accidental conduct." — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of "accidental conduct," claiming that the death of one child and the great bodily harm of the other child that occurred while in the care of defendants was accidental, the district court did not err in denying defendants' proposed instruction because the elements instructions tracked the language of the uniform jury instructions for reckless child abuse, UJI 14-615 NMRA and UJI 14-622 NMRA, and therefore accurately conveyed the law to the jury, making the proposed "accidental conduct" instruction unnecessary. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Jury unanimity is required only as to the verdict, not to any particular theory of guilt. — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their

supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where defendants argued on appeal that the elements instruction failed to appropriately identify the alleged conduct that endangered the victims because the "and/or" language stated in the given instructions misled the jury, in essence arguing that the jury did not unanimously agree on the verdict, the district court did not err by tendering the elements instruction to the jury, because where alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt, and defendants do not point to anywhere in the record to demonstrate that the jury was confused as to the course of conduct alleged to be reckless child abuse. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Insufficient evidence of child abuse by endangerment. — Where defendant was tried on multiple alternative theories of child abuse relating to injuries sustained by her son, and where the jury acquitted defendant under the State's principle theory of child abuse, that she inflicted her son's injuries, but convicted her under one of the State's alternatives, that she recklessly permitted by endangerment each of her son's injuries, there was insufficient evidence to support defendant's convictions for child abuse by endangerment, because it was the State's theory that defendant was guilty of permitting her son to be endangered because she allowed her boyfriend to abuse the child, but the State failed to provide any evidence of any act or omission by defendant establishing that she allowed her boyfriend to abuse the child, and in fact, the State attempted to convince the jury that the boyfriend did not harm the child, which was consistent with the State's primary theory that defendant, rather her boyfriend, inflicted her son's injuries but inconsistent with the alternative theory that defendant allowed her boyfriend to abuse the child. *State v. Leidy*, 2023-NMCA-073.

Insufficient evidence of permitting endangerment by medical neglect. — Where defendant was tried on multiple alternative theories of child abuse relating to injuries sustained by her son, and where the jury acquitted defendant under the State's principle theory of child abuse, that she inflicted her son's injuries, but convicted her under one of the State's alternatives, that she recklessly permitted by endangerment each of her son's injuries, there was insufficient evidence to support defendant's conviction for child endangerment by medical neglect, because under a medical neglect theory, the State had to put forth substantial evidence that defendant's neglect resulted in the child's great bodily harm, meaning that medical neglect was at least a significant cause of the child's great bodily injury, but there was no evidence presented that defendant's failure to seek treatment for the injuries resulted in great bodily harm to the child, and with regard to the count related to bruises on the child, the State presented no evidence suggesting that medical treatment was even necessary for the bruises. *State v. Leidy*, 2023-NMCA-073.

14-621. Child abuse resulting in death; child at least 12 but less than 18; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age, [as charged in Count ____,][1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*);][4]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]]

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*)[6];

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare;][7]

5. _____ (*name of defendant*)'s conduct resulted in the death of _____ (*name of child*);

6. _____ (*name of child*) was at least twelve (12), but less than eighteen (18) years of age;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is an issue, this bracketed alternative must be given if requested.

6. This paragraph sets forth the minimum level of culpability required to sustain a conviction for child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age. *See* NMSA 1978, § 30-6-1(F), (G) (providing that child abuse resulting in death of a child of at least twelve (12), but less than eighteen (18) years of age, whether committed intentionally or with reckless disregard, is a first degree felony); *Cf. State v. Consaul*, 2014-NMSC-030, ¶ 23, 332 P.3d 850 ("[T]he punishment for child abuse resulting in great bodily harm, whether done knowingly, intentionally, negligently, or recklessly, is the same." (emphasis omitted)). In most cases, evidence that a defendant acted knowingly or intentionally will satisfy the standard set forth in this paragraph, and thus separate instructions for knowing and intentional conduct are not provided. *See State v. Montoya*, 2015-NMSC-010, ¶ 33, ___ P.3d ___ ("[I]n most cases when the abuse does not result in the death of a child under twelve, it is not necessary to specify the defendant's mental state or to provide separate jury instructions for reckless or intentional conduct; evidence that the defendant acted 'knowingly, intentionally or [recklessly]' will suffice to support a conviction."); *accord Model Penal Code* § 2.02(5) ("When the law provides that . . . recklessness suffices to establish an element [of an offense], such element also is established if a person acts purposely or knowingly.").

7. Use this element only when there is evidence that the defendant permitted child abuse.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

14-622. Child abuse resulting in death; reckless disregard; child under 12; essential elements.

For you to find _____ (*name of defendant*) guilty of child abuse with reckless disregard resulting in death of a child under twelve (12) years of age, [as charged in Count ____,][1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).[2]

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) [caused] [or] [permitted][3] _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*);][4]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]]

3. _____ (*name of defendant*) showed a reckless disregard [without justification][5] for the safety or health of _____ (*name of child*). To find that _____ (*name of defendant*) showed a reckless disregard, you must find that _____ (*name of defendant*)'s conduct was more than merely negligent or careless. Rather, you must find that _____ (*name of defendant*) [caused] [or] [permitted][3] a substantial and unjustifiable risk of serious harm to the safety or health of _____ (*name of child*). A substantial and unjustifiable risk is one that any law-abiding person would recognize under similar circumstances and that would cause any law-abiding person to behave differently than _____ (*name of defendant*) out of concern for the safety or health of _____ (*name of child*);

[4. _____ (*name of defendant*) was a parent, guardian or custodian of the child, or _____ (*name of defendant*) had accepted responsibility for the child's welfare;][6]

5. _____ (*name of defendant*)'s conduct resulted in the death of _____ (*name of child*);

6. _____ (*name of child*) was under the age of twelve (12);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. As used in this instruction, "conduct" may describe an act or a failure to act that causes child abuse or that permits child abuse to occur.

3. In most cases, only one of the bracketed alternatives should be given in a single instruction. However, both alternatives may be given in the same instruction if the evidence supports a finding beyond a reasonable doubt that the defendant either "caused or permitted" child abuse. *See State v. Leal*, 1986-NMCA-075, ¶13, 104 N.M. 506, 723 P.2d 977 ("Since abuse will frequently occur in the privacy of the home, charging a defendant with 'causing or permitting' may enable the state to prosecute where it is not clear who actually inflicted the abuse, but the evidence shows beyond a reasonable doubt that the defendant either caused the abuse or permitted it to occur.").

4. Use only applicable alternative or alternatives.

5. If "justification" is an issue, this bracketed alternative must be given if requested.

6. Use this element only when there is evidence that the defendant permitted child abuse.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

Separate instructions are provided for intentional child abuse resulting in death of a child under 12 years of age and for child abuse with reckless disregard resulting in death of a child under 12 years of age because the Legislature has defined the offenses separately and provided different punishments for each offense. *See State v. Consaul*, 2014-NMSC-030, ¶¶ 21-22 (noting that "the Legislature meant to punish only the most

deliberate and reprehensible forms of child abuse" as intentional child abuse resulting in the death of a child under 12 years of age). When appropriate, a jury instructed under UJI 14-623 NMRA (Child abuse resulting in death; intentional act; child under 12; essential elements) may also be instructed under UJI 14-622 NMRA (Child abuse resulting in death; reckless disregard; child under 12; essential elements) provided that UJI 14-625 NMRA [withdrawn] (Jury procedure for various degrees of child abuse resulting in death of a child under twelve years of age) is also given. *See State v. Montoya*, 2015-NMSC-010, ¶¶ 41-42, ___ P.3d ___ (holding that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under 12 and that the use of a step-down instruction therefore is appropriate).

[Adopted by Supreme Court Order No.15-8300-001, effective April 3, 2015.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-625 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

When separate instructions are required to prove reckless or intentional child abuse. — Jury instructions are to be read and considered as a whole and when so considered they are proper if they fairly and accurately state the applicable law; where a defendant is charged with both reckless and intentional child abuse resulting in the death of a child under twelve years of age, separate instructions for reckless and intentional child abuse are not necessary as long as the verdict forms make it clear which crime defendant was convicted of because the punishments are different for each crime. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was not reversible error where the elements of both intentional and reckless child abuse were contained in one instruction, when the instruction provided the definitions of reckless acts and intentional acts, and the special forms provided to the jury made it clear which crime defendant was convicted of: intentional child abuse resulting in the death of a child under twelve years of age. *State v. Montoya*, 2015-NMSC-010.

Reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve. — The statutory elements of reckless child abuse resulting in the death of a child under twelve are a subset of the statutory elements of intentional child abuse resulting in the death of a child under twelve; the only distinction between the two crimes is the mens rea required, either intentional or reckless; one can commit child abuse recklessly without acting intentionally, but one cannot intentionally commit child abuse without consciously disregarding a substantial and unjustifiable risk. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction, instructing the jury that if they determined that defendant was guilty of child abuse resulting in death, they had to then determine whether defendant committed the crime intentionally or with reckless disregard, if the jury found that defendant committed the crime intentionally, then they were to complete the special verdict form and go no further, if they had reasonable doubt as to whether the crime was committed intentionally, they had to decide whether the crime was committed with reckless disregard, and if the jury could not find that the crime was committed intentionally or with reckless disregard, they were to find defendant not guilty of child abuse resulting in death. *State v. Montoya*, 2015-NMSC-010.

Lesser-included offense of intentional child abuse resulting in the death of a child under twelve. — Because reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve, when a defendant is charged with intentional child abuse resulting in the death of a child under twelve, the defendant will be on notice to defend against both intentional and reckless child abuse resulting in the death of a child under twelve when the abuse results from the same conduct or course of conduct. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction providing the process by which the jury should consider each charge when both charges were based on the same course of conduct. *State v. Montoya*, 2015-NMSC-010.

This instruction incorporates a criminal negligence standard of conduct for child abuse cases. *State v. Chavez*, 2007-NMCA-162, 143 N.M. 126, 173 P.3d 48, *cert. denied*, 2007-NMCERT-011.

"Reckless disregard" for child's safety. — The trial court erred in refusing to charge the jury with an instruction tendered by defendant to clarify the language "reckless disregard" in this instruction: the use of the words "reckless disregard" and "negligently" in this instruction could confuse jurors on the critical issue of mens rea. *State v. Magby*, 1998-NMSC-042, 126 N.M. 361, 969 P.2d 965 *overruled* by *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221.

"Criminal negligence" instruction. — Trial court's instruction did not adequately define criminal negligence because it failed to sufficiently define the proper negligence standard for child abuse, and there is no way to determine if the jury based their conviction on the terms "knew or should have known," language typically associated with a civil negligence standard, or on the proper criminal negligence standard, which requires that they find defendant acted in "reckless disregard" of the safety of the child. *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221.

No specific intent to disregard one's obligations is involved in the concept of conscious disregard. — The critical inquiry is whether defendants' acts or omissions, irrespective of whether they were knowingly committed, caused or permitted a child to be placed in a situation that may endanger the child's life or health or to be exposed to the inclemency of the weather, and a defendant acts recklessly within the meaning of § 30-6-1(D) NMSA 1978, when he or she disregards a substantial and justifiable risk of serious harm to the safety or health of a child. No specific intent to disregard one's obligations is involved in the concept of conscious disregard; the only intent involved is purposely engaging in conduct which implies a conscious disregard of one's obligations. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Sufficient evidence to support convictions for reckless child abuse. — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where defendants argued that there was insufficient evidence to support their convictions for reckless child abuse because the state failed to show that the defendants acted with a reckless disregard for the safety of the victims, that they did not know they left the victims unattended in the SUV, and therefore, they did not knowingly act or fail to act, there was sufficient evidence to support defendants' convictions because defendants knew the victims were originally in the SUV, defendants created the risk by failing to take the victims out of the SUV, and defendants disregarded that risk by leaving them there. Moreover, defendants' conduct while caring for the victims on the day in question, failing to follow CYFD policies on which they had been trained and failing to follow their own internal accountability procedures, demonstrated a conscious disregard for the safety of the victims. *State v. Taylor*, 2021-NMCA-033, cert. granted.

District court did not err in denying separate instruction on the definition of "reckless disregard." — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of reckless disregard as set forth in UJI 14-133 NMRA, the district court did not err in denying defendants' proposed jury instruction because the elements instruction, UJI 14-622 NMRA, already defined the mens rea necessary to convict defendants for reckless child abuse. *State v. Taylor*, 2021-NMCA-033, cert. granted.

District court did not err in denying separate instruction on the definition of "accidental conduct." — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old

children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of "accidental conduct," claiming that the death of one child and the great bodily harm of the other child that occurred while in the care of defendants was accidental, the district court did not err in denying defendants' proposed instruction because the elements instructions tracked the language of the uniform jury instructions for reckless child abuse, UJI 14-615 NMRA and UJI 14-622 NMRA, and therefore accurately conveyed the law to the jury, making the proposed "accidental conduct" instruction unnecessary. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Jury unanimity is required only as to the verdict, not to any particular theory of guilt. — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where defendants argued on appeal that the elements instruction failed to appropriately identify the alleged conduct that endangered the victims because the "and/or" language stated in the given instructions misled the jury, in essence arguing that the jury did not unanimously agree on the verdict, the district court did not err by tendering the elements instruction to the jury, because where alternative theories of guilt are put forth under a single charge, jury unanimity is required only as to the verdict, not to any particular theory of guilt, and defendants do not point to anywhere in the record to demonstrate that the jury was confused as to the course of conduct alleged to be reckless child abuse. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Concept of criminal negligence was incorporated into instruction by including the definition of reckless disregard. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

UJI 14-603 NMRA applies a criminal negligence standard. *State v. Vasquez*, 2010-NMCA-041, 148 N.M. 202, 232 P.3d 438.

Harmless error. — Where jury was given former version of jury instruction, even assuming that the reckless disregard instruction did not correct the improper child abuse instruction, and that juror confusion persisted due to the order the instructions were given, any error in the child abuse instruction was harmless and not fundamental error. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

14-623. Child abuse resulting in death; intentional act; child under 12; essential elements.

For you to find _____ (*name of defendant*) guilty of intentional child abuse resulting in death of a child under twelve (12) years of age, [as charged in

Count ____,][1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) _____ (*describe conduct or course of conduct alleged to have been child abuse*).

2. By engaging in the conduct described in Paragraph 1, _____ (*name of defendant*) caused _____ (*name of child*)

[to be placed in a situation that endangered the life or health of _____ (*name of child*);][2]

[OR]

[to be exposed to inclement weather;]

[OR]

[to be [tortured] [or] [cruelly confined] [or] [cruelly punished]]

3. _____ (*name of defendant*) acted intentionally[3] [and without justification];[4]

4. _____ (*name of defendant*)'s conduct resulted in the death of _____ (*name of child*);

5. _____ (*name of child*) was under the age of twelve (12);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

3. The definition of "intentionally," UJI 14-626 NMRA, must also be given with this instruction.

4. If "justification" is an issue, this bracketed alternative must be given if requested.

[Adopted by Supreme Court Order No. 15-8300-001, effective for all cases filed or pending on or after April 3, 2015; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-6-1; UJI 14-612 NMRA committee commentary.

Separate instructions are provided for intentional child abuse resulting in death of a child under 12 years of age and for child abuse with reckless disregard resulting in death of a child under 12 years of age because the Legislature has defined the offenses separately and provided different punishments for each offense. *See State v. Consaul*, 2014-NMSC-030, ¶¶ 21-22, 332 P.3d 850 (noting that "the Legislature meant to punish only the most deliberate and reprehensible forms of child abuse" as intentional child abuse resulting in the death of a child under 12 years of age). When appropriate, a jury instructed under UJI 14-623 NMRA (Child abuse resulting in death; intentional act; child under 12; essential elements) may also be instructed under UJI 14-622 NMRA (Child abuse resulting in death; reckless disregard; child under 12; essential elements) provided that UJI 14-625 NMRA [withdrawn] (Jury procedure for various degrees of child abuse resulting in death of a child under twelve years of age) is also given. *See State v. Montoya*, 2015-NMSC-010, ¶¶ 41-42, ___ P.3d ___ (holding that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under 12 and that the use of a step-down instruction therefore is appropriate).

[Adopted by Supreme Court Order No. 15-8300-001, effective April 3, 2015.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-625 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, in Use Note 3, after "UJI", changed "14-141" to "14-626".

When separate instructions are required to prove reckless or intentional child abuse. — Jury instructions are to be read and considered as a whole and when so considered they are proper if they fairly and accurately state the applicable law; where a defendant is charged with both reckless and intentional child abuse resulting in the death of a child under twelve years of age, separate instructions for reckless and intentional child abuse are not necessary as long as the verdict forms make it clear which crime defendant was convicted of because the punishments are different for each crime. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was not reversible error where the elements of both intentional and reckless child abuse were contained in one instruction, when the instruction provided the definitions of reckless acts and intentional acts, and the special forms provided to the jury made it clear which crime defendant was convicted of: intentional child abuse resulting in the death of a child under twelve years of age. *State v. Montoya*, 2015-NMSC-010.

Reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve. — The statutory elements of reckless child abuse resulting in the death of a child under twelve are a subset of the statutory elements of intentional child abuse resulting in the death of a child under twelve; the only distinction between the two crimes is the mens rea required, either intentional or reckless; one can commit child abuse recklessly without acting intentionally, but one cannot intentionally commit child abuse without consciously disregarding a substantial and unjustifiable risk. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction, instructing the jury that if they determined that defendant was guilty of child abuse resulting in death, they had to then determine whether defendant committed the crime intentionally or with reckless disregard, if the jury found that defendant committed the crime intentionally, then they were to complete the special verdict form and go no further, if they had reasonable doubt as to whether the crime was committed intentionally, they had to decide whether the crime was committed with reckless disregard, and if the jury could not find that the crime was committed intentionally or with reckless disregard, they were to find defendant not guilty of child abuse resulting in death. *State v. Montoya*, 2015-NMSC-010.

Lesser-included offense of intentional child abuse resulting in the death of a child under twelve. — Because reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve, when a defendant is charged with intentional child abuse resulting in the death of a child under twelve, the defendant will be on notice to defend against both intentional and reckless child abuse resulting in the death of a child under twelve when the abuse results from the same conduct or course of conduct. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction providing the process by which the jury should consider each charge when both charges were based on the same course of conduct. *State v. Montoya*, 2015-NMSC-010.

No fundamental error where instruction defining "intentional" used the phrase "failure to act". — Where jury in child abuse case was correctly instructed to find that defendant performed an intentional act, not a failure to act, to convict her of intentional child abuse, but where the instruction defining "intentional" (UJI 14-610 (withdrawn 2015)) uses the phrase "failure to act", there was no fundamental error because the State's theory was based entirely on evidence of what defendant did, not on what she failed to do, a theory amply supported by substantial evidence; there was no significant risk of jury confusion, substantial injustice, or a doubtful verdict. *State v. Cabezuela*, 2015-NMSC-016.

Instruction on lesser included offense not warranted. — Where defendant was charged with child abuse resulting in the death of a child under twelve years of age; the state presented expert evidence that the child's death was caused by blunt force injuries to the child's head due to vigorous shaking of the child; and defendant requested an instruction on the lesser included offense of child abuse not resulting in death on the basis of defendant's admission that when defendant pulled the child's pants too hard, the child fell back on the child's head, the trial court did not abuse its discretion in refusing the lesser included instruction, because the incident to which defendant admitted did not rise to the level of criminally punishable conduct and there was insufficient evidence to support a conviction of child abuse not resulting in death. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Endangerment by "medical neglect" defined. — "Medical neglect" is defined as the failure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness. *State v. Garcia*, 2021-NMSC-019.

Insufficient evidence of causation in a case alleging intentional child abuse by endangerment through medical neglect. — Where defendant was found guilty of intentional child abuse resulting in the death of a child under the age of twelve by endangerment through medical neglect, and where the state introduced evidence that the child, while under the care of defendant, suffered blunt force trauma and other injuries to his head that resulted in a lack of oxygen and blood to the brain, and that defendant, in order to avoid blame for the child's injuries, did not call 911 and instead took the child to the child's mother, but where the state's medical experts could not testify to a reasonable degree of medical certainty that the child would have lived with earlier medical intervention, there was insufficient evidence to prove beyond a reasonable doubt that defendant's failure to call 911 resulted in the child's death. Proof of causation in a criminal medical neglect case requires that the medical neglect be a factual, but-for cause of the child's death. *State v. Garcia*, 2021-NMSC-019.

14-625. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-625 NMRA, relating to jury procedure for various degrees of child abuse resulting in death of a child under twelve years of age, was withdrawn effective December 31, 2020. For provisions of former instruction, *see* the 2019 NMRA on *NMOneSource.com*.

14-626. Intentionally, defined for crimes against children.

To find that the defendant [acted intentionally[1]] [2] [intentionally left or abandoned the child [3]] you must find that it was the defendant's conscious objective to [leave or abandon][2] [endanger] [torture, cruelly confine, or cruelly punish] [or] [expose to the inclemency of the weather] the child.

USE NOTES

1. This phrase tracks Element 3 in UJI 14-623 NMRA.

2. Choose applicable alternative or alternatives.

3. This phrase tracks the language in UJIs 14-606 and 14-607 NMRA for crimes of abandonment.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See State v. Granillo*, 2016-NMCA-094, ¶ 17, 384 P.3d 1121. Where *Granillo* interpreted the meaning of "intentional" in NMSA 1978, Section 30-6-1 (2009), this definition should be given in cases charged under that statute that require an intentional mens rea. This includes child abandonment cases instructing with UJI 14-606 and 14-607 NMRA, if at issue, as well as intentional child abuse. The committee notes that UJI 14-623 NMRA (intentional abuse resulting in death) is the only elements instruction specific to an intentional theory of child abuse. Because the penalty for all other forms of child abuse is the same whether committed recklessly or intentionally, all other child abuse instructions were drafted in terms of recklessness. Nevertheless, under the statute, it is possible to commit any form of child abuse either recklessly or intentionally. This definition instruction would be applicable to any intentional abuse charge.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-631. Sexual exploitation of children; possession.

For you to find the defendant guilty of sexual exploitation of children (possession) [as charged in Count ____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally possessed a visual or print medium[2];

2. The medium depicts a prohibited sexual act[2] [or simulation of such an act][3];

3. The defendant knew or had reason to know that medium depicts prohibited sexual act [or simulation of such act][3];

4. The defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age;

[5. The depictions are obscene;[4]][3]; and

6. This happened in New Mexico on or about _____, 20__.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If in issue, UJI 14-130 NMRA, " 'Possession' defined," definitions of "visual or print medium" and/or "prohibited sex act" shall be given. *See* NMSA 1978, § 30-6A-2.

3. Instruct with bracketed language only if in issue.

4. Use bracketed material if obscenity is in issue. If this element is instructed a definition of "obscene" shall also be given. *See* NMSA 1978, § 30-6A-2.

5. If the consensual possession defense defined in NMSA 1978, Section 30-6A-3(B) is in issue, UJI 14-634 NMRA must be given.

6. To invoke the sentencing enhancement defined in Section 30-6A-3(A), special interrogatory UJI 14-635 NMRA must be given.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, § 30-6A-3(A) (2016).

"The [First Amendment] test for child pornography is separate from the obscenity standard enunciated in *Miller* [*v. California*, 413 U.S. 15 (1973)]." *State v. Myers*, 2009-NMSC-016, ¶ 26, 146 N.M. 128, 207 P.3d 1105 (quoting *New York v. Ferber*, 458 U.S. 747, 764 (1982)). Nevertheless, where New Mexico provides a statutory definition of the term obscene, that definition governs the State's burden of proof for conviction in New Mexico. *Id*. ¶¶ 34-40 ("[A]lthough we agree with the Court of Appeals that the challenged material must do more than "'merely depict a naked child'" to run afoul of the contemporary community standard, we disagree that it 'must be identifiable as hard-core child pornography.'" (quoting *State v. Myers*, 2008-NMCA-047, ¶ 12, 143 N.M. 710, 181 P.3d 702 (quoting *State v. Rendleman*, 2003-NMCA-150, ¶ 44, 134 N.M. 744, 82 P.3d 554))).

Section 30-6A-3(A) defines the crime of child pornography possession. To commit the crime intentionally, the possession concepts applicable to any contraband material are applicable, and thus UJI 14-130 NMRA should be instructed when intentional possession is in issue. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including "visual or print medium," "prohibited sex act," and "obscene."

While the act of possession itself must be done "intentionally," the Court of Appeals held that "the scienter requirement in Section 30-6A-3(A) that a person 'knows or has reason

to know' that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient." *State v. Adamo*, 2018-NMCA-013, ¶ 34, 409 P.3d 1002. The Court found sufficient evidence of intentional possession when images were downloaded but later deleted. *Id*. ¶¶ 14-18.

In 2014, the New Mexico Supreme Court held the unit of prosecution for possession offenses under Section 30-6A-3(A) was ambiguous and thus, under the rule of lenity, further held that only one count may be punished for multiple images possessed unitarily. *State v. Olsson*, 2014-NMSC-012, ¶¶ 23, 31, 43-47, 324 P.3d 1230. However, the Court of Appeals held that convictions for possession and manufacture-by-recording do not violate double jeopardy if distinct evidence can support a continuing knowing possession after the manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, 41 P.3d 1157.

The Legislature amended Section 30-6A-3(A) in 2016, adding the one-year sentence enhancement for depictions of children under the age of 13, and adding Subsection B, an affirmative defense for consensual possession among teenagers. The unit of prosecution was not altered. 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016).

In 2016, the Legislature also amended the basic sentence from a "fourth-degree felony" to a "fourth-degree felony for sexual exploitation of children" and added new subsections for felonies "for sexual exploitation of children" to NMSA 1978, Section 31-18-15 (2016) (defining basic sentences). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-632. Sexual exploitation of children; distribution.

For you to find the defendant guilty of sexual exploitation of children (distribution) [as charged in Count ____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally distributed a visual or print medium[2];

2. The medium depicted a prohibited sexual act[2] [or simulation of such an act][3];

3. The defendant knew or had reason to know that medium depicts prohibited sexual act [or simulation of such act][3];

4. The defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age;

[5. The depictions are obscene[4];][3] and

6. This happened in New Mexico on or about _____, 20__.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If in issue, definitions of Avisual or print medium@ and/or Aprohibited sex act@ shall be given. *See* NMSA 1978, ' 30-6A-2.

3. Instruct with bracketed language only if in issue.

4. If this element is instructed, a definition of Aobscene@ shall be given. *See* NMSA 1978, ' 30-6A-2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(C) (2016).

Section 30-6A-3(C) defines the crime of child pornography distribution. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including Avisual or print medium,@ Aprohibited sex act,@ and Aobscene.@ While the act of distribution itself must be done Aintentionally,@ the Court of Appeals held that the additional scienter requirement Athat a person >knows or has reason to know= that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient.@ *State v. Adamo*, 2018-NMCA-013, && 28-34, 409 P.3d 1002. Because that element is identical for possession and distribution offenses, the holding in *Adamo* is applicable to that particular element of distribution as well.

Distribution may be committed by possessing files in a shared location, but the distribution does not occurCand the crime is not completeCuntil a third party downloads a file. *See United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012) (AWhen an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred.@ (citing *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007))). In *Shaffer*, the Tenth Circuit was able to point to extensive evidence of intent in the factual record. 472 F.3d at 1222-24. First, the defendant himself explained that the particular file sharing program he used provided incentive rewards Acorresponding to how many images other users downloaded from his computer,@ and admitted that he stored his possessed images in the shared folder specifically to receive the incentive rewards. *Id*. at 1222. Moreover, the defendant admitted that he subjectively knew that Aother people had downloaded child pornography from his shared folder.@ *Id*. at 1224. Thus, the Tenth Circuit concluded he had Aopenly invited [others] to take, or download, those items.@ *Id*. at 1223.

In 2016, the New Mexico Court of Appeals held the unit of prosecution for distribution offenses under Section 30-6A-3 may be ambiguous if committed by shared possession in a peer-to-peer program, noting the lack of a statutory definition for Adistribute.@ *State*

v. Sena, 2016-NMCA-062, && 9-19, 376 P.3d 887 (ANotably, Section 30-6A-3(D) defines manufacture somewhat differently than possession and distribution, and Section 30-6A-2(D) provides a more specific and detailed definition for the word >manufacture.=@). Thus, the Court held that if a defendant=s distribution conduct is not itself distinct, only one count may be punished for multiple images acquired from the defendant by third parties. *Id*. && 15-16 (citing *State v. Olsson*, 2014-NMSC-012, && 20-29, 32, 324 P.3d 1230 and *State v. Leeson*, 2011-NMCA-068, & 17, 149 N.M. 823, 255 P.3d 401).

The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as Subsection C. *See* 2016 N.M. Laws Ch. 2, ' 1 (eff. Feb. 25, 2016). The Legislature also amended the basic sentence from a Athird-degree felony@ to a Athird-degree felony for sexual exploitation of children,@ and added new subsections for felonies Afor sexual exploitation of children@ to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, '' 1, 2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-633. Sexual exploitation of children; manufacture.

For you to find the defendant guilty of sexual exploitation of children (manufacture) [as charged in Count ____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally manufactured a visual or print medium[2];

2. The medium depicts a prohibited sexual act[2] [or simulation of such act][3];

3. One or more of the participants in that act is a child under eighteen (18) years of age;

[4. The depictions are obscene[4];][3] and

5. This happened in New Mexico on or about _____, 20__.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If in issue, the statutory definitions of Amanufacture,@ Avisual or print medium@ and/or Aprohibited sex act@ shall be given. *See* NMSA 1978, ' 30-6A-2.

3. Instruct with bracketed language only if in issue.

4. If this element is instructed, a definition of Aobscene@ shall be given. *See* NMSA 1978, ' 30-6A-2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(E) (2016).

Section 30-6A-3(E) defines the crime of child pornography manufacture. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including Amanufacture,@ Avisual or print medium,@ Aprohibited sex act,@ and Aobscene.@

The New Mexico Court of Appeals held that Acopying the information from a computer to an external drive to another computer@ falls within the statutory definition of manufacture as Acopying by any means.@ *State v. Smith*, 2009-NMCA-028, && 14-15, 145 N.M. 757, 204 P.3d 1267.

In 2011, the New Mexico Court of Appeals held that the unit of prosecution of manufacture was unambiguous so that each act of taking a photograph constituted a count of manufacture. *State v. Leeson*, 2011-NMCA-068, & 17, 149 N.M. 823, 255 P.3d 401 (AA violation of the statute occurs where a criminal defendant intentionally produces or copies a photograph, electronic image, or video that constitutes child pornography.@); *see also* ' 30-6A-2(D) (defining Amanufacture@ to include Athe production, processing, copying by any means, printing, packaging or repackaging@ of exploitation materials). The Supreme Court subsequently distinguished *Leeson* to find the units of prosecution for possession and distribution ambiguous and that only one count could be punished for multiple images if the defendant acted unitarily. *State v. Olsson*, 2014-NMSC-012, && 23, 31, 43-47, 324 P.3d 1230; *see also State v. Sena*, 2016-NMCA-062, && 3-4, 9-19, 376 P.3d 887. The Court of Appeals held that convictions for possession and manufacture-by-recording do not violate double jeopardy if distinct evidence can support a continuing knowing possession after the manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, && 12-15,417 P.3d 1157.

The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as Subsection E. *See* 2016 N.M. Laws Ch. 2, ' 1 (eff. Feb. 25, 2016). The Legislature also amended the basic sentence from a Asecond-degree felony@ to a Asecond-degree felony for sexual exploitation of children,@ and added new subsections for felonies Afor sexual exploitation of children@ to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, '' 1, 2.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

Elements of the crime of sexual exploitation of children by manufacture. — Although the plain language of this section does not provide any scienter requirement for the crime of sexual exploitation of children by manufacture, the crime of sexual exploitation of children by manufacture, like the crimes of sexual exploitation of children by possession and distribution, requires the State to prove scienter with respect to the content of the manufactured visual or print medium. The State must prove the Defendant intentionally manufactured a visual or print medium, the medium depicts a prohibited sexual act or simulation of such an act, the Defendant knew or had reason to know that the medium depicts a prohibited sexual act or simulation of such act, the Defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age, and the depictions are obscene. *State v. Rael*, 2021-NMCA-040, cert. granted.

Insufficient evidence to support Defendant's conviction for possessing, distributing, and manufacturing sexual exploitation of children material. — Where Defendant was convicted of one count of sexual exploitation of children by possession, one count of sexual exploitation of children by distribution, and three counts of sexual exploitation of children by manufacture, there was insufficient evidence to support Defendant's convictions where the State failed to prove beyond a reasonable doubt that Defendant knew or had reason to know that the videos supporting his convictions contained sexual exploitation of children material. *State v. Rael*, 2021-NMCA-040, cert. granted.

14-634. Consensual possession defense.[1]

In evaluating the elements of sexual exploitation of children (possession) [as charged in Count ____][2], it is a defense to the crime that a teenager possessed depictions of another teenager, consensually created and consensually possessed. If you find the following elements satisfied, you must find the defendant not guilty:

1. The defendant was under the age of eighteen (18) when the defendant possessed the depiction(s);

2. The depicted child was aged fourteen (14) to eighteen (18) at the time the image was captured;

3. The depicted child knowingly and voluntarily consented to the image=s creation; and

4. The depicted child knowingly and voluntarily consented to the defendant=s possession of the image.

USE NOTES

1. For use with UJI 14-631 NMRA when the consensual possession defense defined in NMSA 1978, Section 30-6A-3(B) is in issue.

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

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(B) (2016).

The Legislature amended Section 30-6A-3 in 2016, adding Subsection B, an affirmative defense for consensual possession among teenagers. 2016 N.M. Laws ch. 2, ' 1 (eff. Feb. 25, 2016).

Under New Mexico law, consent to the image=s creation may be withdrawn at any time before the creation, and presumably consent to the possession can also be withdrawn. *Cf. State v. Pisio*, 1994-NMCA-152, & 38, 119 N.M. 252, 889 P.2d 860 (AA person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself.@); accord *State v. McCormack*, 1984-NMCA-042, & 13, 101 N.M. 349, 682 P.2d 742 (stating that criminal trespass is established if the defendant Aentered or remained without authorization or permission, knowing that consent to enter had been denied or withdrawn@).

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

CHAPTER 7
Firearms; Deadly Weapons

14-701. Receipt, transportation or possession of a firearm or destructive device by a felon; essential elements.

For you to find the defendant guilty of receipt, [transportation] [or][1] [possession] of a [firearm] [or] [destructive device] by a felon [as charged in count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [received] [transported] [or][1] [possessed] a [firearm[3]] [or][1] [destructive device[4]]

2. The defendant, in the preceding ten years, was convicted and sentenced to one or more years imprisonment by a court of the United States or by a court of any state [and has not been pardoned of the conviction by the appropriate authority][5];

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

USE NOTES

1. Use only the applicable alternative.

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

3. Give UJI 14-704 NMRA, the definition of a firearm, if applicable.

4. Give the Section 30-7-16(C)(1) definition of "destructive device", if applicable.

5. Use bracketed language only if there is an issue as to whether the defendant has been pardoned for the offense.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

Committee commentary. — The name of the prior felony conviction is not necessary. If the defendant stipulates to the commission of the offense, evidence of the nature of defendant's predicate felony convictions is irrelevant and prejudicial under evidence Rule 11-403 NMRA. *State v. Tave,* 1997-NMCA-056, 122 N.M. 29, 919 P.2d 1094; *accord, Old Chief v. United States,* 117 S. Ct. 644 (1997).

If the defendant does not stipulate to the prior offense, the state may prove the prior offense by a redacted record or other evidence which satisfies the rules of evidence. *See State v. Tave,* at Para. 15.

Section 30-7-16 NMSA 1978 requires that the defendant have been sentenced for the predicate offense to a term of more than one year. This definition would include suspended sentences, which are imposed before their execution is suspended, but would not include deferred sentences, which defer the imposition of sentence so long as no violation of probation occurs. *Compare* Section 31-20-3(B) NMSA 1978 with Section 31-20-3(A) NMSA 1978. "[T]he difference between suspension and deferral is that suspension involves a sentence imposed while deferral does not. Suspension always subjects the defendant to criminal consequences, although he may be pardoned, while deferral ordinarily results in the charges being dismissed." *State v. Kenneman,* 98 N.M. 794, 797, 653 P.2d 170 (Ct.App. 1982). Misdemeanor offenses, which by law cannot invoke sentences of more than one year on a particular offense are not predicate offenses under the statute.

[Amended November 12, 1998.]

ANNOTATIONS

The 1998 amendment, effective January 1, 1999, substituted "a firearm [or] [destructive device]" for "[firearms]" in the introductory language; substituted "a [firearm] [or] [destructive device]" for "a [[shotgun] [rifle] [handgun__ [firearm]" in Element 1; and in Element 2 substituted "was convicted" for "was previously convicted of the crime of]"

near the beginning and added "and sentenced to one or more years imprisonment by a court of the United States or by a court of any state [and has not been pardoned of the conviction by the appropriate authority]" at the end.

Cross references. — For firearms or destructive devices, *see* Section 30-7-16 NMSA 1978.

Erroneous use of instruction. — In a prosecution for being a felon in possession of a firearm, the court's use of this instruction naming the predicate offense, aggravated assault with a deadly weapon, was reversible error. *State v. Tave*, 1996-NMCA-056, 122 N.M. 29, 919 P.2d 1094.

Sufficient evidence of being a felon in possession of a firearm. — Where defendant was charged with being a felon in possession of a firearm after taking a gun inside a Las Cruces club, there was sufficient evidence to support the conviction, because based on evidence presented at trial that defendant told the officer that he was armed with a gun, a witness told the officer over the phone that defendant had a gun, and police recovered a handgun inside the club, a reasonable jury could have found that defendant had knowledge and control, and thereby possession, of a gun. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

14-702. Unlawful carrying of firearm in licensed liquor establishment.

For you to find the defendant guilty of unlawfully carrying a firearm in a licensed liquor establishment [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____[2] is licensed to dispense alcoholic beverages;

2. While _____ *(name of defendant)* was in _____[2] _____ *(name of defendant)* was carrying a loaded or unloaded firearm;

[3. _____ *(name of defendant)* did not have legal authority to possess the firearm while in _____[2];][3]

4. This happened in New Mexico on about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Insert the name of the establishment.

3. Give bracketed information if this is an issue.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

ANNOTATIONS

The 1998 amendment, effective January 1, 1999, made minor stylistic changes in Paragraphs 1 and 2 and in Element 3 substituted "possess" for "have" and "while" for "in his possession in".

Cross references. — For unlawful carrying of a firearm in licensed liquor establishments, *see* Section 30-7-3 NMSA 1978.

14-703. Negligent use of a deadly weapon.

For you to find the defendant guilty of negligent use of a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. [The defendant discharged a firearm into a [building][2] [vehicle];]

   [OR][2]

   [The defendant discharged a firearm knowing that he was endangering [a person][2] [property];]

   [OR]

   [The defendant was carrying a firearm while under the influence of [alcohol][2] [narcotics];]

   [OR]

   [The defendant endangered the safety of another, by handling or using a [deadly weapon[3]] [firearm] in a negligent[4] manner;]

   [OR]

   [The defendant discharged a firearm within one hundred and fifty yards of a [dwelling[5]] [or] [building] without permission of the owner or lessee. [The state must also prove that either:

   A. the weapon was discharged on non-public lands; or

   B. the discharge did not occur during hunting season; or

C. that the [dwelling] [or] [building] was not an abandoned or vacated building];][6]

[2. The defendant was not a peace officer[7] or other public employee who is required or authorized by law to carry or use a firearm in the course of employment and who carries, handles, uses or discharges a firearm while lawfully engaged in carrying out the duties of such office or employment;]

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative.

3. If this alternative is used, Subsection B of Section 30-1-12 NMSA 1978, the definition of "deadly weapon", is given immediately after this instruction.

4. If this alternative is used, UJI 14-133, the definition of criminal negligence, is given immediately after this instruction.

5. If this alternative is given, Instruction 14-1631, definition of "dwelling house" is given as the definition of "dwelling".

6. This alternative is to be given only if the court finds that the evidence presents issues on whether: (1) the building was an abandoned or vacated building; (2) the building was located on public lands; and (3) the defendant discharged the firearm during hunting season.

7. This alternative may be given if there is an issue as to whether the defendant was a peace officer or public employee in the lawful discharge of duty. This alternative is not to be given if the defendant is charged with carrying a firearm while under the influence of an intoxicant or narcotic.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

Committee commentary. — The 1998 amendments to this instruction were made to conform this instruction with the 1993 amendment of Section 30-7-4 NMSA 1978 and to be consistent with the Supreme Court's opinions construing "negligence" as used in the criminal code to mean "criminal negligence. *See State v. Yarborough,* 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131 (1996) and *Santillanes v. State,* 115 N.M. 215, 849 P.2d 358 (1993). If the issue is whether or not the defendant handled a firearm or deadly weapon in a negligent manner, UJI 14-133 is to be given.

The committee also deleted the requirement that the definition set forth in UJI 14-704 NMRA be used with this instruction. UJI 14-704 NMRA is based on the definitions in Section 30-7-16(C) NMSA 1978, which was enacted eighteen years after 30-7-4, does not refer to it and specifically recites that the definition applies only to the term "as used in this section". The definitions in Section 30-7-16 NMSA 1978 may be limited to Section 30-7-16 NMSA 1978 offenses.

[Amended November 12, 1998.]

ANNOTATIONS

The 1998 amendment, effective January 1, 1999, in Element 1, added the first footnote 2 designations in the first through third paragraphs, made a gender neutral change in the third paragraph, added the footnote 4 designation in the fourth paragraph, in the fifth paragraph substituted "a [dwelling] or [building]" for "an occupied [dwelling] [building]", made a minor stylistic change, and added "The state must also prove that either:" at the end, and added paragraphs A through C; added Element 2; and redesignated former Element 2 as Element 3.

Cross references. — For negligent use of a deadly weapon, *see* Section 30-7-4 NMSA 1978.

Adding "negligently" to instruction not necessary. — The trial court did not have to modify this instruction to add the word "negligently." Section 30-7-4(A)(2) NMSA 1978 defines negligent use of a deadly weapon as "carrying a firearm while under the influence of an intoxicant or narcotic." The proscribed conduct is negligence per se. *State v. Mata y Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126.

14-704. Firearm; definition.

A firearm means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of a firearm, any firearm muffler or firearm silencer. Firearm includes any handgun, rifle or shotgun.

USE NOTES

For use with UJI 14-701.

[Adopted, effective May 1, 1986; as amended, effective January 1, 1999.]

Committee commentary. — In 1998, use note 1 was amended to delete "UJI 14-702 and UJI 14-703". The definition of "firearm" in Section 30-7-16 NMSA 1978 is limited to Section 30-7-16 NMSA 1978 offenses. UJI 14-702 is the essential elements instruction for Section 30-7-3 NMSA 1978 offenses and UJI 14-703 is the essential elements instruction for 30-7-4 NMSA 1978 offenses.

Section 30-7-2.2 NMSA 1978 contains a definition of "handgun". However, it is limited to "unlawful possession of a handgun". The only general definition in the Criminal Code is the definition of "deadly weapon" which includes a firearm, whether loaded or unloaded.

[Amended November 12, 1998.]

ANNOTATIONS

The 1998 amendment, effective January 1, 1999, substituted "A firearm means" for "A firearm is any handgun, rifle, shotgun or" at the beginning, substituted "the frame or receiver of a firearm, any firearm muffler or firearm silencer" for "including the frame receiver, muffler or silencer" at the end of the first sentence; and added the second sentence.

Cross references. — For firearms, *see* Section 30-7-16 NMSA 1978.

CHAPTER 8
(Reserved)

CHAPTER 9
Sex Crimes

Part A
Criminal Sexual Contact

14-901. Chart.

SECTION 30-9-12 NMSA 1978
CRIMINAL SEXUAL CONTACT OF AN ADULT

Misdemeanor and Fourth Degree

	MISDE-MEANOR	FOURTH DEGREE — TYPES OF CRIMINAL SEXUAL CONTACT			
TYPE OF FORCE OR COERCION		A. Personal Injury	B. Aided or Abetted	C. Armed With a Deadly Weapon	D. Multiple 4th Degree Types (A-B)
1. Use of physical force or physical violence	14-902	14-906	14-910		
2. Threats of force or coercion	14-903	14-907	14-911		
3. Victim physically or	14-904	14-908	14-912		

mentally unable to consent					
4. All of the above (1-3)	14-905	14-909	14-913		14-915
FORCE OR COERCION NOT AN ELEMENT				14-914	

14-902. Criminal sexual contact; use of physical force or physical violence; essential elements.

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

[3. The defendant's act was unlawful;][4]

4. _____ (*name of victim*) was eighteen (18) years of age or older;

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction contains the essential elements of criminal sexual contact perpetrated through the use of force or coercion. In this instruction "force or coercion" is defined as physical force or physical violence. NMSA 1978, § 30-9-10(A) (2005).

The other definitions of force or coercion are contained in UJI 14-903 NMRA (threats) and UJI 14-904 NMRA (unconscious, etc.). UJI 14-905 NMRA combines UJI 14-902, 14-903, and 14-904 NMRA. It may be used when more than one definition of force or coercion is supported by the evidence.

The introductory paragraph of this instruction identifies the charge as "criminal sexual contact." It would be misleading to include the words "by force or coercion" in the charge. The definition of "force or coercion" includes both active interference by the defendant with the normal consent functions of the victim, *e.g.*, physical force, and passive incapacity of the victim to engage in normal consent functions, *e.g.*, unconsciousness. A jury might be confused as to the elements of the offense if the term "by force or coercion" were used when the force or coercion is supplied by the incapacity of the victim.

Element 1 sets out in the alternative the two ways that the contact may be committed. It was decided that the Legislature intended the term "unclothed" to mean "bare to the touch."

The language "without her consent" was omitted from the second alternative in Element 1 because the language does not appear in the second portion of the statutory definition of criminal sexual contact. It would seem that the concept is covered by the requirement that the defendant "caused" the victim to do the act. Unlawfulness is defined in UJI 14-132 NMRA. Consent may be relevant to unlawfulness, and force or coercion may negate consent.

The committee was of the opinion that the parts of the body included in the term "primary genital area" are those set forth in NMSA 1978, Section 30-9-14 (1996) relating to indecent exposure. In 2018, the word "vagina" was removed from the use note listing body parts for all contact crimes based on the recognition that "contact" with the vagina necessarily requires "penetration" of the vulva, thus conflating the greater and lesser offenses of criminal sexual penetration and criminal sexual contact. *See State v. Tapia*, 2015-NMCA-048, ¶¶ 21, 25, 347 P.3d 738 (acknowledging "that the overlap in the language of the CSCM instruction and the sexual intercourse instruction could have

resulted in some juror confusion") (citing UJI 14-982 NMRA (defining "sexual intercourse")). Rejecting fundamental instructional error, *Tapia* concluded

that the CSCM jury instruction, even though arguably flawed from the standpoint of anatomical definitional accuracy, did not create such confusion in the jury that it would undermine the judicial process. However, as a result of any ambiguity or contradiction that may arise out of the change in the definition of 'sexual intercourse' under UJI 14-982 [NMRA], we believe that 'vagina' should be removed from the list of anatomy that can be included within the jury instructions for any criminal sexual contact.

Tapia, 2015-NMCA-048, ¶ 27. Definitions for all anatomical terms relevant to both contact and penetration offenses are provided in UJI 14-981 NMRA and must be given. Dictionary definitions were considered insufficient because the definitions contained in several dictionaries, such as Webster's and Random House, were found to be excessively technical.

The term "groin" was included in the instructions but was left undefined. The use of this term should be avoided because its technical definition is so broad that it includes parts of the body which the committee considered beyond the scope of the intended prohibited contacts.

Element 2 defines "force or coercion" as physical force or physical violence. Threats of force or violence are a separate statutory definition of force or coercion and are covered in UJI 14-903 NMRA. The issue is not how much force or violence is used, but whether the force or violence was sufficient to negate consent. "Physical or verbal resistance of the victim" is not an essential element. Section 30-9-10(A). *Cf. State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781 (discussing "force or violence" in the context of robbery). The force or violence can be directed against the victim or another.

In all cases of criminal sexual contact the age of the victim is an essential element because it fixes the degree of the crime. The committee considered the argument that the age of the victim should be irrelevant unless the charge of criminal sexual contact of a minor is also submitted to the jury, in which case age is in issue. However, the element was left in this instruction because the committee believed that there was no danger that a defendant would be acquitted of the charge of criminal sexual contact of an adult merely because the evidence showed that the victim was a minor.

The committee recognized that other unconsented touchings are covered by NMSA 1978, Section 30-3-4 (1963), relating to battery. *See* commentary to UJI 14-320 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, changed “use Note reference “2” to “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris,’”, added “or”, and after “‘vulva.’”, deleted “or ‘vagina’”; and added new Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "3" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 4 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 5 of the instruction as Item 4; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — For criminal sexual contact, *see* Sections 30-9-12(D) and 30-9-10(A)(1) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

14-903. Criminal sexual contact; threats of force or coercion; essential elements.

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____] (*name of victim or other person*);][3]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

[4. The defendant's act was unlawful;][5]

5. _____ (*name of victim*) was eighteen (18) years of age or older;

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction contains the essential elements of criminal sexual contact perpetrated through the use of force or coercion. In this instruction "force or coercion" is supplied by threats. Section 30-9-10(A)(2) and Section 30-9-10A(3) NMSA 1978. The definitions from both subsections of the statute; i.e.,

threats to use physical force or physical violence and threats of other action, have been combined into one element in this instruction.

The statute is broad and includes various types of threats. However, the threat must be of such a coercive nature that its use negates the victim's consent. It is therefore a question of law whether a particular threat is sufficient to support the charge. Threats of criminal conduct, such as the statutory examples of kidnapping or extortion, would clearly be sufficient. Promises to confer a benefit upon the victim, such as a raise or promotion, would probably not be considered threats. In such case a purported victim may have bargained for the benefit and thus consented. The threats can be directed against the victim or another.

If the jury requests a definition of the threatened act or offense, e.g., kidnapping, extortion, etc., then in accordance with the general UJI rule, an ordinary dictionary definition should be given. An exception to this general rule should be made if the defendant is also charged with the substantive crime which was threatened. In such case, if the jury asks for the definition, the essential elements of the substantive crime should be referred to as the definition of the threatened offense. Otherwise the jury would be confused as to the elements of the accompanying offense.

The belief of the victim as to the ability and intention of the defendant to carry out the threat is measured by a subjective standard. The committee was of the opinion that an objective test for reasonableness of the fear is inapplicable to sex crimes. If the victim's apprehension caused submission to the contact, the defendant cannot rely on an argument that the victim's response to the threat was irrational. The victim's fear need not be reasonable, it must only be real.

See also the commentary to UJI 14-902 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “applied force to the unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “*victim or other person*);]”, added Use Note reference “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential

element 5 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — For criminal sexual contact, *see* Sections 30-9-12(D) and 30-9-10(A)(2)(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 67.

75 C.J.S. Rape § 82.

14-904. Criminal sexual contact; victim unconscious, asleep, physically or mentally helpless; essential elements.

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. _____ (*name of victim*) was eighteen (18) years of age or older;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* Section 30-9-12 NMSA 1978; misdemeanor.

This instruction contains the essential elements of criminal sexual contact perpetrated through the use of force or coercion. In this instruction "force or coercion" is supplied by the inability of the victim to consent. This statutory definition for force or coercion focuses on the status of the victim and not on the intention of the actor. The defendant must have the same general intent as for all sex crimes and, in addition, must have knowledge of the helpless status of the victim. This knowledge of the victim's condition is measured by either an objective or subjective standard, i.e., the defendant is culpable for what he knew or had reason to know.

The term "physically helpless" means incapable of giving consent. "Unconscious" and "asleep" have meanings which are generally understood.

In *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975), the court cited with approval from *McDonald v. United States*, 114 U.S. App. D.C. 120, 312 F.2d 847, 851 (1962) ". . . [A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral control." If the jury requests a definition of "mental condition," the language from *State v. Nagel*, supra, may be used because the dictionary is inadequate to define the term.

See also the commentary to UJI 14-902.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “[unconscious]”, added Use Note reference “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — For criminal sexual contact, *see* Sections 30-9-12(D) and 30-9-10(A)(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

14-905. Criminal sexual contact; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____) (*name of victim or other person*)[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____; (*name of victim*)]

[3. The defendant's act was unlawful;][6]

4. _____ (*name of victim*) was eighteen (18) years of age or older;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* Section 30-9-12B NMSA 1978; misdemeanor.

This instruction combines UJI 14-902 (physical force or physical violence), UJI 14-903 (threats) and UJI 14-904 (unconscious, etc.). It may be used if the evidence supports more than one type of force or coercion as the means employed in perpetrating the criminal contact. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

Note, however, that even if different theories of force or coercion are submitted to the jury, in this instruction the defendant is being charged with only one crime, misdemeanor criminal sexual contact. Throughout the statutes on sexual offenses (Sections 30-9-11 to 30-9-13 NMSA 1978) alternative methods are set forth for committing the offenses. For example, there are three ways in which a defendant can commit criminal sexual contact in the fourth degree. Section 30-9-12A NMSA 1978. Separate instructions have been prepared for each of these methods, and where force or coercion is an essential element of a particular method, separate instructions for each definition of force or coercion have been prepared. There are, therefore, ten separate instructions setting forth the essential elements of the single crime of criminal sexual contact in the fourth degree.

In all cases where alternate methods of committing one offense are submitted to the jury, the defendant is being charged with only one offense and may be found guilty of only one offense.

See also commentary to UJI 14-902, 14-903 and 14-904 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “unclothed _____”, changed Use Note reference “4” to “3”, after “consent;]”, added Use Note reference “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after the first occurrence of “physical violence;]”, deleted Use Note

reference 3 and added Use Note reference “4”, after “*or other person*)”, changed Use Note reference 3 to “4”, and after “(unconscious)”, added Use Note reference “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”; deleted Use Note 3 and redesignated former Use Note 4 as Use Note 3; in Use Note 3, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 4; and in Use Note 5, after “Section 30-9-10(A)(3)”, added “(2005)”.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "3" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 4 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 5 of the instruction as Item 4; and deleted former Use Note 6, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — For criminal sexual contact, *see* Sections 30-9-12(C) and 30-9-10(A) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

14-906. Criminal sexual contact; use of physical force or physical violence; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in _____[4];

[4. The defendant's act was unlawful];[5]

5. _____ (*name of victim*) was eighteen (18) years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Four separate instructions have been prepared for criminal sexual contact which results in personal injury to the victim. UJI 14-906 NMRA (physical force or physical violence), 14-907 NMRA (threats) and 14-908 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-906, 14-907, 14-908 and 14-909 NMRA are the same as UJI 14-902, 14-903, 14-904 and 14-905 NMRA, respectively, with the additional element of personal injury to the victim.

UJI 14-909 NMRA combines UJI 14-906, 14-907 and 14-908 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more

clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

The statutory definition of personal injury is broad and includes various types of personal injuries. It is therefore a question of law as to whether a particular injury constitutes an aggravating factor sufficient to support the charge. Personal injury includes but is not limited to: disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ. Section 30-9-10(C) NMSA 1978.

See also commentaries to UJI 14-902, 14-903 and 14-904 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, changed Use Note reference “2” to “3”, and after “to touch the _____”, deleted Use Note reference “3” and added Use Note reference “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 3; and in Use Note 4, after “Section 30-9-10(D)”, added “(2005)”.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(1) and 30-9-10(A)(1) NMSA 1978.

UJI 14-946 proper instruction for fellatio. — UJI 14-946, stating the elements of criminal sexual penetration in the second degree, is the appropriate instruction when the offense is fellatio, rather than this instruction. *State v. Gabaldon*, 1978-NMCA-077, 92 N.M. 93, 582 P.2d 1306.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

14-907. Criminal sexual contact; threats of force or coercion; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][3]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

4. The defendant's acts resulted in _____[5];

[5. The defendant's act was unlawful][6];

6. _____ (*name of victim*) was eighteen (18) years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When

definitions are provided in Instruction 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) for examples of types of threats.

5. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) for types of personal injuries.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-906 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “defendant”, deleted Use Note reference “2”, and after “victim or other person);]”, changed Use Note reference “2” to “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 3; in Use Note 4, after “Section 30-9-10(A)(3)”, added “(2005)”; and in Use Note 5, after “Section 30-9-10(D)”, added “(2005)”.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 6, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(1) and 30-9-10(A)(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 67.

75 C.J.S. Rape § 82.

14-908. Criminal sexual contact; victim unconscious, asleep, physically or mentally helpless; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing)];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in _____[4];

[5. The defendant's act was unlawful;][5]

6. _____ (*name of victim*) was eighteen (18) years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-906 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after "defendant", deleted Use Note reference "2", after "unclothed _____", changed Use Note reference "3" to "2", after "consent;]", changed Use Note reference "2" to "3", and after "to touch the _____", changed Use Note reference "3" to "2"; in Element 2, after "(unconscious)", changed Use Note reference "2" to "3"; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after "'mons veneris'", added "or", and after "'vulva'", deleted "or 'vagina'"; added Use Note 3; and in Use Note 4, after "Section 30-9-10(D)", added "(2005)".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(1) and 30-9-10(A)(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

14-909. Criminal sexual contact; force or coercion; personal injury; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact causing personal injury [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6];

4. _____ (*name of victim*) was eighteen (18) years of age or older;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-906 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “unclothed _____”, changed Use Note reference “4” to “3”, after “consent;]”, changed Use Note reference “3” to “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after “physical violence;]”, changed Use Note reference “3” to “4”, after “victim or other person)”, changed Use Note reference “3” to “4”, and after

“(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”; deleted Use Note 3 and redesignated former Use Note 4 as Use Note 3; in Use Note 3, after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 4.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 7, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(1) and 30-9-10(A) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

14-910. Criminal sexual contact; use of physical force or physical violence; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][4]

5. _____ (*name of victim*) was eighteen (18) years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Four separate instructions have been prepared for criminal sexual contact when the perpetrator is aided or abetted by one or more persons. UJI 14-910 NMRA (physical force or physical violence), 14-911 NMRA (threats) and 14-912 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-910, 14-911, 14-912 and 14-913 NMRA are the same as UJI 14-902, 14-903, 14-904 and 14-905 NMRA, respectively, with the additional element of aided or abetted.

UJI 14-913 NMRA combines UJI 14-910, 14-911 and 14-912 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

The committee was of the opinion that the legislative use of the terms "aided and abetted" to describe the aggravated offense was not intended to involve consideration of complicated issues of the necessary criminal intent for an accessory. The culpability of the defendant for this aggravated charge of criminal sexual contact does not depend upon the intention of another entertained without his knowledge; it is the intention of the defendant and the effect of the assistance which is controlling.

The committee considered whether the statute must be construed to require that the aiding and abetting be an assist to the force or coercion. The committee decided that the help or encouragement provided the defendant by another may be an assist to any element of the unlawful contact. The gravamen of the offense is the use of another as a tool in the perpetration of the crime.

Therefore, the committee was of the opinion that the element of aided and abetted was properly stated by the phrase "acted with the help or encouragement of one or more persons." The committee noted that the legislature was expressing concern for the victim by including this element as an aggravating factor. A sexual assault by persons acting in concert poses a greater threat to a victim's physical and mental safety than an assault by a single defendant. Statistical support for this theory is reported by Menachem Amir in his two studies of rape and rape victims in Philadelphia. *See* generally MacDonald, *Rape Offenders and Their Victims*, (Charles C. Thomas, 1971).

The committee also considered what degree of contemporaneity must exist between the actions of the defendant and the help or encouragement of the purported aider and abettor. It decided that there must be a sufficient nexus in time and place for the victim to be aware of the aggravated danger. For example, it would be sufficient if the defendant threatened that his assistant would harm the victim's family or if the victim was aware that the defendant had an assistant in the next room ready to provide aid if victim resisted, etc. *See also* commentaries to UJI 14-902, 14-903 and 14-904 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, changed Use Note reference “2” to “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(2) and 30-9-10(A)(1) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 28, 29.

75 C.J.S. Rape § 82.

14-911. Criminal sexual contact; threats of force or coercion; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or another*);][3]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][5]

6. _____ (*name of victim*) was eighteen (18) years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-910 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “defendant”, deleted Use Note reference “2”, after “*victim or another*)’]”, changed Use Note reference “2” to “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 3; and in Use Note 4, after “Section 30-9-10(A)(3)”, added “(2005)”.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 5, which read: "Use the bracketed

sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(2) and 30-9-10(A)(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 28, 29, 57.

75 C.J.S. Rape § 82.

14-912. Criminal sexual contact; victim unconscious, asleep, physically or mentally helpless; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing);

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][4]

6. _____ (*name of victim*) was eighteen (18) years of age or older;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-910 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “(unconscious)”, deleted Use Note reference “2” and added Use Note reference “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "5" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 6 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 7 of the instruction as Item 6; and deleted former Use Note 4, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(2) and 30-9-10(A)(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 28, 29, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

14-913. Criminal sexual contact; force or coercion; aided or abetted by another; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact when aided or abetted by another [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][6]

5. _____ (*name of victim*) was eighteen (18) years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or physical incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-910 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “unclothed _____”, changed Use Note reference “4” to “3”, after “consent;]”, changed Use Note reference “3” to “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after “violence;]”, changed Use Note reference “3” to “4”, after “*victim or other person*))”, changed Use Note reference “3” to “4”, and after “(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”; deleted Use Note 3 and redesignated former Use Note 4

as Use Note 3; in Use Note 3, after "'mons veneris'", added "or", and after "'vulva'", deleted "or 'vagina'"; and added Use Note 4.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 6, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(2) and 30-9-10(A) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 28, 29.

75 C.J.S. Rape § 82.

14-914. Criminal sexual contact; deadly weapon; essential elements.

For you to find the defendant guilty of criminal sexual contact when armed with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[2] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant was armed with and used a [_____][4] [_____ (*name of object*) with the intent to use it as a weapon and a _____ (*name of object*) when used as a weapon, is capable of inflicting death or great bodily harm[5]][6];

[3. The defendant's act was unlawful;][7]

4. _____ (*name of victim*) was eighteen (18) years of age or older;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

5. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B).

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — UJI 14-914 NMRA contains the essential elements of criminal sexual contact when the perpetrator is armed with a deadly weapon, a fourth degree felony.

The statute states that the offense of criminal sexual contact is a fourth degree felony "when the perpetrator is armed with a deadly weapon." The instruction requires in Element 2 that the defendant be armed with and use a deadly weapon. The statute must be construed to require use of the weapon because there is no requirement of force or coercion. It would seem that the legislative intent was to supplant the element of force or coercion with the element of "being armed." In order for the substitution to be logically consistent, the weapon must be used.

Compare UJI 14-1621 NMRA (armed robbery), UJI 14-1632 NMRA (aggravated burglary) and Section 30-7-3 NMSA 1978 (unlawful carrying of a firearm into a liquor dispensary).

The defendant uses the deadly weapon if he employs it in any manner that constitutes an express or implied threat to use it against the victim or another. That may be done by displaying the weapon, or referring to it or by permitting its presence to become known to the victim. The weapon must be used to supply the required coercion.

This instruction was revised in 1999 and 2004 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154. *See* commentary to UJI 14-304 NMRA.

See also commentary to UJI 14-902 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “unclothed _____”, changed Use Note reference “3” to “2”, after “consent;]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, revised element 2, added the bracketed essential element number "3" and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1999 amendment, effective February 1, 2000, rewrote element 2 which read: "The defendant was armed with and used .....;[4]" and, in the Use Note, rewrote Paragraph 4 to correspond to the amendment of element 2, and inserted Paragraphs 5 and 6.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 4 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 5 of the instruction as Item 4; and deleted former Use Note 5, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Section 30-9-12(C)(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 C.J.S. Rape § 25.

14-915. Criminal sexual contact in the fourth degree; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact in the fourth degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the unclothed _____[3] of _____ (*name of victim*) without _____'s (*name of victim*) consent;][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant

(used threats of physical force or physical violence against _____) (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6]; OR, the defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][7]

5. _____ (*name of victim*) was eighteen (18) years of age or older;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or other incapacity of the victim. The instruction also sets forth, in the alternative, two of the three types of criminal sexual contact in the fourth degree in NMSA 1978, Section 30-9-12(A) (1993): (1) contact resulting in personal injury, and (2) contact while aided and abetted by another. If the evidence supports one or more theories of "force or coercion" and also supports both of these theories of criminal sexual contact in the fourth degree, this instruction may be used. If the evidence also supports the third type of criminal sexual contact in the fourth degree (contact while armed with a deadly weapon), UJI 14-914 NMRA must also be given.

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

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective September 1, 1994; January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction combines UJI 14-906 NMRA (physical force or physical violence; personal injury), 14-907 NMRA (threats; personal injury), 14-908 NMRA (unconscious, etc.; personal injury), 14-910 NMRA (physical force or physical violence; aided or abetted), 14-911 NMRA (threats; aided or abetted) and 14-912 NMRA (unconscious, etc.; aided or abetted).

This instruction may be used if the evidence supports two theories of aggravation of the offense; i.e., personal injury and aided or abetted. However, in some circumstances individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

This combined instruction does not include UJI 14-912 NMRA (deadly weapon). It is awkward and confusing to combine it with the other fourth degree sexual contacts because UJI 14-914 NMRA contains no definitions of force or coercion. If the evidence also supports the charge that the defendant was armed with a deadly weapon, UJI 14-914 NMRA must be given. That is because the use of the deadly weapon element of UJI 14-914 NMRA supplants the force or coercion set forth in UJI 14-915 NMRA.

See also commentary to UJI 14-902 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “unclothed _____”, changed Use Note reference “4” to “3”, after “consent;]”, added Use Note reference “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after “physical violence;]”, changed Use Note reference “3” to “4”, after “*victim or other person*))”, changed Use Note reference “3” to “4”, after “(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”, and after “Section 30-9-12(A)”, added “(1993)”; deleted Use Note 3 and redesignated former Use Note 4 as Use Note 3; in Use Note 3, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 4.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element numbered "4" and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction; deleted former Item 5 of the instruction, which read: "....*(name of victim)* was not the spouse of the defendant"; redesignated former Item 6 of the instruction as Item 5; and deleted former Use Note 7, which read: "Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of 'spouse,' UJI 14-983, must also be given".

Cross references. — *See* Sections 30-9-12(C)(1), 30-9-12(C)(2) and 30-9-10(A) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape §§ 14, 82.

Part B
Criminal Sexual Contact of a Minor

14-920. Chart.

SECTION 30-9-13 NMSA 1978
CRIMINAL SEXUAL CONTACT OF A MINOR

Fourth Degree and Third Degree

	FOURTH DEGREE	THIRD DEGREE — TYPES OF CRIMINAL SEXUAL CONTACT OF A MINOR					
TYPE OF FORCE OR COERCION	13–18	A. Child Under 13	B. Person in Position of Authority	C. Personal Injury 13-18	D. Aided or Abetted 13-18	E. Armed With Deadly Weapon 13-18	F. Multiple 3rd Degree Types 13-18 (B-C)
1. Use of physical force or physical violence	14-921			14-927	14-931		
2. Threats of force or coercion	14-922			14-928	14-932		
3. Victim physically or mentally unable to consent	14-923			14-929	14-933		
4. All of the above (1-3)	14-924			14-930	14-934		14-936
FORCE OR COERCION NOT AN ELEMENT	14-925	14-926			14-935		

14-921. Criminal sexual contact of a minor in the fourth degree; use of physical force or physical violence; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][4]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13(D) (2004): fourth degree felony.

Four separate instructions have been prepared for criminal sexual contact of a minor. UJI 14-921 NMRA (physical force or physical violence), UJI 14-922 NMRA (threats), and UJI 14-923 NMRA (unconscious, etc.) contain separate definitions of "force or coercion." *See* NMSA 1978, § 30-9-10(A) (2005).

UJIs 14-921, 14-922, 14-923. and 14-924 NMRA are the same as UJIs 14-902, 14-903, 14-904, and 14-905 NMRA, respectively, with the additional element that the victim is a minor between the ages of thirteen and eighteen.

UJI 14-924 NMRA combines UJI 14-921, 14-922, and 14-923 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some

circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which UJI should be given for these essential elements.

Criminal sexual contact of an adult requires that the part of the body contacted be "unclothed." That is not the case in criminal sexual contact of a minor, and these instructions omit the requirement.

Criminal sexual contact of an adult by the touching or application of force, as distinguished from the causing of a touching, etc., requires that the contact be without the consent of the victim. That is not the case in criminal sexual contact of a minor, and these instructions omit the requirement.

The committee recognized that other unconsented touchings are covered by NMSA 1978, Section 30-3-4 (1963) relating to battery. *See* commentary to UJI 14-320 NMRA.

The statute requires that the touching be intentional. This element is covered by the general intent instruction, UJI 14-141 NMRA.

The parts of the body which are protected by NMSA 1978, Section 30-9-13 are more extensive than in criminal sexual contact of an adult. The breast and buttocks are included as well as the anus, penis, and genital area. The committee was of the opinion that the parts of the body protected against unlawful touchings by the term "primary genital area" are those set forth in NMSA 1978, Section 30-9-14 (1996) relating to indecent exposure. In 2018, the word "vagina" was removed from the use note listing body parts for all contact crimes based on the recognition that "contact" with the vagina necessarily requires "penetration" of the vulva, thus conflating the greater and lesser offenses of criminal sexual penetration and criminal sexual contact. *See State v. Tapia*, 2015-NMCA-048, ¶¶ 21, 25, 347 P.3d 738 (acknowledging "that the overlap in the language of the CSCM instruction and the sexual intercourse instruction could have resulted in some juror confusion") (citing UJI 14-982 NMRA (defining "sexual intercourse")). Rejecting fundamental instructional error, *Tapia* concluded

that the CSCM jury instruction, even though arguably flawed from the standpoint of anatomical definitional accuracy, did not create such confusion in the jury that it would undermine the judicial process. However, as a result of any ambiguity or contradiction that may arise out of the change in the definition of ‘sexual intercourse' under UJI 14-982 [NMRA], we believe that ‘vagina' should be removed from the list of anatomy that can be included within the jury instructions for any criminal sexual contact.

Tapia, 2015-NMCA-048, ¶ 27.

Definitions for all anatomical terms relevant to both contact and penetration offenses are provided in UJI 14-981 NMRA and must be given. Dictionary definitions were considered insufficient because the definitions contained in several dictionaries, such as Webster's and Random House, were found to be excessively technical.

Definitions for "breast" and "buttocks" were not included because the meaning of these terms is generally understood. In accordance with the general UJI rule, a dictionary definition of these terms should be given if the jury requests a definition.

The term "groin" was included in the instructions but was left undefined. The use of this term should be avoided because its technical definition is so broad that it includes parts of the body which the committee considered beyond the scope of the intended prohibited contacts.

NMSA 1978, Section 30-9-13 requires that the sexual contact be both unlawful and intentional. Unlawfulness is defined in UJI 14-132 NMRA. Consent may be relevant to unlawfulness, and force or coercion may negate consent.

In all cases of criminal sexual contact, the age of the victim is an essential element, because the age of the victim fixes the degree of the crime. A "minor" is a person under the age of eighteen (18). A person eighteen (18) years of age has reached majority. *See* NMSA 1978, § 28-6-1 (1973).

See commentaries to UJIs 14-902, 14-903, and 14-904 NMRA for a discussion of the definitions of "force or coercion."

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “applied force to the _____”, changed Use Note reference “3” to “2”, after “*name of victim*);]”, changed Use Note reference “2” to “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element "4" and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13(B)(1) and 30-9-10(A)(1) NMSA 1978.

Compiler's notes. — Section 30-9-12 NMSA 1978, which deals with criminal sexual contact of an adult, was amended in 1981 and now also protects breasts and buttocks,

along with 30-9-13 NMSA 1978, referred to in the ninth paragraph of the committee commentary.

Lack of consent is not an element of criminal sexual contact of a minor. — Where Defendant was convicted of one count of criminal sexual contact of a minor for forcibly touching the breast of a sixteen-year-old female victim, and where the evidence at trial established that Defendant, a thirty-three year old man, who appeared intoxicated, entered a candy shop where the victim was working alone, that Defendant lingered and made lewd comments of a sexual nature to the victim, that Defendant repeatedly asked the victim to give him a hug, that when the victim instead extended her hand across the counter in an attempt to shake the Defendant's hand, Defendant took her hand and forcibly pulled her into a hug, and that as Defendant released the victim from the hug, he brushed his hand over her chest and squeezed her breast, and where Defendant claimed that fundamental error occurred because of the failure to instruct the jury on lack of consent, claiming that surveillance video footage of his encounter with the victim was evidence of the victim's consent to his actions, fundamental error did not occur, because lack of consent is not an element of criminal sexual contact of a minor. Consent of a child between the ages of thirteen and sixteen to engage in sexual contact is irrelevant where force occurred. *State v. Begaye*, 2022-NMCA-012, *cert. denied*.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-922. Criminal sexual contact of a minor in the fourth degree; threats of force or coercion; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][3]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed that the defendant would carry out the threat;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][5]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-921 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “applied force to the _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “defendant”, deleted Use Note reference “2”, after “*victim or*

other person);]", added Use Note reference "3"; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after "'mons veneris'", added "or", and after "'vulva'", deleted "or 'vagina'"; added Use Note 3; and in Use Note 4, after "Section 30-9-10(A)(3)", added "(2005)".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13(B)(1), 30-9-10(A)(2) and 30-9-10(A)(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-923. Criminal sexual contact of a minor in the fourth degree; victim unconscious, asleep, physically or mentally helpless; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-921 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “applied force to the _____”, changed Use Note reference “3” to “2”, after “*name of victim*);]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “[unconscious]”, changed Use Note reference “2” to “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13(B)(1) and 30-9-10(A)(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 16, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

14-924. Criminal sexual contact of a minor in the fourth degree; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact of a minor [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[3] of _____ (*name of victim*);][4]

[OR]

[caused _____ (*name of victim*) to touch _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____) (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-921 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “touched or applied force to the _____”, changed Use Note reference “4” to “3”, after “*name of victim*);]”, added Use Note reference “4”, and after “to touch _____”, changed Use Note reference “4” to “3”; in Element 2, after “physical violence;]”, changed Use Note reference “3” to “4”, after “*victim or other person*))”, changed Use Note reference “3” to “4”, and after “(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”; deleted Use Note 3 and redesignated former Use Note 4 as Use Note 3; in Use Note 3, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 4.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element "4" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness

of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13(B) and 30-9-10(A)(2), 30-9-10(A)(3) or 30-9-10(A)(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-925. Criminal sexual contact of a minor in the [third] [second] degree; child under thirteen (13); essential elements.

For you to find the defendant guilty of criminal sexual contact of a child under the age of thirteen (13) [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*name of victim*) was a child under the age of thirteen (13);

[3. The defendant's act was unlawful;][4]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective October 1, 1992; January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13(B), (C) (2003) (defining second and third-degree criminal sexual contact of a minor).

This instruction contains the essential elements for criminal sexual contact of a child under the age of thirteen (13). If the victim is under the age of thirteen (13) years, no force or coercion is necessary.

Mistake of the defendant as to the age of a child under the age of thirteen (13) is not a defense. *Perez v. State*, 1990-NMSC-115, 111 N.M. 160, 162, 803 P.2d 249; Perkins, *Criminal Law*, 168 (2d ed. 1969).

If the child is "spouse" to the defendant, sexual contact is not a crime. Marriage may be permitted at any age by the children's court or family court and therefore the contact would not be unlawful. *See* NMSA 1978, § 40-1-6(B) (2013).

This instruction was revised in 1992 to comply with the Supreme Court's opinion in *State v. Osborne*, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624. *See also State v. Orosco*, 1992-NMSC-006, ¶ 5 n.3, 113 N.M. 780, 833 P.2d 1146, in which the Supreme Court further clarified its earlier decision in *Osborne*.

In 1991, NMSA 1978, Section 30-9-13 was amended to delete "other than one's spouse." To be consistent with this 1991 amendment, the Supreme Court approved in 1992 the deletion of former element 3, "victim was not the spouse of the defendant."

See also commentary to UJI 14-921 NMRA.

[As revised, September 10, 1993; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, changed Use Note reference “2” to “3”, after “to touch the _____”, changed Use Note reference “3” to “2”, and after

“defendant;]”, deleted Use Note reference “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title , after "third", added the brackets and word "second"; in the first sentence, after "child under the age of", added "thirteen"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 2, after "(name of victim) was", deleted "12 years of age or younger" and added "a child under the age of thirteen (13)".

The 2004 amendment, effective January 20, 2005, deleted "unlawfully and intentionally" in essential element 1, added the bracketed essential element 3 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former Use Notes 2, 3 and 5.

The 1992 amendment, effective October 1, 1992, inserted "unlawfully and intentionally" in Item 1, deleted former Item 3, relating to the victim not being the spouse of the defendant, redesignated former Item 4 as Item 3; and, in the "Use Note", added present Items 2 and 3, redesignated former Item 2 as present Item 5, deleted former Item 4, relating to sentencing when a spousal relationship issue has been raised, and redesignated former Item 3 as present Item 4.

Cross references. — *See* Section 30-9-13A(1) NMSA 1978.

Second degree criminal sexual contact of a minor. — Second degree criminal sexual contact of a minor as defined in Subsection B of Section 30-9-13 NMSA 1978 is limited to instances in which a defendant touches or applies force to the unclothed intimate parts of a minor. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

Sufficient evidence of third degree criminal sexual contact of a minor. — Where defendant caused the ten-year-old victim to touch defendant’s unclothed penis while in bed; the trial court instructed the jury using the language of the uniform jury instruction in effect at the time for third degree criminal sexual contact of a minor; and defendant was found guilty of and was sentenced for second degree criminal sexual contact of a minor; defendant’s conduct was a third degree felony under Subsection C, not a third degree felony under Subsection B. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, *cert. denied*, 2012-NMCERT-008.

Sufficient evidence of criminal sexual contact. — Where defendant was charged with criminal sexual contact of a minor and where the minor child, at trial, testified that defendant unzipped her pajamas and positioned his hand in the her underwear and touched the skin underneath her underwear in a rubbing motion, a jury could reasonably believe that defendant touched or applied force to the child’s unclothed groin area, and

thus there was sufficient evidence of criminal sexual contact of a minor. *State v. Pitner*, 2016-NMCA-102, *cert. denied*.

Use of term "groin" in instruction proper. *State v. Vigil*, 1985-NMCA-103, 103 N.M. 583, 711 P.2d 28.

Time as essential element. — Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

Disjunctive in instruction not error. — It was not error for the district court to instruct the jury that in order to convict defendant of criminal sexual contact of a minor under the age of 13, it must conclude that defendant touched or applied force either to the vagina or breast of the victim, as the essential element of the crime is touching an intimate part of the child. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

Instruction on unlawfulness need not be given where unlawfulness is not at issue. — Where defendant was charged with criminal sexual contact of a minor (CSCM), and where defendant claimed that the district court committed fundamental error in instructing the jury regarding CSCM by failing to include as an essential element that defendant's conduct was unlawful and failing to provide the jury with the corresponding instruction on unlawfulness, and where at trial, the jury heard from the child that defendant showed the child movies with women showing all of their body parts, that defendant exposed his own penis to the child, and then touched the child's clothed penis with his hand and mouth, there was no evidence in the record that defendant's contact of the child's penis was lawful; it is not fundamental error to fail to provide the unlawful element of this instruction in a case where the element of unlawfulness is not at issue. *State v. Luna*, 2018-NMCA-025, *cert. denied*.

Jury instruction for attempt to commit second-degree CSCM under thirteen did not amount to fundamental error. — Where Defendant was charged with attempt to commit second-degree criminal sexual contact of a minor, and where the child victim testified at trial that Defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating, then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her clothing, and further testified that she was afraid that Defendant was going to touch her private parts, and where Defendant claimed that the jury instruction describing the elements of second-degree CSCM under thirteen failed to properly state the "unclothed" element because the language describing attempted contact with "the unclothed mons veneris and/or the undeveloped breast area" allowed the jury to convict Defendant based on attempted contact with the child's "clothed" undeveloped breast area, and further claimed that because "undeveloped breast area" is preceded by the word "the," the word "unclothed" modifies only "mons veneris" and does not modify "undeveloped

breast area." A reasonable juror would not have been confused or misdirected by the addition of the word "the" in the written version of the jury instruction, because each time the given jury instruction was read aloud to the jury, the word "the," which Defendant claims created fundamental error, was omitted, and to the extent the instruction may have been erroneous, such error was technical in nature. *State v. Notah*, 2022-NMCA-005, *cert. denied*.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 16 to 19.

75 C.J.S. Rape § 82.

14-926. Criminal sexual contact of a minor in the [third] [second] degree; use of coercion by person in position of authority; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor by use of coercion by a person in a position of authority [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant was a

[(parent) (relative) (household member)[4] (teacher) (employer)][3]

[OR]

[person who by reason of the defendant's relationship to _____ (*name of victim*) was able to exercise undue influence over _____ (*name of victim*)]

AND used this position of authority[5] to coerce _____ (*name of victim*) to submit to sexual contact;

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. If this bracketed alternative is given, UJI 14-370 NMRA, "household member defined," must be given after this instruction.

5. *See* NMSA 1978, § 30-9-10(E) (2005) for the definition of "position of authority."

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction contains the essential elements of criminal sexual contact of a minor perpetrated through the use of coercion by a person in a position of authority.

Only one instruction was prepared for this method of committing the crime of criminal sexual contact of a minor because the term "force or coercion" has no application. The meaning of "coerce" in this offense is uniquely related to the status of the defendant. The defendant must occupy a position which enables that person to exercise undue influence over the victim and that influence must be the means of compelling submission to the contact. The committee recognized that such coercion might take many forms but is less overtly threatening than physical force or threats. The state is not required to prove that the defendant, by reason of the defendant's position as a household member, was able to exercise undue influence over the child, because the Legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under NMSA 1978, Section 30-9-13 (2004). *See State v. Erwin*, 2016-NMCA-032, ¶¶ 5-9, 367 P.3d 905. Thus, for defendants in enumerated positions of authority in Element 2, the jury

need not separately find that "by reason of the defendant's relationship with [the victim], [the defendant] was able to exercise under influence over [the victim]." *See id*. ¶ 16.

See also the commentary to UJI 14-921 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, after “to touch the _____”, changed Use Note reference “3” to “2”, after “(household member)”, added Use Note reference “4”, after “(employer)”, changed Use Note reference “4” to “3”, after “AND used this”, added “position of”, and after “authority”, added Use Note reference “5”; in Element 4, after “unlawful;]”, changed Use Note reference “5” to “6”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Notes 3 and 4 and redesignated former Use Note 4 as Use Note 5; in Use Note 5, deleted “use the applicable alternative”, after “*See*”, deleted “Subsection E of Section 30-9-10 NMSA 1978” and added “NMSA 1978, § 30-9-10(E) (2005)”.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 3, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added bracketed "parent", "relative" household member", "teacher" and "employer" to essential element 1 and new Use Note 4 relating to "position of authority", deleted essential element 4 and added a new essential element 4 and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

Cross references. — *See* Section 30-9-13(C)(2) NMSA 1978.

Coercion. — The defendant's requested jury instruction that "[t]he fact the Defendant was in a position of authority does not alone establish that he used that authority to coerce sexual contact" was not a correct statement of the law because coercion for the purposes of the criminal sexual contact of a minor statute, 30-9-13 NMSA 1978, occurs when a defendant occupies a position which enables that person to exercise undue influence over the victim and that influence is the means of compelling submission to

the contact. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

"Position of authority" interpreted. — In Section 30-9-10(E) NMSA 1978, the legislature has designated certain relationships with a child that represent a "position of authority," and the language "who, by reason of that position, is able to exercise undue influence over a child" does not pertain to each of the types of position of authority listed in the definition. Under the definition of "position of authority", a household member is presumed to be able to exercise undue influence over a child such that additional proof concerning a perpetrator's use or possession of such authority is not required. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Where defendant, who was charged with criminal sexual contact of a child thirteen to eighteen years of age, did not dispute the evidence that he was a household member, but claimed that the state failed to prove that he used this position of authority to coerce the child to submit to sexual contact, the state was not required to prove that defendant, by reason of his position as a household member, was able to exercise undue influence over the child, because the legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under Section 30-9-13 NMSA 1978. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Coercion by a person in a position of authority is not negated where victim resists the defendant's attempts to force sexual contact. — Where defendant was found guilty of two counts of criminal sexual contact of a minor by a person in a position of authority, where the evidence at trial established that defendant grabbed his thirteen-year-old niece's clothed buttocks while she walked past him, and later placed his hand directly on the "outer lip" of her genital area while she was sleeping, and where defendant argued that the child was not coerced to submit to sexual contact because she immediately resisted his attempts to force sexual contact, there was sufficient evidence for a jury to infer defendant was in a position of authority over the child and used that authority to coerce the child to submit to sexual contact because of the nature of the relationship between defendant and the child and the child's testimony that she felt pressure not to interfere with the family dynamics given the close relationship between her family and her uncle's family. Though a child's resistance may have some relevance to the element of coercion, the primary focus of the analysis should be on the perpetrator's actions, not the victim's. *State v. Arvizo*, 2018-NMSC-026, *rev'g* No. 33,697, mem. op. (N.M. Ct. App. June 28, 2016) (non-precedential).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Incest § 14; 65 Am. Jur. 2d Rape § 41.

75 C.J.S. Rape § 15.

14-927. Criminal sexual contact of a minor in the [third] [second] degree; use of physical force or physical violence; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in _____[4];

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful[5];]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Four separate instructions have been prepared for criminal sexual contact of a minor which results in personal injury to the victim. UJI 14-927 NMRA (physical force or physical violence), 14-928 NMRA (threats) and 14-929 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-927, 14-928, 14-929 and 14-930 NMRA are the same as UJI 14-921, 14-922, 14-923 and 14-924 NMRA, respectively, with the additional element of personal injury to the victim.

UJI 14-930 combines UJI 14-927, 14-928 and 14-929 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The statutory definition of personal injury is broad and includes various types of personal injuries. It is therefore a question of law as to whether a particular injury constitutes an aggravating factor sufficient to support the charge. "Personal injury" includes but is not limited to: disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ. Section 30-9-10(D) NMSA 1978.

See commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of each of the definitions of force or coercion.

See also the commentary to UJI 14-921 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, changed Use Note reference “2” to “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after

"'vulva'", deleted "or 'vagina'"; added Use Note 3; and in Use Note 4, after "Section 30-9-10(D)", added "(2005)".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element "5" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(b) and 30-9-10A(1) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-928. Criminal sexual contact of a minor in the third degree; threats of force or coercion; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][3]

[OR]

[threatened to _____[4];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant's acts resulted in _____[5];

5. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[6. The defendant's act was unlawful;][6]

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10 (A)(3) (2005) for examples of types of threats.

5. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) for types of personal injuries.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-927 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note

reference “3” to “2”, and after “*victim or other person*;]”, added Use Note reference “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 3; and in Use Note 4, after “Section 30-9-10(A)(3)”, added “(2005)”.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element "6" and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(b) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-929. Criminal sexual contact of a minor in the third degree; victim unconscious, asleep, physically or mentally helpless; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. _____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in _____[4];

5. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[6. The defendant's act was unlawful;][5]

7. This happened in New Mexico on or about the _____ day of_____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Name victim and describe personal injury or injuries. *See* NMSA 1978, Section 30-9-10(D) (2005) for types of personal injuries.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-927 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “[unconscious]”, changed Use Note reference “2” to “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 3; and in Use Note 4, after “Section 30-9-10(D)”, added “(2005)”.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element "6" and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness

of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(b) and 30-9-10A(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 16, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

14-930. Criminal sexual contact of a minor in the [third] [second] degree; force or coercion; personal injury; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact of a minor causing personal injury [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*)][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

[2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (caused _____ (*name of victim*) to touch the _____[3] through the use of threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6];

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10 (A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-927 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in

Element 1, after “defendant”, deleted Use Note reference “3”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “4” to “3”, after “(*name of victim*);]”, added Use Note reference “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after “physical violence;]”, changed Use Note reference “3” to “4”, after “to touch the _____”, changed Use Note reference “4” to “3”, after “(*name of victim or other person*))”, added Use Note reference “4”, and after “(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”; deleted Use Note 3 and redesignated former Use Note 4 as Use Note 3; in Use Note 3, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 4.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, revised the first essential element 2 to delete "used" and insert "caused _____ (name of victim) to touch the _____ through the use of", added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(b) and 30-9-10A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-931. Criminal sexual contact of a minor in the [third] [second] degree; use of physical force or physical violence; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13(B), (C) (defining second and third-degree criminal sexual contact of a minor).

Four separate instructions have been prepared for criminal sexual contact of a minor when the perpetrator is aided or abetted by one or more persons. UJI 14-931 NMRA (physical force or physical violence), UJI 14-932 NMRA (threats), and UJI 14-933 NMRA (unconscious, etc.) contain separate definitions for "force or coercion." Section 30-9-10(A).

UJI 14-931, 14-932, 14-933, and 14-934 NMRA are the same as UJI 14-921, 14-922, 14-923, and 14-924 NMRA, respectively, with the additional element of "aided or abetted."

UJI 14-934 NMRA combines UJI 14-931, 14-932, and 14-933 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

See the commentary to UJI 14-910 NMRA for a discussion of the element of "aided or abetted."

See commentaries to UJI 14-902, 14-903, and 14-904 NMRA for a discussion of each of the definitions of "force or coercion."

See also the commentary to UJI 14-921 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title after "third", added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(c) and 30-9-10A(1) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 16, 28, 29.

75 C.J.S. Rape § 82.

14-932. Criminal sexual contact of a minor in the [third] [second] degree; threats of force or coercion; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ (*name of victim or other person*);][3]

[OR]

[threatened _____[4];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant acted with the help or encouragement of one or more persons;

5. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[6. The defendant's act was unlawful;][5]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva."

When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, Section 30-9-10(A)(3) (2005) for examples of types of threats.

5. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-931 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, and after “to touch the _____”, changed Use Note reference “3” to “2”; in Element 2, after “*victim or other person*);]”, changed Use Note reference “2” to “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; added Use Note 3; and in Use Note 4, after “Section 30-9-10(A)(3)”, added “(2005)”.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title after "third", added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 5, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 6 and Use Note 5 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 5 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(c) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 16, 28, 29.

75 C.J.S. Rape § 82.

14-933. Criminal sexual contact of a minor in the [third] [second] degree; victim unconscious, asleep, physically or mentally helpless; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when aided and abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;] _____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing);

2. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

3. The defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][4]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-931 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, after “to touch the _____”, changed Use Note reference “3” to “2”; and after “(unconscious)”, changed Use Note reference “2” to “3”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title, added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 6 and Use Note 4 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 6 and former Use Note 4 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(c) and 30-9-10A(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 4, 8, 9, 16, 28, 29, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

75 C.J.S. Rape §§ 14, 82.

14-934. Criminal sexual contact of a minor in the [third] [second] degree; force or coercion; aided or abetted by another; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact of a minor when aided or abetted by another [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[3] of _____ (*name of victim*)][4];

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. [The defendant used physical force or physical violence;][4]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[4] (OR) (threatened to _____[5]); AND [_____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][6]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) for examples of types of threats.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* committee commentary under UJI 14-931 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “4” to “3”, after “(*name of victim*);]”, added Use Note reference “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after “physical violence;]”, changed Use Note reference “3” to “4”, after “*victim or other person*))”, changed Use Note reference “3” to “4”, and after “(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”; deleted Use Note 3 and redesignated former Use Note 4 as Use Note 3; in Use Note 3, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 4.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title, added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 4, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13B(2)(c) and 30-9-10A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 16, 28, 29.

75 C.J.S. Rape § 82.

14-935. Criminal sexual contact of a minor in the [third] [second] degree; deadly weapon; essential elements.

For you to find the defendant guilty of criminal sexual contact of a minor when armed with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the [unclothed] _____[2] of _____ (*name of victim*);][3]

[OR]

[caused _____ (*name of victim*) to touch the _____[2] of the defendant;]

2. The defendant was armed with and used a [_____][4] [_____] (*name of object*) with the intent to use it as a weapon and a _____ (*name of object*), when used as a weapon, is capable of inflicting death or great bodily harm[5]][6];

3. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

3. Use only the applicable alternative or alternatives.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in NMSA 1978, Section 30-1-12(B).

5. UJI 14-131 NMRA, the definition of "great bodily harm,"must also be given.

6. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B).

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-9-13 (B), (C) (2003) (defining second and third-degree criminal sexual contact of a minor).

This instruction sets forth the charge of criminal sexual contact of a minor when the perpetrator is armed with a deadly weapon. *See* the commentary to UJI 14-914 NMRA for a discussion of the meaning of "while armed with a deadly weapon."

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861, and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

See also committee commentary to UJI 14-921 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “touched or applied force to the [unclothed] _____”, changed Use Note reference “3” to “2”, after “(*name of victim*);]”, added Use Note reference “3”, and

after “to touch the _____”, changed Use Note reference “3” to “2”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; in Use Note 2, after “‘mons veneris’”, added “or”, and after “‘vulva’”, deleted “or ‘vagina’”; and added Use Note 3.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title, added the brackets and word "second"; in Paragraph 1, after "applied force to the", added "unclothed"; and in Paragraph 3, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

The 1999 amendment, effective February 1, 2000, rewrote element 2 which read: "The defendant was armed with and used .....;[4]" and, in the Use Note, rewrote Paragraph 4 to correspond to the amendment of element 2, inserted Paragraphs 5 and 6 and redesignated former Paragraph 5 as present Paragraph 7.

Cross references. — *See* Section 30-9-13B(2)(d) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 C.J.S. Rape §§ 25, 82.

14-936. Criminal sexual contact of a minor in the third degree; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual contact of a minor in the third degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[touched or applied force to the _____[3] of _____ (*name of victim*);][4]

[OR]

[caused _____ (*name of victim*) to touch the _____[3] of the defendant;]

2. The defendant

[used threats of physical force or physical violence against _____ *(name of victim or other person*)][4]

[OR]

[threatened to _____[5]]; AND [_____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[4] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[6]; OR the defendant acted with the help or encouragement of one or more persons;

4. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in NMSA 1978, Section 30-9-10(A) (2005): (1) use of physical force or physical violence, (2) threats, and (3) mental or other incapacity of the victim. The instruction also sets forth two of the four types of criminal sexual contact of a minor thirteen (13) to eighteen (18) years old in the third degree in NMSA 1978, Section 30-9-13(C) (2003): (1) contact resulting in personal injury, and (2) contact while aided or abetted by another. If the evidence supports one or more theories of "force or coercion" and also supports both of these theories of criminal sexual contact of a minor in the third degree, this instruction may be used. If the evidence also supports either of the other two theories of criminal sexual contact of a minor thirteen (13) to eighteen (18) years old in the third degree, the appropriate instruction or instructions must also be given: (1) UJI 14-926 NMRA for contact by a person in position of authority, or (2) UJI 14-935 NMRA for contact while armed with a deadly weapon.

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

3. Name one or more of the following parts of the anatomy touched: "buttocks," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," or "vulva." When definitions are provided in UJI 14-981 NMRA, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Use only the applicable alternative or alternatives.

5. Describe threats used against the victim or another in layman's language. *See* NMSA 1978, § 30-9-10(A)(3) for examples of types of threats.

6. Name victim and describe personal injury or injuries. *See* NMSA 1978, § 30-9-10(D) for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction combines UJI 14-927 NMRA (physical force or physical violence; personal injury), 14-928 NMRA (threats; personal injury), 14-929 NMRA (unconscious, etc.; personal injury), 14-931 NMRA (physical force or physical violence; aided or abetted), 14-932 NMRA (threats; aided or abetted) and 14-933 NMRA (unconscious, etc.; aided or abetted).

This instruction may be used if the evidence supports two theories of aggravation of the offense; i.e., personal injury and aided or abetted. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

This combined instruction does not include UJI 14-926 (position of authority), nor UJI 14-935 NMRA (deadly weapon). It is awkward and confusing to combine either with the other third degree sexual contacts because UJI 14-926 NMRA and 14-935 NMRA contain no definitions of force or coercion. If the evidence also supports the giving of UJI 14-926 NMRA or 14-935 NMRA, that individual instruction should also be given.

See also commentary to UJI 14-921 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, and revised the Use Notes; in Element 1, after “defendant”, deleted Use Note reference “3”, after “touched or applied force to the _____”, changed Use Note reference “4” to “3”, after “(*name of victim*);]”, added Use Note reference “4”, and after “to touch the _____”, changed Use Note reference “4” to “3”; in Element 2, after “*victim or other person*)]”, changed Use Note reference “3” to “4”, and after “(unconscious)”, changed Use Note reference “3” to “4”; in Use Note 1, after “Section 30-9-10(A)”, added “(2005)”, and after “Section 30-9-13”, deleted “(A)(2) NMSA 1978” and added “(C) (2003)”; deleted Use Note 3 and

redesignated former Use Note 4 as Use Note 3; in Use Note 3, after "'mons veneris'", added "or"; added Use Note 4; and in Use Note 5, after "*See*", deleted "Subsection C of Section", and after "Section 30-9-10", added "(D)".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-13A(2)(b) and 30-9-13A(2)(c) and 30-9-10A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape § 16.

75 C.J.S. Rape § 82.

14-937. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated November 19, 1997, this instruction, dealing with the definition of unlawful in the context of criminal sexual contact of a minor, was withdrawn effective on and after January 15, 1998.

Part C
Criminal Sexual Penetration

14-940. Chart.

SECTION 30-9-11 NMSA 1978
CRIMINAL SEXUAL PENETRATION

Third Degree, Second Degree and First Degree

	THIRD DEGREE	SECOND DEGREE						FIRST DEGREE	
TYPE OF FORCE OR COERCION		Person in Position of Authority 13-16	Personal Injury	Aided or Abetted	Commission of a Felony	Armed With Deadly Weapon	Multiple 2nd Degree Types	Child Under 13	Great Bodily Harm or Great Mental Anguish
1. Use of physical force or	14-941		14-946	14-950					14-958

physical violence									
2. Threats of force or coercion	14-942		14-947						14-959
3. Victim physically or mentally unable to consent	14-943		14-948	14-952					14-960
4. All of the above (1-3)	14-944		14-949	14-953			14-956		14-961
FORCE OR COERCION NOT AN ELEMENT		14-945			14-954	14-955		14-957	

14-941. Criminal sexual penetration in the third degree; use of physical force or physical violence; essential elements.

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant caused _____ (*name of victim*) to engage in _____[3] through the use of physical force or physical violence;

[3. The defendant's act was unlawful;][6]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* Section 30-9-11(E) NMSA 1978: third degree felony.

UJI 14-941 NMRA (physical force), 14-942 NMRA (threats) and 14-943 NMRA (unconscious, etc.) contain the three definitions of "force or coercion" in criminal sexual penetration perpetrated through the use of force or coercion. *See* the commentary to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of the definitions of "force or coercion".

UJI 14-944 NMRA combines UJI 14-941, 14-942 and 14-943 NMRA with the three definitions of "force or coercion" set out in the alternative. It may be used when there is evidence of more than one type of force or coercion. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The introductory paragraph of these instructions identifies the charge as "criminal sexual penetration." It would be misleading to include the words "by force or coercion" in the charge. The definition of "force or coercion" includes both active interference by the defendant with the normal consent functions of the victim, e.g., physical force, and passive incapacity of the victim to engage in normal consent functions, e.g., unconsciousness. A jury might be confused as to the elements of the offense if the term "by force or coercion" were used when the force or coercion is supplied by the incapacity of the victim.

The statute requires that the penetration be intentional. This element is covered by the general intent instruction, UJI 14-141 NMRA.

The statute provides that criminal sexual penetration may be committed: (1) by unlawfully and intentionally causing another to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse; or (2) by unlawfully and intentionally causing

penetration, to any extent and with any object, of the genital or anal openings of another.

The first alternative in Paragraph 1 covers the case in which the defendant causes the victim to engage in one of the acts with the defendant or with another.

The second alternative in Paragraph 1 covers the case in which the penetration occurs with an object other than the genital organ. This type of penetration may be committed by the defendant directly or indirectly, i.e., by the defendant inserting the object, or causing the victim or another to insert the object.

These instructions do not refer to consent, because lack of consent as such is not an element of the offense of criminal sexual penetration. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App.), cert. denied, 89 N.M. 652, 556 P.2d 60 (1976) so holds in a case involving force or coercion resulting in personal injury.

The statute refers to sexual intercourse, anal intercourse, cunnilingus and fellatio. Definitions for those acts are contained in UJI 14-982. *See* the commentary to that instruction for a discussion of the statutory construction involved.

In the part of the statute which refers to penetration by an object, the legislature used the phrase "the genital or anal openings of another". The instructions use the terms "vagina", "penis" and "anus". UJI 14-981 NMRA defines the terms. Dictionary definitions were considered insufficient because the definitions contained in several dictionaries, such as Webster's and Random House, were found to be excessively technical.

The committee recognized that an unlawful penetration of the penis with an object is an unlikely occurrence, but supplied the term as an alternative because it is included within the statute.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, deleted "used" in element 2 and inserted in its place "caused _____ (name of victim) to engage in _____3 through the use of", added the bracketed essential element 3 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11(E) and 30-9-10(A)(1) NMSA 1978.

Not incumbent upon state to prove victim not wife. — It was not incumbent on the state to prove that the victim was not the wife of the defendant since the statutory definition of the crime creates by negative exclusion the exculpatory status of husband. *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-942. Criminal sexual penetration in the third degree; threats of force or coercion; essential elements.

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3] through the use of threats of physical force or physical violence against _____ (*name of victim or other person*);]]

   [OR]

   [threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus." The applicable definition from Instruction 14-981 NMRA must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10 (A)(3) NMSA 1978 for examples of types of threats.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, deleted "used" in element 2 and inserted in its place "caused _____ (*name of victim*) to engage in _____[3] through the use of", added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11(E), 30-9-10(A)(2) and 30-9-10(A)(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 57, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-943. Criminal sexual penetration in the third degree; victim unconscious, asleep, physically or mentally helpless; essential elements.

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Use only the applicable alternatives.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11(E) and 30-9-10(A)(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 110, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

14-944. Criminal sexual penetration in the third degree; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

   [caused _____ (*name of victim*) to engage in _____[4];]

   [OR]

   [caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

   [OR]

   [The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[3] (OR) [threatened to _____[7]]; AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

   [OR]

[_____ (name of victim) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

[3. The defendant's act was unlawful;][8]

4. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-974 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 3 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11(E) and 30-9-10(A) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-945. Criminal sexual penetration of a 13 to 18 year old in the second degree; use of coercion by person in position of authority; essential elements.

For you to find the defendant guilty of criminal sexual penetration of a child at least thirteen (13) but less than eighteen (18) years old by use of coercion by a person in a position of authority [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant

[caused _____ (*name of victim*) to engage in _____[2];][3]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old;

3. The defendant was a

[(parent) (relative) (household member)[6] (teacher) (employer)][3]

[OR]

[person who by reason of the defendant's relationship to _____ (*name of victim*) was able to exercise undue influence over _____ (*name of victim*)]

AND used this position of authority[7] to coerce _____ (*name of victim*) to submit to sexual contact;

[4. The defendant's act was unlawful;][8]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

This instruction is only to be used in cases based on crimes that occurred before the 2007 amendment (July 1, 2007).

1. Insert the count number if more than one count is charged.

2. Name the sexual act or acts: *i.e*., "sexual intercourse," "anal intercourse," "cunnilingus," or "fellatio." The applicable definition or definitions from UJI 14-982 NMRA must be given after this instruction.

3. Use only the applicable alternative or alternatives.

4. Identify the object used.

5. Name the part or parts of the body, *i.e*., "vagina," "penis," or "anus." The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

6. If this bracketed alternative is given, UJI 14-370 NMRA, "household member defined," must be given after this instruction.

7. *See* NMSA 1978, Section 30-9-10(E) (2005) for the definition of "position of authority."

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined," must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction contains the essential elements of criminal sexual penetration of a child at least thirteen and less than eighteen years of age perpetrated through the use of coercion by a person in a position of authority. Only

one instruction was prepared for this method of committing the crime of criminal sexual penetration because the term "force or coercion" has no application. The meaning of "coerce" in this offense is uniquely related to the status of the defendant. The defendant must occupy a position which enables that person to exercise undue influence over the victim and that influence must be the means of compelling submission to the penetration. The committee recognized that such coercion might take many forms but is less overtly threatening than physical force or threats. The state is not required to prove that the defendant, by reason of the defendant's position as a household member, was able to exercise undue influence over the child, because the Legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under NMSA 1978, Section 30-9-13 (2004). *See State v. Erwin*, 2016-NMCA-032, ¶¶ 5-9, 367 P.3d 905. Thus, for defendants in enumerated positions of authority in Element 3, the jury need not separately find that "by reason of the defendant's relationship with [the victim], [the defendant] was able to exercise under influence over [the victim]." *See id*. ¶ 16

See also the commentary to UJI 14-941 NMRA.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical changes, revised the Use Notes, and revised the committee commentary; in Element 1, after “defendant”, deleted Use Note reference “2”, after “engage in _____”, changed Use Note reference “3” to “2”, and after the next semicolon, added Use Note reference “3”; in Element 3, after “(household member)”, added Use Note reference “6”, after “(employer)”, changed Use Note reference “6” to “3”, after “AND use this”, added “position”, and after “authority”, added Use Note reference “7”; in Element 4, after “unlawful;]”, changed Use Note reference “7” to “8”; deleted Use Note 2 and redesignated former Use Note 3 as Use Note 2; added Use Note 3; added Use Note 6 and redesignated former Use Notes 6 and 7 as Use Notes 7 and 8, respectively; in Use Note 7, after “Section 30-9-10”, added “(2005)”.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-037, effective November 18, 2011, in the Use Note, added the introductory sentence to restrict the use of the instruction to crimes that occurred prior to July 1, 2007.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first sentence, after "criminal sexual penetration of a child", changed "13 to 18" to "at least thirteen (13) but less than eighteen (18) year old"; and in Paragraph 2, after "was at least", changed "13 but less than 18 years old" to "thirteen (13) but less than eighteen (18) years old"; and in the committee commentary, in the

first sentence after "a child", deleted "13 to 16 years" and added "at least thirteen and less than eighteen years".

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Section 30-9-11E(1) NMSA 1978.

Fundamental error occurred where jury convicted defendant on an invalid legal theory. — Where defendant was charged with two counts of criminal sexual penetration of a minor in the second degree (CSPM-II) based on the state's theory that defendant used his position of authority to coerce the victim to submit to the sexual act, and where the district court instructed the jury using an inapplicable uniform jury instruction that omitted the essential element of "force or coercion", fundamental error occurred because the given instructions would have confused or misled a reasonable juror and it was a miscarriage of justice to convict defendant of "position of authority" CSPM-II because that crime did not exist at the time the CSPM at issue was alleged to have occurred. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Incest § 14; 65 Am. Jur. 2d Rape §§ 3, 41.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

Liability of parent for injury to unemancipated child caused by parent's negligence - modern cases, 6 A.L.R.4th 1066.

75 C.J.S. Rape §§ 15, 82.

14-946. Criminal sexual penetration in the second degree; use of physical force or physical violence; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant caused the insertion of _____[4] into the _____[5] of _____ (*name of victim*) through the use of physical force or physical violence;

3. The defendant's acts resulted in _____[6];

[4. The defendant's act was unlawful[7];]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina," "penis" or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(D) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — Four separate instructions have been prepared for criminal sexual penetration which results in personal injury to the victim. UJI 14-946 NMRA (physical force or physical violence), 14-947 NMRA (threats) and 14-948 NMRA (unconscious, etc.) contains separate definitions for "force or coercion." Section 30-9-10(A) NMSA 1978.

UJI 14-946, 14-947, 14-948 and 14-949 NMRA are the same as UJI 14-941, 14-942, 14-943 and 14-944 NMRA, respectively, with the additional element of personal injury to the victim.

UJI 14-949 NMRA combines UJI 14-946, 14-947 and 14-948 NMRA with the three definitions of force or coercion set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The statutory definition of "personal injury" is broad and includes various types of personal injuries. It is therefore a question of law as to whether a particular injury constitutes an aggravating factor sufficient to support the charge. "Personal injury" includes but is not limited to: disfigurement, mental anguish, chronic or recurrent pain, pregnancy, or disease or injury to a sexual or reproductive organ. Section 30-9-10(C) NMSA 1978.

See commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of the definitions of "force or coercion".

See also the commentary to UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added to essential element 2 "caused the insertion of _____[4] into the _____[5] of _____ (*name of victim*) through the use of", deleted former essential element 5 and former Use Note 7 which required proof that the victim was not the spouse of the defendant and added the bracketed essential element 4 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

Cross references. — *See* Sections 30-9-11E(3) and 30-9-10A(1) NMSA 1978.

This instruction is appropriate when offense is fellatio, rather than UJI 14-906 stating the elements of criminal sexual contact. *State v. Gabaldon*, 1978-NMCA-077, 92 N.M. 93, 582 P.2d 1306.

Instruction in language of statute sufficient. — An instruction which set forth the elements of the crime of second degree criminal sexual penetration in the language of the statute was sufficient, and there was no error in failing to instruct on the absence of the victim's consent. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Consent defense. — Defendant was not denied effective assistance of counsel because of counsel's failure to request an instruction on consent of his wife to the

sexual intercourse. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. granted, 2005-NMCERT-008.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-947. Criminal sexual penetration in the second degree; threats of force or coercion; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant

   [used threats of physical force or physical violence against _____ (*name of victim or other person*);]

   [OR]

   [threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant's acts resulted in _____[7];

[5. The defendant's act was unlawful;][8]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

7. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-946 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(3), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 57, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-948. Criminal sexual penetration in the second degree; victim unconscious, asleep, physically or mentally helpless; personal injury; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in _____[6];

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary to UJI 14-946 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(3) and 30-9-10A(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 110.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

14-949. Criminal sexual penetration in the second degree; force or coercion; personal injury; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration causing personal injury [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

   [caused _____ (*name of victim*) to engage in _____[4];]

   [OR]

   [caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[3] (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[8];

[4. The defendant's act was unlawful;][9]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion", this instruction may be used.

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

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-946 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 4 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(3) and 30-9-10A NMSA 1978.

Fundamental error occurred where jury convicted defendant on an invalid legal theory. — Where defendant was charged with two counts of criminal sexual penetration of a minor in the second degree (CSPM-II) based on the state's theory that defendant used his position of authority to coerce the victim to submit to the sexual act, and where the district court instructed the jury using an inapplicable uniform jury instruction that omitted the essential element of "force or coercion", fundamental error occurred because the given instructions would have confused or misled a reasonable juror and it was a miscarriage of justice to convict defendant of "position of authority" CSPM-II because that crime did not exist at the time the CSPM at issue was alleged to have occurred. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-950. Criminal sexual penetration in the second degree; use of physical force or physical violence; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];][2]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant used physical force or physical violence;

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — Four separate instructions have been prepared for criminal sexual penetration when the perpetrator is aided or abetted by one or more

persons. UJI 14-950 (physical force or physical violence), 14-951 (threats), 14-952 (unconscious, etc.) contain separate definitions for "force or coercion". Section 30-9-10(A) NMSA 1978.

UJI 14-950, 14-951, 14-952 and 14-953 NMRA are the same as UJI 14-941, 14-942, 14-943 and 14-944 NMRA, respectively, with the additional element of "aided or abetted".

UJI 14-953 NMRA combines UJI 14-950, 14-951 and 14-952 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized uniform jury instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

See the commentary to UJI 14-910 NMRA for a discussion of the element of "aided or abetted".

See commentaries to UJI 14-902, 14-903 and 14-904 NMRA for a discussion of each of the definitions of "force or coercion".

See also the commentary to UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 4 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(4) and 30-9-10A(1) NMSA 1978.

Intent for accessory crimes not required in instruction on principal's crime. — Where the defendants were charged with aiding and abetting the crime of sexual penetration in the second degree, the required intent for accessory crimes was not required to be included in the instruction setting forth the elements of the principal's crime. *State v. Urioste*, 1979-NMCA-119, 93 N.M. 504, 601 P.2d 737, cert. denied, 93 N.M. 683, 604 P.2d 821.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 28, 29, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-951. Criminal sexual penetration in the second degree; threats of force or coercion; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant

   [used threats of physical force or physical violence against _____ (*name of victim or other person*);][2]

   [OR]

   [threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][7]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary to UJI 14-950 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(4), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 28, 29, 57, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-952. Criminal sexual penetration in the second degree; victim unconscious, asleep, physically or mentally helpless; aided or abetted by another; essential elements.

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of_____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][2] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant acted with the help or encouragement of one or more persons;

[5. The defendant's act was unlawful;][6]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-950 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 5 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness

of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(4) and 30-9-10A(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 28, 29, 110, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

14-953. Criminal sexual penetration in the second degree; force or coercion; aided or abetted by another; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration when aided or abetted by another [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

   [caused _____ (*name of victim*) to engage in _____[4];]

   [OR]

   [caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

   [OR]

   [The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*)) (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

   [OR]

   [_____ was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant

knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][8]

5. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

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

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary to UJI 14-950 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 4 and Use Note 8 providing for the jury to be instructed on whether the

defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(4) and 30-9-10A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 28, 29, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-954. Criminal sexual penetration in the second degree; commission of a felony; essential elements.

For you to find the defendant guilty of criminal sexual penetration while committing another felony [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

[caused _____ (*name of victim*) to engage in _____;][3]

[OR]

[caused the insertion, to any extent, of a[n] _____[4] into the _____[5] of _____ (*name of victim*);]

[2. The defendant's act was unlawful;][6]

3. The defendant committed the act during the commission of _____;[7]

4. The commission of _____[7] was against _____ (*name of victim*);

5. The commission of _____[7] assisted the defendant in

[causing _____ (*name of victim*) to engage in _____[3];]

[OR]

[causing the insertion, to any extent, of a[n] _____[4] into the _____[5] of _____ (*name of victim*);] and

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., “sexual intercourse”, “anal intercourse”, “cunnilingus”, or “fellatio”. The applicable definition or definitions from UJI 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., “vagina”, “penis”, or “anus”. The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant’s actions. If this element is given, UJI 14-132 NMRA, “unlawful defined,” must be given after this instruction.

7. Identify the felony, and give the essential elements unless they are covered in an essential element instruction for the substantive offense. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

8. Age of the victim is not an essential element of the *offense*. However, where the state has not charged a violation of Section 30-9-11(E)(1), NMSA 1978, and is seeking the mandatory three-year minimum sentence because the victim is 13 to 18, the victim’s age is an essential sentencing fact that must be determined by the jury beyond a reasonable doubt, using UJI 14-6019A NMRA. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — This instruction contains the essential elements of criminal sexual penetration perpetrated in the commission of any other felony. Note that the essential elements of the accompanying felony must be given, unless they are covered in another instruction.

To avoid double jeopardy, the felony must be other than a violation of NMSA 1978, Sections 30-9-11 through 30-9-14. It also might have to be other than an aggravated

assault or battery on the victim. *Cf*. the commentary to UJI 14-202 NMRA, felony murder.

Note the language that the felony must be “in the commission of any other felony”. The felony must *both* be committed against the victim of the unlawful sexual penetration *and* assist in the accomplishment of the unlawful sexual penetration. *See State v. Stevens*, 2014-NMSC-011, ¶ 39, 323 P.3d 901. It is not enough that otherwise lawful sexual activity simply occurs at the same time or has been facilitated or caused by the commission of a felony not committed against the victim; the jury must find both. *Id*. ¶ 37.

See also the commentary to UJI 14-941 NMRA.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 7, added “To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.”

The 2015 amendment, approved by Supreme Court Order No. 15-8300-004, effective December 31, 2015, provided that for the jury to find the defendant guilty of criminal sexual penetration while committing another felony, the state must prove beyond a reasonable doubt both that the felony was committed against the victim of the unlawful sexual penetration and that the felony assisted in the accomplishment of the unlawful sexual penetration, revised the Use Note, and revised the committee commentary; in Paragraph 1, after “to any extent, of”, deleted “[a]” and added “a[n]”; added new Paragraph 2; redesignated former Paragraph 2 as Paragraph 3; deleted former Paragraph 3 and added Paragraphs 4 and 5; redesignated former Paragraph 4 as Paragraph 6; added Use Note 6; redesignated former Use Note 6 as Use Note 7; deleted former Use Note 7, and added Use Note 8; and added Use Note designations throughout.

The 2004 amendment, effective January 20, 2005, added the bracketed essential element 3 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 7 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Section 30-9-11E(5) NMSA 1978.

Criminal sexual penetration based on the commission of a felony. — When criminal sexual penetration in the second degree is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the

accomplishment of, sexual penetration by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent. Simply causing another person to engage in otherwise lawful sexual intercourse at the same time a felony is being committed does not constitute the crime of criminal sexual penetration during the commission of a felony. The jury should be instructed that the crime of criminal sexual penetration during the commission of a felony requires the commission of unlawful sexual activity with the victim of the felony. *State v. Stevens*, 2014-NMSC-011.

Where defendant directed the victim to perform oral sex on defendant's friend after the three injected methamphetamine together; defendant did not force the victim to perform oral sex; the victim complied with defendant's direction because the victim was high and did not care; defendant was charged with causing criminal sexual penetration during the commission of the felony of distribution of a controlled substance to a minor; and the jury was not instructed that the State was required to prove that the sexual penetration was unlawful and that the penetration was caused by the commission of a felony against the victim, the deficiency in the jury instructions did not result in fundamental error because the sexual relation between the victim, who was thirteen years of age, and defendant's friend, who was as least ten years older, was unlawful and the fact that it was after the victim had been injected with methamphetamine that the victim acquiesced to defendant's direction to perform oral sex established the nexus of causation between the commission of the felony against the victim and the resulting unlawful sexual act committed on the victim. *State v. Stevens*, 2014-NMSC-011.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

14-955. Criminal sexual penetration in the second degree; deadly weapon; essential elements.

For you to find the defendant guilty of criminal sexual penetration while armed with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant was armed with and used a [_____][6] [_____ (*name of object*) with the intent to use it as a weapon and a _____ (*name of object*) when used as a weapon, is capable of inflicting death or great bodily harm[7]][8];

[3. The defendant's act was unlawful;][9]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12(B) NMSA 1978.

7. UJI 14-131 NMRA, the definition of "great bodily harm", must also be given.

8. This alternative is given only if the object used is not specifically listed in Section 30-1-12(B) NMSA 1978.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective February 1, 2000; January 20, 2005.]

Committee commentary. — This instruction contains the essential elements of criminal sexual penetration when the perpetrator is armed with a deadly weapon.

This instruction was revised in 1999 and 2004 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

See the commentary to UJI 14-914 NMRA for a discussion of "armed with a deadly weapon".

See also the commentary to UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 3 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

The 1999 amendment, effective February 1, 2000, rewrote element 2 which read: "The defendant was armed with and used .....;[6]" and, in the Use Note, rewrote Paragraph 6 to correspond to the amendment of element 2, inserted Paragraphs 7 and 8, and redesignated former Paragraph 7 as present Paragraph 9.

Cross references. — *See* Section 30-9-11E(6) NMSA 1978.

Other deadly weapons. — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of Section 30-1-12(B) NMSA 1978, the jury must be instructed (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 25, 82.

14-956. Criminal sexual penetration in the second degree; force or coercion; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration in the second degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][3]

[OR]

[The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*)[3] (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was (unconscious)[3] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. The defendant's acts resulted in _____[8]; OR the defendant acted with the help or encouragement of one or more persons;

[4. The defendant's act was unlawful;][9]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. The instruction also sets forth two of the five types of criminal sexual penetration in the second degree: (1) penetration resulting in personal injury; (2) contact while aided or abetted by another. If the evidence supports one or more theories of "force or coercion" and also supports both of these theories of criminal sexual penetration, this instruction may be used. If the evidence also supports one or more of the other three theories of criminal sexual penetration, the appropriate instruction or instructions must also be given: (1) UJI 14-945 NMRA for crimes committed before July 1, 2007, for penetration of a person 13 to 18 years old by a person in a position of authority; (2) UJI 14-954 NMRA for penetration during the commission of a felony; (3) UJI 14-955 NMRA for penetration while armed with a deadly weapon.

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

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from UJI 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., “vagina,” “penis” or “anus.” The applicable definition or definitions from UJI 14-980 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman’s language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Name victim and describe personal injury or injuries. *See* Section 30-9-10(C) NMSA 1978 for types of personal injuries.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant’s actions. If this element is given, UJI 14-132 NMRA, “unlawful defined,” must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — *See* Section 30-9-11B NMSA 1978; second degree felony.

This instruction combines UJI 14-946 NMRA (physical force or physical violence; personal injury), UJI 14-947 NMRA (threats; personal injury), UJI 14-948 NMRA (unconscious, etc.; personal injury), UJI 14-950 NMRA (physical force or physical violence; aided or abetted), UJI 14-951 NMRA (threats; aided or abetted) and UJI 14-952 NMRA (unconscious, etc.; aided or abetted).

This instruction may be used if the evidence supports two theories of aggravation of the offense; i.e., personal injury and aided or abetted. However, in some circumstances the individual and particularized Uniform Jury Instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

This combined instruction does not include UJI 14-945 NMRA (position of authority), nor UJI 14-954 NMRA (commission of a felony) nor UJI 14-955 NMRA (deadly weapon). It is awkward and confusing to combine these methods of commission of the offense with the other second degree sexual penetrations because UJI 14-945, 14-954 and 14-955 NMRA contain no definitions of “force or coercion.” If the evidence also supports the giving of UJI 14-945, 14-954 and 14-955 NMRA, that individual instruction should also be given. For a person thirteen (13) to eighteen (18) years old, *see* UJI 14-956A NMRA.

See the committee commentary to UJI 14-941 NMRA.

[As amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-023 effective December 31, 2013, advised the user that UJI 14-945 NMRA may also be used for crimes committed before July 1, 2007 when the evidence supports a theory of criminal sexual penetration that is not included in UJI 14-956 NMRA; and in the Use Note, in Paragraph 1, in the fourth sentence, after “UJI 14-945 NMRA”, added “for crimes committed before July 1, 2007”.

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 4 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11E(3), 30-9-11E(4) and 30-9-10A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-956A. Criminal sexual penetration in the second degree; force or coercion; child 13 to 18; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration in the second degree [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____;[4]]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;]

[OR]

[The defendant [used threats of physical force or physical violence against _____ (*name of victim or other person*)[3]] [OR] [threatened to _____[7]]; AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

[OR]

[_____ (*name of victim*) was [unconscious][3] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing]; AND the defendant knew or had reason to know of the condition of _____ (*name of victim*);]

3. _____ (*name of victim*) was at least 13 but less than 18 years old;

[4. The defendant's act was unlawful;][8]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim.

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

3. Use only the applicable alternatives.

4. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from UJI 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina," "penis" or "anus." The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[Adopted by Supreme Court Order No. 13-8300-023, effective for all cases filed or pending on or after December 31, 2013.]

14-957. Criminal sexual penetration; child under 13; essential elements.

For you to find the defendant guilty of criminal sexual penetration of a child under the age of thirteen (13) [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2] [caused _____ (*name of victim*) to engage in _____[3];]

[OR]

[caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was a child under the age of thirteen (13);

[3. The defendant's act was unlawful;][6]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — This instruction contains the essential elements of criminal sexual penetration of a child under 13. If the victim is under the age of 13 years, no force or coercion is necessary.

Mistake of the defendant as to the age of the child is not a defense. Perkins, *Criminal Law*, 168 (2d ed. 1969). *Compare* Sections 40A-9-3 and 40A-9-9 NMSA 1953 (repealed) (a reasonable belief that the child was 16 years of age or older is a defense to statutory rape and sexual assault, respectively).

See also the commentary to UJI 14-941 NMRA.

ANNOTATIONS

The 2010 amendment, effective December 31, 2010, in the first sentence, after "child under the age of", added "thirteen"; in Paragraph 2, after "(name of victim) was", deleted "12 years of age or younger" and added "a child under the age of thirteen (13)".

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 3 and Use Note 6 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 6 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Section 30-9-11D(1) NMSA 1978.

Use of wrong alternative in uniform instruction. — Where defendant was charged with first degree criminal sexual penetration of a minor for vaginal penetration and first degree criminal sexual penetration of a minor for anal penetration; the court instructed the jury that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the vagina and/or vulva" of the victim and that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the anus" of the victim; and although the court erred in using the second alternative of the uniform instruction as the form of the instructions given to the jury, the instructions as given accurately reflected the statutory law and did not constitute reversible error. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92.

Instruction was held properly given, where the defendant was charged with causing a child under the age of 13 to engage in cunnilingus, even though there was no penetration. *State v. Orona*, 1982-NMSC-002, 97 N.M. 232, 638 P.2d 1077.

Sufficient evidence to prove a pattern of conduct of criminal sexual penetration of a minor. — Where defendant was charged with twelve counts of criminal sexual penetration of a minor, and where the two children testified to a pattern of conduct where defendant would put his penis and fingers in each child's vagina and anus before she went to school in the mornings, and where the children further testified that defendant did this more than six times, with one instance tied to the first day of school, but where no other evidence tied an incident to a certain time or place, the undifferentiated multiple acts against a victim within a period of time is evidence sufficient to support a conviction on one count per child for a pattern of conduct of criminal sexual penetration of a minor. *State v. Huerta-Castro*, 2017-NMCA-026.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 16.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-958. Criminal sexual penetration in the first degree; use of physical force or physical violence; great bodily harm or great mental anguish; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][1] [great mental anguish] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[1]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant used physical force or physical violence which resulted in [great bodily harm[6]][1] [great mental anguish[7]] to _____ (*name of victim*);

[3. The defendant's act was unlawful;][8]

4. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Use only the applicable alternatives.

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

3. Name the sexual act or acts: i.e., "sexual intercourse," "anal intercourse," "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. The definition of "great bodily harm," Instruction 14-131 NMRA, must be given after this instruction.

7. The definition of "great mental anguish," Instruction 14-980 NMRA, must be given after this instruction.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — Four separate instructions have been prepared for criminal sexual penetration which results in great bodily harm or great mental anguish to the victim. UJI 14-958 NMRA (physical force or physical violence), 14-959 NMRA (threats) and 14-960 NMRA (unconscious, etc.) contain separate definitions for "force or coercion". Section 30-9-10(A) NMSA 1978.

UJI 14-958, 14-959, 14-960 and 14-961 NMRA are the same as UJI 14-941, 14-942, 14-943 and 14-944 NMRA, respectively, with the additional element of great bodily harm or great mental anguish to the victim.

UJI 14-961 combines UJI 14-958, 14-959 and 14-960 NMRA with the three definitions of "force or coercion" set out in the alternative. If there is evidence of more than one type of force or coercion, this instruction may be used. However, in some circumstances the individual and particularized Uniform Jury Instructions may be more clear and therefore preferable. The court has discretion as to which instruction should be given for these essential elements.

The definitions of "great bodily harm" and "great mental anguish" are contained in UJI 14-131 and 14-980 NMRA, respectively.

See also the commentary to UJI 14-941 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 3 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 3 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11D(2) and 30-9-10A(1) NMSA 1978.

Phraseology of instruction not prejudicial. — In a prosecution for criminal sexual penetration, the defendant is not prejudiced by the giving of jury instructions, such as this instruction, referring to "sexual intercourse" or "penis." *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 90, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-959. Criminal sexual penetration in the first degree; threats of force or coercion; great bodily harm or great mental anguish; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][1] [great mental anguish] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[1]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. The defendant:

   [used threats of physical force or physical violence against _____ (*name of victim or other person*);][1]

   [OR]

[threatened to _____[6];]

3. _____ (*name of victim*) believed the defendant would carry out the threat;

4. The defendant's acts resulted in [great bodily harm[7]][1] [great mental anguish[8]] to _____ (*name of victim*);

[5. The defendant's act was unlawful[9];]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only the applicable alternatives.

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

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

7. The definition of "great bodily harm", Instruction 14-131 NMRA, must be given after this instruction.

8. The definition of "great mental anguish", Instruction 14-980 NMRA, must be given after this instruction.

9. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-958 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 5 and Use Note 9 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 9 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11D(2), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 57, 90, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-960. Criminal sexual penetration in the first degree; victim unconscious, asleep, physically or mentally helpless; great bodily harm or great mental anguish; essential elements.

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][1] [great mental anguish] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[1]

   [caused _____ (*name of victim*) to engage _____[3];][1]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was [unconscious][1] [asleep] [physically helpless] [suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing];

3. The defendant knew or had reason to know of the condition of _____ (*name of victim*);

4. The defendant's acts resulted in [great bodily harm[6]][1] [great mental anguish[7]] to _____ (*name of victim*);

[5. The defendant's act was unlawful[8];]

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Use only the applicable alternatives.

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

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. The definition of "great bodily harm", Instruction 14-131 NMRA, must be given after this instruction.

7. The definition of "great mental anguish", Instruction 14-980 NMRA, must be given after this instruction.

8. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary to UJI 14-958 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 5 and Use Note 8 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 5 and former Use Note 8 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11D(2) and 30-9-10A(4) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 8, 9, 90, 110, 111.

When woman deemed to be within class contemplated by statute denouncing offense of carnal knowledge of female who is feebleminded or imbecile, 31 A.L.R.3d 1227.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape §§ 14, 82.

14-961. Criminal sexual penetration in the first degree; force or coercion; great bodily harm or great mental anguish; essential elements.[1]

For you to find the defendant guilty of criminal sexual penetration causing [great bodily harm][2] [great mental anguish] [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[4];]

   [OR]

   [caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. [The defendant used physical force or physical violence;][2]

   [OR]

   [The defendant (used threats of physical force or physical violence against _____ (*name of victim or other person*))[2] (OR) (threatened to _____[7]); AND _____ (*name of victim*) believed that the defendant would carry out the threat;]

   [OR]

   [_____ (*name of victim*) was (unconscious)[2] (asleep) (physically helpless) (suffering from a mental condition so as to be incapable of understanding the nature or consequences of what the defendant was doing); AND the defendant knew or had reason to know of the condition of _____ (name of victim);]

3. The defendant's acts resulted in [great bodily harm[8]][2] [great mental anguish[9]] to _____ (*name of victim*);

[4. The defendant's act was unlawful;][10]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10(A) NMSA 1978: (1) use of physical force or physical violence; (2) threats; (3) mental or other incapacity of the victim. If the evidence supports two or more of these theories of "force or coercion," this instruction may be used.

2. Use only the applicable alternatives.

3. Insert the count number if more than one count is charged.

4. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. *See* Section 30-9-10(A)(3) NMSA 1978 for examples of types of threats.

8. The definition of "great bodily harm", Instruction 14-131 NMRA, must be given after this instruction.

9. The definition of "great mental anguish," Instruction 14-980 NMRA, must be given after this instruction.

10. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* committee commentary under UJI 14-958 NMRA.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 4 and Use Note 10 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act. The 2004 amendment also deleted former essential element 4 and former Use Note 10 relating to whether the victim was the spouse of the defendant.

Cross references. — *See* Sections 30-9-11D(2) and 30-9-10A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 3, 4, 90, 110.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

75 C.J.S. Rape § 82.

14-962. Criminal sexual penetration of a 13 to 16 year old; by person 18 years or older; essential elements.

For you to find the defendant guilty of criminal sexual penetration of a child 13 to 16 by a person who is at least 18 years old and at least 4 years older than the victim, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____;][3]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was at least 13 but less than 16 years old;

3. The defendant was 18 years old or older at the time of the offense;

4. The defendant is at least 4 years older than _____ (*name of victim*);

[5. _____ (*name of victim*) was not the spouse of the defendant];[6]

[6. The defendant's act was unlawful;][7]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus." The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of "spouse", Instruction 14-983 NMRA, must also be given.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

Committee commentary. — *See* UJI 14-957, Criminal sexual penetration; child under 13 years of age.

This instruction contains the essential elements of criminal sexual penetration of a child 13 to 16 years of age perpetrated by a person who was at least 18 years old and who is at least 4 years older than the child.

See Sections 40-1-5 and 40-1-6 NMSA 1978 for marriage of minors.

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, rewrote essential element 2, added the bracketed essential element 6 and Use Note 7 providing for the jury to be instructed on whether the defendant's act was "lawful" if the evidence raises a genuine issue of the unlawfulness of the defendant's act.

Cross references. — *See* Section 30-9-11G(1) NMSA 1978.

14-963. Criminal sexual penetration of an inmate by a person in position of authority; essential elements.

For you to find the defendant guilty of criminal sexual penetration of an inmate confined in a correctional facility or jail [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2]

   [caused _____ (*name of victim*) to engage in _____[3];]

   [OR]

   [caused the insertion, to any extent, of a _____[4] into the _____[5] of _____ (*name of victim*);]

2. _____ (*name of victim*) was an inmate at a [correctional facility] [jail][2] at the time of the offense;

3. The defendant was in a position of authority over _____ (*name of victim*);

[4. The defendant's act was unlawful;][6]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Name the sexual act or acts: i.e., "sexual intercourse", "anal intercourse", "cunnilingus" or "fellatio". The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

4. Identify the object used.

5. Name the part or parts of the body: i.e., "vagina", "penis" or "anus". The applicable definition or definitions from Instruction 14-981 NMRA must be given after this instruction.

6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[As amended, effective January 20, 2005.]

ANNOTATIONS

The 2004 amendment, effective January 20, 2005, deleted "unlawfully and intentionally" in the first essential element of this instruction, inserted a new essential element 4 and deleted Use Notes 2 and 3.

Cross references. — *See* Section 30-9-11E(2) NMSA 1978.

Part D
Indecent Exposure and Enticement of a Child

14-970. Indecent exposure; essential elements.

For you to find the defendant guilty of indecent exposure [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly and intentionally exposed [his] [her] _____[2] to public view;

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name the part or parts of the anatomy exposed: i.e., “mons pubis,” “penis,” “testicles,” “mons veneris,” “vulva” or “vagina.” The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

[As amended, effective September 1, 1994; as amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — *See* Section 30-9-14 NMSA 1978; petty misdemeanor or misdemeanor.

Indecent exposure was a common-law offense. Some jurisdictions have held that it is a specific intent crime while others have held that a conviction may be based on criminal negligence. *See* Perkins, Criminal Law 395 (2d ed. 1969).

For a discussion of the term “indecent,” *see State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App. 1969).

The scope of the term “public” is not defined in the statute. The committee decided that this term meant “any group of persons who would ordinarily expect to be protected against a visual assault.” The ordinary use of a public restroom, for example, is not contemplated as within the purview of the prohibition.

[As amended by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-023, effective December 31, 2013, added the elements of knowledge and intent; eliminated the element that the child be under the age of thirteen; in Paragraph 1, after “The defendant”, added “knowingly and intentionally”; and deleted former Paragraph 2, which required that the defendant committed the crime before a child was thirteen years of age.

The 1994 amendment, effective September 1, 1994, made a gender neutral change in Item 1 of the instruction.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Lewdness, Indecency and Obscenity § 39.

Criminal offense predicated upon indecent exposure, 93 A.L.R. 996, 94 A.L.R.2d 1353.

Indecent exposure: what is "person", 63 A.L.R.4th 1040.

67 C.J.S. Obscenity § 5.

14-970A. Aggravated indecent exposure; essential elements.

For you to find the defendant guilty of aggravated indecent exposure [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly and intentionally exposed [his] [her] _____[2] to public view in a lewd and lascivious manner;

2. The defendant did so with the intent to threaten or intimidate another person;

3. The defendant did so [before a child under the age of eighteen (18) years of age] [while committing an assault] [while committing an aggravated assault] [while committing an assault with intent to commit a violent felony] [while committing a battery] [while committing an aggravated battery] [while committing criminal sexual penetration] or [while committing abuse of a child][3];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Name the part or parts of the anatomy exposed: i.e., “mons pubis,” “penis,” “testicles,” “mons veneris,” “vulva” or “vagina.” The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

3. Use the applicable bracketed element(s). If element(s) other than “before a child under eighteen (18) years of age” are used, the essential elements(s) for those offenses must also be given unless given elsewhere as a substantive instruction. *See* UJI 14-140 NMRA.

[Adopted by Supreme Court Order No. 13-8300-023, effective for all cases pending or filed on or after December 31, 2013.]

14-971. Enticement of a child; essential elements.[1]

For you to find the defendant guilty of enticement of a child [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[(enticed)[3] (persuaded) (attempted to persuade) _____ *(name of child)* to enter a _____[4]];

[OR]

[had possession of _____ *(name of child)* in a _____];[4]

2. The defendant intended to commit the crime or crimes of _____[5];

3. _____ *(name of child)* was less than 16 years old;

4. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. This instruction sets forth, in the alternative, the two types of enticement of a child set forth in Section 30-9-1 NMSA 1978.

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

3. Use only the applicable alternatives.

4. Use applicable term or terms: vehicle; building; room; secluded place.

5. Identify the crime or crimes the defendant intended to commit and give the essential elements, unless they are covered in an essential elements instruction for the substantive offense. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* Section 30-9-1 NMSA 1978; misdemeanor.

This instruction sets forth the two ways in which the offense of enticement of a child may be committed. It should be noted that the defendant must intend the substantive sexual offense underlying the enticement.

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-025, effective December 31, 2021, in Use Note 5, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used."

Am. Jur. 2d, A.L.R. and C.J.S. references. — 43 C.J.S. Infants § 93.

14-972. Aggravated criminal sexual penetration in the first degree; child under thirteen;1 essential elements.

For you to find the defendant guilty of aggravated criminal sexual penetration of a child under the age of thirteen [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[3]

[caused _____ (*name of victim*) to engage in _____[4];]

[OR]

[caused the insertion, to any extent, of a _____[5] into the _____[6] of _____ (*name of victim*);]

2. _____ (*name of victim*) was twelve (12) years of age or younger;

3. [The defendant acted with an intent to kill][3]

[OR]

[the act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;]

[4. The defendant's act was unlawful;][7]

5. This happened in New Mexico on or about the ____ day of _____, _____.

A person acts with a depraved mind by intentionally engaging in outrageously reckless conduct with a depraved kind of wantonness or total indifference for the value of human life. Mere negligence or recklessness is not enough. In addition, the defendant must have a corrupt, or malicious state of mind, such as when a person acts with ill will, hatred, spite, or evil intent. Whether a person acted with a depraved mind may be inferred from all the facts and circumstances of the case.

USE NOTES

1. This instruction is to be used for crimes that occurred on or after July 1, 2009. For crimes occurring on or after July 1, 2007, but before July 1, 2009, the child’s age must be under nine (9).

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

3. Use only the applicable alternatives.

4. Name the sexual act or acts: *i.e.*, "sexual intercourse," "anal intercourse," "cunnilingus," or "fellatio." The applicable definition or definitions from Instruction 14-982 NMRA must be given after this instruction.

5. Identify the object used.

6. Name the part or parts of the body: *i.e.*, "vagina," "penis," or "anus." The applicable definition or definitions from UJI 14-981 NMRA must be given after this instruction.

7. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness of the defendant's actions. If this element is given, UJI 14-132 NMRA, "unlawful defined", must be given after this instruction.

[Adopted by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011.]

ANNOTATIONS

Sufficient evidence of aggravated CSP of a child under thirteen. — Where defendant was convicted of aggravated criminal sexual penetration of a child under thirteen years of age, and where the State presented evidence from a forensic pathologist that the baby's injuries to her anus and vagina were consistent with a blunt object larger than the orifices being inserted in those areas or an object having been inserted forcefully, and evidence that defendant's sperm cells were found in the baby's mouth, and where defendant claimed that the State did not prove that he acted with a depraved mind without regard for human life or that his acts were unlawful because he acted in the interest of saving his daughter's life, the jury could reasonably have concluded that defendant acted both unlawfully and with a depraved mind without regard for human life based on the evidence of the baby's young age and the severity of the separate injuries to her vagina and anus. *State v. Galindo*, 2018-NMSC-021.

Part E
Definitions

14-980. "Mental anguish" and "great mental anguish"; defined.

Mental anguish means psychological or emotional damage marked by change of behavior or physical symptoms.

Great mental anguish means psychological or emotional damage marked by extreme change of behavior or severe physical symptoms.

Committee commentary. — *See* Section 30-9-10B NMSA 1978.

The committee was of the opinion that the legislature employed the statutory reference to psychiatric or psychological treatment or care as a vehicle to demonstrate the severity of the mental anguish being defined. It was not intended to be an element of the definition that the victim actually received such care, but only that such care would have been beneficial. The committee further recognized that a psychological trauma which causes extreme change of behavior or severe physical symptoms is, by definition, in need of treatment and therefore the statutory reference to treatment is surplusage.

ANNOTATIONS

Sufficient evidence of great mental anguish. — Where defendant was convicted of first-degree criminal sexual penetration (CSP), and where defendant claimed that the state failed to establish that the victim suffered great mental anguish as a result of the incident and that the evidence is therefore insufficient to support his conviction for first-degree CSP, evidence that the victim was over seventy years of age, that she moved to another state to live with her daughter because she felt unable to live alone, that she experienced constant flashbacks, and as a result had trouble concentrating and was unable to drive for a period of time, was sufficient to support a conclusion that the victim suffered great mental anguish as a result of the incident. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

14-981. Definitions of parts of the primary genital area.

The "mons pubis" is the rounded eminence or protuberance at the lower point of the abdomen that is ordinarily covered with pubic hair on an adult. The mons pubis of a man extends upward in a triangular shape to a point in the middle line of the abdomen.

The "mons veneris" is the rounded eminence or protuberance at the lowest point of the abdomen of a woman that is ordinarily covered with pubic hair on an adult. The upper border of the hair on the mons veneris forms a horizontal line.

The "penis" is the male organ of urination and sexual intercourse.

The "testicles" are the male sex glands which are located in a sac known as the scrotum. The testicles are round or oval and produce the male sperm.

The "vulva" are the external parts of the female organ of sexual intercourse. It is composed of the major and minor lips, the clitoris and the opening of the vagina. The outer lip of the vulva is covered with hair and the inner surface is smooth. The inner lips or parts of the vulva are completely covered by the outer lips.

The "vagina" is the canal or passage for sexual intercourse in the female, extending from the vulva to the neck of the uterus.

The "anus" is the opening to the rectum.

Committee commentary. — Neither Section 30-9-12 nor Section 30-9-13 NMSA 1978 defines "primary genital area." The committee decided that it was the intent of the legislature that this term include those anatomical parts referred to in Section 30-9-14 NMSA 1978. Dictionary definitions were rejected as being too technical to convey to the average juror the areas of the body intended by these terms.

Definitions for "breast" and "buttocks" were not included because these terms are in common usage and have a commonly understood meaning. In accordance with the general UJI rule, a dictionary definition of these words should be given if the jury requests a definition.

14-982. "Sex acts"; defined.

Sexual intercourse means the penetration of the vulva or vagina, the female sex organ, by the penis, the male sex organ, to any extent.

Cunnilingus means the touching of the edge or inside of the female sex organ with the lips or tongue.

Fellatio means the touching of the penis with the lips or tongue.

Anal intercourse means the penetration of the anus by the penis to any extent.

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

Committee commentary. — The definitions of "cunnilingus" and "fellatio" are dictionary definitions. The definition of "anal intercourse" is an adaptation of the definition of "sexual intercourse." The definition of "sexual intercourse" is the legal definition of that element of rape. *See, e.g., State v. Harbert*, 20 N.M. 179, 147 P. 280 (1915). It is not an accurate dictionary definition of "sexual intercourse" because the statute provides that no emission is required for criminal sexual penetration. 30-9-11 NMSA 1978.

The committee considered the question of whether the legislature intended to restrict the definitions of "cunnilingus" and "fellatio" to those acts involving penetration. It was concluded that the legislature used those terms in the sense set out in these definitions. In the Encyclopedia Britannica, Macropoedia, v. 16, p. 610 (1975), the term "fellatio" is defined as "oral stimulation of the penis," and the term "cunnilingus" is defined as "oral stimulation of the vulva or clitoris." In the Random House Dictionary of the English Language (unabridged ed., 1971), the term "fellatio" is defined as "oral stimulation of the penis, especially to orgasm," and the term "cunnilingus" is defined as "act, practice, or technique of orally stimulating the female genitalia." *See also People v. Hunter*, 158 C.A.2d 500, 322 P.2d 942 (1958), in which the term "cunnilingus" was defined as placing the mouth upon the genital organ, and the act was held to constitute a violation of a statute proscribing "oral copulation."

In *State v. Tafoya*, 2010-NMCA-010, ¶ 52, 147 N.M. 602, 227 P.3d 92, the New Mexico Court of Appeals clarified that the definition of "sexual intercourse," as used in the jury instructions for criminal sexual penetration, includes penetration of the vulva.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first sentence, after "penetration of the", added "vulva or"; and in the committee commentary, added the last paragraph.

Fundamental error analysis applied to the jury instruction defining "sexual intercourse" and criminal sexual contact. — In a claim of fundamental error based on the overlap of the jury instruction defining "sexual intercourse" and the jury instruction on criminal sexual contact of a minor, the first component in the fundamental error analysis requires the court to determine whether a reasonable juror would have been confused or misdirected by the jury instructions; if there is instructional error, then the court must review the entire record, placing the instruction in the context of the individual facts and circumstances of the case, to determine whether the defendant's conviction was a plain miscarriage of justice; there is no miscarriage of justice where, despite any misunderstanding by the jury, the circumstances of the case demonstrate that all the necessary elements of the offense were satisfied beyond a reasonable doubt. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004 (35,182 and 35,190).

Where the definition of "sexual intercourse" includes penetration of the vulva or the vagina and there ultimately can be no contact with the vagina without a penetration of the vulva occurring because the opening of the vagina is encompassed with the vulva, *see* UJI 14-981 NMRA, the language of the criminal sexual contact of a minor (CSCM) instruction could have resulted in some juror confusion because it is impossible to contact the vagina without penetrating the vulva, resulting in criminal sexual penetration; however, where defendant was convicted of CSCM based on his four-year-old stepdaughter's testimony describing how defendant unzipped her pajamas, pulled down her underwear, and lay on top of her with his unclothed "private" touching her unclothed "private," there was sufficient evidence to establish that defendant touched or applied force to the vagina, and the jury could have reasonably determined that defendant touched her unclothed groin area with his penis, amounting to CSCM; no distinct possibility exists from the evidence that the jury convicted defendant without finding all the elements beyond a reasonable doubt; the instruction defining "sexual intercourse", even though arguably flawed from the standpoint of anatomical definitional accuracy, did not create such confusion in the jury that it would undermine the judicial process. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004 (35,182 and 35,190).

Cunnilingus is not limited to acts involving penetration. *State v. Orona*, 1982-NMSC-002, 97 N.M. 232, 638 P.2d 1077.

14-983. "Spouse"; defined.

"Spouse" means a husband or wife, unless they are living apart or unless one has filed a legal action for divorce or separate maintenance against the other.

Committee commentary. — Sexual conduct between spouses is not within the scope of Chapter 9. However, the definition of "spouse," for purposes of this chapter, is much more limited than the usual meaning of the term. By the terms of the definition in Section 30-9-10E NMSA 1978, two people, legally married but living apart, are not spouses. Apparently the separation need not be on account of marital difficulty; the separation by itself is sufficient to take the couple out of the spousal relationship.

ANNOTATIONS

Last sentence of committee commentary is incorrect statement of law. — The committee commentary "apparently the separation need not be on account of marital difficulty; the separation itself is sufficient to take the couple out of the spousal relationship" is an incorrect statement of the law. *State v. Brecheisen*, 1984-NMCA-011, 101 N.M. 38, 677 P.2d 1074.

14-984. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, defining "unlawful" for purposes of criminal sexual penetration or contact, was withdrawn by Supreme Court order effective January 20, 2005. *See* UJI Criminal 14-132 NMRA, "unlawfulness as an element" for the instruction on the definition of "unlawful".

14-985. Criminal sexual penetration; medical procedure.

An issue in this case is whether the criminal sexual penetration was performed as part of a medically indicated procedure.

The burden is on the state to prove beyond a reasonable doubt that the criminal penetration was not performed as a part of a medically indicated procedure. If you have a reasonable doubt as to whether the defendant performed the sexual penetration as part of a medically indicated procedure, you must find the defendant not guilty.

USE NOTES

If there is an issue as to whether “sexual penetration,” as defined by NMSA 1978, Section 30-8-11(A) (2009), was performed as part of a medically indicated procedure, this instruction must be given. If this instruction is given, the following should be added to the essential elements instruction: “The penetration was not performed as part of a medically indicated procedure.”

[Adopted, effective January 1, 1997; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in the first paragraph, deleted “Evidence has been presented that” and added “An issue in this case is whether”; and in the Use Notes, after “defined by”, deleted “Subsection A of Section 30-9-11 NMSA 1978” and added “NMSA 1978, Section 30-8-11(A) (2009).”

Cross references. — *See* Section 30-9-11(B) NMSA 1978.

14-990. Chart.

SECTIONS 29-11A-4 AND -4.1 NMSA 1978
SEX OFFENDER REGISTRATION AND NOTIFICATION[1]

	SORNA Versions			
	1999	**2000**	**2005 & 2007**	**2013**
Applicability: applicable to a person convicted of a sex offense who:	Convicted on or after July 1, 1999, subject to subsequent provisions of the 2000 version.	Convicted on or after July 1, 1995, and persons convicted prior to July 1, 1995, and still incarcerated or on probation or parole.	Convicted on or after July 1, 2005, and a person convicted prior to July 1, 2005, who was still incarcerated or on probation or parole.	On or after July 1, 2013, is found guilty of committing a sex offense.
Included Offenses (NMSA 1978, §§ 29-11A-3 and -5). **Period of Renewal** (NMSA 1978, § 29-11A-4).				
Attempt to commit offenses have same registration period as the actual offense (attempted solicitation not included).	same	same	same	same
CSP, 1st degree. NMSA 1978, § 30-9-13.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
CSP, 2nd degree. NMSA 1978, § 30-9-13.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
CSP, 3rd degree. NMSA 1978, § 30-9-13.	10 years, annually	10 years, annually	life, 90 days	life, 90 days

CSP, 4th degree. NMSA 1978, § 30-9-13.	10 years, annually	10 years, annually	10 years, annually	10 years, every 6 months
Aggravated CSP; 1st, 2nd, 3rd degrees. NMSA 1978, § 30-9-11.	N/A	N/A	life, 90 days (beginning 2007)	life, 90 days
CSC, 4th degree. NMSA 1978, § 30-9-12.	10 years, annually	10 years, annually	life, 90 days	life, 90 days
CSCM, 2nd Degree. NMSA 1978, § 30-9-13.	N/A	N/A	life, 90 days	life, 90 days
CSCM, 3rd degree. NMSA 1978, § 30-9-13.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
CSCM, 4th degree. NMSA 1978, § 30-9-13.	10 years, annually	10 years, annually	life, 90 days	life, 90 days
Sexual exploitation of children. NMSA 1978, § 30-6A-3.	20 years, annually	20 years, annually	life, 90 days	life, 90 days
Kidnapping when victim is less than 18 and offender is not the parent of victim. NMSA 1978, § 30-4-1.	N/A	20 years, annually	life, 90 days	life, 90 days
Kidnapping when committed with the intent to inflict a sexual offense. NMSA 1978, § 30-4-1.	N/A	N/A	N/A	life, 90 days[2]
Sexual Exploitation of children by prostitution. NMSA 1978, § 30-6A-4.	10 years, annually	10 years, annually	10 years, annually	10 years, every 6 months
Solicitation to	10 years,	10 years,	10 years,	10 years, every 6

commit 2nd, 3rd, or 4th degree CSCM. NMSA 1978, §§ 30-9-13 & 30-28-1. (2nd added in 2005) (attempted solicitation not included).	annually	annually	annually	months
False imprisonment when victim is less than 18 and offender not a parent of victim. NMSA 1978, § 30-4-3.	N/A	10 years, annually	10 years, annually	N/A[2]
False imprisonment when committed with the intent to inflict a sexual offense. NMSA 1978, § 30-4-3.	N/A	N/A	N/A	10 years, every 6 months[2]
Aggravated indecent exposure. NMSA 1978, § 30-9-14.3.	N/A	N/A	10 years, annually	10 years, every 6 months
Enticement of a Child. NMSA 1978, § 30-9-1.	N/A	N/A	10 years, annually	10 years, every 6 months
Incest when victim under 18. NMSA 1978, § 30-10-3.	N/A	N/A	10 years, annually	10 years, every 6 months
Second or subsequent sex offense. NMSA 1978, § 29-11A-4(M).	N/A	N/A	life, 90 days	life, 90 days
Child solicitation by electronic commc'n	N/A	N/A	N/A	10 years, every 6 months[3]

device. NMSA 1978, § 30-37-3.2.				

Trigger Registration and/or Notice	**1999**	**2000**	**2005 & 2007**	**2013**
Register from release from custody of corrections department or being placed on probation or parole. NMSA 1978, § 29-11A-4(B).	10 days	10 days	see below	see below
Register from release from custody of corrections department, municipal or county jail; or a federal, military or tribal correctional facility or detention center; or being placed on probation or parole. NMSA 1978, § 29-11A-4(B).	N/A	N/A	10 days	5 business days
Changes Residence to New Mexico. NMSA 1978, § 29-11A-4(B).	10 days	10 days	10 days	5 business days
Resident of another state, but working or employed in New Mexico.	10 days	10 days	10 days	5 business days

NMSA 1978, § 29-11A-4(D).				
Changes residence within county. NMSA 1978, § 29-11A-4(F).	10 days	10 days	10 days	5 business days
Changes residence to new county. NMSA 1978, § 29-11A-4(G).	10 days (both new and old county)	10 days (both new and old county)	10 days (both new and old county)	5 business days (both new and old county)
Does not have established residence (shelter, halfway house, transient); register each county temporarily living in. NMSA 1978, § 29-11A-4(H).	N/A	N/A	10 days after change in temporary location	5 business days after change in temporary location
Attending institution of higher learning. Notify: (1) local county sheriff, (2) institution's law enforcement entity, and (3) registrar. NMSA 1978, § 29-11A-4(I).	N/A	N/A	10 days from start and 10 days from any change	5 business days from start and 5 business days from change
School employment, notice to school and principal. NMSA 1978, § 29-11A-4(J).	N/A	N/A	10 days from start and 10 days from any change	5 business days from start and 5 business days from change
Notice to employer immediately (whether	N/A	N/A	Immediately	Immediately

compensated or volunteers). NMSA 1978, § 29-11A-4(K).				
Moves out of New Mexico. Notify county sheriff where currently resides and identify state moving to. NMSA 1978, § 29-11A-4.1.	N/A	30 days prior to move	30 days prior to move	30 days prior to move

Penalties	**1999**	**2000**	**2005 & 2007**	**2013**
Failure to Comply. NMSA 1978, § 29-11A-4.	willfully, misdemeanor	willfully, 4th degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony
Provides false information. NMSA 1978, § 29-11A-4.	misdemeanor	willfully, 4th degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony	willfully or knowingly. 1st violation: 4th degree felony; subsequent violation: 3rd degree felony
Failure to provide notice of moving from New Mexico. NMSA 1978, § 29-11A-4.1.	N/A	willfully, misdemeanor	willfully, 4th degree felony	willfully, 4th degree felony

USE NOTES

1. New Mexico's Sex Offender Notification and Registration Act ("SORNA") has been amended multiple times since it first was enacted. Different versions of SORNA also impose different requirements on someone subject to its provisions. Consequently, the necessary first step in correctly instructing a jury on the essential elements of an alleged SORNA violation is to identify which version of the statute applies. This chart is to be used to determine which version of the statute applies and to provide guidance in selecting the correct elements instruction from the instructions that follow. When using

the chart to determine the applicable version of SORNA, it is important to first look at when a person was convicted of a sex offense as well as when a person completed their sentence for that sex offense. Second, it is important to determine whether or not the "sex offense" was a registerable offense under the applicable version of SORNA before proceeding further.

2. In 2013, the Legislature changed the sex offense definitions for kidnapping and false imprisonment in NMSA 1978, Section 29-11A-3(I). The Legislature deleted "the victim is less than eighteen years of age and the offender is not a parent of the victim" and added "committed with the intent to inflict a sexual offense." However, these changes were not incorporated into NMSA 1978, Section 29-11A-5(D) or (E). Based on this legislative history it appears the legislative intent of the 2013 amendment was to narrow down the scope of offenders convicted of kidnapping and false imprisonment to those that committed the offense with the intent to inflict a sexual offense.

3. Child solicitation by electronic device was added in 2013 to the list of registerable sex offenses but not incorporated into NMSA 1978, Section 29-11A-5(D) or (E) for purposes of length of registration period. Previously in 2007, the Legislature added child solicitation by electronic communication device under Section 29-11A-5(E), requiring a ten (10)-year registration period, but it failed to become law. *See State v. Ho*, 2014-NMCA-038, 321 P.3d 147. Based on this legislative history it appears the legislative intent of the 2013 amendment is to require a ten (10)-year registration period.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — New Mexico's first Sex Offender Registration Act (SORA) was enacted on July 1, 1995, in response to the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Program. Under the original SORA, the legislature listed 5 offenses that would require registration: (1) criminal sexual penetration in the first, second, third or fourth degree, as provided in Section 30-9-11 NMSA 1978; (2) criminal sexual contact in the fourth degree, as provided in Section 30-9-12 NMSA 1978; (3) criminal sexual contact of a minor in the third or fourth degree, as provided in Section 30-9-13 NMSA 1978; (4) sexual exploitation of children, as provided in Subsection A, B or C of Section 30-6A-3 NMSA 1978; and (5) sexual exploitation of children by prostitution, as provided in Section 30-6A-4 NMSA 1978.

Subsequent amendments were made to SORA and in 1999, the Legislature amended SORA to what has now become SORNA—Sex Offender Registration and Notification Act. Major changes again were made in 2000, 2005, 2007, and 2013.

Laws 1999, Chapter 19, Section 11 provided that "Sections 1 through 9 of this act apply to persons convicted of a sex offense committed on or after July 1, 1999. As to persons convicted of a sex offense committed prior to July 1, 1999, the laws with respect to registration requirements for sex offenders in effect at the time the sex offense was

committed shall apply." The changes went into effect on July 1, 1999. Due to the changes of applicability in the 2000 version, expressly allowing for retroactivity, the 1999 version has been superseded by the 2000 version. *See State v. Druktenis*, 2004-NMCA-032, 135 N.M. 223.

Laws 2000, Chapter 8, Section 9 provided that "the provisions of this 2000 version of the Sex Offender Registration and Notification Act apply to: A. persons convicted of a sex offense on or after July 1, 1995; and B. persons convicted of a sex offense prior to July 1, 1995 and who, on July 1, 1995, were incarcerated, on probation or on parole." The changes went into effect on July 1, 1999. Based on the applicable statute, any person who completed their sentence, including probation and parole, prior to July 1, 1995 has no registration obligation.

Laws 2005, Chapter 279, Section 14 provided that "the provisions of this 2005 version of the Sex Offender Registration and Notification Act are applicable to: A. a person convicted of a sex offense on or after July 1, 2005; and B. a person convicted of a sex offense prior to July 1, 2005 and who, on July 1, 2005, was still incarcerated, on probation or on parole for commission of that sex offense." The changes went into effect on July 1, 2005.

In 2007, there was a change to Section 29-11A-3 to add "aggravated criminal sexual penetration," which became a new offense pursuant to Section 30-9-11. Laws 2007, Chapter 69, Section 8 provided that "the provisions of Section 5 of this act are applicable to: A. a person convicted of a sex offense on or after July 1, 1995; and B. a person convicted of a sex offense prior to July 1, 1995 and who, on July 1, 1995, was still incarcerated, on probation or on parole for commission of that sex offense." Since Chapter 69, Section 5, only deals with Section 29-11A-3 – Definitions and adds "aggravated criminal sexual penetration," this doesn't affect the prior applicability of the 2005 version. Therefore, the Chart reflects the 2005 and 2007 versions of SORNA in the same column.

Laws 2013, Chapter 152, Section 5 provided that "the provisions of these 2013 amendments to the Sex Offender Registration and Notification Act are applicable to a person who, on or after July 1, 2013, is found guilty of committing a sex offense." The changes went into effect on July 1, 2013. The application of the 2013 version was not made retroactive to those offenders who were still serving their sentence or on probation or parole. Therefore, those offenders convicted prior to July 1, 2013, would still fall under one of the prior versions of SORNA.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added the offenses of

“Kidnapping when committed with the intent to inflict a sexual offense” and “False imprisonment when committed with the intent to inflict a sexual offense” to the list of included offenses, reflecting legislative amendments to the definitions of kidnapping and false imprisonment, added certain clarifying language, and revised the Use Notes; in the Included Offenses column, after “Attempt to commit offenses have same registration period as the actual offense”, added “(attempted solicitation not included)”; in the 2013 column for “Kidnapping when victim is less than 18 and offender is not the parent of victim.”, deleted “life, 90 days” and added “N/A”; added a new row for “Kidnapping when committed with the intent to inflict a sexual offense. NMSA 1978, § 30-4-1.”; in the Included Offenses column, in the Solicitation to commit 2nd, 3rd, or 4th degree CSCM.” box, added “(attempted solicitation not included).”; in the False imprisonment when victim is less than 18 and offender not a parent of victim” box, deleted “including attempt”; added a new row for “False imprisonment when committed with the intent to inflict a sexual offense. NMSA 1978, § 30-4-3.”; and added a new Use Note 2 and redesignated former Use Note 2 as Use Note 3.

14-991. Failure to register as a sex offender; 1999 and 2000 versions of SORNA; essential elements.[1]

For you to find the defendant guilty of failure to register as a sex offender [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was convicted of [_____][3];

2. The defendant was [residing] [employed] [attending school][4] in New Mexico between _____, _____ and _____, _____[5];

3. The defendant [*triggering event*] on [*date*][6];

4. The defendant did not register with the county sheriff prior to _____[7];

5. The defendant willfully failed to register; and

6. This happened in New Mexico between _____, _____ and _____, _____.

USE NOTES

1. For use for offenders required to register under the 1999 and 2000 versions of SORNA. Threshold questions of law must be determined before the jury may be instructed. The chart included as UJI 14-990 NMRA is a tool to aid in determining which version of the statute, and thus which UJI, applies.

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

3. If there is a stipulation that the offense was a registrable offense under SORNA, insert “a sex offense on _____ (*date*).” If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Use applicable alternative or alternatives.

5. Enter relevant dates. Once the applicable statute is identified, calculating the dates triggering registration obligations vary, so that the date of an actual registration requirement involves a threshold legal determination based on the completion of sentence or release from physical custody.

6. Describe event triggering registration or notice requirement (Ex: changing residence); and include date triggering registration or notice requirement. *See* Use Notes 1, 5; UJI 14-990 (Chart).

7. Enter date defendant registration is alleged to have been required. *See* Use Notes 1, 5; UJI 14-990 (Chart).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — As outlined in Use Note 1, many of the statutory elements of Failure to Register are legal questions, such as whether registration was required in the first place. The Committee determined that the jury is ill-equipped to make such legal determinations, and therefore provided as many resources as possible to aid parties and judges in correctly determining both the applicable version of SORNA, and the defendant's specific legal obligations in a particular case. For jury instruction purposes, the Committee identified the following primary factual findings in element one: (1) the identity of the crime of conviction, (2) when the defendant was convicted, and (3) when the defendant completed serving the underlying sentence.

The relevant legal questions include (1) whether the underlying sex offense carries a registration requirement at all, (2) whether the “triggering” event creates a registration requirement under the applicable statute; (3) the duration of the registration obligation (and thus whether that requirement was still in effect at the time of the alleged failure), and (4) the frequency of the registration requirement (as it informs the applicable registration deadline). While these determinations will require judicial fact-finding, because they are threshold questions of law, they must be determined before submitting a charge to the jury, and indeed, directly determine the elements contained in the jury instructions.

The requisite jury findings informing the legal determination are included in elements 1, 2, and 3. However, the court must ultimately determine whether, legally, the defendant has been convicted of a valid sex offense requiring registration.

Instructions regarding the underlying sex offense.

The name of the prior felony conviction is not necessary. If the defendant stipulates to the commission of the underlying offense, evidence of the nature of defendant's predicate felony convictions is irrelevant and prejudicial under evidence Rule 11-403 NMRA. *See State v. Tave*, 1997-NMCA-056, 122 N.M. 29, 919 P.2d 1094; *accord, Old Chief v. United States*, 519 U.S. 172 (1997).

If the defendant does not stipulate to the prior offense, the state may prove the prior offense by documentary or other evidence which satisfies the rules of evidence. Under NMSA 1978, Section 29-11A-3, the definition of "conviction" requires that the defendant must have been sentenced for the predicate sex offense including a suspended or deferred sentence, but does not include a conditional discharge. *See State v. Brothers*, 2002-NMCA-110, ¶¶ 9-10, 133 N.M. 36, 59 P.3d 1268 (declining to find deferred sentence results in eradication of conviction for purposes of sex offender registration, in part, because to do so would make deferred sentence no different than a conditional discharge); *State v. Herbstman*, 1999-NMCA-014, ¶ 11, 126 N.M. 683, 974 P.2d 177 (finding conditional discharge is not a conviction for purposes of sex offender registration).

Determining equivalency of sex offenses

An offense is "equivalent" to a New Mexico offense, for purposes of the New Mexico Sex Offender Registration and Notification Act, if the defendant's actual conduct that gave rise to the out-of-state conviction would have constituted one of the enumerated offenses requiring registration pursuant to the Act. *See State v. Hall*, 2013-NMSC-001, 294 P.3d 1235 (outlining methods of proving underlying conduct aligning with a New Mexico statutory offense); *see also, State v. Orr*, 2013-NMCA-069, 304 P.3d 449 (remanding to trial court to determine under *Hall* whether defendant's conduct associated with a North Carolina conviction for taking indecent liberties with children was equivalent to any of the enumerated offenses under SORNA.).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-992. Failure to register as a sex offender; 2005, 2007, and 2013 versions of SORNA; essential elements.[1]

For you to find the defendant guilty of failure to register as a sex offender [as charged in Count _____][2] , the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was convicted of [_____][3];

2. The defendant was [residing] [employed] [attending school] [temporarily located][4] in New Mexico between _____, _____ and _____, _____[5];

3. The defendant [triggering event] on [date][6];

4. The defendant did not register with the county sheriff prior to _____[7];

5. The defendant willfully or knowingly failed to register; and

6. This happened in New Mexico between _____, _____ and _____, _____.

USE NOTES

1. For use for offenders required to register under the 2005, 2007, and 2013 versions of SORNA. Threshold questions of law must be determined before the jury may be instructed. The chart included as UJI 14-990 NMRA is a tool to aid in determining which version of the statute, and thus which UJI, applies.

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

3. If there is a stipulation that the offense was a registerable offense under SORNA, insert "a sex offense on _____ (*date*)." If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Use applicable alternative or alternatives.

5. Enter relevant date(s). Once the applicable statute is identified, calculating the dates triggering registration obligations vary, so that the date of an actual registration requirement involves a threshold legal determination based on the completion of sentence or release from physical custody.

6. Describe event triggering registration or notice requirement (Ex: changing residence); and include date triggering registration or notice requirement. *See* Use Notes 1, 5; UJI 14-990 (Chart).

7. Enter date defendant registration is alleged to have been required. *See* Use Notes 1, 5; UJI 14-990 (Chart).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* UJI 14-991 NMRA committee commentary.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-993. Providing false information when registering as a sex offender; essential elements.[1]

For you to find the defendant guilty of providing false information when registering as a sex offender [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was convicted of [_____][3];

2. The defendant [willfully][or] [knowingly][4] provided false information when registering as a sex offender on _____;[5] and

3. This happened in New Mexico [on _____, _____] [between _____, _____ and _____, _____].

USE NOTES

1. Applicable to all versions of SORNA.

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

3. If there is a stipulation that the offense was a registerable offense under SORNA, insert "a sex offense on _____ (*date*)." If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Use applicable alternative or alternatives depending on the applicable version of SORNA. The chart included as UJI 14-990 NMRA is a tool to aid in determining which version of the statute applies.

5. Insert date of registration depending on the applicable version of SORNA.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-994. Failure to notify county sheriff of intent to move from New Mexico to another state, essential elements.[1]

For you to find the defendant guilty of failing to notify county sheriff of intent to move from New Mexico to another state [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was convicted of [_____][3];

2. The defendant moved to _____[4] on _____;[5]

3. Prior to moving, the defendant resided in _____ County;

4. Defendant willfully failed to [notify the county sheriff of his or her intent to move to another state][6] [or] [provide written notice to the county sheriff identifying the state to which defendant intended to move] at least thirty (30) days prior to moving; and

5. This happened in New Mexico between _____, _____ and _____, _____.

USE NOTES

1. For use for defendants required to register under the 2000 version of SORNA and forward.

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

3. If there is a stipulation that the offense was a registerable offense under SORNA, insert "a sex offense on _____ (*date*)." If there is no stipulation, insert the name of the prior offense and date of conviction.

4. Insert state to which defendant moved.

5. Insert date defendant moved.

6. Use applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

CHAPTER 10 to 13
(Reserved)

CHAPTER 14
Trespass

Part A
Criminal Trespass

14-1401. Criminal trespass; public property; essential elements.

For you to find the defendant guilty of criminal trespass [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ (*identify lands or structure entered); [the least intrusion constitutes an entry*;][2]

2. This property was not open to the public at that time;

3. The defendant knew that the defendant did not have permission to enter;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-14-1 (1995); NMSA 1978, § 30-20-13 (1981). UJI 14-1401 NMRA is limited to criminal trespass of lands or buildings owned or controlled by a state agency or political subdivision of the state when the person has been denied permission to enter the premises or where previous permission has been withdrawn. UJI 14-2001 NMRA should be used instead of UJI 14-1401 NMRA if there is sufficient evidence that the failure or refusal to leave a state or local government building is accompanied by the impairment or interference with or obstruction of the lawful processes, procedures, or functions of the property.

In 1975, the Legislature amended NMSA 1978, Sections 30-14-1 and 30-20-13 to make both sections applicable to property owned or under the control of the state or its political subdivisions. These two sections create separate offenses, with NMSA 1978, Section 30-20-13 requiring an additional element of willfully impeding or interfering. *See* NMSA 1978, § 30-20-13 (B)-(D).

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. NMSA 1978, Section 12-6-2 (2009) defines "political subdivisions." "State" generally includes all three branches of government. *See id.*

"Lands" as used in NMSA 1978, Section 30-14-1 includes buildings and fixtures. *See State v. Ruiz*, 1980-NMCA-123, ¶ 45, 94 N.M. 771, 617 P.2d 160. A criminal trespass may be a lesser-included offense of the crime of burglary of a dwelling house. *See id.* ¶ 50; *see also State v. Romero*, 1998-NMCA-057, ¶¶ 18, 21, 125 N.M. 161, 958 P.2d 119 (concluding that criminal trespass could be a lesser included offense of aggravated burglary where the facts supported a trespass based solely on unlawful entry and not on unlawfully remaining without permission).

The mens rea required for criminal trespass is actual, subjective knowledge that permission to enter or remain had been denied or withdrawn. *See State v. Ancira*, 2022-NMCA-053, ¶¶ 18-20, ___ P.3d ___ (holding the plain language of NMSA 1978, Section 30-14-1(B) requires proof of not what a reasonable person would have understood, but actual knowledge that permission to enter had been denied).

[As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-037, effective for December 31, 2022, revised the element in the jury instruction related to the defendant's state of mind, and completely rewrote the Committee commentary; and in Element 3, after "The defendant knew", deleted "or should have known", and after "that", deleted "he" and added "the defendant".

Cross references. — *See* Section 30-14-4A(1) NMSA 1978.

Defendant's belief that warnings did not apply to press is no defense. — Where defendant journalist purposely entered barricaded area even after he had heard the warnings, it was no defense that defendant did not believe warnings applied to press. *State v. McCormack,* 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

14-1402. Criminal trespass; private or state or local government property; essential elements.

For you to find the defendant guilty of criminal trespass [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered or remained _____ (*identify lands or structure entered*) without permission from the [owner][2] [occupant] [custodian] of that property; [the least intrusion constitutes an entry;][3]

2. The defendant knew that permission to enter or remain had been [denied][2] [withdrawn];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative. If custodian is used, give UJI 14-1420 NMRA, Custodian; definition.

3. Use bracketed phrase if entry is in issue.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-14-1 (1995); NMSA 1978, § 30-20-13 (1981). UJI 14-1402 NMRA is a general criminal trespass instruction. It applies to trespass of lands or buildings owned or controlled by a state agency or political subdivision of the state when the person has been denied permission to enter the premises or where previous permission has been withdrawn. It also applies to trespass onto private property. UJI 14-2001 NMRA should be used instead of UJI 14-1402 NMRA if there is sufficient evidence that the failure or refusal to leave a state or local government building is accompanied by the impairment or interference with or obstruction of the lawful processes, procedures, or functions of the property.

The mens rea required is actual, subjective knowledge that permission to enter or remain had been denied or withdrawn. *See State v. Ancira*, 2022-NMCA-053, ¶¶ 18-20, ___ P.3d ___ (holding the plain language of NMSA 1978, Section 30-14-1(B) requires proof of not what a reasonable person would have understood, but actual knowledge that permission to enter had been denied).

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. NMSA 1978, Section 12-6-2 (2009) defines "political subdivisions." "State" generally includes all three branches of government. *See id*.

[As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-037, effective December 31, 2022, revised the element in the jury instruction related to the defendant's state of mind, and revised the committee commentary; and in Element 2, after "The defendant knew", deleted "or should have known".

Cross references. — *See* Section 30-14-1A and B and 30-14-1.1 NMSA 1978.

Private land not properly posted. — If private land is not properly posted under the statutory requirements, then a person can only commit criminal trespass by entering or remaining upon the property knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. *State v. Merhege*, 2017-NMSC-016, *rev'g* 2016-NMCA-059, 376 P.3d 867.

Proof of knowledge element of criminal trespass. — Where defendant was charged with criminal trespass for running through the front yard of a private residence that was enclosed by a three foot high wall and for attempting to jump over an adjoining fence into the back yard of the residence while fleeing from a police officer at 3:40 a.m., there was sufficient circumstantial evidence for the jury to find that defendant knew that he did not have consent to enter the property based on the wall surrounding the property's front yard, the purpose of defendant's entry, and the time of his entry on the property. *State v. Merhege*, 2017-NMSC-016, *rev'g* 2016-NMCA-059, 376 P.3d 867.

Uniform jury instruction does not accurately describe the mens rea for criminal trespass. — Where defendant was charged with breaking and entering, attempt to commit breaking and entering, criminal trespass, and resisting, evading, or obstructing an officer, and where, at trial, the jury was instructed that in order to find defendant guilty of criminal trespass, they must find beyond a reasonable doubt that defendant *knew or should have known* that permission to enter the land had been denied, in accordance with UJI 14-402 NMRA; NMSA 1978, § 30-14-1(B), however, requires a finding beyond a reasonable doubt that a defendant "*knowingly* entered or remained upon the unposted lands of another *knowing* that such consent to enter or remain was denied or withdrawn by the owner or occupant thereof." The "should have known" language in the instruction adds civil negligence as an alternative to the statute's requirement of actual knowledge, and thus allows a jury to improperly convict based on its belief that a reasonable person would have understood that access was barred. New Mexico law requires proof beyond a reasonable doubt of actual knowledge that permission to enter the land had been denied. *State v. Ancira*, 2022-NMCA-053, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

14-1403. Criminal trespass; damage; essential elements.

For you to find the defendant guilty of criminal trespass [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ *(identify lands or structure entered)* without permission; [the least intrusion constitutes an entry;][2]

2. The defendant [damaged][3] [destroyed] _____ *(identify part of realty or improvements (e.g. buildings, trees));*

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. Use only the applicable alternative.

Committee commentary. — UJI 14-1403 applies to entering upon the lands of another and causing damage to the real property. Subsection C of 30-14-1 NMSA 1978 was added to the criminal trespass statute in 1979 making it a petty misdemeanor to injure, damage or destroy any part of the real property after having entered without permission. Lands, as used in this section, are synonymous with real property and includes buildings and natural features such as trees. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

ANNOTATIONS

Statutory reference. — Section 30-14-1C NMSA 1978.

Lesser included offense. — The court properly refused to give defendant's requested instruction of criminal trespass with damage as a lesser-included offense of breaking and entering where there was no dispute that defendant gained entry by breaking a window and the jury could not have rationally acquitted defendant on the greater offense of breaking and entering. *State v. Contreras*, 2007-NMCA-119, 142 N.M. 518, 167 P.3d 966.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

Part B
Breaking and Entering

14-1410. Breaking and entering; essential elements.

For you to find the defendant guilty of breaking and entering [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered _____ (*identify lands, vehicle, or structure*) without permission; [the least intrusion constitutes an entry;][2]

2. The entry was obtained by [fraud][3] [deception] [the breaking of _____[4]] [the dismantling of _____[4]][5];

3. The defendant knew the entry was without permission;[6]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. If the jury requests a definition of "fraud," a dictionary definition of this term should be given.

4. Insert the property or device which was broken or dismantled in order to secure entry of the lands, vehicle, or structure. Example: "[by the breaking of a window]."

5. Use the applicable alternative.

6. *See* Committee commentary.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-14-8 (1981).

New Mexico's breaking and entering statute is "grounded in common law burglary" and is "a type of statutory burglary." *State v. Holt*, 2016-NMSC-011, ¶ 15, 368 P.3d 409 (internal quotation marks and citations omitted). It protects the "right to exclude" and "entry" constitutes any penetration of the interior space, however slight. *Id.* ¶¶ 16-19 (holding putting one's fingers behind a window screen is an entry).

Although the statute uses the phrase "unauthorized entry," this instruction's use of "without permission" is a longstanding, permissible variation. *See State v. Rubio*, 1999-NMCA-018, ¶¶ 4-7, 126 N.M. 579, 973 P.2d 256.

Where entry is obtained by fraud, deceit, or pretense, the entry is unauthorized. *See State v. Ortiz*, 1978-NMCA-074, ¶¶ 6, 13-15, 92 N.M 166, 584 P.2d 1306 (upholding a burglary conviction and the trial court's instructing the jury that entry by fraud, deceit, or

pretense constitutes entry without authorization or permission). Where entry was made by fraud or deceit, a similar instruction about lack of permission may be appropriate.

“[T]he mental state which accompanies the ‘without permission’ element of breaking and entering is knowledge of the lack of permission.” *State v. Contreras*, 2007-NMCA-119, ¶ 17, 142 N.M. 518, 167 P.3d 966. The “knowledge” mens rea required is actual, subjective knowledge that permission to enter has not been granted. *See State v. Ancira*, 2022-NMCA-053, ¶¶ 28-31, ___ P.3d ___ (concluding that failure of UJI 14-1410 NMRA to require the State to prove defendant’s actual knowledge of lack of permission was an error but not fundamental error).

[As amended by Supreme Court Order No. 22-8300-037, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-037, effective December 31, 2022, added an element in the jury instruction related to the defendant’s state of mind, revised the Use Notes, and completely rewrote the committee commentary; added a new Element 3 and redesignated former Element 3 as Element 4; and in the Use Notes, added Use Note 6.

Cross references. — *See* NMSA 1978, § 30-14-8 (1981).

Part C
Definitions

14-1420. Custodian; definition.

The term "custodian" means any person including a law enforcement officer who has charge or control of the property, building or facility.

USE NOTES

For use with Instructions 14-1402 and 14-2001 when the authority of the person asking the trespasser not to enter or to leave is an issue.

Committee commentary. — This instruction is to be used with UJI 14-1402 and 14-2001 when the authority of the person asking the trespasser not to enter or to leave is an issue. The committee was of the opinion that the term "custodian" may be ambiguous and confusing to the jury, and this instruction is intended to clear up that confusion.

Sections 30-14-1B and 30-20-13C NMSA 1978 refer to the individual in control of the building, facility or property as the "custodian" and "lawful custodian." This term was

probably chosen due to the creation, in 1901, of the capitol custodian commission (§§ 5391-5399, 1915 Code). This commission had the duty of care, control and custody of the capitol building and grounds. The commission was given the authority to promulgate "all necessary rules and regulations for the conduct of persons in and about the buildings and grounds thereof, necessary and proper for the safety, care and preservation of the same." (§ 5393, 1915 Code).

In 1971 the capitol custodian commission was abolished, and replaced by the property control division of the department of finance and administration (Laws 1971, ch. 285) [now property control division of general services department]. The duties of the property control division are exactly the same as those of the commission, with the expansion of control to all state buildings (exceptions noted in 15-3-2A(1) NMSA 1978). In neither the laws relating to the commission nor the division was there any specific mention of authority to evict trespassers. In fact, it seems absurd to imagine that the governor would need to call the director of the division in order to have a trespasser evicted from his office, even though the director is the lawful custodian of the capitol building. The committee is sure that this was not the legislative intent in using the word custodian in 30-14-1B and 30-20-13C NMSA 1978.

The New Mexico Court of Appeals and Supreme Court have never spoken to the issue of who is a lawful custodian. Therefore, it was necessary for the committee to look elsewhere for a definition to aid the jury in its deliberations.

It was decided that the standard Webster's Dictionary definition lacked sufficient detail. The Black's Law Dictionary definition of "custody" provided useful wording which was adopted into UJI 14-1420. In criminal trespass jury instructions from other jurisdictions, the following terms were employed to define a person authorized to give permission to enter or to evict another: "person in possession or his duly authorized agent," "regularly employed guard or authorized employee" (Maryland Crim. J. Inst. § 4.85); "person in charge, his representative or his employee who has lawful control of the premises by ownership, tenancy, official position or other legal relationship" (Oregon UJI 421.51); "owner or any person occupying the land or premises and authorized to give such consent [to enter]" (Virginia Model J. Inst. Crim.; Trespass Inst. 1).

It appears that great flexibility is needed in determining the authority of the person stating he is a custodian. An actual, written authorization is not necessary, nor would it be practical in all circumstances. Developing some relationship between the person and the property he is attempting to control is imperative, though. After presentation of all the evidence, it is up to the jury to decide whether an individual comes within the definition of "custodian."

The statement referring to law enforcement officers as custodians for the purposes of the instruction was added because of common usage. Common law and general custom dictate that, since law enforcement officers are charged with the duty of enforcing laws, they must be allowed to exercise that authority. It is obvious that, upon

the request of an occupant of a building or facility, a law enforcement officer should be allowed to evict an individual who is in apparent violation of the law.

ANNOTATIONS

Department of finance and administration. — The property control division of the department of finance and administration, referred to in the third paragraph of the committee commentary, was transferred to the general services department by Laws 1983, ch. 301, § 3. See 9-17-3 NMSA 1978 and notes thereto.

CHAPTER 15
Criminal Damage to Property

14-1501. Criminal damage to property; essential elements.

For you to find the defendant guilty of criminal damage to property [in excess of $1000.00][1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally[3] damaged property of another;

[2. The defendant did not have the owner's permission to damage the property;][4]

[3. The amount of damage to the property was more than $1000.00;][1]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Bracketed language is to be used if the amount of damage to the property exceeds $1000.00. If the bracketed language is used UJI 14-1510 must also be given.

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

3. UJI 14-141, general criminal intent, must also be given.

4. Use this alternative only if sufficient evidence has been introduced to raise an issue of permission.

[Approved, effective October 1, 1992.]

ANNOTATIONS

Cross references. — *See* Section 30-15-1 NMSA 1978.

14-1510. "Amount of damage"; defined.

"Amount of damage" means the difference between the price at which the property could ordinarily be bought or sold prior to the damage and the price at which the property could be bought or sold after the damage. If the cost of repair of the damaged property exceeds the replacement cost of the property, the value of the damaged property is the replacement cost.

USE NOTES

This instruction is to be used with UJI 14-1501.

[Approved, effective October 1, 1992.]

ANNOTATIONS

Determining damage amount for felony criminal damage to property. — The damage amount for felony criminal damage to property is the cost of repair or replacement cost, whichever is less. The State bears the burden of proving the replacement cost of the damaged property. *State v. Fernandez*, 2015-NMCA-091.

Where defendant kicked victim's twelve-year-old pickup truck, causing a large dent in the door of victim's vehicle and then struck victim's truck with defendant's own vehicle, and the State presented evidence at trial that the cost of repair of victim's truck was between $1,500 and $1,600, but failed to offer evidence regarding replacement cost, there was insufficient evidence to convict defendant of felony criminal damage to property, because the State was required to submit evidence as to replacement cost so that the jury could reasonably determine whether it exceeded the cost of repair. *State v. Fernandez*, 2015-NMCA-091.

Cost of repair. — The state may rely on cost of repair evidence and when it does, the amount of damage can be assessed without determining the before and after value of the property. *State v. Barreras*, 2007-NMCA-067, 141 N.M. 653, 159 P.3d 1138, cert. denied, 2007-NMCERT-005.

CHAPTER 16
Crimes Against Property

Part A
Larceny

14-1601. Larceny; essential elements.

For you to find the defendant guilty of larceny [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away[2] _____ (*describe property*), belonging to another, which had a market value[3] [over $_____[4]];[5]

2. At the time he took this property, the defendant intended to permanently deprive the owner of it;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. *See* UJI 14-1603 if "asportation" is in issue.

3. *See* UJI 14-1602 for definition of market value. Use this bracketed provision for property other than money if the value is over $250. State whether the value of merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

4. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $500 in the blank. If the charge is a misdemeanor (over $250), use $250 in the blank.

5. This bracketed provision should not be used if: (a) the property is a firearm with a value of less than $2,500; (b) if the property is livestock; or (c) if the property has a value of less than $250.00 or less. In these cases, value is not in issue.

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

Committee commentary. — *See* § 30-16-1 NMSA 1978. The intent to permanently deprive the owner or another of the property is the intent to steal. *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct. App.), *cert. denied*, 86 N.M. 281, 523 P.2d 16 (1974). *State v. Parker*, 80 N.M. 551, 458 P.2d 803 (Ct. App.), *cert. denied*, 80 N.M. 607, 458 P.2d 859 (1969). It is not necessary that the property taken be owned by a certain person. It is only necessary that the property did not belong to the defendant. *State v. Ford*, 80 N.M. 649, 459 P.2d 353 (Ct. App. 1969). *See also State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

This instruction does not use the words "without consent" or the like to indicate that larceny involves a trespassory taking. *See generally* Perkins, *Criminal Law* 245-46 (2d

ed. 1969). The committee believed that the element of trespassory taking was covered by this instruction together with the instruction on general criminal intent, UJI 14-141.

The statute provides that larceny of livestock is a third degree felony without regard to the value of the property. The constitutionality of this provision was upheld in *State v. Pacheco*, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 3, added the second, third and fourth sentences; in Paragraph 4, added the first sentence; in the third sentence, after "fourth degree felony", deleted "(over $100), use $100" and added "(over $500), use $500"; and added the last sentence; and in Paragraph 5, in the first sentence, after "less than $2,500;", deleted "or"; after "property is livestock,", added "or (c) if the property has a value of less than $250.00 or less"; and in the last sentence, after "In", deleted "either case" and added "these cases".

This instruction and UJI 14-141 correctly state law applicable to larceny. *Lopez v. State*, 1980-NMSC-050, 94 N.M. 341, 610 P.2d 745.

Proof by state in fourth degree larceny. — The approved jury instructions do not require the state to prove, in a case of fourth degree larceny, that the value of the stolen property was less than $2,500. *State v. Dominguez*, 1977-NMCA-128, 91 N.M. 296, 573 P.2d 230, cert. denied, 91 N.M. 249, 572 P.2d 1257.

Instruction as incorrect statement of larceny. — The defendant's requested instruction which told the jury that if the defendant was an employee of the corporate owner and as such had the right to have the possession of the equipment in question, then even though he sold said equipment without authority, he was not guilty of larceny, was an incorrect statement of the law, because it failed to recognize that the defendant's physical control of the equipment was no more than custody on behalf of an employer who retained possession. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

Instruction construed where property stolen in another jurisdiction. — Because a party taking stolen property from one jurisdiction to another is guilty of a new caption and asportation in the latter jurisdiction, the uniform jury instructions do not either conflict with or overrule prior case law. *State v. Stephens*, 1990-NMCA-081, 110 N.M. 525, 797 P.2d 314.

Modification of instruction acceptable. — The defendant's requested instruction for fourth-degree larceny, which substituted "under $2,500" for the term "over $100," included the correct elements of the crime and was a minor and inconsequential modification of the instruction where the issue in the case was whether the value of the

stolen property was more or less than $2,500, not whether the value was over $100. *Gallegos v. State*, 1992-NMSC-014, 113 N.M. 339, 825 P.2d 1249.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Larceny § 180.

Intent to convert property to one's own use or to the use of third person as element of larceny, 12 A.L.R. 804.

Taking and pledging or pawning another's property as larceny, 82 A.L.R.2d 863.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Modern status: instruction allowing presumption or inference of guilt from possession of recently stolen property as violations of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

52A C.J.S. Larceny § 142.

14-1602. "Market value"; defined.[1]

"Market value" means the price at which the property could ordinarily be bought or sold at the time of the alleged _____ *(criminal act)*[2].

USE NOTES

1. For use if market value is in issue. This instruction should be given immediately after UJI 14-1601, 14-1640, 14-1641 or 14-1650.

2. Theft, receipt of stolen goods, etc.

Committee commentary. — This instruction is used with the following crimes: larceny - 40A-16-1 NMSA 1953 Comp. [30-16-1 NMSA 1978]; fraud - 40A-16-6 [30-16-6 NMSA 1978]; embezzlement - 40A-16-7 [30-16-8 NMSA 1978]; receiving stolen property - 40A-16-11 [30-16-11 NMSA 1978]. All four statutes use the term "value" without further qualification.

This instruction by its terms should not limit the type of evidence that is admissible to prove market value; nor was it the intent of the committee to indicate what evidence is sufficient to prove market value in a particular case. For New Mexico cases on this issue *see*: *State v. Gallegos*, 63 N.M. 57, 312 P.2d 1067 (1957); *State v. Landlee*, 85 N.M. 449, 513 P.2d 186 (Ct. App. 1973); *State v. Williams*, 83 N.M. 477, 493 P.2d 962 (Ct. App. 1972).

Market value as the best test is supported by decisions in other jurisdictions. *See, e.g.*, *People v. Cook*, 233 Cal. App. 2d 435, 43 Cal. Rptr. 646 (1965); *State v. Cook*, 263 N.C. 730, 140 S.E. 2d 305 (1965); *Cunningham v. State*, 90 Tex. Crim. 500, 236 S.W. 89 (1921); 4 Nichols, Eminent Domain § 12.31. Use of market value as a test distinguished petty larceny from grand larceny at common law on the theory that the more serious crime required stricter proof. *See generally*, Perkins, Criminal Law 273-74 (2d ed. 1969); Note, 59 Dick. L. Rev. 377 (1955). For a discussion of when property may be aggregated under a single "transaction," *see State v. Klasner*, 19 N.M. 474, 145 P. 679 (1914). *See also*, Annot., 37 A.L.R.3d 1407 (1971); Annot., 136 A.L.R. 948 (1942).

The owner is competent to testify as to the market value of his property. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App. 1970). His testimony may be sufficient to withstand a motion for a directed verdict. *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

The definition used in this instruction is derived from the instruction used in *State v. Gallegos*, supra. *See also*, *Stephens v. State*, 1 Ala. App. 159, 55 So. 940 (1911); *Hoffman v. State*, 24 Okla. Crim. 236, 218 P. 176 (1923).

The market value of an item is the retail price. Gross receipts tax is not to be considered when determining "value," unless the advertised retail or actual market price included this tax. *Tunnell v. State*, 99 N.M. 446, 659 P.2d 898 (1983).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Larceny § 50 et seq.

52A C.J.S. Larceny § 147.

14-1603. Larceny; "carried away"; defined.

"Carried away" means moving the property from the place where it was kept or placed by the owner.

USE NOTES

This instruction is to be given with UJI 14-1601, 14-1620 and 14-1621 when there is a question as to whether the evidence establishes the element of asportation.

Committee commentary. — For a discussion of the element of asportation or "carrying away," *see State v. Curry*, 32 N.M. 219, 252 P. 994 (1927), and *Wilburn v. Territory*, 10 N.M. 402, 62 P. 968 (1900).

ANNOTATIONS

Element of "carrying away" satisfied. — The instant cashier, under coercion, removes money from a register, the element of "carrying away" the money is satisfied. *State v. Williams*, 1982-NMSC-041, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Larceny § 22.

52A C.J.S. Larceny § 143.

Part B
Shoplifting

14-1610. Shoplifting; conversion of property without payment; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [took possession[2] of][3] [concealed] _____ (*describe merchandise*);

2. This merchandise had a market value[4] [over $_____[5]];

[3. This merchandise was offered for sale to the public in a store;][6]

4. At the time the defendant took this merchandise, the defendant intended to take it without paying for it;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use UJI 14-130 if "possession" is in issue.

3. Use applicable alternative.

4. *See* UJI 14-1602 for definition of market value. Use this bracketed provision for merchandise if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

5. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $500 in the blank.

6. For use if there is an issue as to whether or not the items taken were merchandise in a store.

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

Committee commentary. — UJI 14-1610 is to be used when the defendant is accused of taking possession of or concealing merchandise with the intent to convert it without paying for it. UJI 14-1611 is to be used when the defendant is accused of altering a price tag or other marking on the merchandise or transferring the merchandise from one container to another with the intent to deprive the merchant of all or part of its value.

Although the statute, in defining degrees of the offense, uses the term "value," without specifying how value is to be determined, the statute is interpreted to mean "market value." *State v. Richardson*, 89 N.M. 30, 546 P.2d 878 (Ct. App. 1976). *See also* commentary to UJI 14-1602.

Section 30-16-22 NMSA 1978 creates two presumptions in the offense of shoplifting. The first is the presumption that one who willfully conceals merchandise intends to convert it. The second is the presumption that merchandise found concealed on a person or in his belongings has been willfully concealed. If the state is relying on either of these presumptions, UJI 14-5061, Presumptions or inferences, should be given.

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 4, added the second, third and fourth sentences; and in Paragraph 5, added the first sentence, and in the third sentence, after "fourth degree felony", deleted "(over $100), use $100" and added "(over $500), use $500".

Cross references. — *See* Section 30-16-20 NMSA 1978.

14-1611. Shoplifting; alteration of label or container; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [altered a label, price tag or marking upon _____ (*describe merchandise*)][2] [transferred _____ (*describe merchandise*) from the container [in] [on][2] which it was displayed to another container];

2. The [altered] [transferred][2] merchandise had a market value[3] [over $_____[4]];

[3. The [altered] [transferred][2] merchandise was offered for sale to the public in a store;][5]

4. The defendant intended to deprive _____ (*name of merchant*) of all or some part of the value of this merchandise;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable alternative.

3. *See* UJI 14-1602 for definition of market value. Use this bracketed provision for merchandise if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed alternative.

4. If the charge is a second degree felony (over $20,000), use $20,000 in the blank. If the charge is a third degree felony (over $2,500), use $2,500 in the blank. If the charge is a fourth degree felony (over $500), use $500 in the blank. If the charge is a misdemeanor (over $250), use $250 in the blank.

5. For use if there is an issue as to whether or not the items were merchandise in a store.

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

Committee commentary. — *See* committee commentary to UJI 14-1610.

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 3, added the second, third and fourth sentences; and in Paragraph 4, added the first sentence; in the third sentence, after "third degree felony", changed "(over $100), use $100" to "(over $500), use $500", and added the last sentence.

Cross references. — *See* Section 30-16-20 NMSA 1978.

Part C
Robbery

14-1620. Robbery; essential elements.

For you to find the defendant guilty of robbery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away[2] _____ *(identify property),* from _____ *(name of victim),* or from his immediate control intending to permanently deprive _____ *(name of victim)* of the property; [the _____ *(property)* had some value;][3]

2. The defendant took the _____ *(property)* by [force or violence][4] [or] [threatened force or violence];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use UJI 14-1603 if asportation is in issue.

3. Use the bracketed provision only if there is a question as to whether or not the property taken had any value.

4. Use the applicable bracketed phrase.

Committee commentary. — *See* § 30-16-2 NMSA 1978. The gist of the offense of robbery is the use of force or intimidation. *State v. Sanchez,* 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967); *State v. Walsh,* 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969). Although the amount of force is immaterial, the force or threatened use of force must be directly related to the separation of the property from the person of another. *See State v. Baca,* 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971); *State v. Martinez,* 85 N.M. 468, 513 P.2d 402 (Ct. App. 1973).

Theft, an element of robbery, requires an intent to steal, that is, the intent to permanently deprive the owner of his property. *State v. Puga,* 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

Some examples of decisions finding "immediate control" of the property in the victim are: the defendant forced the store clerk to open the cash register and lie down on the

floor, *People v. Day,* 256 Cal. App. 2d 83, 63 Cal. Rptr. 677 (1967); the property was taken from the victim's pants pockets some 10 feet from his bed, *Osborne v. State*, 200 Ga. 763, 38 S.E. 2d 558 (1946); the goods were upstairs from the person who had custody of them, *State v. Cottone,* 52 N.J. Super. 316, 145 A.2d 509 (1958), petition for certification denied, 28 N.J. 527, 147 A.2d 305 (1959); the victim was locked in the bathroom before the property was taken from the bedroom, *State v. Culver,* 109 N.J. Super. 108, 262 A.2d 422 (1970); the victim was locked within a building by the defendant and the defendant took the property from the victim's automobile outside the building, *Fields v. State,* 364 P.2d 723 (Okla. Crim. 1961).

ANNOTATIONS

No evidence to support instruction on lesser offenses of robbery. — Where the testimony did not give rise to any other conclusion than that the defendant committed the robbery while armed, the defendant was not entitled to have the jury instructed on the lesser offenses of robbery and larceny because there was no evidence to establish them. *State v. Sweat*, 1972-NMCA-092, 84 N.M. 122, 500 P.2d 207.

Robbery of a deceased person. — Where defendant, with the assistance of others, robbed and then killed the victim, left the scene only to return several hours later to empty the victim's pocket of cash and pour gasoline throughout the residence and on the victim's body and set the residence on fire, defendant was properly convicted under the robbery statute for the second robbery, because the principle of law that one cannot be guilty of robbery if the victim is a deceased person does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable, and it is reasonable to conclude that defendant's second robbery and the subsequent arson were directly connected with the original robbery and killing, and therefore the second robbery can rationally be linked to the murder that enabled the robbery. *State v. Montoya*, 2017-NMCA-033, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Robbery § 10.

77 C.J.S. Robbery § 1 et seq.

14-1621. Armed robbery; essential elements.

For you to find the defendant guilty of armed robbery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took and carried away[2] _____ *(identify property),* from _____ *(name of victim)* or from his immediate control intending to permanently deprive _____ *(name of victim)* of the _____ *(property);* [the property had some value;][3]

2. The defendant was armed with a _____[4];

3. The defendant took the _____ *(property)* by [force or violence][5] [or] [threatened force or violence];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use UJI 14-1602 if asportation is in issue.

3. Use the bracketed provision only if there is a question as to whether or not the property taken had any value.

4. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12B NMSA 1978, or use the phrase "an instrument or object which, when used as a weapon, could cause death or very serious injury."

5. Use the applicable bracketed phrase.

Committee commentary. — *See* § 30-16-2 NMSA 1978. Armed robbery is an aggravated form of robbery by use of a deadly weapon. Some courts indicate that being armed means only that the defendant has the ability to inflict an injury by having the weapon in his possession, not that the weapon is exhibited. *See, e.g., Commonwealth v. Chapman,* 345 Mass. 251, 186 N.E.2d 818 (1962); *People v. Rhem,* 261 N.Y.S.2d 808, 24 A.D.2d 517 (1965). *See also State v. Encee,* 79 N.M. 23, 439 P.2d 240 (Ct. App. 1968) and *State v. Sweat*, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972). Where the jury may find the absence of a deadly weapon, it should be instructed on simple robbery as a lesser included offense. *Cf. State v. Mitchell,* 43 N.M. 138, 87 P.2d 432 (1939).

A deadly weapon may include an unloaded gun. *State v. Montano,* 69 N.M. 332, 367 P.2d 95 (1961). If the weapon is not listed in the statute as a deadly weapon, it must be established that it was a deadly weapon as a matter of fact under the general, statutory definition. *State v. Gonzales,* 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973) (tire tool used as a deadly weapon).

ANNOTATIONS

Element of "carrying away" satisfied. — The instant that a cashier, under coercion, removes money from a register, the element of "carrying away" the money is satisfied. *State v. Williams*, 1982-NMSC-041, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Robbery § 4.

77 C.J.S. Robbery § 1 et seq.

Part D
Burglary and Possession of Burglary Tools

14-1630. Burglary; essential elements.

For you to find the defendant guilty of burglary [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization; [the least intrusion constitutes an entry];[3]

2. The defendant entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____][4] (*name of felony*) when inside;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the charge is burglary of a dwelling house, UJI 14-1631 NMRA should be given.

3. Use bracketed phrase if entry is in issue.

4. It is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* Section 30-16-3 NMSA 1978. The crime of burglary is complete at the time the person makes the unauthorized entry into the structure with intent to commit a theft or felony. *State v. Gutierrez*, 82 N.M. 578, 484 P.2d 1288 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971). Consequently, the intention to carry out the theft or felony is sufficient and the act itself need not be carried out. *See also State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

Under the general rule, the least intrusion is sufficient to show entry. *See State v. Grubaugh*, 54 N.M. 272, 221 P.2d 1055 (1950) (Sadler, J., dissenting). *See also State v. Pigques*, 310 S.W.2d 942 (Mo. 1958); *People v. Massey*, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (1961).

Criminal trespass, Section 30-14-1 NMSA 1978, may be a lesser included offense to burglary. Possession of burglary tools is not a necessarily included offense to burglary. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969). *See also* commentary to UJI 14-6002 [withdrawn].

A single premise may be comprised of more than one structure, and entry into each structure constitutes an act of burglary. *See State v. Ortega*, 86 N.M. 350, 524 P.2d 522 (Ct. App. 1974).

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-6002 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 4, after “must be given”, added “if not separately instructed”, and added the last sentence.

The 2001 amendment, effective August 1, 2001, inserted in Paragraphs 1. and 2. identification of the types of structures that may be burgled, substituted in Paragraph 1. "authorization" for "permission," substituted "with the intent" for "he intended" in Paragraph 2., and made stylistic changes.

Cross references. — *See* Section 30-16-3 NMSA 1978.

Entry into separate residence of spouse. — Section 40-3-3 NMSA 1978 does not provide immunity from prosecution for burglary of a spouse’s separate residence. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Sufficient evidence of burglary of a vehicle. — Where surveillance video evidence showed a dark-colored pickup truck enter a motel parking lot in the early morning hours and showed a person identified by the arresting officer as defendant forcibly entering and removing items from two vehicles, and where, during a custodial interview, defendant made statements to the effect that he did not remember what he took and did not know the whereabouts of the items taken from the vehicles, and where the arresting officer testified that he observed defendant forcibly enter two other vehicles at a different motel, there was sufficient evidence to support defendant’s convictions on four counts of burglary of a vehicle. *State v. Sweat*, 2017-NMCA-069, cert. denied.

The erroneous addition of a statutory element to a jury instruction does not create an additional essential element under the applicable statute. — Where defendant was charged with four counts of burglary of a vehicle, and where the district court modified UJI 14-1630 NMRA to include ownership by specific persons as elements of the crimes, the erroneous addition of a statutory element to a jury instruction did not create an additional essential element to be proved beyond a reasonable doubt, because the sufficiency of the evidence should be assessed against the elements of the charged crime, and if the jury instruction requires the jury to find guilt on those elements, the defendant has been accorded the procedure required to protect the presumption of innocence. *State v. Sweat*, 2017-NMCA-069, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary § 67.

Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

12A C.J.S. Burglary §§ 127 to 130.

14-1631. Burglary; "dwelling house"; defined.

A "dwelling house" is any structure, any part of which is customarily used as living quarters.

USE NOTES

For use in conjunction with UJI 14-1630.

Committee commentary. — Under a case decided prior to the division of burglary into third and fourth degree felonies, the supreme court upheld the conviction of a charge of burglary of a dwelling house where the victim slept on a cot in his drugstore. *State v. Hudson*, 78 N.M. 228, 430 P.2d 386 (1967).

ANNOTATIONS

“Dwelling house” construed. — To determine whether a structure constitutes a dwelling house, the court considers the evidence presented regarding the physical characteristics of the structure to determine whether it is a type of structure customarily used for living quarters and in which possessory and privacy interests of habitation should be protected, and examines whether the structure was actually used for living quarters, whether its purpose was for habitation, and whether its use as living quarters was sufficient to warrant protection of the heightened privacy and possessory interests of habitation. *State v. Shelby*, 2021-NMCA-064, *cert. denied*.

Sufficient evidence of burglary of a dwelling house. — Where Defendant was convicted of burglary of a dwelling, larceny over $2,500, and criminal damage to property over $1,000, and where Defendant claimed that his conviction for burglary of a

dwelling was not supported by sufficient evidence because the interior of the house at issue was under construction, it lacked electricity and running water, and the evidence did not show that the owner "customarily used" the house "as living quarters" under the definition of "dwelling house," as set out in UJI 14-1631 NMRA, the evidence sufficiently established that the structure entered was a dwelling house within the meaning and purpose of the burglary statute and UJI 14-1631, because the State presented evidence that the structure was a house with an enclosed, finished exterior, the house was used for habitation in a regular, yet intermittent, way, and the apparent purpose of the house was for habitation. *State v. Shelby*, 2021-NMCA-064, *cert. denied*.

Attached garage with no opening to house was, nonetheless, part of "dwelling house" within the meaning of 30-16-3 NMSA 1978, because the garage was a part of the habitation, directly contiguous to and a functioning part of the residence. *State v. Lara*, 1978-NMCA-112, 92 N.M. 274, 587 P.2d 52, cert. denied, 92 N.M. 260, 586 P.2d 1089.

And structure unoccupied for year does not lose its character as "dwelling house" for purposes of 30-16-3A NMSA 1978, unless there is evidence that the last tenant has abandoned the structure with no intention of returning. *State v. Ervin*, 1981-NMCA-068, 96 N.M. 366, 630 P.2d 765.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary § 4.

Outbuilding or the like as part of "dwelling house," 43 A.L.R.2d 831.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

12A C.J.S. Burglary §§ 28, 29.

14-1632. Aggravated burglary; essential elements.

For you to find the defendant guilty of aggravated burglary [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization;

2. The defendant entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____][2] (*name of felony*) once inside;

3. The defendant

[was armed with a _____[3]];[4]

[became armed with a _____[3] after entering];

[touched or applied force to _____ (*name of victim*) in a rude or angry manner while entering or leaving, or while inside];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. It is not necessary to instruct on the elements of a theft. If intent to commit a felony other than theft is alleged, the essential elements of the felony must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12(B) NMSA 1978, or use the phrase “an instrument or object which, when used as a weapon, could cause death or very serious injury.”

4. Use the applicable bracketed phrase.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* commentary to UJI 14-1621 for explanation of the deadly weapon provision. Carrying a deadly weapon is not a lesser included offense to aggravated burglary. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

The elements of a statutory battery are included in this instruction as one of the "aggravating" circumstances. *See* Section 30-3-4 NMSA 1978. For a case involving the distinctions between aggravated burglary, aggravated battery and robbery, *see State v. Ranne*, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 2, after “must be given”, added “if not separately instructed”, and added the last sentence.

The 2001 amendment, effective August 1, 2001, inserted in Paragraphs 1. and 2. identification of the types of structures that may be burgled; deleted in Paragraph 1. "[or permission]" after "authorization"; deleted the word "when" at the start of Paragraph 2.; added "with the intent" before "to commit a theft" for "he intended to commit [a theft],"

and substituted "once" for "[when he got]" in Paragraph 2.; substituted "became armed" for "armed himself" in Paragraph 3.; and made stylistic changes.

Cross references. — *See* Section 30-16-4 NMSA 1978.

Entry into separate residence of spouse. — Where, because of domestic problems, defendant rented a separate apartment for defendant's spouse; the parties agreed that the apartment was the spouse's separate residence, that defendant would not have a key to the apartment, and that defendant did not have the spouse's permission to enter the apartment; and several months later, defendant entered the spouse's apartment through a window, Section 40-3-3 NMSA 1978 did not preclude defendant's conviction for burglary of the spouse's separate dwelling. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Intent to commit felony deemed crucial factor. — The crucial factor in the crime of aggravated burglary is whether a defendant had the intent to commit a felony on entering the dwelling, not whether the felony was actually committed, and the intent does not have to be consummated. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

As commission of felony unimportant. — Proof of intent at the time of entry does not depend upon the subsequent commission of the felony, failure to commit the felony or even an attempt to commit it. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

Defendant's tendered instruction on intent covered by this instruction. — Where the defendant tendered an instruction stating that, even if he was found sane at the time of the crime, the jury must still determine whether he had an ability to form an intent to commit the underlying felony, though this may have been a correct statement of the law, the matter was adequately covered by other instructions (including this instruction) given. *State v. Luna*, 1980-NMSC-009, 93 N.M. 773, 606 P.2d 183.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12A C.J.S. Burglary § 91.

14-1633. Possession of burglary tools; essential elements.

For you to find the defendant guilty of possession of burglary tools [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession[2] _____ (*name of tools or devices*);

2. _____ (*name of tools or devices*) [is] [are] designed for or commonly used in the commission of a burglary;

3. The defendant intended that the _____ (*tools or devices*) be used for the purpose of committing a burglary;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. See UJI 14-130 NMRA for definition of "possession," if the question of possession is in issue.

3. The jury should be instructed on the elements of burglary following this instruction. *See* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-16-5. No New Mexico appellate decision defines burglary tools. *See generally* Annot., 33 A.L.R.3d 798 (1970).

Possession of burglary tools is a separate offense from the crime of burglary. A defendant does not need to be convicted of the crime of burglary in order be held liable for possession of burglary tools. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

An individual can be "exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary." *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983. The statute is therefore not void for vagueness. *Id.*

Whether an item is commonly used for burglaries is a factual determination for a jury. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882.

Constructive possession is sufficient for conviction of possession of burglary tools. *State v. Langdon*, 1942-NMSC-034, 46 N.M. 277, 127 P.2d 875; *see also, State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767 (burglary tools do not have to be on the person of the defendant in order to be possessed).

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, added the last sentence of Use Note 3.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-012, effective December 31, 2017, added a new Element designation "2" and added "_____ (*name of tools or devices*) [is]", and redesignated former Elements 2 and 3 as Elements 3 and 4, respectively; added new Use Note 3; and revised the committee commentary.

Possession of a burglary tool is alone insufficient to satisfy the statutory element of intent to commit burglary. — Where defendant was charged with possession of burglary tools, and where, at trial, the arresting officer testified that defendant was found in possession of "jiggle" or "bump" keys, which the officer testified are filed down car keys which may be used as universal keys to start vehicles and which are designed for or commonly used in the commission of a burglary, there was insufficient evidence to support defendant's conviction for possession of burglary tools, because although defendant was found to be carrying a tool that has no legitimate purpose and is designed for burglary, proof of possession of a tool designed exclusively for use as a burglary tool is alone insufficient to satisfy the statutory element of intent to use that tool in the commission of a burglary. *State v. Montoya*, 2021-NMCA-006, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary § 74.

Construction and application of statute relating to burglar's tools, 33 A.L.R.3d 798.

12A C.J.S. Burglary §§ 131, 136, 138.

Part E
Fraud, Embezzlement, Extortion and Forgery

14-1640. Fraud; essential elements.

For you to find the defendant guilty of fraud [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant, by any words or conduct, [made a promise he had no intention of keeping] [misrepresented a fact][2] to _____ (*name of victim*), intending to deceive or cheat _____ (*name of victim*);

2. Because of the [promise] [misrepresentation][2] and _____'s (*name of victim*) reliance on it, defendant obtained _____ (*describe property or state amount of money*);[3]

3. This _____ (*property*) belonged to someone other than the defendant;

[4. The _____ (*property*) had a market value[4] [of over $_____;][5]]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed phrase.

3. If money is involved, state whether the amount charged is "over $20,000" or [over] "over $2,500" or "over $500" or "over $250."

4. *See* UJI 14-1602 NMRA for definition of "market value."

5. Use this bracketed provision for property other than money if the value is over $250. State whether the value of the property at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 21-8300-015, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* § 30-16-6 NMSA 1978. Reliance is included as an element of this instruction following the interpretation of the statute in *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435. *See also* Perkins, *Criminal Law* 297 (2d ed. 1969). To establish reliance, the state must prove (1) that a particular misrepresentation of fact (2) caused the victim to act in a way the victim would not have otherwise acted. *See State v. Garcia*, 2016-NMSC-034, ¶¶ 18-20, 384 P.3d 1076 (concluding that there was sufficient evidence of reliance based on the defendant's misrepresentation that she was the victim's "girlfriend or loving partner").

Fraudulent intent must exist at the time the defendant obtains the property or the crime is embezzlement. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260.

[As amended by Supreme Court Order No. 21-8300-015, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-015, effective December 31, 2021, revised the committee commentary; and in Use Note 4, after “UJI 14-1602”, added “NMRA”.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the Use Note, in Paragraph 3, after "whether the amount charged is", added "'over $20,000' or" and after "'over $2,500' or", deleted "'over $100'" and added "'over $500' or 'over $250'"; and in Paragraph 5, in the first sentence, after "property other than money", added the remainder of the sentence, and added the second and third sentences.

Ownership of website. — Where an independent website designer created a website on the internet under contract with the defendant who was seeking to use the website for commercial purposes; the contract recognized the designer’s legal ownership of the copyright to the web pages; the contract provided that upon payment to the designer, the defendant would receive a license to use the web pages; the contract never transferred any interest in the web page design or ownership of the web site to the defendant; in breach of the contract, the defendant never paid the designer; the defendant locked out the designer from access to the website by changing the password, the designer was the owner of the website and the defendant was properly convicted of criminal fraud by taking property that belonged to someone other than the defendant. *State v. Kirby*, 2007-NMSC-034, 141 N.M. 838, 161 P.3d 838.

Fraud includes the intentional taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations. *State v. Thoreen,* 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

Reliance as essential element of fraud. — Because the fraud statute does not require the making of a false voucher; and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275.

Sufficient evidence to support a finding of reliance on defendant’s misrepresentations. — In defendant’s trial for fraud, where the jury was presented with evidence that defendant, by misrepresenting that she was the victim’s girlfriend, induced the victim, an eighty year old man, to allow defendant access to his bank accounts and that the victim would not have allowed such access had he known either that defendant had married or that she never truly considered herself the victim’s girlfriend, a jury could reasonably infer that the victim’s willingness to allow defendant access to his accounts was grounded on the misrepresentation that she was his girlfriend, and therefore the jury’s finding of reliance was supported by substantial evidence. *State v. Garcia*, 2016-NMSC-034, *rev’g* 2015-NMCA-094, 356 P.3d 45.

Reliance on misrepresentation required. — A misrepresentation for purposes of criminal fraud may include a deceptive silence or omission. The state must also present evidence sufficient to prove that because of the victim's reliance on the misrepresentation, the defendant obtained the thing of value. *State v. Garcia*, 2015-NMCA-094, cert. granted, 2015-NMCERT-008.

Where defendant, a woman in her fifties, misrepresented her marital status to victim, a man in his mid-eighties, and convinced victim to provide her with access to victim's bank accounts, where defendant transferred funds from victim's accounts to defendant's own bank account for personal use, and where victim testified at trial that he allowed defendant access to his bank accounts because it would be easier for defendant to help him with his personal finances, that he wanted to help defendant out with her children and family, and that he was helping defendant out because he felt sorry for her, the evidence was insufficient to sustain defendant's conviction for fraud because the State failed to carry its burden of proving beyond a reasonable doubt that victim relied on defendant's misrepresentation, that he would not have given defendant access to his bank accounts but for his impression that she was romantically available to him. *State v. Garcia*, 2015-NMCA-094, cert. granted, 2015-NMCERT-008.

Intent to induce reliance. — Although reliance is an element of fraud, the fact that defendant did not succeed in inducing reliance on the photocopied non-carbon records of checks is not the issue. The fact remains that he intended to induce reliance on them, as an attempt conviction requires. *State v. Cearley,* 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. denied, 2004-NMCERT-006.

Validity of contract provisions as affecting fraud. — The question of whether a specific contractual provision is based on a valid statute or regulation is irrelevant in a criminal case for fraud. The prosecution here was directed at the alleged criminal fraud of each of the defendants rather than a civil action to enforce the contract. Under these circumstances, defendants' convictions for fraud were not invalid. *State v. Crews,* 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592.

Instruction amplifying element of crime of fraud properly refused. *State v. Hamilton*, 1980-NMCA-014, 94 N.M. 400, 611 P.2d 223, cert. denied, 94 N.M. 628, 614 P.2d 545.

Variance. — In a criminal fraud case, the defendants' argument that the instruction using the words "would pay" constituted a material variance from the language of the indictment using the words "were paying", was without merit. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37 Am. Jur. 2d Fraud and Deceit §§ 11, 12.

37 C.J.S. Fraud §§ 3, 154.

14-1641. Embezzlement; essential elements.

For you to find the defendant guilty of embezzlement [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was entrusted with _____[2]. [This _____ (*property*) had a market value[3] [of $_____;][4]]

2. The defendant converted this _____ (*property or money*) to the defendant's own use. "Converting something to one's own use" means keeping another's property rather than returning it, or using another's property for one's own purpose [rather than][5] [even though the property is eventually used] for the purpose authorized by the owner;

3. At the time the defendant converted _____ (*property or money*), the defendant fraudulently intended to deprive the owner of the owner's property. "Fraudulently intended" means intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Describe property. If money is involved, state the amount.

3. *See* UJI 14-1602 for definition of "market value".

4. Use this bracketed provision for property other than money if the value is over $250. State whether the value alleged to have been embezzled or converted is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

5. Use the applicable bracketed phrase.

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* Section 30-16-8 NMSA 1978. Embezzlement, like larceny, is divided into degrees depending on the value of the property. *See generally* LaFave & Scott, *Criminal Law* 654 (1972). For the purpose of this crime, money has its face value, and the state need not prove that its value is something else. *Territory v. Hale*, 13 N.M. 181, 81 P. 583 (1905). The same rule applies to checks. *State v. Peke*, 70 N.M. 108, 371 P.2d 226 (1962).

In *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971), the court held that the term "entrusted" had an ordinary meaning and need not be defined in the instructions. In *State v. Archie*, 1997-NMCA-058, ¶¶ 8-9, 123 N.M. 503, 943 P.2d 537, the court determined the term "use" applies when a person having possession of another's property treats it as their own, whether the person uses it, sells it, or discards it; the details are less important than the interference.

In contrast to the intent to permanently deprive in larceny, this crime requires only intent to deprive the owner of his property, even temporarily. *Archie*, 1997-NMCA-058, ¶ 4; *State v. Gonzales*, 99 N.M. 734, 735, 663 P.2d 710, 711 (Ct. App. 1983); *Moss*, 83 N.M. at 43, 487 P.2d at 1348; *State v. Prince*, 52 N.M. 15, 18, 189 P.2d 993, 995 (1948). "Fraudulent intent" is defined in this instruction. *See State v. Green*, 116 N.M. 273, 278-79, 861 P.2d 954, 959-60 (1993).

Following *State v. Brooks*, 117 N.M. 751, 877 P.2d 557 (1994), the legislature amended Section 30-16-8 NMSA 1978 to exclude the single criminal intent doctrine (single larceny doctrine) in embezzlement cases by adding the following language: "Each separate incident of embezzlement or conversion constitutes a separate and distinct offense." *See State v. Faubion*, 1998-NMCA-095, ¶ 11, 125 N.M. 670, 964 P.2d 834; *State v. Rowell*, 121 N.M. 111, 118, 908 P.2d 1379, 1386 (1995). Prior to this legislative amendment, the single larceny doctrine had allowed a series of takings of property or money from a single victim to be treated as a single offense. *See Brooks*, 117 N.M. at 752-53, 877 P.2d at 558-59; *State v. Pedroncelli*, 100 N.M. 678, 675 P.2d 127 (1984); *State v. Allen*, 59 N.M. 139, 280 P.2d 298 (1955).

[Commentary revised, June 24, 1999; amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 1, after "market value of", deleted "over"; and in the Use Note, in Paragraph 2, in the second sentence, after "money is involved, state", deleted "whether the amount charged is '($100) or less', 'over ($100)', 'over ($250)', 'over ($2,500)' or 'over twenty thousand dollars ($20,000)'", and added "the amount"; and in Paragraph 4, in the first sentence, after "property other than money", added "if the value is over $250"; in the second sentence, after "embezzled or converted is", deleted "'over one hundred dollars ($100)', 'over two hundred fifty dollars ($250)', 'over twenty-five hundred dollars ($2,500)', or over ($20,000)'" and added the remainder of the sentence; and added the last sentence.

The 1995 amendment, effective March 15, 1995, added the last sentence in Paragraph 2 of the instruction defining "converting something to one's own use", inserted "fraudulently intended" and added the last sentence defining "fraudulently intended" in Paragraph 3 of the instruction, deleted the former last paragraph of the instruction which

defined "converting something to one's own use", rewrote Use Note 2, and added the last sentence of Use Note 4.

Cross references. — *See* Section 30-16-8 NMSA 1978.

Compiler's notes. — Revised committee commentary was added to this instruction in 1999.

Embezzlement requires specific intent to deprive owner of property at time of conversion. — Embezzlement is a crime which requires proof that at the time of the conversion of the property, the defendant entertained a specific intent to deprive the owner of the property. *State v. Gonzales*, 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Fraudulent intent is an essential element of embezzlement as that crime is defined by 30-16-8 NMSA 1978, and a jury instruction which omitted this statutory element was deficient, warranting reversal of conviction. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

District court did not err in denying defendant's motion for directed where there was sufficient evidence of embezzlement. — Where defendant was charged with embezzlement, and where, at trial, evidence was established that in December of 2019, a customer brought a 2008 Chevrolet pick-up truck into an automotive shop operated by defendant for repairs, that defendant told the customer that the truck needed a new transmission and that he could order one, that the customer gave defendant a check for $3,630, that the check's memo line stated "2008 Silverado Transmission", that defendant cashed the check, that over the next several months defendant gave the customer inconsistent explanations about the transmission's status, that in May 2020, the customer had the truck towed from defendant's shop, and that the truck had been damaged and was missing parts, and where, after the state's case, defendant moved for a directed verdict, the district court did not err in denying defendant's motion for a directed verdict, because there was sufficient evidence from which the jury could reasonably infer that the $3,630 had been earmarked to be used for a particular purpose, that defendant was entrusted with the money to purchase a transmission, and that based on the truck's condition upon recovery and the inconsistent explanations about the status and location of the transmission that defendant never intended to complete the work for which he was paid, and that defendant, therefore, converted the money to his own use. *State v. Ferguson*, 2023-NMCA-029, cert. denied.

Fraudulent intent essential instruction. — The failure to instruct the jury on an essential element of embezzlement, fraudulent intent, is reversible error and can never be corrected by including the concept elsewhere in the instructions. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

No mistake-of-fact instruction unless defendant believed he was authorized to expend public funds. — The defendant is not entitled to a mistake-of-fact instruction in

a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales*, 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Insufficient evidence of entrustment. — Where defendant was never given possession of the pre-signed checks she was convicted of embezzling, or authority over the pre-signed checks or the bank account on which the checks were drawn, and defendant had access to the filing cabinet where the checks were stored only for purposes other than taking possession or control of the checks, there was insufficient evidence of entrustment. *State v. Kovach*, 2006-NMCA-122, 140 N.M. 430, 143 P.3d 192, cert. denied, 2006-NMCERT-009.

Insufficient evidence of entrustment to support embezzlement conviction. — Where defendant, a homebuilder hired to build homes in a luxury golf community in Santa Fe, was charged with embezzlement for his failure to finish several construction projects, and where evidence at trial established that defendant's clients paid initial deposits to defendant to be used toward construction costs of their new homes, there was insufficient evidence to convict defendant of embezzlement because contractors cannot be convicted of embezzlement of down payment of funds upon a failure to complete a project because deposit money is legally the property of the contractor at the time it is paid. Consequently, at the time defendant used the deposit money for purposes other than the construction of the properties, the deposits already legally belonged to defendant; he could not be found to have converted deposits because they were his property, not the property of another. *State v. Kalinowski*, 2020-NMCA-018, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Embezzlement § 79.

29A C.J.S. Embezzlement § 49.

14-1642. Extortion; essential elements.

For you to find the defendant guilty of extortion [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) threatened

   [to injure the person or property of _____ (*name of victim*) or another][2]

   [to accuse _____ (*name of victim*) or another of a crime]

[to expose or imply the existence of a deformity or disgrace of _____ (*name of victim*) or another]

[to expose any secret of _____ (*name of victim*) or another]

[to kidnap _____ (*name of victim*) or another],[3] intending to wrongfully[4]

[obtain anything of value from _____ (*name of victim*)][5]

[compel _____ (*name of victim*) to do something _____ (*name of victim*) would not have done]

[compel _____ (*name of victim*) to refrain from doing something _____ (*name of victim*) would have done];

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable threatening acts.

3. If a threatened kidnapping is alleged, the essential elements of kidnapping as determined in UJI 14-403A NMRA must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. If there is a specific issue of wrongfulness of an act, a specific definition may need to be prepared.

5. Use the applicable element.

[UJI Criminal 16.32; UJI 14-1642 SCRA 1986; UJI 14-1642 NMRA; as amended, effective July 1, 1998; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — This instruction has been amended to add the term "wrongfully" because of the line of cases such as *State v. Osborne,* 111 N.M. 654, 808 P.2d 624 (1991) and *State v. Parish,* 118 N.M. 39, 42, 878 P.2d 988, 991 (1994).

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, completely rewrote Use Note 3; in Use Note 4, deleted “See for

example UJI Criminal 14-937, defining ‘unlawful’ for purposes of criminal sexual contact of a minor”; and added Use Note 5.

The 1998 amendment, effective for cases filed on or after July 1, 1998, substituted "_____ *(name of defendant)*" for "The defendant"; added "wrongfully[4]" following the phrase "intending to"; substituted "_____ *(name of victim)*" for "he" in the second and third phrases under "intending to" in Paragraph 1; and added Use Note 4.

Cross references. — *See* Section 30-16-9 NMSA 1978.

Crime of extortion is complete when person makes threat, intending to compel victim to do something he would not have done. *State v. Wheeler*, 1980-NMCA-185, 95 N.M. 378, 622 P.2d 283.

Evidence sufficient for charge of extortion to go to jury. *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31 Am. Jur. 2d Extortion, Blackmail, and Threats § 9.

Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to the person", 87 A.L.R.5th 715.

35 C.J.S. Extortion §§ 2, 13.

14-1643. Forgery; essential elements.

For you to find the defendant guilty of forgery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant[2] [made up a false _____ (*name of writing*)] [made a false signature] [made a false endorsement] [changed a genuine _____ (*name of writing*) so that its effect was different from the original];

2. At the time, the defendant intended to injure, deceive or cheat _____ (*name of victim*) or another;

[3. The damage was over _____;][3]

[4. The writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting the title to real property.][4]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternative bracketed provisions.

3. For use if the damage was quantifiable and exceeds $2,500. If the damage was over $2,500, use "$2,500" in the blank. If the damage was over $20,000, use "$20,000" in the blank.

4. For use if the writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting the title to real property. If the type of writing is in issue, please add an instruction containing the relevant legal definition. *See, e.g.*, Sections 45-1-201 and 46A-1-103 NMSA 1978.

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

Committee commentary. — *See* NMSA 1978, § 30-16-10 (2006). This instruction does not require the jury to find that the writing purports to have any legal efficacy. Whether or not the state had proved the legal efficacy of the writing is a question of law. *See, e.g.*, *Poe v. People*, 163 Colo. 20, 428 P.2d 77 (1967); *Davis v. Commonwealth*, 399 S.W.2d 711 (Ky. 1965), *cert. denied*, 385 U.S. 831, 87 S. Ct. 67, 17 L. Ed. 2d 66 (1966). The phrase "legal efficacy" refers to the fact that the instrument on its face could be made the foundation of some liability. *State v. Cowley*, 79 N.M. 49, 439 P.2d 567 (Ct. App.), *cert. denied*, 79 N.M. 98, 440 P.2d 136 (1968). The court may refer to the Uniform Commercial Code [Chapter 55 NMSA 1978] to determine the legal efficacy of the writing. *Cf. State v. Weber*, 76 N.M. 636, 417 P.2d 444 (1966) and *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970).

The four types of forgery listed in this instruction are derived from the following decisions: false writing - *State v. Smith*, 32 N.M. 191, 252 P. 1003 (1927), *State v. Nation*, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973); false signature - *State v. Crouch*, 75 N.M. 533, 407 P.2d 671 (1965), *State v. Garcia*, 26 N.M. 70, 188 P. 1104 (1920), *State v. Weber*, supra; false endorsement - *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), *cert. denied*, 81 N.M. 140, 464 P.2d 559 (1970), *State v. Martinez*, 85 N.M. 198, 510 P.2d 916 (Ct. App. 1973); alteration of genuine document - *State v. Cowley*, supra. *See also* California Jury Instructions Criminal No. 15.04 (1970).

The intent to injure or defraud is not limited to economic harm. *See, e.g.*, *State v. Nation*, supra, where the defendant obtained drugs by use of a forged prescription. The intent to defraud is the same as the element in the crime of fraud, the intent to deceive or cheat. *People v. Leach*, 168 Cal. App. 2d 463, 336 P.2d 573 (1959). Neither proof of an intent to injure or defraud a specific person (*State v. Smith, supra*) nor proof that the intent was accomplished (*State v. Nation* and *State v. Weber*, supra), is a necessary element of the crime.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added Paragraphs 3 and 4 and renumbered former Paragraph 3 as Paragraph 5; in the Use Note, added Paragraphs 3 and 4; and in the committee commentary, in the first sentence after "See", added "NMSA 1978" and after "§ 30-16-10", deleted "NMSA 1978" and added "(2006)".

Before jury may return verdict of guilty it must have been proved to their satisfaction and beyond a reasonable doubt that, among other things, the check in question is forged. *State v. Bibbins*, 1960-NMSC-006, 66 N.M. 363, 348 P.2d 484.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 36 Am. Jur. 2d Forgery § 3.

37 C.J.S. Forgery § 106.

14-1644. Issuing or transferring a forged writing; essential elements.

For you to find the defendant guilty of forgery [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant gave or delivered to _____ (*name of victim*) a _____ (*name of writing*) knowing it to [be a false _____ (*name of writing*)][2] [have a false signature] [have a false endorsement] [have been changed so that its effect was different from the original or genuine] intending to injure, deceive or cheat _____ (*name of victim*) or another;

[2. The damage was over _____;][3]

[3. The writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting title to real property;][4] and

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative bracketed provisions.

3. For use if the damage was quantifiable and exceeds $2,500. If the damage was over $2,500, use "$2,500" in the blank. If the damage was over $20,000, use "$20,000" in the blank.

4. For use if the writing was a will, codicil, trust instrument, deed, mortgage, lien, or any other instrument affecting title to real property. If the type of writing is in issue, please add an instruction containing the relevant legal definition. *See, e.g.*, Sections 45-1-201, 46A-1-103 NMSA 1978.

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

Committee commentary. — *See* § 30-16-10B NMSA 1978. Since the writing must be forged, this instruction contains all of the elements of forgery. *See* commentary to UJI 14-1643. Relying on the Uniform Commercial Code [Chapter 55 NMSA 1978] for definitions, the court of appeals has held that this crime requires an issuing or transfer of an interest and not merely a physical transfer. *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970). A transfer, etc., which does not come within the commercial law definitions is an attempted forgery. *State v. Tooke*, supra. The court must determine the commercial law question as a matter of law. *See* commentary to UJI 14-1643. The instruction requires that the jury make only a determination of the physical transfer.

Knowledge that the writing is forged may be proved by all of the facts and circumstances surrounding the incident. *State v. Nation*, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added Paragraphs 2 and 3 and renumbered former Paragraph 2 as Paragraph 4; and in the Use Note, added Paragraphs 3 and 4.

Non-standard instruction. — A non-standard instruction on forgery that tracks the language of the forgery statute, includes all the elements of the forgery statute, and does not differ from the uniform jury instruction in any material way does not constitute fundamental error. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 36 Am. Jur. 2d Forgery § 20.

37 C.J.S. Forgery § 37.

14-1645. Insurance policies; false applications; essential elements.

For you to find the defendant guilty of making a false application, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made a false or fraudulent statement or representation as to any application for insurance [or] _____ (*describe other coverage*);

2. The false statement or representation was material to the application for insurance which means the statement or representation had a natural tendency to influence the decision of _____ (*insert name of insurance company or other provider of coverage*).

3. The defendant [knew the statement to be untrue][2] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

ANNOTATIONS

Cross references. — *See* Section 59A-16-23(A)(1) NMSA 1978.

14-1646. Insurance; false claims or proof of loss; essential elements.

For you to find the defendant guilty of making a [false claim][1] [false proof of loss][1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [presented][3] [or] [caused to be presented] [a false or fraudulent claim][1] [any proof in support of a false or fraudulent claim for payment of loss under an insurance policy];

2. The [claim] [proof in support of a claim for payment] was made for the purpose of obtaining any money or benefit;

3. The defendant [knew the statement to be untrue][2] [or] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. If both making a false claim and presenting proof in support of a fraudulent claim are in issue, a separate elements instruction must be prepared for each issue.

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

3. Use applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

ANNOTATIONS

Cross references. — *See* Section 59A-16-23(A)(2) NMSA 1978.

14-1647. Insurance; false or fraudulent account; essential elements.

For you to find the defendant guilty of making preparing, making or signing a false or fraudulent account, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant prepared, made or signed a false or fraudulent [account,][2] [certificate,] [affidavit] [proof of loss] [or] [_____ (*other document*)];

2. The defendant intended that the [account,][2] [certificate,] [affidavit] [proof of loss] [or] [_____ (*other document*)] be presented or used in support of a claim for payment of a loss under an insurance policy;

3. The defendant [knew the statement to be untrue][2] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

ANNOTATIONS

Cross references. — *See* Section 59A-16-23(A)(3) NMSA 1978.

14-1648. Insurance; false statement or representation; essential elements.

For you to find the defendant guilty of making a false statement or representation relative to an insurance policy [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made a false or fraudulent statement or representation [on an application for an insurance policy] [or] [relative to an application for an insurance policy];

2. The statement or representation was made for the purpose of obtaining any fee, commission or benefit from an insurer, agent, broker or individual;

3. The defendant [knew the statement to be untrue][2] [or] [acted with reckless disregard of the truth];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only applicable alternative or alternatives.

[Approved, effective January 20, 2005.]

ANNOTATIONS

Cross references. — *See* Section 59A-16-23(A)(4) NMSA 1978.

Part F
Receiving Stolen Property

14-1650. Receiving stolen property; essential elements.

For you to find the defendant guilty of receiving stolen property [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The _____ (*describe the property in question*) had been stolen [by another][2];

2. The defendant [acquired possession[3] of] [kept] [disposed of][4] this property;

3. At the time the defendant [acquired possession[3] of] [kept] [disposed of][4] this property, the defendant knew or believed that it had been stolen;

[4. The property was a firearm;][5]

[5. The property had a market value[6] [of over $_____][7];][8]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. This bracketed material must be used for a charge of receiving (acquiring possession of) stolen property. It must not be used for a charge of either retaining (keeping) stolen property or disposing of stolen property.

3. Use UJI 14-130 if possession is in issue.

4. Use only applicable bracketed phrase.

5. Use this element if the stolen property is a firearm.

6. *See* UJI 14-1602 for definition of market value.

7. Use this bracketed provision for property other than money if the value is over $250. State whether the value of the property at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

8. This bracketed provision need not be used if the property is a firearm with a value of less than $2,500.

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

Committee commentary. — *See* NMSA 1978, § 30-16-11 (2006). This is a general intent crime. *See State v. Viscarra*, 84 N.M. 217, 501 P.2d 261 (Ct. App. 1972). The committee concluded that the statutory provision "unless received, etc. with intent to restore the property to its owner" should be treated as a defense rather than a negative "specific intent" element which must be proven by the state. Knowledge that the goods are stolen may be proven by inference from all of the facts and circumstances. *State v. Elam*, 86 N.M. 595, 526 P.2d 189 (Ct. App. 1974).

In *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976), it was held that a thief, convicted of larceny under Section 30-16-1 NMSA 1978, can also be convicted of receiving stolen property by disposing of it in violation of Section 30-16-11 NMSA 1978. In dicta, the *Tapia* decision also indicates that the thief may not be convicted of unlawfully retaining the stolen property. The committee was of the view that although the thief may not be convicted of both stealing and acquiring stolen property, he may be convicted of either offense.

In *State v. Bryant*, 99 N.M. 149, 655 P.2d 161 (Ct. App. 1982), the court held that, under Section 30-16-11 NMSA 1978, embezzled property does not come within the meaning of stolen property.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 3, after "At the time", changed "he" to "the defendant"; in the Use Note, in Paragraph 7, deleted the former first sentence, which provided if the charge is a third degree felony, $2,500 should be used in the blank; deleted the former second sentence, which provided that if the charge is a fourth degree felony, $100 should be used in the blank; and added the first, second, and third sentences; and in the committee commentary, in the first sentence, deleted "40A-16-11 NMSA 1953 Comp." and added "(2006)"; and in the third paragraph, changed the citation for *State v. Brown* from "22 N.M. St. B. Bull. 18 (Ct. App., Jan. 6, 1983)" to "99 N.M. 149, 655 P.2d 161 (Ct. App. 1982)".

Cross references. — *See* Section 30-16-11 NMSA 1978.

Intent-to-return defense. — The Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

Defendant was entitled to an instruction on the intent-to-return defense, where reasonable doubt could arise from the possibility that defendant's involvement consisted of only awareness of the burglary, knowledge of where the goods were being kept, use of reward money from an investigator to purchase the goods from those holding them, and delivery of the goods to the investigator. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 66 Am. Jur. 2d Receiving and Transporting Stolen Goods § 3.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

76 C.J.S. Receiving Stolen Goods § 1 et seq.

14-1651. Receiving stolen property; dealers; statutory presumptions on knowledge or belief.[1]

If you find that the defendant was a person in the business of buying and selling goods and[2]

[was in possession or control of property stolen from two or more persons on separate occasions]

[acquired stolen property for a price which he knew was far below the property's market[3] value]

[had possession of five or more items of stolen property within one (1) year prior to his possession of the property involved in this charge]

you may, but are not required to, find that the defendant knew or believed that the property involved in this case had been stolen. However, you may do so only if, upon consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant knew or believed that the property had been stolen.

USE NOTES

1. For use when the state relies on the statutory presumption to prove the defendant's knowledge or belief that the goods were stolen.

2. Use only the applicable presumptions.

3. *See* UJI 14-1602 for the definition of market value.

Committee commentary. — *See* § 30-16-11B & 30-16-11C NMSA 1978. The use of evidence of independent offenses to prove knowledge is a recognized exception to the rule against introducing evidence of other crimes. *See* commentary to UJI 14-5028. The statutory "presumption" of knowledge is treated as an inference. New Mexico Rules of Evidence, Rule 11-303. *State v. Jones,* 88 N.M. 110, 537 P.2d 1006 (Ct. App.), *cert. denied,* 88 N.M. 318, 540 P.2d 248 (1975).

By the 1975 amendment to this statute, the legislature limited the use of these presumptions to cases involving "dealers." The statute includes a further presumption that a dealer knows the fair market value of the property when he acquires property he knows is far below the property's reasonable value. This further presumption was not included in this instruction because it would require the jury to find a presumption within a presumption.

Some doubt has been expressed concerning the constitutionality of the first bracketed presumption in this instruction. *See State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct. App.), *cert. denied,* 86 N.M. 593, 526 P.2d 187 (1974).

14-1652. Possession of stolen vehicle; essential elements.

For you to find the defendant guilty of possession of a stolen vehicle [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had possession[2] of _____ *(describe vehicle in question)*;

2. This vehicle had been stolen or unlawfully taken;

3. At the time the defendant had this vehicle in his possession he knew or had reason to know that this vehicle had been stolen or unlawfully taken;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use UJI 14-130 "Possession" defined, if possession is in issue.

Committee commentary. — Section 66-3-505 NMSA 1978 defines two separate offenses: receipt or transfer of a stolen vehicle and possession of a stolen vehicle. *State v. Wise*, 85 N.M. 640, 515 P.2d 644 (Ct. App. 1973). The offense of receipt or transfer of a stolen vehicle has the same elements as possession of a stolen vehicle, but requires an additional element of intent to procure or pass title. The committee was of the opinion that since possession of a stolen vehicle includes the same conduct as the offense of receipt or transfer of a stolen vehicle the state would never charge the offense of receipt or transfer of a stolen vehicle. An instruction for the offense of receipt or transfer of a stolen vehicle has therefore not been prepared.

UJI 14-1652, Possession of stolen vehicle; essential elements, is to be given when the defendant is charged only with having possession of a stolen vehicle.

Although a person may be found guilty of "stealing" a motor vehicle without proof of an intent to permanently deprive the owner of his property, as required for larceny, *see Kilpatrick v. Motors Insurance Corporation*, 90 N.M. 199, 561 P.2d 472 (1977), a person may not be found guilty of receiving a stolen vehicle unless the vehicle has been "stolen." The committee was of the opinion that the phrase "stolen or unlawfully taken without the owner's consent" includes any of the common law methods of "stealing"

property as well as statutory unlawful taking of a motor vehicle, UJI 14-1660. This includes "stealing" by larceny, burglary, robbery (including armed robbery) and embezzlement. *See* LaFave & Scott, Criminal Law at 684.

In New Mexico a car thief can be convicted of both stealing the vehicle and "receiving or disposing of the vehicle." *See State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976) and *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968) (defendant convicted of both armed robbery and unlawful taking of a vehicle).

UJI 14-141, General criminal intent, must also be given with this instruction. *See State v. Lopez*, 84 N.M. 453, 504 P.2d 1086 (Ct. App. 1972) and *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

ANNOTATIONS

Cross references. — *See* Section 30-16D-4 NMSA 1978.

Possession of stolen vehicle statute defines two separate crimes. — Section 30-16D-4 NMSA 1978 defines two separate crimes: (1) taking, receiving, or transferring possession of a vehicle with knowledge or reason to believe it is stolen and with intent to procure or pass title, and (2) unlawful possession of a stolen vehicle. The legislature's use of the word "or" indicates that a person who possesses a stolen vehicle is independent from a person who, with intent to procure or pass title to a vehicle, receives or transfers possession of the vehicle. *State v. Bernard*, 2015-NMCA-089.

Where defendant was convicted of four counts of receiving or transferring stolen vehicles for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two all-terrain vehicles, defendant's claim that the jury instructions failed to instruct the jury that it was required to find that defendant intended to procure or pass title to a vehicle, and therefore improperly omitted an essential element of the offense of possession of a stolen vehicle, was without merit, because the "intent to procure or pass title to a vehicle" is not an essential element of the crime of possession of a stolen vehicle, which is a separate and distinct offense under 30-16D-4 NMSA 1978. *State v. Bernard*, 2015-NMCA-089.

Part G
Unlawful Taking of Vehicle

14-1660. Unlawful taking of vehicle or motor vehicle; essential elements.

For you to find the defendant guilty of unlawfully taking a [vehicle] [motor vehicle][1] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took a _____ (*describe vehicle*) without the owner's consent;

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the applicable bracketed phrase.

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

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

Committee commentary. — For a discussion of the elements of this crime, *see State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969), and *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968). The "intentional" element of this crime was not included in this instruction because it would duplicate UJI 14-141. *See* NMSA 1978, §§ 66-1-4.11(H) (2007) and 66-1-4.19(B) (2005) (for the definitions of "motor vehicle" and "vehicle").

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the title added "or motor vehicle"; in the first sentence, after "unlawfully taking a vehicle", added the brackets and "[motor vehicle]"; deleted former Paragraph 2, which stated "The value of the vehicle taken was $2,500 or more"; and renumbered former Paragraph 3 as Paragraph 2; in the Use Note, deleted former Paragraph 1, which provided that the count number should be inserted if more than one count is charged; deleted former Paragraph 2, which provided that the bracketed language is given if there is evidence that the value of the vehicle is $2,500 or more and that if the value is disputed, a lesser included offense may be appropriate; and added current Paragraphs 1 and 2; and in the committee commentary, deleted the last sentence, which read "*See* Section 66-8-9 NMSA 1978 for the penalty for this crime."; and added the current last sentence.

The 2001 amendment, effective August 1, 2001, added present Paragraph 2 and redesignated former Paragraph 2 as present Paragraph 3, and added Use Note 2.

Cross references. — *See* Section 30-16D-1 NMSA 1978.

Sufficient evidence to prove unlawful taking of a motor vehicle. — In delinquency proceedings where the child was charged with unlawful taking of a motor vehicle and reckless driving, there was sufficient evidence to support the jurors' reasonable determination that the child committed the delinquent act of unlawful taking of a motor

vehicle where the state, in addition to presenting Facebook messages in which the child apologized to the victim and claimed that she was intoxicated when she took the victim's vehicle, presented testimony from the victim that after getting out of his vehicle to hug the child goodbye, the child pushed him aside and took off in his vehicle without his permission, and that she failed to stop even though he ran after her, banged on the driver side window, and yelled for her to stop. *State v. Jesenya O.*, 2021-NMCA-030, 493 P.3d 418, *rev'd on other grounds by* 2022-NMSC-014.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 349.

Asportation of motor vehicle as necessary element to support charge of larceny, 70 A.L.R.3d 1202.

61A C.J.S. Motor Vehicles § 696.

Part H
Worthless Checks

14-1670. Fraud by worthless check; essential elements.

For you to find the defendant guilty of fraud by worthless check [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant gave a check[2] for $_____[3] to _____ *(identify person or company)*;

2. _____ *(identify person or company)* gave [money][4] [_____,[5] which had some value] for the check;

3. When the defendant gave the check, he knew that there would be neither sufficient funds nor credit[6] for payment of the check in full;

4. The defendant intended to cheat or deceive _____ *(identify person or company)* or another by use of the check;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-1674, the definition of a check, should be given immediately following this instruction if the instrument is not a check within the commonly understood meaning of that term.

3. Insert face amount of check.

4. Use applicable alternative or alternatives.

5. Insert description of thing of value.

6. UJI 14-1675, the definition of credit, may be given immediately following this instruction if requested.

Committee commentary. — The Worthless Check Act is made up of Sections 30-36-1 to 30-36-9 NMSA 1978. The act defines the crime of issuance of a worthless check, divided into petty offenses and felonies. If the amount of the check is $25.00 or more, the offense is a felony. This instruction is appropriate for a felony or petty misdemeanor charge. Although Section 30-36-5 NMSA 1978 authorizes the aggregation, or totaling, of two or more checks to establish a felony, the totaling portion of the penalty statute has been found to be so vague as to deny due process. *State v. Conners,* 80 N.M. 662, 459 P.2d 461 (Ct. App. 1969), and *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

In the introductory paragraph, the offense is referred to as fraud by worthless check, instead of issuance of a worthless check. The use of the word "fraud" better describes the offense, because the gist of the offense is obtaining money or property by the use of false pretenses. The giving of a check is a representation of the existing fact that the drawer has credit with the drawee bank for the amount involved. *State v. Tanner*, 22 N.M. 493, 164 P. 821 (1917).

The statute makes it unlawful for a person to "issue" a worthless check. Issue means the "first delivery of an instrument to a holder or a remitter." Section 55-3-102(1)(a) NMSA 1978. New Mexico courts have approved the application of definitions contained in the Uniform Commercial Code [Chapter 55 NMSA 1978] where appropriate for criminal offenses. *State v. Weber*, 76 N.M. 636, 417 P.2d 444 (1966); *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970). If the court finds a particular transfer of a check to be an issuance within the meaning of Section 55-3-102(1)(a) NMSA 1978, then the jury may properly be instructed that they must find the defendant "gave" the check.

In most cases, the worthless instrument will be a check. "Check" is a term commonly understood and, therefore, identification of the instrument simply as a check will not confuse the jury. In cases where the instrument is one other than that readily recognizable as a check and commonly referred to as such, then the definition of "check" must be given.

The statute is in the language, "knowing . that the offender has insufficient funds in or credit with the bank .. " However, Paragraph 3 of this instruction requires that the defendant know there are neither sufficient funds nor sufficient credit. The state must show both. Lack of credit is an essential element of the crime. *See State v. Thompson*, 37 N.M. 229, 20 P.2d 1030 (1933).

Something of value must have been received by the defendant in exchange for the check. One who gives a worthless check in payment of an account lacks the intent to defraud which is an essential element of the offense. Thus, the offense is not committed by the giving of a worthless check to pay a debt if no property changes hands on the strength of the check. *See State v. Davis*, 26 N.M. 523, 194 P. 882 (1921), decided under a prior statute.

It is not essential that the defendant intend that the one who accepts the check be the one who ultimately suffers the loss. *See* 35 C.J.S., False Pretenses, § 21; *cf., State v. Smith*, 32 N.M. 191, 252 P. 1003 (1927). For that reason, Paragraph 4 requires that the defendant intended to cheat or deceive someone.

Fraud by worthless check is a specific intent crime. Intent to defraud may be established prima facie by proof of dishonor and notice of dishonor. Section 30-36-7 NMSA 1978. The statute sets out a rule of evidence and does not require notice as an essential element of the offense. *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969). *See also Marchbanks v. Young*, 47 N.M. 213, 139 P.2d 594 (1943).

As in the crime of fraud, UJI 14-1640, "cheat" does not mean to permanently deprive a person of his money or property.

ANNOTATIONS

Cross references. — *See* Section 30-36-1 et seq., NMSA 1978.

14-1671. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 14-8300-005, UJI 14-1671 NMRA, relating to worthless checks and statutory presumption regarding intent when defendant had no account, was withdrawn effective for all cases filed or pending on or after December 31, 2014. For provisions of former instruction, *see* the 2014 NMRA on *NMOneSource.com*.

14-1672. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 14-8300-005, UJI 14-1672 NMRA, relating to worthless checks and statutory presumption regarding intent when notice of dishonor given, was withdrawn effective for all cases filed or pending on or after December 31, 2014. For provisions of former instruction, *see* the 2014 NMRA on *NMOneSource.com*.

14-1673. Defense of notice to payee that check is worthless.[1]

An issue you must consider [in Count _____][2] is whether _____[3] was on notice that the check was an insufficient funds check when _____[3] accepted the check. If _____[3] was on notice that the check was an insufficient funds check, then you must find the defendant not guilty [of Count _____][2].

A person who accepts a check is on notice that it is an insufficient funds check if:

[The check is postdated; that is, dated later than the day that the check is delivered][4]

[or]

[The person who accepts the check (knows)[5] (has been told) (has reason to believe) that at the time the check was delivered and accepted, the person who signed the check did not have on deposit (or to his credit)[6] sufficient funds to insure payment of the check when it reached the bank].

The burden is on the state to prove beyond a reasonable doubt that _____[3] was not on notice that the check was an insufficient funds check.

USE NOTES

1. For use when there is an issue as to an exception under the Worthless Check Act [30-36-1 NMSA 1978].

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

3. Identify the person or persons, in the alternative, to whom notice would constitute a defense.

4. Use applicable bracketed paragraph or paragraphs.

5. If this bracketed paragraph is used, use in the alternative the applicable parenthetical phrase or phrases.

6. Use parenthetical clause if credit is in issue.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Section 30-36-6 NMSA 1978 states that certain checks are excepted from the Worthless Check Act. These exceptions are covered in this instruction, which sets out an absolute defense under the act. *See State v. Downing*, 83 N.M. 62, 488 P.2d 112 (Ct. App. 1971).

Subsection A of the statute refers to actual knowledge and express notice "prior to the drawing of the check." This instruction refers to the time that the check was delivered and accepted, using the definition of "draw" that is most favorable to the defendant. Section 30-36-2C NMSA 1978.

Although the statute refers to the knowledge of the payee or holder, the instruction is worded more broadly. If an agent of the payee receives the notice, the defense is applicable.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made technical language changes; deleted “Evidence has been presented as to” and added “An issue you must consider in”, after the first Use Note reference “2”, deleted “that” and added “is whether”, and after the first occurrence of “insufficient funds check”, added “when _____[3] accepted the check”.

Cross references. — *See* Section 30-36-6 NMSA 1978.

14-1674. Check; definition.

A check is a written order to a bank or other depository for the payment of money.

USE NOTES

For use, on request, when the instrument is not a check within the commonly understood meaning of that term, i.e., when the instrument is a draft or other written order for money.

ANNOTATIONS

Cross references. — *See* Section 30-36-2A NMSA 1978.

14-1675. Worthless checks; "credit"; defined.

"Credit" means an understanding with the bank to pay the check although there is not sufficient money in the account.

USE NOTES

For use when the jury requests a definition of "credit."

Committee commentary. — This definition of "credit" is substantially the same as the statutory definition, Section 30-36-2E NMSA 1978, and is in understandable language. The dictionary definition is inadequate. The definition is not incorporated into the essential elements, UJI 14-1670, because the word "credit" is commonly understood in this context, and it is unlikely that the jury will need a definition.

ANNOTATIONS

Cross references. — *See* Section 30-36-2E NMSA 1978.

Part I
Credit Card Offenses

14-1680. Theft of credit card; essential elements.

For you to find the defendant guilty of theft of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant took from the [person][2] [possession[3]] [custody] [control] of another a credit card[4] issued to _____ without the cardholder's[4] consent;

2. At the time the defendant took this credit card, the defendant intended to permanently deprive the cardholder of the card;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable alternative.

3. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

4. If the jury requests a definition of "credit card" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

Committee commentary. — The purpose in enacting legislation dealing specifically with credit cards was that the existing structure of law was inadequate to deal with the socio-economic phenomenon of credit card transactions. While certain aspects of credit card transactions may be sufficiently covered by traditional statutes regulating forgery and fraud, inter alia, other aspects did not fall within the existing legal framework. Therefore, for example, because of the negligible value of the credit card itself, the theft of a credit card, if charged as larceny under Section 30-16-1 NMSA 1978, would be a petty misdemeanor, whereas under the specific law, Section 30-16-26 NMSA 1978, theft of a credit card is a fourth degree felony.

The first enactment of credit card legislation in New Mexico was in 1963 (Laws, ch. 86, § 1). More detailed legislation was enacted in 1969 (Laws, ch. 73, §§ 1-10), and in 1971 (Laws, ch. 239, §§ 1-14) the present statutory scheme was signed into law. Sections 30-16-25 through 30-16-38 NMSA 1978 evidence an increasing complexity in credit card law which reflects the increasing complexity in types of credit cards and transactions made with them.

Because one person could commit numerous statutory offenses with a credit card, the committee is of the opinion that an example of possible combinations, and any resultant problems, will be helpful. An individual could steal eight credit cards; sell or give away two of them; change the numbers on the others; sign the name of the cardholder on the back of the cards; purchase merchandise with one of the cards; and have in his possession the machinery necessary to alter credit cards. This could give rise to charges under the following statutory sections: § 30-16-26 NMSA 1978 - Theft of a credit card; § 30-16-28 NMSA 1978 - Fraudulent transfer of a credit card; § 30-16-30 NMSA 1978 - Dealing in credit cards of another; § 30-16-31 NMSA 1978 - Forgery of a credit card; § 30-16-32 NMSA 1978 - Fraudulent signing of a credit card or sales slips or agreements; § 30-16-33 NMSA 1978 - Fraudulent use of credit cards; and § 30-16-35 NMSA 1978 - Possession of machinery designed to reproduce credit cards. Additionally, because these statutes have an applicability clause, § 30-16-38 NMSA 1978, the individual could also be charged with larceny, § 30-16-1 NMSA 1978, fraud, § 30-16-6 NMSA 1978 and forgery, § 30-16-10 NMSA 1978.

Obviously, problems may arise as to multiplicitous charging and merger. Prosecutorial discretion will have to be observed, because public policy seems to prohibit such "overzealousness" in charging.

Section 30-16-26 NMSA 1978 provides that taking a credit card without consent includes obtaining it by conduct defined or known as "statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick, embezzlement or obtaining property by false pretense, false promise or extortion." The elements of each of these crimes are set forth in LaFave & Scott, Criminal Law, as follows:

Common law larceny by trespassory taking:

trespassory (either constructive or actual)

taking dominion over

carrying away (slight distance is enough)

personal property

of another

with intent to steal or deprive owner of perma-

nent possession or of possession for unreasonable period of time.

LaFave & Scott at p. 622.

Statutory larceny:

enlarged types of personal property included within common law larceny.

LaFave & Scott at p. 622.

Common law embezzlement:
fraudulent conversion of property
of another
by one in lawful possession of it.

LaFave & Scott at p. 644.

Common law obtaining property by false pretenses:

false representation of material present or past
fact which causes victim

to pass title

to a wrongdoer

who knows his misrepresentation is false

and intends to defraud victim.

LaFave & Scott at p. 655.

Common law larceny by trick:

Same as common law obtaining property by false pretenses except defendant obtains "possession" as opposed to "title" by false pretenses.

LaFave & Scott at p. 627.

Extortion (assume statutory as set forth in NMSA 1978):

See UJI 14-1642 for essential elements of statutory extortion.

LaFave & Scott at p. 704.

ANNOTATIONS

Cross references. — *See* Section 30-16-26 NMSA 1978.

14-1681. Possession of stolen credit card; essential elements.

For you to find the defendant guilty of possession of a stolen credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant possessed[2] a credit card[3] issued to _____;

2. At the time the defendant acquired the credit card, the defendant knew or had reason to know that the credit card had been stolen;

3. At the time the defendant acquired the credit card, the defendant intended to [use the credit card][4] [sell or transfer the credit card to another person other than to the cardholder or issuer[3]];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card," "cardholder," or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. Use applicable alternative.

[As amended, effective March 15, 1995.]

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1660.

The essential elements of possession of a stolen credit card as described in Sections 30-16-26 and 30-16-27 NMSA 1978 are identical except that Section 30-16-27 provides that the crime is committed if the defendant knew or had reason to know that the card had been stolen while Section 30-16-26 seems to require actual knowledge that the card had been stolen.

ANNOTATIONS

The 1995 amendment, effective March 15, 1995, substituted "possessed" for "had in his possession" in Paragraph 1 of the instruction, and added "At the time the defendant acquired the credit card" to the beginning of Paragraphs 2 and 3 of the instruction.

Cross references. — *See* Section 30-16-26 NMSA 1978.

14-1682. Possession of stolen, lost, mislaid or delivered by mistake credit card; essential elements.

For you to find the defendant guilty of possession of a [stolen credit card][1] [lost or mislaid credit card] [credit card which was delivered under a mistake as to identity or address] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The credit card[3] had been [stolen][1] [lost or mislaid] [delivered under a mistake as to the identity or address of the cardholder];

2. The defendant [received][1] [had in his possession[4]] a credit card issued to _____;

3. The defendant knew or had reason to know that the credit card had been [stolen][1] [lost or mislaid] [delivered under a mistake as to the identity or address of the cardholder];

4. The defendant retained possession with the intent to [use the credit card][1] [sell or transfer the credit card to another person other than to the cardholder or issuer[3]];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use applicable alternative.

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

3. If the jury requests a definition of "credit card," "cardholder" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

For possession of a stolen credit card, *see* UJI 14-1681. This section also deals with credit cards which have been "lost, mislaid or delivered under a mistake as to the identity or address of the cardholder."

ANNOTATIONS

Cross references. — *See* Section 30-16-27 NMSA 1978.

14-1683. Fraudulent transfer of a credit card; essential elements.

For you to find the defendant guilty of fraudulent transfer of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant transferred possession[2] of a credit card[3] to a person other than the cardholder[3];

2. The defendant intended to deceive or cheat;

3. The defendant was not the issuer[3] or an authorized agent of the issuer;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card," "cardholder" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Sections 30-16-28 and 30-16-29 provide that it is a criminal offense to fraudulently transfer or fraudulently receive a credit card. The essential difference between the two sections is that Section 30-16-29 is limited to a misstatement of a material fact relating to identity or financial condition while 30-16-28 merely requires an intent to defraud. *See* UJI 14-1640 for a review of the elements of fraud.

ANNOTATIONS

Cross references. — *See* Section 30-16-28 NMSA 1978.

14-1684. Fraudulent receipt of a credit card; essential elements.

For you to find the defendant guilty of fraudulent receipt of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant obtained possession[2] of a credit card[3] from a person other than the issuer[3] or the authorized agent of the issuer;

2. The defendant intended to deceive or cheat;

3. The credit card was issued to someone other than the defendant;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

See UJI 14-1640 for a review of the elements of fraud.

See commentary to UJI 14-1663.

ANNOTATIONS

Cross references. — *See* Section 30-16-28 NMSA 1978.

14-1685. Fraudulent taking, receiving or transferring credit cards; essential elements.

For you to find the defendant guilty of fraudulent [taking][1] [receiving] [transferring] of a credit card [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [received][1] [sold] [transferred] a credit card[3];

2. The defendant made a false statement [about his (identity)[4] (financial condition)][1] [about the (identity)[4] (financial condition) of (another person)[4] (firm) (corporation)];

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use applicable alternative.

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

3. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. Use applicable word or phrase set forth in parentheses.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680. Also *see* commentary to UJI 14-1683 for discussion of fraudulent transfer or receipt of a credit card. For a review of the elements of fraud, *see* UJI 14-1640.

ANNOTATIONS

Cross references. — *See* Section 30-16-29 NMSA 1978.

14-1686. Dealing in credit cards of another; essential elements.

For you to find the defendant guilty of dealing in credit cards of another [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [had in his possession[2]][3] [received] [or] [transferred] four or more credit cards[4];

2. The credit cards were issued to one or more persons other than the defendant;

[3. The defendant was not the issuer[4] of the credit cards or the authorized agent of the issuer;][5]

4. [The defendant, without consent, took the credit cards from the person, possession, custody or control of another with the intent to permanently deprive the (cardholder)[3] (cardholders) of possession of the credit cards;][6] or

[The defendant knew that the credit cards had been stolen and intended (to use the credit cards)[3] (sell or transfer the credit cards to another person other than to the cardholder or issuer);][6] or

[The credit cards had been (stolen)[3] (lost or mislaid) (delivered under a mistake as to identity or address of the cardholder). The defendant knew or had reason to know that the credit cards had been (stolen)[3] (lost or mislaid) (delivered under a mistake as to the identity or address of the cardholder). The defendant retained possession of the credit cards with the intent to (use the credit cards)[3] (sell or transfer the credit cards to another person other than to the cardholder or issuer[4]);][7] or

[The defendant transferred possession of the credit cards to a person other than the cardholder with the intent to deceive or cheat;][8] or

[The defendant obtained possession of the credit cards from a person other than the issuer or the authorized agent of the issuer with the intent to deceive or cheat;][8] or

[The defendant (received)[3] (sold) (transferred) the credit cards by making a false statement (about his identity or financial condition)[3] (about the identity or financial condition of another) with the intent to deceive or cheat;][9]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. Use the applicable alternative.

4. If the jury requests a definition of "credit card," "issuer" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

5. Use bracketed phrase only if an issue.

6. Use this element if the underlying offense is Section 30-16-26 NMSA 1978.

7. Use this element if the underlying offense is Section 30-16-27 NMSA 1978.

8. Use this element if the underlying offense is Section 30-16-28 NMSA 1978.

9. Use this element if the underlying offense is Section 30-16-29 NMSA 1978.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-30 NMSA 1978 reflects a legislative intent to punish more severely an individual in possession of four or more credit cards. Presumably, the legislature assumed that one who possesses, receives, sells or transfers four or more credit cards is dealing in unlawfully obtained credit cards, and is not merely a petty thief.

The committee was of the opinion that the offense of dealing in credit cards may be committed in more than one way and that if alternative elements in Element 4 are given, it is not necessary for all jurors to agree on any single alternative element. It is only necessary that the jury unanimously agree that the defendant had possession of, received or transferred four or more credit cards in one or more of the unlawful manners set forth in Element 4. Thus six jurors could believe that the credit cards were taken and six believe that they were delivered to the defendant under a mistake of identity of address. *See State v. Roy,* 40 N.M. 397, 416, 60 P.2d 646 (1936).

It is the committee's opinion that dealing is a separate offense, not an enhancement provision. No position was taken as to lesser included offenses of this crime.

The committee did not include the term "sale" in Element 1, as any sale is also a transfer.

ANNOTATIONS

Cross references. — *See* Section 30-16-30 NMSA 1978.

14-1687. Forgery of a credit card; essential elements.

For you to find the defendant guilty of forgery of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant, without the consent of the issuer[2] of the credit card,[2] [made][3] [altered] [embossed] a credit card;

2. The defendant intended to deceive or cheat;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "issuer" or "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable alternative. If the jury requests a definition of "made," "altered" or "embossed," the statutory definition set forth in 30-16-31 NMSA 1978 is to be given.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-31 NMSA 1978 deals with the making of a purported credit card, or the embossing or altering of a legitimately issued credit card. This includes, but is not limited to, changing the number or expiration date on a credit card.

See UJI 14-1640 for a review of the elements of fraud.

ANNOTATIONS

Cross references. — *See* Section 30-16-31 NMSA 1978.

14-1688. Fraudulent signing of credit cards or sales slips; essential elements.

For you to find the defendant guilty of fraudulently signing a [credit card][1] [sales slip or agreement] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant signed a [credit card[3]][1] [sales slip or agreement[3]] with a name other than his own name;

2. The defendant was not authorized to use the credit card;

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use applicable alternative.

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

3. If the jury requests a definition of "credit card" or "sales slip or agreement," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-32 NMSA 1978 has been held not to be unconstitutionally vague. *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972). The word "another" as used in Section 30-16-32 means "other than oneself." Id. at 417.

ANNOTATIONS

Cross references. — *See* Section 30-16-32 NMSA 1978.

14-1689. Fraudulent use of credit cards obtained in violation of law; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[2] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a market value[3] [over _____;][4]

3. The defendant intended to deceive or cheat;

4. [The credit card was taken from the person, possession, custody or control of another with the intent to permanently deprive the cardholder of possession of the credit card;][5] or [The credit card was stolen, and possession was transferred to another person who intended to use, sell or transfer the credit card;] or

[The credit card had been lost, mislaid or delivered under a mistake as to the identity or address of the cardholder, and was retained by someone with the intent to use, sell or transfer the credit card to another person other than the cardholder or issuer]; or

[The credit card was given to someone other than the cardholder with the intent to deceive or cheat;] or

[The credit card was received by someone who intended to deceive or cheat;] or

[The credit card was acquired by the making of a false statement about identity or financial condition;] or

[The credit card was forged with the intent to deceive or cheat;] or

[The credit card was signed by someone other than the cardholder with the intent to deceive or cheat;]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. *See* UJI 14-1602 for definition of "market value."

4. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

5. Use only the applicable bracketed phrase or phrases.

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

Committee commentary. — Section 30-16-33 NMSA 1978 deals with the actual use of an illegally obtained, or invalid, credit card. This section also deals with situations where an individual fraudulently represents that he is the cardholder, or is using the card without the cardholder's consent. While a person may have another's credit card with the cardholder's permission, it may be only for a specific use, and any other use without the cardholder's consent would be a violation of this section.

"[E]ach use of another's credit card is punishable as a separate offense. . . . [T]he Legislature intended to punish each use of a credit card, not the continuing possession and usage of one card." *State v. Salazar*, 98 N.M. 70, 644 P.2d 1059 (Ct. App. 1982). In *Salazar*, the defendant was convicted of seven counts of fraudulent use of a credit card under Section 30-16-33A(4). The total value of all things received by this fraudulent use was $109.66, therefore, he could not be tried under Subsection B which provides for a third degree felony if the total value is over $300.00. Instead, Salazar received seven separate fourth degree felony convictions under Subsection A.

The committee is of the opinion that Subsection B is not unconstitutional under the ruling in *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969), where totalling provisions of the Worthless Check Act, Section 40-49-5 NMSA 1953 [30-36-5 NMSA 1978] were held to be so vague as to offend due process, and were, therefore, declared void. However, Subsection B to Section 30-16-33, *supra*, is not so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Ferris*, 80 N.M. at 665, 459 P.2d at 464. Moreover, it does not fail to "convey a sufficiently definite warning of the proscribed conduct." *Id.* Subsection B is explicit in its language, and no ambiguities are inherent in its interpretation.

Although as of yet there is no case law in New Mexico interpreting the constitutionality of Subsection B, a 1973 Idaho case is on point. In *State v. Boyenger*, 95 Idaho 396, 509 P.2d 1317 (1973), a similar provision was upheld as being within the police power of the state "to protect the people of Idaho from fraud and deceit by the use of credit cards. . . ." *Id.* at 1324. The statute in question provided for a misdemeanor penalty for fraudulent use of a credit card, but

if the value of goods or services obtained through a violation of . . . this act amounts to the sum of $60.00 or more, or if the value of the goods or services obtained through a series of violations . . . committed within a period not exceeding six (6) months amounts in the aggregate to the sum of $60.00 or more, any such violation or violations shall constitute a felony. . .

Idaho Code Section 18-3119.

In *Boyenger*, the defendant was charged under the aggregation clause, and he appealed alleging that this provision was unconstitutional. The court upheld the statute stating "the distinction between felony and misdemeanor based on value of goods obtained is a rational distinction based on the police power of the state and therefore is not a violation of equal protection of the laws." *State v. Boyenger*, *supra*, at 1324. This is analogous to our Section 30-16-33B which differentiates between a third and fourth degree felony based on the value of things obtained by the fraudulent use of credit cards. Therefore, the committee is of the opinion, using the reasoning in *State v. Salazar*, *supra*, and *State v. Boyenger*, *supra*, that if an individual's fraudulent use of a credit card results in obtaining goods of a value less than $300.00, each individual use should be charged under the applicable subparagraph of Section 30-16-33A. If a single use or the aggregation of amounts is over $300.00, the charge should be brought under Subsection B. It would seem that if an individual made two separate charges of $350.00 each, he could only be charged with one violation of Subsection B, unless these transactions occurred in a time span of over six months apart.

The committee is of the opinion that more than one of the alternatives set forth in Element 4 may be given. *See* UJI 14-1686.

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, after "market value", changed "value over $300" to "over ____"; and in the Use Note, in Paragraph 4, deleted the former first sentence, which provided that if the value of all goods or services exceeds $300, the bracketed phrase should be used; and added the first, second and third sentences.

Cross references. — *See* Paragraph (1) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

14-1690. Fraudulent use of invalid, expired or revoked credit card; essential elements.

For you to find the defendant guilty of fraudulent use of [an invalid] [an expired] [a revoked][1] credit card [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[3] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a value [over _____];[4]

3. At the time the defendant used the credit card, the credit card [was invalid] [had expired] [had been revoked][1];

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use applicable alternative.

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

3. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

4. *See* UJI 14-1602 NMRA for a definition of "market value." Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

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

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first sentence, changed "[an invalid] [a revoked]" to "[an expired] [a revoked]"; in Paragraph 2, after "services had a", changed "[value] [value over $300]" to "value [over ____]"; and in the Use Note, added Paragraph 4.

Cross references. — *See* Paragraph (2) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

14-1691. Fraudulent use of credit card by person representing that he is the cardholder; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card by representing that he was the cardholder [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[2] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a value [over _____];[3]

3. The defendant was not the cardholder[2];

4. The defendant represented by words or conduct [that he was the cardholder] [that he was authorized by the cardholder to use the credit card][4];

5. The defendant intended to deceive or cheat;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over

$2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

4. Use applicable bracketed phrase.

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

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, deleted the former sentence which stated "These goods or services had a [value] [value over $300]" and added the current sentence; and in the Use Note, deleted former Paragraph 3 which provided that the applicable alternative should be used, and added new Paragraphs 3 and 4.

Cross references. — *See* Paragraph (3) of Subsection A, Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

14-1692. Fraudulent use of credit card without consent of the cardholder; essential elements.

For you to find the defendant guilty of fraudulent use of a credit card without consent, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant used a credit card[2] to obtain _____ (*describe money, goods or services obtained with the credit card*);

2. These goods or services had a value [over _____];[3]

3. The defendant used the credit card without the cardholder's[2] consent;

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card" or "cardholder," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

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

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1689 NMRA for a discussion of fraudulent use of credit cards.

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, deleted the former sentence which stated "The goods or services had a [value] [value over $300]" and added the current sentence; in the Use Note, in Paragraph 3 deleted the former sentence which provided that the applicable alternative should be used, and added the first, second, and third sentences; and in the committee commentary added "NMRA" after the UJI citations.

Cross references. — *See* Paragraph (4) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

14-1693. Fraudulent acts by merchants or their employees; fraudulently furnishing something of value; essential elements.

For you to find the defendant guilty of fraudulently furnishing something of value [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. In his capacity as [a merchant][2] [an employee of _____][3],the defendant [furnished] [allowed to be furnished][3] _____ (*describe money, goods or services furnished*);

2. These goods or services had a market value[4] [over _____];[5]

3. The defendant accepted for payment a credit card[2] that he knew was being used to deceive or cheat;

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "merchant" or "credit card" the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable bracketed phrase.

4. *See* UJI 14-1602 NMRA for definition of "market value."

5. Use this bracketed provision for goods and services if the value is over $250. State whether the value of the merchandise at issue is "over $250," "over $500," "over $2,500," or "over $20,000." If the charge is a petty misdemeanor ($250 or less), do not use this bracketed provision.

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

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA.

Section 30-16-34A NMSA 1978 deals with the fraudulent furnishing of something of value upon presentation of a credit card which in some way is invalid. Section 30-16-34B NMSA 1978 deals with the situation where a credit slip is filled out, but no merchandise is actually furnished.

In the former situation there seems to be an assumption of collusion between the merchant or employee and the individual presenting the credit card. An example of an offense under Subsection B would be when the merchant or employee accepts a credit card for a valid purchase, and makes two credit slips; the customer signs one not knowing about the second and the merchant or employee signs the cardholder's name to the second credit slip and pockets the money from the alleged sale.

For a discussion on the aggregation of amounts provided for in this section, *see* committee commentary to UJI 14-1689 NMRA.

See UJI 14-1640 NMRA for a review of the elements of fraud.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 2, deleted the former sentence which stated "These goods or services had a market value [over $300]" and added the current sentence; in the Use Note, added Paragraph 3; renumbered former Paragraph 3 as Paragraph 4;

deleted former Paragraph 4, which provided that if the value of the goods or services exceed $300, the bracketed phrase should be used; and added Paragraph 5; and in the committee commentary added "NMRA" after the UJI citations.

Cross references. — *See* Section 30-16-34A NMSA 1978.

14-1694. Fraudulent acts by merchants or their employees; representing that something of value has been furnished; essential elements.

For you to find the defendant guilty of fraudulently representing that something of value has been furnished [as charged in Count _____[1]], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. In the defendant's capacity as [a merchant[2]] [an employee of _____][3], the defendant falsely represented in writing to _____ (*issuer or participating party*[2]) that he furnished _____ (*describe money, goods or services allegedly furnished*) on a credit card[2] of the issuer[2], which had a market value[4] of _____[5];

2. The defendant [did not furnish such goods or services][3] [furnished goods or services of a market value only of _____[5]][3];

[3. The difference between the represented market value and the actual market value is _____[6]];

4. The defendant intended to deceive or cheat; and

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "merchant," "credit card," "issuer" or "participating party," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable alternative.

4. *See* UJI 14-1602 for definition of "market value."

5. Insert the applicable represented or actual value.

6. If the charge is a second degree felony (over $20,000), use "over $20,000" in the blank. If the charge is a third degree felony (over $2,500), use "over $2,500" in the blank. If the charge is a fourth degree felony (over $500), use "over $500" in the blank. If the charge is a misdemeanor (over $250), use "over $250" in the blank. If the charge is a petty misdemeanor (under $250), use "under $250" in the blank.

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

Committee commentary. — *See* NMSA 1978, § 30-16-34(C) (2006). For general information on credit card crimes, *see* committee commentary to UJI 14-1680 NMRA. Also *see* commentary to UJI 14-1673 for a discussion of fraudulent acts by merchants or their employees.

See UJI 14-1640 NMRA for a review of the elements of fraud.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, added Paragraph 3; and renumbered former Paragraphs 3 and 4 as Paragraphs 4 and 5; in the Use Note, added Paragraphs 5 and 6; and in the committee commentary, added "*See* NMSA 1978, § 30-16-34(C) (2006)."

Cross references. — *See* Section 30-16-34B NMSA 1978.

14-1695. Possession of incomplete credit cards; essential elements.

For you to find the defendant guilty of possession of incomplete credit cards [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession[2] [4 or more][3] incomplete credit cards[4];

2. The defendant intended to deceive or cheat;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. Use only if applicable.

4. If the jury requests a definition of "incomplete credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-35A NMSA 1978 makes it an offense for a person to possess an incomplete credit card. Section 30-16-35B makes it an offense to "possess machinery, plates or other contrivance designed to reproduce instruments purporting to be credit cards."

An "incomplete credit card means a credit card upon which a part of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder, has not been stamped, embossed, imprinted or written on it." Section 30-16-25H NMSA 1978.

This section is aimed at the person who manufactures credit cards without the consent of an issuer. The committee can envision an individual setting up quite a lucrative "business" by making and selling purported credit cards which look like the real thing. It is this that the legislature is trying to prevent, and the clause in Subsection A making it a fourth degree felony to possess four or more incomplete credit cards, reflects this legislative intent.

See UJI 14-1640 for a review of the elements of fraud.

ANNOTATIONS

Cross references. — *See* Section 30-16-35A NMSA 1978.

14-1696. Possession of machinery, plates or other contrivance; essential elements.

For you to find the defendant guilty of possession of a device used to make credit cards [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession[2] a device used to make credit cards[3] of an issuer[3];

2. The issuer did not authorize the defendant to make such credit cards;

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-130, "Possession" defined, is to be given if the question of possession is in issue.

3. If the jury requests a definition of "credit card" or "issuer," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680. Also *see* commentary to UJI 14-1695 for a discussion of Section 30-16-35 NMSA 1978. For a review of the elements of fraud, *see* UJI 14-1640.

ANNOTATIONS

Cross references. — *See* Section 30-16-35B NMSA 1978.

14-1697. Receipt of property obtained by fraudulent use of credit card; essential elements.

For you to find the defendant guilty of receiving property obtained by fraudulent use of a credit card [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____ (*describe money, goods or services received*);

2. This property was obtained by another's fraudulent use of a credit card;[2]

3. The defendant knew or had reason to believe that:[4]

[the credit card was obtained in violation of law and then used]; or

[the credit card was invalid, expired or had been revoked, and was used with the intent to deceive or cheat]; or

[the credit card was used with the intent to deceive or cheat by a person misrepresenting that he was the cardholder, or was authorized by the cardholder to use the credit card]; or

[the credit card was used without the cardholder's consent by a person with the intent to deceive or cheat];

4. These goods or services had a [value][3] [value over $300.00];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury requests a definition of "credit card," the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.

3. Use applicable alternative.

4. Use only the applicable bracketed phrase or phrases set forth in Element 3. If there is an issue as to the underlying elements of one of the crimes set forth in Element 3 of this instruction, then upon request, the court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680; *see also* State v. Castillo, 2011-NMCA-046, ¶¶ 7-12, 149 N.M. 536, 252 P.3d 760 (discussing definition of "credit card" and concluding that a debit card does not fall within the statutory definition of "credit card").

Section 30-16-36 NMSA 1978 is similar to our receiving stolen property statute, Section 30-16-11 NMSA 1978. Here though, the property was not technically stolen, but was obtained by another's fraudulent use of a credit card. The knowledge requirement is the same: the defendant "knows or has reason to believe" the money, goods or services were obtained in violation of law.

For a discussion on the aggregation of amounts provided for in this section, see committee commentary to UJI 14-1689 NMRA.

The committee is of the opinion that one or more of the alternatives set forth in Element 3 may be given. *See* UJI 14-1686 NMRA.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, made nonsubstantive amendments to the Use Notes, and revised the committee commentary.

Cross references. — *See* Section 30-16-36 NMSA 1978.

Section 30-14-1 NMSA 1978.

Section 30-14-8 NMSA 1978.

CHAPTER 17
Arson

14-1701. Arson; with purpose of destroying or damaging property; essential elements.

For you to find the defendant guilty of arson [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally or maliciously [started a fire] [or] [caused an explosion];[2]

2. The defendant did so with the intent to destroy or damage _____ (*identify property*), which belonged to another;

3. The defendant caused over $_____[3] in damage to the property; and

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed phrase.

3. If the charge is a second degree felony (over $20,000), use “$20,000” in the blank. If the charge is a third degree felony (over $2,500), use “$2,500” in the blank. If the charge is a fourth degree felony (over $500), use “$500” in the blank. If the charge is a misdemeanor (over $250), use “$250” in the blank.

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

Committee commentary. — *See* NMSA 1978, § 30-17-5. The prior statute, N.M. Laws 1963, ch. 303, § 17-5, which made criminal the "intentional damaging by any explosive substance or setting fire to" certain structures, was held unconstitutional in *State v. Dennis*, 1969-NMCA-036, 80 N.M. 262, 454 P.2d 276. Since both the New Mexico statute prior to 1963 (N.M. Laws 1927, ch. 61, § 1) and common-law arson required a willful and malicious state of mind, the Court concluded that the Legislature intended to eliminate that element. The Court held that to eliminate this mental element was not a reasonable exercise of the police power by the Legislature since the statute then made criminal what could be a burning for innocent and beneficial purposes.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, delineated, as a separate element of the crime of arson, a finding of the amount of damages, revised the Use Notes, and revised the committee commentary; in Element 2, after "belonged to another", deleted "and which had a [market] value of over $ _____," and added a new Element 3 and redesignated former Element 3 as Element 4; and in Use Note 3, deleted "Unless the property has no market value, this bracketed word should be used and UJI 14-1707 also given."

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 1, after "The defendant", added "intentionally or maliciously"; in the Use Note, in Paragraph 3, added the second, third, fourth and fifth sentences; and in the committee commentary, deleted the second, third, fourth, fifth, sixth, seventh, eighth and ninth paragraphs.

Compiler's notes. — Laws 1963, ch. 303, § 17-5, referred to in the first sentence in the first paragraph of the committee commentary, was compiled as 40A-17-5, 1953 Comp., before being repealed by Laws 1970, ch. 39, § 1.

Laws 1927, ch. 61, § 1, referred to in the second sentence in the first paragraph of the committee commentary, was compiled as 40-5-1, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1.

Section 448a of the California Penal Code, referred to in the fourth sentence in the third paragraph of the committee commentary, was repealed in 1979. *See now* § 452 of the Penal Code.

Sufficient evidence to support arson conviction. — Where defendant was charged with arson, breaking and entering and violating an order of protection, and where the state presented evidence that defendant had broken into the victim's house through her window on prior occasions, similar to the way the arsonist did on the night of the fire,

that defendant's blood was found on a pair of pliers and pruning shears recovered near the victim's broken window on the night of the fire, tools which the victim did not recognize or notice when she had her window secured earlier that morning, and that defendant had a motive to burn the victim's house down, jealousy following a breakup, there was sufficient evidence for a rational juror to find that defendant broke into the victim's house and set it on fire. *State v. Pamphille*, 2021-NMCA-002, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arson and Related Offenses § 1.

6A C.J.S. Arson § 55.

14-1702. Arson; with purpose of collecting insurance; essential elements.

For you to find the defendant guilty of arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally or maliciously [started a fire][2] [or] [caused an explosion][2] with the intent to destroy or damage _____ (*identify property*) which had a [market][3] value of over $_____;

2. The defendant did so for the purpose of collecting insurance for the loss;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use the applicable bracketed phrase.

3. Unless the property has no market value, this bracketed word should be used and UJI 14-1707 NMRA must also be given. If the charge is a second degree felony (over $20,000), use "$20,000" in the blank. If the charge is a third degree felony (over $2,500), use "$2,500" in the blank. If the charge is a fourth degree felony (over $500), use "$500" in the blank. If the charge is a misdemeanor (over $250), use "$250" in the blank.

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

Committee commentary. — *See* § 30-17-5A NMSA 1978. *See* the commentary to UJI 14-1701 NMRA. Arson with intent to defraud an insurer is a statutory addition to common-law arson.

This type of arson is divided into degrees depending on the value of the property, not on the amount of the insurance. This arson applies to all types of property and is not limited to that "of another."

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in Paragraph 1, after "The defendant", added "intentionally or maliciously"; in the Use Note, in Paragraph 3, added the second, third, fourth, and fifth sentences; and in the committee commentary, deleted all of the first paragraph after the second sentence; deleted the former second paragraph; and in the third paragraph, after "This type of arson is" deleted "also".

Compiler's notes. — Section 450a of the California Penal Code, referred to in the sixth sentence in the first paragraph of the committee commentary, was repealed in 1979.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arson and Related Offenses § 3.

6A C.J.S. Arson § 6.

14-1703. Negligent arson; essential elements.

For you to find the defendant guilty of negligent arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant recklessly[2] [started a fire][3] [caused an explosion] on [his] [another's] property;

2. This act caused[4]

[the death of _____ *(name of victim)*][3]

[bodily injury to _____ *(name of victim)*]

[the damage to another's building]

[the damage to another's _____[5]]

[the destruction of another's building]

[the destruction of another's _____[5]];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. *See* UJI 14-1704 for definition of "recklessly."

3. Use only applicable bracketed word or phrase.

4. UJI 14-1705 must also be used if causation is in issue.

5. Insert name or description of the appropriate occupied structure.

Committee commentary. — *See* § 30-17-5B NMSA 1978. The statute is derived from the Model Penal Code § 220.1(2) (Proposed Official Draft, 1962). *See also* Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960). Following the general policy of the committee, the instruction eliminates the word "directly" as a modifier of "causing the death, etc., of " as found in the statute. If there is a factual question concerning causation, UJI 14-1705 should be given. This crime is not divided into degrees.

This crime may only be committed by a fire or explosion which causes the death or bodily injury of another or the destruction or damaging of a "building or occupied structure" of another. The definition of occupied structure is derived from the Model Penal Code § 220.1(4) (Proposed Official Draft, 1962). The intent of the model code appears to include only those burnings which ordinarily endanger life. Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960). However, the New Mexico version includes structures used for storing property.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65A C.J.S. Negligence § 306.

14-1704. Negligent arson; "recklessly"; defined.

For you to find that the defendant acted recklessly in this case, you must find that he knew that his conduct created a substantial and foreseeable risk, that he disregarded that risk and that he was wholly indifferent to the consequences of his conduct and to the welfare and safety of others.

Committee commentary. — *See* § 30-17-5B NMSA 1978. The concept of recklessness is the same as criminal negligence. *Cf. State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973). *See also* Perkins, Criminal Law 760 (2d ed. 1969); Model Penal Code § 2.02(2)(c) (Proposed Official Draft, 1962).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65A C.J.S. Negligence § 306.

14-1705. Negligent arson; "causation"; defined.

For you to find that the [death][1] [injury] [damage] [destruction] in this case was "caused" by the conduct of the defendant, you must find that the [death][1] [injury] [damage] [destruction] was an actual result of the conduct of the defendant and that the natural sequence of events from the defendant's act to the resulting [death][1] [injury] [damage] [destruction] was not interrupted by any other intervening cause.

USE NOTES

Use applicable bracketed word.

Committee commentary. — *See* § 30-17-5B NMSA 1978. The statute requires that the death, harm, destruction, etc., be directly caused by the defendant's conduct. Following its general policy, the committee determined that the jury should be instructed on causation only if a question of fact exists. *See, e.g.*, UJI 14-230 and commentary. *See generally* Perkins, Criminal Law 704 (2d ed. 1969); Model Penal Code § 2.03(3)(b) (Proposed Official Draft, 1962).

14-1706. Aggravated arson; essential elements.

For you to find the defendant guilty of aggravated arson [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [set fire to][2] [damaged by any explosive substance] a _____[3] which belonged to another;

2. His act caused[4] _____ *(name of victim)* to sustain

   [an injury creating a high probability of death][5]

   [serious disfigurement]

   [an injury resulting in permanent or long-lasting loss or impairment of the function of any member organ of the body];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed phrase.

3. Insert name or description of property from Section 30-17-6 NMSA 1978.

4. *See* UJI 14-1705 if causation is in issue.

5. Use applicable bracketed phrase depending on the great bodily harm caused.

Committee commentary. — *See* 30-17-6 NMSA 1978. This statute requires a "willful or malicious" damaging but not an "intent to destroy or damage." *See* the commentary to UJI 14-1701. *See also* Practice Commentary, N.Y. Penal Code § 150. The instruction uses the statutory elements of "great bodily harm." *See* § 30-1-12A NMSA 1978. The property or structure, the "burning" of which may create culpability under this crime, is limited under the terms of the statute. The value of the property is not relevant under this statute as the gravamen of the offense is the physical harm to others.

The willful or malicious, i.e., intentional, element is not listed in the elements in this instruction because the mandatory criminal intent instruction includes that element and this instruction is limited to the burning of another's property. *See* UJI 14-141 and commentary. To include the element in this instruction would duplicate the element. *See also* commentary to UJI 14-1701.

The statute does not require that the burning be of the property of another or that the burning be with an intent to cause great bodily harm. Apparently any willful and malicious burning resulting in great bodily harm to another gives rise to culpability under the statute. The committee, therefore, believed that the better view was to limit this instruction to a burning, etc., of the property of another. *See State v. Dennis*, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969). *See generally* Perkins, Criminal Law 226 (2d ed. 1969). If the defendant is charged under this section with burning his own property, a special instruction will have to be drafted.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arson and Related Offenses § 52.

6A C.J.S. Arson § 24.

14-1707. Arson; "market value"; defined.

"Market value" means the price at which the property could ordinarily be bought or sold just prior to the time of its destruction or damage.

USE NOTES

For use in conjunction with Instructions 14-1701 and 14-1702.

Committee commentary. — *See* § 30-17-5A NMSA 1978. The arson statute does not establish a test for determining value. The committee adopted a market value test recognizing that the New Mexico courts have not settled on any one test. *See* committee commentary to UJI 14-1602. However, if the property burned or destroyed has no market value, for example, a bridge, a sign, etc., a special instruction should be drafted using an appropriate test of value.

CHAPTER 18 and 19
(Reserved)

CHAPTER 20
Crimes Against Public Peace

Part A
Refusal to Leave State or Local Government Property

14-2001. Crimes against public peace; refusal to leave state or local government property; essential elements.

For you to find the defendant guilty of refusal to leave state or local government property [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant failed or refused to leave _____ *(identify lands or structure entered)*; [the least intrusion constitutes an entry;][2]

2. The defendant knew that consent to remain had been [denied][3] [withdrawn] by the custodian[4] of the property;

3. The defendant [committed][3] [threatened to commit] [incited] _____ *(describe act)*, an act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the _____ *(identify lands or structure)*;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use bracketed phrase if entry is in issue.

3. Use only the applicable alternative.

4. Also give UJI 14-1420, Custodian; definition.

Committee commentary. — UJI 14-2001 is used when the failure or refusal to leave state or local government property is accompanied by the impairment or interference with, or obstruction of the lawful processes, procedures or functions of the property.

Unlike the criminal trespass statute found unconstitutional due to vagueness in *State v. Jaramillo*, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972), Section 30-20-13 NMSA 1978 specifically gives the custodian guidelines upon which to draw in determining whether or not to request a person leave the property. The trespasser must commit, threaten to commit, or incite others to commit any act which would interfere with the mission of the property. (*See* committee commentary UJI 14-1401.)

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. *See* Section 12-6-2 NMSA 1978 for a definition of "political subdivisions." "State" generally includes all three branches of government.

ANNOTATIONS

Cross references. — *See* Section 30-20-13C NMSA 1978.

CHAPTER 21
(Reserved)

CHAPTER 22
Custody; Confinement; Arrest

Part A
Assault and Battery Against Peace Officers; Essential Elements

14-2200. Assault on a peace officer; attempted battery; essential elements.[1]

For you to find the defendant guilty of assault on a peace officer [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner[4].

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

3. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[5];

4. The defendant knew _____ (*name of peace officer*) was a peace officer.

5. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);][6]

[or]

[challenged the authority of _____ (*name of peace officer*);]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2200A NMRA, then UJI 14-2200B NMRA should be given instead of this instruction.

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

3. Use ordinary language to describe the touching or application of force.

4. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense or another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978 and UJI 14-2216 NMRA. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction

may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

6. Use only applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-21(A)(1).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-2200A. Assault on a peace officer; threat or menacing conduct; essential elements.[1]

For you to find the defendant guilty of assault on a peace officer [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[3];

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[4];

5. The defendant knew _____ (*name of peace officer*) was a peace officer.

6. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);][5]

[or]

[challenged the authority of _____ (*name of peace officer*);]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2200 NMRA, then UJI 14-2200B NMRA should be given instead of this instruction.

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

3. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense or another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978 and UJI 14-2216 NMRA. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

5. Use only applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-21(A)(2).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-2200B. Assault on a peace officer; attempted battery; threat or menacing conduct; essential elements.1

For you to find the defendant guilty of assault on a peace officer [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner[4].

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[5];

5. The defendant knew _____ (*name of peace officer*) was a peace officer.

6. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);][6]

[or]

[challenged the authority of _____ (*name of peace officer*);]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction combines the elements of UJI 14-2200 and 14-2200A NMRA. If the evidence supports both of the theories of assault set forth in UJI 14-2200 and 14-2200A NMRA, use this instruction.

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

3. Use ordinary language to describe the touching or application of force.

4. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense or another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978 and UJI 14-2216 NMRA. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

6. Use only applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-21(A).

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-2201. Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner[4].

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

3. The defendant used a [_____][5] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of*

object) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[6]][7];

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[8];

5. The defendant knew _____ (*name of peace officer*) was a peace officer;

6. The defendant's conduct [threatened the safety of _____ (*name of peace officer*);]

[or][9]

[challenged the authority of _____ (*name of peace officer*);]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2202 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.

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

3. Use ordinary language to describe the touching or application of force.

4. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

7. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

8. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978 and UJI 14-2216 NMRA. If there is an issue as to whether or not the victim was a peace

officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

9. Use only applicable alternative or alternatives.

[Adopted effective October 1, 1976; UJI Criminal Rule 22.00 NMSA 1978; UJI 14-2201 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — *See* NMSA 1978, § 30-22-22(A)(1) (1971). This crime follows the elements of an aggravated assault by use of a deadly weapon, UJI 14-306 NMRA. *See State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, *cert. denied*, 87 N.M. 299, 532 P.2d 888 (1974).

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

NMSA 1978, § 30-22-22(A)(1) (1971) provides that the peace officer must be in the lawful discharge of duty at the time of the assault. If the officer was attempting to make an arrest while not in the lawful discharge of duty, an appropriate defense instruction for “resisting an unlawful arrest” must be prepared. *See State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464 for a discussion of “lawful discharge of duties.”

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with a deadly weapon, defined “battery”, and revised the Use Notes; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”; after Element 1, added the next sentence defining “battery”; added new Elements 2 and 3, and redesignated former Elements 2 through 4 as Elements 4 through 6, respectively; in Element 4, after “peace officer”, deleted Use Note reference “9” and added Use Note

reference “8”; in Element 6, after “[or]”, deleted Use Note reference “4” and added Use Note reference “9”; deleted former Elements 5 through 7 and redesignated former Element 8 as Element 7; in the Use Notes, deleted Use Note 4 and redesignated former Use Notes 5 through 9 as Use Notes 4 through 8, respectively, and added new Use Note 9.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered Paragraph 6 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 9, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12" and "and "UJI 14-2216 NMRA"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, in the first paragraph, changed the statutory reference from "Section 30-22-22A(1) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(1) (1971)" and added "NMRA" after the UJI citation; deleted the former third paragraph and inserted the current language; and in the fourth paragraph, changed the statutory reference from "Section 30-22-22A(1) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(1) (1971)".

The 1999 amendment, effective February 1, 2000, rewrote element 5 which read: "The defendant used .....;[5]" and, in the Use Note, rewrote Paragraph 6 to correspond to the amendment of element 5 and renumbered the paragraphs.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt, specifically set out the requirement of touching or applying force in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout the instruction; added present element 2; redesignated former element 2 as present element 4, specifically set out the requirement of touching or applying force and redesignated all elements thereafter accordingly; deleted previous Use Note 2; redesignated former Use Note 3 as present Use Note 2 and substituted "ordinary" for "laymen's"; added present Use Notes 3 and 4; redesignated former Use Note 4 as present Use Note 5; and added present Use Note 6.

Cross references. — *See* Section 30-22-22A(1) NMSA 1978.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, ***aff'g*** 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

If there is factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 17, 24.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2202. Aggravated assault on a peace officer; threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[8];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;

5. The defendant's conduct[3]

[threatened the safety of _____ (*name of peace officer*);]

[or][4]

[challenged the authority of _____ (*name of peace officer*);]

6. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

7. The defendant used a [_____][5] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[6]][7];

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

USE NOTES

1. If the evidence supports both this theory of assault as well as that found in UJI 14-2201 NMRA, then UJI 14-2203 NMRA should be given instead of this instruction.

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

3. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. Use only applicable alternative or alternatives.

5. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

7. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

8. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.01 NMSA 1978; UJI 14-2202 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 6 as Paragraph 2; added Paragraph 3; and renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 8, in the first sentence, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

The 1999 amendment, effective February 1, 2000, rewrote element 5 which read: "The defendant used .....;[4]" and, in the Use Note, rewrote Paragraph 5 to correspond to the amendment of element 5 and renumbered the paragraphs.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of conduct to be described in the blank line of element 1; rewrote elements 2 and 3, redesignated all elements thereafter accordingly and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout the instruction; rewrote Use Note 2; added present Use Note 3; redesignated previous Use Note 3 as present Use Note 4; and added present Use Note 5.

Cross references. — *See* Section 30-22-22A(1) NMSA 1978. Section 30-22-21A(2) NMSA 1978.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Officer performing duties essential element of offense. — The failure to instruct that an officer must have been performing his duties is the omission of an essential element, and this omission requires reversal of a conviction of aggravated assault upon a peace officer. *State v. Rhea*, 1979-NMCA-121, 93 N.M. 478, 601 P.2d 448.

Omission of essential elements in jury instruction did not amount to fundamental error. — Where defendant was charged with aggravated assault on a police officer based on facts that he walked towards a police officer, who was in the lawful performance of his duties, with a knife and made a stabbing motion, and where, at trial, the given jury instruction erroneously failed to inform the jury that it was also required to find that defendant used a deadly weapon and that his conduct was unlawful, the omission did not rise to the level of fundamental error because an appellate court may affirm a conviction notwithstanding the absence of an implicit jury finding on an omitted element if the jury, having considered the parties' legal and factual presentations and having returned a guilty verdict on the given instructions, undoubtedly would have found

the essential element if properly instructed, and the facts and circumstances of this case show that the jury implicitly found the missing elements in reaching its verdict. The jury explicitly found that defendant walked towards the officer with a large, sharp knife and made a stabbing motion, placing the officer in an objectively reasonable fear for his personal safety, amounting to a finding that defendant used the knife as a weapon, and undoubtedly would have found, if instructed properly, that the knife was capable of causing death or great bodily harm and that defendant acted unlawfully. *State v. Ocon*, 2021-NMCA-032, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2203. Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with a deadly weapon; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____[3];

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[5];

5. The defendant knew _____ (*name of peace officer*) was a peace officer.

6. The defendant's conduct[4]

[threatened the safety of _____ (*name of peace officer*);][5]

[or][6]

[challenged the authority of _____ (*name of peace officer*);]

7. The defendant used a [_____][7] [deadly weapon. The defendant used a _____ (*name of object*). A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[8][9];

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

USE NOTES

1. This instruction combines the elements of UJI 14-2201 and 14-2202 NMRA. If the evidence supports both of the theories of assault set forth in UJI 14-2201 and 14-2202 NMRA, use this instruction.

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

3. Use ordinary language to describe the touching or application of force.

4. In *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, the Supreme Court held that to satisfy the Section 30-22-24 NMSA 1978 requirement that the act be "unlawful" the state must prove "injury or conduct that threatens an officer's safety or meaningfully challenges his or her authority." If any other issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted.

The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

6. Use only applicable alternative or alternatives.

7. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

8. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

9. This alternative is given only if the object used is not specifically listed in Section 30-1-12B NMSA 1978.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.02 NMSA 1978; UJI 14-2203 SCRA; as amended, effective January 15, 1998; February 1, 2000; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-031, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — *See* committee commentary for UJI 14-2201 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-031, effective December 31, 2021, added the specific intent "intentionally" to the definition of "battery" to conform with the statutory definition of "battery"; and in the second sentence of Element 1, after "A battery consists of", added "intentionally".

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with a deadly weapon, defined "battery", and revised the Use Notes; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Elements 2 through 4, and redesignated former Element 5 as Element 2; in the second type of aggravated assault, deleted Elements 2 and 3 and redesignated former Elements 4 and 5 as Elements 2 and 3, respectively; added new Elements 4 and 5; in Element 6, after "[or]", deleted Use Note reference "5" and added Use Note reference "6"; in Element 7, in the first sentence, after "The defendant used a [_____]", deleted Use Note reference "6" and added Use Note reference "7", in the

third sentence, after “great bodily harm”, deleted Use Note references “7” and “8” and added Use Note references “8” and “9”; in the Use Notes, added new Use Note 5 and redesignated former Use Notes 5 through 8 as Use Notes 6 through 9, respectively, and deleted former Use Note 9, relating to “peace officer”.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first alternative set of paragraphs before "OR", renumbered former Paragraph 6 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 and 3 as Paragraphs 4 and 5; and in the second alternative set of paragraphs after "OR", added Paragraphs 2 and 3; and renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 9, in the first sentence, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

The 1999 amendment, effective February 1, 2000, rewrote element 5 which read: "The defendant used .....;[6]" and, in the Use Note, rewrote Paragraph 6 to correspond to the amendment of element 5, inserted Paragraphs 7 and 8 and redesignated former Paragraph 7 as present Paragraph 9.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt and specifically set out the requirement of touching or applying force in present elements 1 and 3, created present elements 2 and 3 from previous lines 2 and 3, respectively, of former element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout the instruction; divided the previous three undesignated lines following "OR" as the present second set of elements 1, 2 and 3; broadened the conduct to be described in the second present element 1; rewrote the second previous element 2 to set out specifically the victim's beliefs; added present element 4; redesignated previous element 2 as present element 5; added present element 6; redesignated previous element 4 as present element 7; rewrote Use Note 1; deleted previous Use Note 3; redesignated previous Use Note 4 as present Use Note 3 and substituted "ordinary" for "laymen's"; added present Use Notes 4 and 5; redesignated previous Use Note 5 as present Use Note 6; and added present Use Note 7.

Cross references. — *See* Section 30-22-22A(1) and A(2).

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, ***aff'g*** 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2204. Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[3]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[4]

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

3. The defendant also intended to commit the crime of _____;[1]

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;[5]

5. The defendant knew _____ (*name of peace officer*) was a peace officer;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

3. Use ordinary language to describe the touching or application of force.

4. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.03 NMSA 1978; UJI 14-2204 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-22-22(A)(3) (1971). This crime includes the elements of an aggravated assault with intent to commit a felony. *See* commentary to UJI 14-308, 14-309, and 14-310 NMRA. *See also* commentary to UJI 14-2201, 14-2202, and 14-2203 NMRA.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M.142, 207 P.3d 1119.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020, in Use Note 1, added the last sentence.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, and defined “battery”; in Element 1, after “The defendant”, deleted “tried to touch or apply force to” and added “intended to commit the crime of battery against”; after Element 1, added the next sentence defining “battery”; added new Elements 2 and 3, and redesignated former Elements 2 and 3 as Elements 4 and 5, respectively; deleted former Elements 4 through 6 and redesignated former Element 7 as Element 6.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 4, added "NMRA" after the UJI citations; in Paragraph 5, in the first sentence, changed the statutory reference from "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, changed the statutory reference from "[Section 30-22-22(A)(3) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(3) (1971)"; added "NMRA" after the UJI citations; and in the second paragraph, deleted ""Peace officer" is defined in Section 30-1-12(C) NMSA 1978. If there is an issue as to whether or not the victim is a peace officer, UJI 14-2216 must be given. *See Reese v. State*, 106 N.M. 498, 501, 745 P.2d 1146, 1149 (1987)."; and added the current language.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt and added the language dealing with touching or applying force in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; redesignated former element 3 as present element 2; redesignated former element 2 as present element 3 and added the language dealing with touching or applying force; made stylistic changes and the language gender neutral in element 5; made a stylistic change in Use Note 1; deleted former Use Note 3; redesignated former Use Note 4 as present Use Note 3, substituting "ordinary" for "laymen's"; and added present Use Notes 4 and 5.

Cross references. — *See* Section 30-22-22(A)(3) NMSA 1978.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, ***aff'g*** 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice § 10.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2205. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;[3]

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

6. The defendant intended to commit the crime of _____;[1]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

3. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.04 NMSA 1978; UJI 14-2205 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order

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

Committee commentary. — *See* committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 1, added the last sentence.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 4, in the first sentence, changed the statutory reference from "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation and added the last sentence.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of coverage of the blank line in element 1; rewrote element 2 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout, making corresponding stylistic changes; rewrote Use Note 3; and added Use Note 4.

Cross references. — *See* Section 30-22-22(A) (3) NMSA 1978.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2206. Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____[2] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

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

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;[5]

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____;[2]

5. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;[6]

6. The defendant knew _____ (*name of peace officer*) was a peace officer.

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction combines the essential elements in UJI 14-2204 and UJI 14-2205 NMRA.

2. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, see UJI 14-5181 to UJI 14-5184 NMRA.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.05 NMSA 1978; UJI 14-2206 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 2, added the last sentence.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to commit a felony, and defined "battery"; in the first alternative type of aggravated assault, in Element 1, after "The

defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against"; after Element 1, added the next sentence defining "battery"; deleted Elements 2 through 4, and redesignated former Element 5 as Element 2; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of peace officer) by _____[4]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery"; in the second type of aggravated assault, deleted Elements 2 and 3, and redesignated former Elements 4 through 6 as Elements 2 through 4, respectively; in Element 4, after "The defendant", added "also"; and added new Elements 5 and 6.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first alternative set of paragraphs before "OR", renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 and 3 as Paragraphs 4 and 5; in the second alternative set of paragraphs after "OR", added Paragraphs 2 and 3; and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 6, in the first sentence, changed the statutory reference from "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt in element 1 and the corresponding Use Note; added the language dealing with touching or applying force in elements 1 and 3 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; broadened the scope of coverage of the blank line in the second element 1; rewrote the second element 2; rewrote Use Note 1; made a stylistic change in Use Note 2; deleted former Use Note 4; redesignated former Use Note 5 as present Use Note 4, substituting "ordinary" for "laymen's"; and added Use Notes 5 and 6.

Cross references. — *See* Section 30-22-22(A) (3) NMSA 1978.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, ***aff'g*** 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2207. Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to [kill] [or][1] [commit _____][2] [as charged in Count _____[1]],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[4]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[5]

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

3. The defendant also intended to [kill] [or][1] [commit _____][2] on _____ (*name of peace officer*);

4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;[6]

5. The defendant knew _____ (*name of peace officer*) was a peace officer;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only the applicable bracketed alternatives.

2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, i.e., mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the count number if more than one count is charged.

4. Use ordinary language to describe the touching or application of force.

5. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.06 NMSA 1978; UJI 14-2207 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-22-23(A) (1971). *Compare* UJI 14-311 NMRA, UJI 14-312 NMRA, UJI 14-313 NMRA and commentary. *See also* commentary to UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 2, added the last sentence.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to kill or commit a violent felony, defined "battery", and revised the Use Notes; after the heading, in the introductory sentence, after "with intent to", inserted an opening bracket prior to "kill", and after "kill", added a closing bracket and "[or] [commit _____[2]", after "Count _____]", deleted Use Note reference "1" and added Use Note reference "3"; in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against", and after "by _____", deleted Use Note reference "2" and added Use Note reference "4; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____ (name of peace officer) by _____[2]" and added "began to do an act which constituted a substantial part of the battery but failed to commit the battery";

deleted former Elements 3 through 5, and redesignated former Element 6 as Element 3; in Element 3, after “The defendant”, added “also”, after “intended to”, inserted an opening bracket prior to “kill”, and after “kill”, added a closing bracket and “[or] [commit _____[2]] on”; added new Elements 4 and 5, and redesignated former Element 7 as Element 6; and in the Use Notes, added new Use Notes 1 and 2, and redesignated former Use Notes 1 through 4 as Use Notes 3 through 6, respectively.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 3; added Paragraph 4; and renumbered former Paragraphs 3, 4 and 6 as Paragraphs 5 through 7; in the Use Note, in Paragraph 4, deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, changed the statutory reference from "Section 30-22-23(A) NMSA 1978" to "NMSA 1978, § 30-22-23(A) (1971)"; added "NMRA" after the UJI citations; and added the last sentence.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt in element 1 and the corresponding Use Note; added the touching or applying force language in elements 1 and 3 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout, making corresponding stylistic changes; redesignated former Use Note 3 as present Use Note 2, substituting "ordinary" for "laymen's"; and added Use Notes 3 and 4.

Cross references. — *See* Section 30-22-23 NMSA 1978 and Section 30-22-21(A) (1).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 17.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2208. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to kill [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer[3];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[2];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

6. The defendant intended to kill _____ (*name of peace officer*);

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.07 NMSA 1978; UJI 14-2208 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* committee commentary for UJI 14-2207 NMRA. *See also* UJI 14-312 NMRA for aggravated assault by threat or menacing conduct with intent to commit a violent felony. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2, added Paragraph 3, and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; and in the Use Note, in Paragraph 3, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citations; and added the last sentence.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of coverage of the blank line in element 1; rewrote element 2; substituted "*(name of peace officer)*" for "*(name of victim)*" throughout and made corresponding stylistic changes; deleted former Use Note 2; and added present Use Notes 2 and 3.

Cross references. — *See* Sections 30-22-23 NMSA 1978 and 30-22-21(A) (2) NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 24.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2209. Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements.[1]

For you to find the defendant guilty of aggravated assault on a peace officer with intent to [kill] [or][2] [commit _____][3] [as charged in Count _____],[4] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____;[5]

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.[6]

2. The defendant began to do an act which constituted a substantial part of the battery but failed to complete the battery;

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant' s conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner;[6]

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. The defendant also intended to [kill] [or][2] [commit _____][3] on _____ (*name of peace officer*);

5. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer;[7]

6. The defendant knew _____ (*name of peace officer*) was a peace officer;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-2207 and 14-2208 NMRA.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, i.e., mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. Insert the count number if more than one count is charged.

5. Use ordinary language to describe the touching or application of force.

6. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

7. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer' s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.08 NMSA 1978; UJI 14-2209 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* committee commentary for UJI 14-2207 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 3, added the last sentence.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of aggravated assault by attempted battery with intent to kill or commit a violent felony, defined "battery", and revised the Use Notes; after the heading, in the introductory sentence, after "with intent to", inserted an opening bracket prior to "kill", and after "kill", added a closing bracket and "[or] [commit _____[3]", after "Count _____", deleted Use Note reference "2" and added Use Note reference "4"; in the first alternative type of aggravated assault, in Element 1, after "The defendant", deleted "tried to touch or apply force to" and added "intended to commit the crime of battery against", and after "by _____", deleted Use Note reference "3" and added Use Note reference "5"; after Element 1, added the next sentence defining "battery"; in Element 2, after "The defendant", deleted "intended to touch or apply force to _____(name of peace officer) by _____[3]" and added "began to do an act which constituted a substantial part of the battery but failed to complete the battery"; deleted Elements 3 through 5; in the second type of aggravated assault, deleted Elements 2 and 3, and redesignated

former Elements 4 through 6 as Elements 2 through 4, respectively; in Element 2, after “angry manner”, deleted Use Note reference “4” and added Use Note reference “6”; in Element 4, after “The defendant”, added “also”, and after “intended to”, inserted an opening bracket prior to “kill”, and after “kill”, added a closing bracket and “[or] [commit _____3] on”; added new Elements 5 and 6; in the Use Notes, added new Use Notes 2 and 3, and redesignated former Use Notes 2 through 5 as Use Notes 4 through 7, respectively.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the first alternative set of paragraphs before "OR", renumbered former Paragraph 5 as Paragraph 3, added Paragraph 4, renumbered former Paragraph 3 as Paragraph 5; in the second alternative set of paragraphs after "OR", added Paragraphs 2 and 3 and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; and in the Use Note, in Paragraph 5, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citation; and added the last sentence.

The 1997 amendment, effective for cases field in the district courts on and after January 15, 1998, deleted the bracketed material dealing with attempt in element 1 and the corresponding Use Note; added the touching or applying force language in elements 1 and 3 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; broadened the scope of coverage of the blank line in the second element 1; rewrote the second element 2 and made corresponding stylistic changes; rewrote Use Note 1; redesignated former Use Note 4 as present Use Note 3, substituting "ordinary" for "laymen's"; and added present Use Notes 4 and 5.

Cross references. — *See* Section 30-22-23 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10, 13, 17, 24.

What constitutes offense of obstructing or resisting Officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2210. Aggravated assault in disguise on a peace officer; essential elements.

For you to find the defendant guilty of aggravated assault in disguise on a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[5];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner[2];

5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

6. At the time _____ (*name of defendant*) was [wearing a _____[3]] [or][4] [disguised] for the purpose of concealing _____'s (*name of defendant*) identity;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the "unlawfulness" of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use either or both alternatives.

5. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.09 NMSA 1978; UJI 14-2210 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* NMSA 1978, § 30-22-22(A)(2) (1971). This crime includes the elements of regular aggravated assault in disguise. *See* UJI 14-307 NMRA and commentary. *See also* commentary to UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2, added Paragraph 3, and renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; and in the Use Note, in Paragraph 5, in the first sentence, after "'Peace officer' is defined in", changed "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, changed "Section 30-22-22(A)(2) NMSA 1978" to "NMSA 1978, § 30-22-22(A)(2) (1971)"; added "NMRA" after the UJI citations; and added the last sentence.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, broadened the scope of coverage of the blank line in element 1; rewrote element 2 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; made elements 4 and 5 gender neutral and made stylistic changes; rewrote Use Notes 2 and 4; and added Use Note 5.

Cross references. — *See* Section 30-22-22(A)(2) NMSA 1978.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: “Defendant knew _____ (name of peace officer) was a peace officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, ***aff’g*** 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice § 10.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2211. Battery upon a peace officer; essential elements.

For you to find the defendant guilty of a battery upon a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally touched or applied force to _____ (*name of peace officer*) by _____[2];

[2. The defendant's act was unlawful;][3]

3. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer;

4. The defendant knew _____ (*name of peace officer*) was a peace officer[4];

5. The defendant's conduct caused

[an actual injury to _____ (*name of peace officer*)][5];

[or]

[an actual threat to the safety of _____ (*name of peace officer*)];

[or]

[a meaningful challenge to the authority of _____ (*name of peace officer*)];

6. The defendant acted in a rude, insolent, or angry manner;

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use ordinary language to describe the touching or application of force.

3. In addition to the harm component of Element 5, the underlying battery must also be Aunlawful.@ If the unlawfulness of the act is at issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 is given. If the issue of Alawfulness@ involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. APeace officer@ is defined in NMSA 1978, Section 30-1-12(C). If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines Apeace officer.@ If there is an issue as to whether the officer was within the lawful discharge of the officer=s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

5. Use only applicable alternative or alternatives.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.10 NMSA 1978; UJI 14 2211 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order No. 10 8300 039, effective December 31, 2010; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-22-24 (1971). *See* commentaries to UJI 14-320 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA.

In State v. Padilla, 1997-NMSC-022, && 2, 11, 123 N.M. 216, 937 P.2d 492, the Supreme Court held that to satisfy the Section 30-22-24 requirement that the act be Aunlawful@ the state must prove Ainjury or conduct that threatens an officer=s safety or meaningfully challenges his or her authority.@ *See also State v. Jones*, 2000-NMCA-047, & 1, 129 N.M. 165, 3 P.3d 142 (although sufficient for conviction under the factual circumstances, whether spitting on an officer constitutes a Ameaningful challenge to authority@ in a particular case is a jury question). The separate Aunlawfulness@ requirement may be placed in issue under a justification defense or evidence implicating the scenarios discussed in UJI 14-132 NMRA. *See, e.g.*, *State v. Padilla*, 1983-NMCA-096, & 15, 101 N.M. 78, 678 P.2d 706 (AIn New Mexico, simple battery is a lesser included offense of peace officer battery; defendant is entitled to an instruction on simple battery if the evidence raises a factual issue of whether the peace officer used excessive force so as to take him out of the scope of his lawful duties.@ (*citing State v. Gonzales*, 1982-NMCA-043, && 9-11, 97 N.M. 607, 642 P.2d 210 (recognizing the right of self defense against a peace officer using excessive force, thus negating the lawful discharge of the officer=s duties))), *rev=d on other grounds*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686.

The committee believed that it would be seldom, if ever, that a person would be charged with the crime of assisting in assault on a peace officer during a riot or unlawful assemblage pursuant to NMSA 1978, ' 30-22-26 (1971) and, therefore, provided no instruction for the latter offense.

This instruction was amended in 2010 by adding a subjective knowledge element in accordance with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

Statutory reference. — Section 30-22-24 NMSA 1978.

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added “unlawfulness” as a separate element of the offense, revised the Use Notes, and revised the committee commentary; in Element 1, after “intentionally”, deleted “and unlawfully”; added a new Element 2 and redesignated the succeeding elements accordingly; and in the Use Notes, added a new Use Note 2 and redesignated former Use Note 2 as Use Note 3, rewrote Use Note 3, deleted former Use Notes 3 and 4 and redesignated former Use Note 5 as Use Note 4, and added Use Note 5.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 4 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2, 3 and 5 as Paragraphs 4 through 6; in the Use Note, in Paragraph 5, in the first sentence, changed "Section 30-1-12(C)" to "Subsection C of Section 30-1-12"; in the second sentence, deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, in the first paragraph changed the statutory reference from "Section 30-22-24 NMSA 1978" to "NMSA 1978, § 30-22-24 (1971)", and added "NMRA" after the UJI citations"; in the second paragraph, changed the statutory references from "Section 30-22-26 NMSA 1978" to "NMSA 1978, § 30-22-26 (1971)"; from "Section 30-22-24 NMSA 1978" to "NMSA 1978, § 30-22-24 (1971)"; and from "Section 30-1-13 NMSA 1978" to "NMSA 1978, § 30-1-13 (1972)"; and in the third paragraph, deleted the sentence which read "'Peace officer' is defined in Section 30-1-12(C) NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given."; and inserted the current language.

The 2001 amendment, effective November 1, 2001, inserted "intentionally [and unlawfully][2]" in Element 1; inserted "caused" in the introductory language, substituted "and actual" for "[caused]", "an actual threat to" for "[threatened]" and "a meaningful challenge to" for "[challenged]" in Element 2; renumbered Use Note 2 as Use Note 3, added present Use Note 2, and deleted former Use Note 3.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added element 2 and made corresponding stylistic changes; substituted "ordinary" for "laymen's" in Use Note 2; and added Use Notes 3 through 5.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Sufficiency of evidence. — Where a defendant coupled his rude, insolent, or angry remarks with force upon a police officer, the jury could properly find defendant guilty of battery upon a police officer. *State v. Cruz,* 1990-NMCA-103, 110 N.M. 780, 800 P.2d 214.

Use of "lawful discharge of his duties" not required. — In a prosecution for battery upon a police officer, the trial court did not commit error in refusing defendant's requested jury instruction seeking the use of the words "lawful discharge of his duties" instead of "performing the duties of a peace officer." *State v. Nemeth,* 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936.

Instruction when officer not discharging duties. — One cannot batter a peace officer while in the lawful discharge of his duties without battering the person of another, and there being evidence that the police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul,* 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

If there is factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales,* 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

There was no error in refusing instruction on officer's right to detain person where the requested instruction was incomplete because it focused only on the officer's initial approach to the defendant and disregarded the officer's attempt to arrest after the defendant allegedly hit the officer. In light of the evidence, the requested instruction would have confused the jury on the issue of lawful discharge of duties. *State v. Kraul,* 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, *cert. denied,* 90 N.M. 637, 567 P.2d 486.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10, 20, 24.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2212. Aggravated battery on a peace officer with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated battery on a peace officer with a deadly weapon [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3] with a [_____][4] [deadly weapon. A _____ (*name of object*) is a deadly weapon only if you find that a _____ (*name of object*), when used as a weapon, could cause death or great bodily harm[5]][6];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[8];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct

[caused injury to _____ (*name of peace officer*)];

[or][7]

[threatened the safety of _____ (*name of peace officer*)];

[or][7]

[challenged the authority of _____ (*name of peace officer*)];

5. The defendant intended to injure _____ (*name of peace officer*);

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Subsection B of Section 30-1-12 NMSA 1978.

5. UJI 14-131 NMRA, the definition of "great bodily harm," must also be given.

6. This alternative is given only if the object used is not specifically listed in Subsection B of Section 30-1-12 NMSA 1978.

7. Use only applicable alternative or alternatives.

8. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.11 NMSA 1978; UJI 14-2212 SCRA; as amended, effective January 15, 1998; February 1, 2000; November 1, 2001; as amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009; by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* NMSA 1978, § 30-22-25 (1971). *See* commentaries to UJI 14-322 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA.

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

[As amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009; by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 4 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2, 3, and 5 as Paragraphs 4 through 6; in the Use Note, in Paragraphs 4 and 6, changed "NMSA 1978, Section 30-1-12(B) (1963)" to "Subsection B of Section 30-1-1-2 NMSA 1978"; in Paragraph 8, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, added "NMRA" after the UJI citations; and added the last sentence.

The 2008 amendment, as approved by Supreme Court Order No. 08-8300-060, effective February 2, 2009, in Paragraphs 4, 6 and 8 of the "USE NOTE" changed the form of the statutory citation.

The 2001 amendment, effective November 1, 2001, inserted "[unlawfully][2]" at the beginning of Element 1 and deleted the former second sentence in Element 1, pertaining to the name of the object the defendant used; rewrote former Use Note 6 as present Use Note 2; and renumbered Use Notes 2 through 5 as 3 through 6.

The 1999 amendment, effective February 1, 2000, rewrote element 1 which read: "The defendant touched or applied force to _____ (name of peace officer) by _____[2] with a" and, in the Use Note, rewrote Paragraph 3 to correspond to the amendment of element 1, inserted Paragraphs 4 and 5 and redesignated former Paragraphs 4, 5 and 6 as present Paragraphs 6, 7 and 8, respectively.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added element 2 and made corresponding stylistic changes; substituted "ordinary" for "laymen's" in Use Note 2; and added Use Notes 4 through 6.

Cross references. — *See* NMSA 1978, § 30-22-25 (1971).

Knowledge of the victim's identity as a peace officer. — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 17, 20.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2213. Aggravated battery on a peace officer; great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery with great bodily harm on a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[6];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct

[caused injury to _____ (*name of peace officer*)];

[or][4]

[threatened the safety of _____ (*name of peace officer*)];

[or][4]

[challenged the authority of _____ (*name of peace officer*)];

5. The defendant intended to injure _____ (*name of peace officer*);

6. The defendant

[caused great bodily harm[5] to _____ (*name of peace officer*)];

[or][4]

[acted in a way that would likely result in death or great bodily harm[5] to _____ (*name of peace officer*)];

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. The definition of "great bodily harm," UJI 14-131 NMRA, must also be given.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.12 NMSA 1978; UJI 14-2213 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* NMSA 1978, § 30-22-25(A) and (C) (1971). *See* commentaries to UJI 14-131 NMRA, UJI 14-320 NMRA, UJI 14-322 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M.142, 207 P.3d 1119.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 5 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 4 and 6 as Paragraphs 4 through 7; in the Use Note, in Paragraph 6, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA", which defined 'peace officer'"; and added the last sentence; and in the committee commentary, changed "Subsections A and C of Section 30-22-25 NMSA 1978" to "NMSA 1978, § 30-22-25(A) and (C) (1971)"; added "NMRA" after the UJI citations; deleted the last two sentences, which read "'Peace officer' is defined in Section 30-1-12C NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given."; and inserted the current last sentence.

The 2001 amendment, effective November 1, 2001, inserted "[unlawfully][2]" at the beginning of Element 1; rewrote former Use Note 3 as present Use Note 2; and renumbered former Use Note 2 as present Use Note 3.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language in element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added Use Note 2 and made corresponding stylistic changes; substituted "ordinary" for "laymen's" in Use Note 2; rewrote Use Note 3; and added Use Notes 5 and 6.

Cross references. — *See* Section 30-22-25(C) NMSA 1978.

Knowledge of the victim's identity as a peace officer. — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Instruction on lesser included offense of battery. — Where the defendant is tried for aggravated battery on a peace officer, the defendant is entitled to an instruction on the lesser included offense of battery. *State v. Nozie*, 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756, cert. granted, 2007-NMCERT-009.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 17, 20.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2214. Aggravated battery on a peace officer; without great bodily harm; essential elements.

For you to find the defendant guilty of aggravated battery on a peace officer without great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [unlawfully][2] touched or applied force to _____ (*name of peace officer*) by _____[3];

2. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer[6];

3. The defendant knew _____ (*name of peace officer*) was a peace officer;

4. The defendant's conduct

[caused injury to _____ (*name of peace officer*)];

[or][4]

[threatened the safety of _____ (*name of peace officer*)];

[or][4]

[challenged the authority of _____ (*name of peace officer*)];

5. The defendant intended to injure _____ (*name of peace officer*);

6. _____'s (*name of peace officer*) injury was not likely to cause death or great bodily harm[5];

7. The defendant caused _____ (*name of peace officer*) [painful temporary disfigurement] [or][4] [a temporary loss or impairment of the use of _____ (*name of organ or member of the body*)];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. The bracketed language is given if an issue is raised as to the lawfulness of the battery. If the issue of lawfulness is raised, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. If the issue of "lawfulness" involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

3. Use ordinary language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. UJI 14-131 NMRA, the definition of "great bodily harm" must be given if this alternative is used.

6. "Peace officer" is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[UJI 14-2214 SCRA; as amended, effective January 15, 1998; November 1, 2001; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — *See* NMSA 1978, § 30-22-25(A) and (B) (1971). *See* commentaries to UJI 14-321 NMRA, UJI 14-2201 NMRA, UJI 14-2202 NMRA and UJI 14-2203 NMRA.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, renumbered former Paragraph 6 as Paragraph 2; added Paragraph 3; renumbered former Paragraphs 2 through 5 and 7 as Paragraphs 4 through 8; in the Use Note, in Paragraph 6, in the first sentence, after "'Peace officer' is defined in", deleted "Section 30-1-12(C)" and added "Subsection C of Section 30-1-12"; in the second sentence, after "a peace officer", deleted "UJI 14-2216 must be given" and added "give UJI 14-2216 NMRA, which defines 'peace officer'"; and added the last sentence; and in the committee commentary, deleted "Section 30-22-25A and 30-22-25B NMSA 1978" and added "NMSA 1978, § 30-22-25(A) and (B) (1971)"; added "NMRA" after the UJI citations; deleted the last two sentences, which read ""Peace officer" is defined in Section 30-1-12C NMSA 1978. If there is an issue as to whether the victim is in fact a peace officer, UJI 14-2216 must be given."; and added the current last sentence.

The 2001 amendment, effective November 1, 2001, inserted "[unlawfully][2]" at the beginning of Element 1; rewrote former Use Note 3 as present Use Note 2; and renumbered former Use Note 2 as present Use Note 3.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, added the touching or applying force language of element 1 and substituted "*(name of peace officer)*" for "*(name of victim)*" throughout; added elements

2 and 4 and made corresponding stylistic changes; clarified the meaning of "member" in element 5; substituted "ordinary" for "laymen's" in Use Note 2; added Use Note 3 and made a corresponding stylistic change; and added Use Notes 5 and 6.

Cross references. — *See* Section 30-22-25B NMSA 1978.

Knowledge of the victim's identity as a peace officer. — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Instruction modified by the Supreme Court. — The Supreme Court modified this instruction to include the following element: "Defendant knew _____ (name of peace officer) was a peace officer". *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 17, 20.

What constitutes offense of obstructing or resisting officer, 48 A.L.R. 746.

6A C.J.S. Assault and Battery § 81; 67 C.J.S. Obstructing Justice § 5.

14-2215. Resisting, evading or obstructing an officer; essential elements.[1]

For you to find the defendant guilty of resisting, evading or obstructing an officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of officer*) was a [peace officer[2]] [judge] [magistrate][3] in the lawful discharge of duty;

2. The defendant knew_____(*name of officer*) was a [peace officer] [judge] [magistrate][3];

3. [The defendant knowingly obstructed, resisted or opposed _____ (*name of officer*) in serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;]

[OR][3]

[The defendant, with the knowledge that _____ (*name of officer*) was attempting to apprehend or arrest the defendant, fled, attempted to evade or evaded _____ (*name of officer*);]

[OR][3]

[The defendant willfully refused to bring a vehicle to a stop when given a visual or audible signal to stop by _____ (*name of officer*), a uniformed officer who was in an appropriately marked police vehicle;]

[OR][3]

[The defendant resisted or abused _____ (*name of officer*) in the lawful discharge of _____'s (*name of officer*) duties;]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert count number if more than one count is charged.

2. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines "peace officer." The mistake of fact referred to in prior UJI 16-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

3. Use only the applicable alternative.

[Adopted May 1, 1986; UJI 14-2215 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

Committee commentary. — Pursuant to the court order of February 10, 1986, this instruction is applicable to cases tried after May 1, 1986. This instruction was amended in 2011 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

"'Resisting, evading, or obstructing an officer' primarily consists of acts of physical resistance." *State v. Wade*, 100 N.M. 152, 153, 667 P.2d 459, 460 (Ct. App. 1983). "New Mexico courts have found [NMSA 1978,] § 30-22-1 to prohibit certain speech, when that speech is abusive, but not when it is merely evasive." *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1216-17 (10th Cir. 2008) (citing *Wade*, 100 N.M. at 154, 667 P.2d at 461). "'[A]busing' speech in § 30-22-1(D) . . . covers only speech that can be called 'fighting' words." *Wade*, 100 N.M. at 154, 667 P.2d at 461. "'Fighting' words are those which tend to incite an immediate breach of the peace." *Id.*

[As amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-004, effective March 21, 2011, added Paragraph 2 concerning the defendant's knowledge of the victim's official status; in Paragraph 3, added alternative instructions concerning obstruction of the service of process and refusal to stop a vehicle; and in the Use Note, added references to jury instructions that define "peace officer" and that concern the defense of mistake of fact.

The 1997 amendment, effective for cases filed in the district courts on and after January 15, 1998, substituted "*(name of peace officer)*" for "*(name of victim)*" throughout and made related stylistic changes; made element 1 gender neutral; added present Use Note 3, redesignating former Use Note 3 as present Use Note 4; and deleted former Use Note 4.

Cross references. — *See* Section 30-22-1(B) and (D) NMSA 1978.

Burden of proof on state. — In order to convict defendant of evading and eluding a police officer, the state had the burden of proving that officer was a peace officer engaged in the lawful discharge of his duty and defendant, with knowledge that officer was attempting to apprehend or arrest him, fled, attempted to evade, or evaded officer. *State v. Gutierrez*, 2005-NMCA-093, 138 N.M. 147, 117 P.3d 953, cert. granted, 2005-NMCERT-007, 138 N.M. 146, 117 P.3d 952.

Sufficient evidence. — Where police officers arrested defendant for DWI; defendant argued with the officers and refused to cooperate; defendant would not put defendant's legs into the police car, preventing the officers from closing the door; when the officers forced defendant's legs into the car, defendant placed defendant's head in a position that prevented the officer from closing the door; defendant intentionally fell out of the car; and defendant twice kicked one officer, the evidence was sufficient to support defendant's conviction of resisting and abusing an officer. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Insufficient evidence of evading an officer. — Where defendant was charged with intentionally fleeing, attempting to evade or evading an officer after taking a gun inside a Las Cruces club and refusing to exit the club, there was insufficient evidence to support defendant's conviction, because although defendant refused to comply with the officer's orders to surrender from inside the club, the State failed to present any evidence that defendant fled, attempted to evade, or evaded the officers before they were able to arrest him, and there was no evidence presented to suggest that defendant surreptitiously tried to escape from the building, such as out the back or side door, in order to evade arrest. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

Reversal was warranted where defendant was convicted of a crime that the state had not charged. — Where defendant was charged and convicted of resisting, evading, or obstructing an officer pursuant to § 30-22-1(D) NMSA 1978, but where, at trial, the state used, with some customization, the alternative from the uniform jury instruction that corresponds to § 30-22-1(C) NMSA 1978, the jury was not instructed on the "resisting or abusing" elements of § 30-22-1(D) that differentiates the offense from other forms of resisting, evading, or obstructing an officer. Reversal was therefore warranted, because the jury convicted defendant of a crime for which he had not been charged. *State v. Ocon*, 2021-NMCA-032, cert. denied.

14-2216. "Peace officer"; defined.[1]

A "peace officer"[1] is any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

USE NOTES

1. The definition of "peace officer" is taken from Subsection C of Section 30-1-12 NMSA 1978.

[Adopted, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010.]

Committee commentary. — The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into UJIs 14-2201 NMRA to 14-2215 NMRA. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

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

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, deleted the former title of the rule which stated "Defendant did not know victim was a peace officer" and added the current title; deleted all of the former paragraphs of the instruction except the current paragraph; in the Use Note, deleted former Paragraph 1, which provided that the instruction is to be given if there is a question of fact as to whether or not the defendant knew that the victim was a law enforcement officer; renumbered former Paragraph 2 as Paragraph 1 and changed the statutory reference; and replaced the former committee commentary with the current commentary.

Resisting, evading or obstructing an officer. — Where defendant, who was charged with resisting, evading or obstructing a law enforcement officer, testified that defendant did not know that the persons pursuing defendant were police officers, because the officers were in plain clothes and drove unmarked vehicles, defendant was entitled to a

jury instruction requiring the state to prove that the defendant knew that the persons seeking to detain defendant were law enforcement officers. *State v. Akers*, 2010-NMCA-103, 149 N.M. 53, 243 P.3d 757.

Where defendant was charged with resisting, evading or obstructing law enforcement officers and with aggravated assault on one of the officers; defendant provided evidence that defendant did not know that the persons pursuing defendant were police officers; on the charge of resisting, evading and obstructing a law enforcement officer, the trial court refused to instruct the jury that defendant needed to know that the persons pursuing defendant were peace officers; on the charge of aggravated assault, the trial court gave the jury an instruction in conformance with UJI 14-2216 NMRA; and the jury was instructed that each crime should be considered separately, the instruction given on aggravated assault was not sufficiently applicable to both crimes, and defendant was entitled to an instruction in conformance with UJI 14-2216 NMRA that, to convict defendant of resisting, evading and obstructing a peace officer, the state had to prove the defendant knew that the officers were peace officers. *State v. Akers*, 2010-NMCA-103, 149 N.M. 53, 243 P.3d 757.

Knowledge of the victim's identity as a peace officer. — Where a reasonable jury could have found that defendant was in a dazed, disoriented, and intoxicated state; the defendant was fighting with the defendant's spouse in a supermarket parking lot; a supermarket security guard subdued the defendant; the defendant escaped and walked to an adjacent parking lot; a police officer arrived at the scene and followed the defendant in a marked police car; the police officer was wearing a police uniform; the police officer did not verbally identify himself as a police officer or activate the siren or emergency lights on the police car; the defendant physically attacked the police officer; the defendant believed that the victim was the private security guard who had followed the defendant from the supermarket parking lot; and the jury was not otherwise instructed that knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, the defendant was entitled to a mistake of fact instruction. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Aggravated battery on a peace officer. — This instruction applies to the offense of aggravated battery on a peace officer when there is a question of fact as to whether the defendant knew the victim was a peace officer. *State v. Nozie*, 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756, cert. granted, 2007-NMCERT-009.

14-2217. Aggravated fleeing a law enforcement officer.

For you to find the defendant guilty of aggravated fleeing a law enforcement officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;

2. The defendant drove willfully and carelessly in a manner that endangered or could have endangered the life of another person;

3. The defendant had been given a visual or audible signal to stop by a uniformed law enforcement officer in an appropriately marked law enforcement vehicle;

4. The defendant knew that a law enforcement officer had given the defendant an audible or visual signal to stop;

5. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

[Adopted by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as amended by Supreme Court Order No. 22-8300-032, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-1.1 (2003).

This instruction has been modified to comport with the holding in *State v. Vest*, 2021-NMSC-020, ¶¶ 13, 19, 28, 39, 488 P.3d 626, which interprets the aggravated fleeing statute to focus on the social harm from a defendant's conduct, rather than the particular result of the conduct. *Vest* clarifies aggravated fleeing requires "only that a defendant willfully and carelessly drove so dangerously that the defendant created a risk of harm, a risk that could have endangered someone in the community," and "does not require that an identifiable person was actually endangered as a result of the defendant's flight from law enforcement." *Id.* ¶¶ 13, 19.

Some language in *Vest* could be interpreted as expanding liability to causing a risk of harm to the community other than death. *See Vest*, 2021-NMSC-020, ¶ 39. The Committee believes the holding of *Vest* does not relax the statutory requirement that the risk to the community be life-threatening: "A defendant is guilty of aggravated fleeing if he or she fled police by driving in a way that threatened the lives of people in the community." *Id.* ¶ 19.

Although the statute requires that the pursuit be conducted "in accordance with" the Law Enforcement Safe Pursuit Act, NMSA 1978, §§ 29-20-1 to -4 (2003), this is not an essential element of the crime. *State v. Padilla*, 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299.

[Adopted by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as amended by Supreme Court Order No. 22-8300-032, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-032, effective December 31, 2022, clarified that a jury can find a defendant guilty of aggravated fleeing a law enforcement officer if the defendant drove so dangerously that he created a risk of harm that could have endangered someone in the community and does not require a finding that an identifiable person was actually endangered, and revised the committee commentary; and in Element 2, after "that endangered", added "or could have endangered".

Cross references. — *See* NMSA 1978, § 30-22-1.1 (2003).

Aggravated fleeing does not require that an identifiable person was actually endangered as a result of the driver's conduct. — Where defendant was convicted of aggravated fleeing a law enforcement officer after he led an officer on a high-speed chase through rain-slicked streets during the early morning hours, and where defendant argued that there was insufficient evidence to support his conviction because the crime of aggravated fleeing requires proof that a defendant drove in a manner that actually endangered the life of another individual and in this case, no person was actually in the vicinity of the pursuit, the New Mexico supreme court held that there was sufficient evidence to support defendant's conviction because the statute requires proof that the defendant drove so dangerously that his or her conduct endangered the lives of others, but does not require that an identifiable person was actually endangered as a result of the defendant's flight from law enforcement. It is the conduct of fleeing the police by driving dangerously, not the result of the conduct, that violates the aggravated fleeing statute, and in this case there was evidence that defendant displayed dangerous driving that put people in the community at risk of harm when he sped at seventy miles per hour on town roads, refused to slow down while passing an apartment complex, and drove onto a sidewalk and crashed into a road sign. *State v. Vest*, 2021-NMSC-020, *rev'g* 2018-NMCA-060, 428 P.3d 287.

Actual endangerment of another person is an essential element of aggravated fleeing. — Where defendant was charged with aggravated fleeing of a law enforcement officer following a high-speed chase in which defendant drove at least seventy miles per hour through a residential area, on a wet and slippery road, with at least one curve in it, crashing the car into a traffic sign, rendering the car inoperable, and getting out of the car and leaving it in the middle of the roadway, the state failed to present sufficient evidence to prove that defendant's flight from police actually endangered another person when the uncontroverted testimony was that defendant never encountered any other motorists on the roadway. *State v. Vest*, 2018-NMCA-060, cert. granted.

Actual endangerment of another person is an essential element of aggravated fleeing. — Where defendant was charged with aggravated fleeing of a law enforcement officer following a high-speed chase in which defendant drove his motorcycle through parking lots, drove on several side streets in which he ran several stop signs, and drove on the highway exceeding the speed limit, causing other motorists to pull off the road,

the State failed to present sufficient evidence to prove that defendant endangered another person when the uncontroverted testimony of two participating officers was that the pursuit did not create a public safety issue or place any person in danger. *State v. Chavez*, 2016-NMCA-016, 365 P.3d 61, *vacated by* N.M. Sup. Ct. Order No. S-1-SC-35614 (Aug. 24, 2016).

Part B
Escape and Rescue

14-2220. Unlawful rescue; felony; capital felony; essential elements.

For you to find the defendant guilty of unlawful rescue [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in [custody of _____ *(name of peace officer)*][2] [confinement];

2. _____ *(name of prisoner)* was [under conviction of _____[3]][2] [charged with _____[3]];

3. The defendant freed _____ *(name of prisoner);*

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Insert name of crime.

Committee commentary. — *See* Section 30-22-7 NMSA 1978. The intentional element of the statutory crime is covered by the general intent instruction, UJI 14-141.

Although the lawfulness of the custody or confinement of the prisoner is an essential element of the crime of unlawful rescue, this issue is almost always a question of law to be decided by the judge. (*See* "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

Unlawful Rescue; Assisting Escape Distinguished. - The essential elements of unlawful rescue (Section 40A-27-7 NMSA 1953 Comp.) and assisting escape (Section 40A-27-11; UJI 14-2224), as set forth in the Criminal Code, appear to be the same. The courts,

when confronted with similar statutory provisions, have held that the distinguishing element between the two offenses is the cooperation of the prisoner. An unlawful rescue takes place where there is no effort on the part of the prisoner to escape. The prisoner's deliverance must be effected by the intervention of others without his cooperation. The crime of assisting a prisoner to escape consists of inciting, supporting or reenforcing a prisoner's exertions to escape. *See Merrill v. State*, 42 Ariz. 341, 26 P.2d 110 (Ariz. 1933); *People v. Murphy*, 130 Cal. App. 408, 20 P.2d 63 (1933); *Day v. State*, 86 Ga. App. 757, 72 S.E.2d 500 (1952); and *Robinson v. State*, 82 Ga. 535, 9 S.E. 528 (1889).

In New Mexico there is one further distinguishing characteristic between the crime of unlawful rescue and the crime of assisting escape: unlawful rescue is limited to confinement or custody for felony offenses while assisting escape is not so limited.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not a person is a peace officer is normally a question of law to be decided by the court. In the event there is a question of fact as to whether the person having custody of the defendant is a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

Cross references. — *See* Section 30-22-7 NMSA 1978.

For the Criminal Code, *see* 30-1-1 NMSA 1978 and notes thereto.

Compiler's notes. — The reference to 40A-27-7 and 40A-27-11, 1953 Comp., in the first sentence in the third paragraph of the committee commentary should seemingly be to 40A-22-7 and 40A-22-11, 1953 Comp., which are compiled as 30-22-7 and 30-22-11 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 5.

30A C.J.S. Escape and Related Offenses; Rescue § 28 et seq.

14-2221. Escape from jail; essential elements.[1]

For you to find the defendant guilty of escape from jail [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed[3] to jail;

2. The defendant [escaped from][4] [or] [attempted to escape from] jail;

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

USE NOTES

1. *See* NMSA 1978, § 30-22-8 (1963). If the escape is from a jail initiated prisoner-release program, established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. If the escape is from a community custody release program, NMSA 1978, § 30-22-8.1 (1999), use UJI 14-2228C NMRA.

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

3. "Committed" means being physically placed in custody, with or without an order of confinement.

4. Use only the applicable bracketed element established by the evidence.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.00 NMSA 1978; UJI 14-2221 SCRA; as amended, effective January 1, 1999; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-8 (1963).

Before a defendant can be charged and convicted with escape, the defendant "must first have undergone some moment of actual custody." *See State v. Pearson*, 2000-NMCA-102, ¶ 13, 129 N.M. 762, 13 P.3d 980 (construing escape from prison under NMSA 1978, Section 30-22-9 (1963)). A defendant is "committed" when placed in custody with or without an order of confinement. *See State v. Garcia*, 1968-NMCA-007, ¶¶ 3-8, 78 N.M. 777, 438 P.2d 521. Physical confinement at the time of escape is not required; escape from constructive custody while assigned to a work detail or failure to return from furlough constitutes an escape. *See State v. Gilman*, 1981-NMCA-123, ¶ 7, 97 N.M. 67, 636 P.2d 886; *State v. Hill*, 1994-NMCA-069, ¶ 5, 117 N.M. 807, 877 P.2d 1110.

Although both offenses are fourth-degree felony violations of Section 30-22-8, the elements of escape from jail are not the same as the elements of escape from a jail initiated prisoner-release program; the latter is a more specific—and limited—sub-set of the former. *Compare* NMSA 1978, § 33-3-24 (1981) (establishing jail release program requirements and limiting applicability to NMSA 1978, §§ 33-2-43 (1969), *and* 33-2-44 (1971)), *with* § 30-22-8 (escape from jail is a fourth degree felony and has different elements), *and State v. Najar*, 1994-NMCA-098, ¶¶ 3, 6, 118 N.M. 230, 880 P.2d 327 (explaining that escape from a jail initiated prisoner-release program is a fourth degree felony). The Court of Appeals has held that it was fundamental error to use UJI 14-2221 NMRA (escape from jail) and (former) UJI 14-2228 NMRA (escape from an inmate release program) interchangeably. *See State v. Grubb*, 2020-NMCA-003, ¶¶ 10-17, 455 P.3d 877.

[Amended November 12, 1998; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-031, effective December 31, 2022, revised the Use Notes, and revised the committee commentary; in Use Note 1, added "*See* NMSA 1978, § 30-22-8 (1963).", after "If the escape is from a jail", added "initiated prisoner-", after "release program", added "established under NMSA 1978, Section 33-3-24 (1981)", and after "use UJI 14-2228A NMRA", added "If the escape is from a community custody release program, NMSA 1978, § 30-22-8.1 (1999), use UJI 14-2228C NMRA."; and in Element 3, deleted "The issue of lawfulness of the commitment is almost always a question of law to be decided by the judge. (*See* "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest', following these instructions.)" and added "'Committed' means being physically placed in custody, with or without an order of confinement.".

The 1998 amendment, effective January 1, 1999, inserted the first instance of "from" in Element 2.

Cross references. — *See* Section 30-22-8 NMSA 1978.

Fundamental error to instruct the jury on escape from an inmate-release program when defendant was charged with escape from jail. — Where defendant was charged with escape from jail, and where, at trial, the district court judge instructed the jury using the uniform jury instruction that lists the essential elements for the crime of escape from an inmate-release program, defendant's conviction for escape from jail resulted in fundamental error, because the district court instructed the jury on a crime for which defendant was never charged. It is improper to instruct the jury as to a crime not formally charged if that crime is not a lesser-included offense of the crime formally charged. *State v. Grubb*, 2020-NMCA-003.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

30A C.J.S. Escape §§ 6 to 9.

14-2222. Escape from the penitentiary; essential elements.

For you to find the defendant guilty of escape from the penitentiary [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed to the penitentiary;

2. The defendant [escaped][2] [attempted to escape] from [the penitentiary][2] [_____ *(official title)*[3]];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Describe the name or place of custody or confinement if it is not actually within the confines of the penitentiary.

Committee commentary. — *See* Section 30-22-9 NMSA 1978. Escape from the penitentiary includes escape from other facilities under the department of corrections. *See State v. Peters,* 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962), and *State v. Budau,* 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), *cert. denied,* 86 N.M. 5, 518 P.2d 1209 (1974).

Section 30-22-9 NMSA 1978 requires that the defendant must have been lawfully committed for the crime of escape from the penitentiary to be committed. The issue of the lawfulness of the commitment is almost always a question of law to be decided by the judge.

ANNOTATIONS

Cross references. — *See* Section 30-22-9 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

30A C.J.S. Escape §§ 6 to 9.

14-2223. Escape from custody of a peace officer; essential elements.

For you to find the defendant guilty of escape from custody of a peace officer [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was arrested [under authority of a warrant][2] [upon reasonable grounds to believe that he had committed _____[3]];

2. The defendant [escaped][2] [attempted to escape] from the custody of a _____ *(official title)*;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Insert name of felony for which the defendant had been arrested. The essential elements of the felony must also be given immediately following this instruction.

Committee commentary. — *See* Section 30-22-10 NMSA 1978. A charge of escape from the custody of a peace officer may be shown by evidence of escape from an institution. *See State v. Millican,* 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

An essential element of the crime of escape from custody of a peace officer is that the person escaping must have been placed under lawful arrest. If the arrest is without a warrant and the jury finds that the person was arrested upon reasonable grounds that the defendant committed a felony, the person has been lawfully arrested. If the arrest is made under authority of a warrant, the question of lawfulness will almost always be a question of law to be decided by the judge.

See State v. Selgado, 76 N.M. 187, 413 P.2d 469 (1966), for a discussion of when a police officer may make an arrest for a misdemeanor without a warrant.

See Perkins, Criminal Law 500 (2d ed. 1969), for when an arrest takes place.

ANNOTATIONS

Cross references. — *See* Section 30-22-10 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

30A C.J.S. Escape §§ 6 to 9.

14-2224. Assisting escape; essential elements.

For you to find the defendant guilty of assisting escape [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in [custody of _____ *(name of peace officer)*][2]

[confinement at _____[3]];

2. _____ *(name of prisoner)* escaped;

3. The defendant aided the escape of _____ *(name of prisoner)*;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Describe place of custody or confinement.

Committee commentary. — *See* Section 30-22-11A NMSA 1978. In New Mexico, the statutory offense of assisting escape is a separate and distinct offense from the crime of unlawful rescue (Section 30-22-7 NMSA 1978) and the crime of furnishing articles for prisoner's escape (Section 30-22-12 NMSA 1978). *See* commentary to UJI 14-2220 for the distinction between the offense of unlawful rescue and assisting escape.

The crime of assisting escape may be a lesser included offense of the crime of furnishing articles for prisoner's escape.

If a question is raised concerning the lawfulness of the custody or confinement of the prisoner, this question will almost always be a question of law to be decided by the judge.

See Section 30-1-12H NMSA 1978 for the definition of lawful custody or confinement.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not a person is a peace officer is normally a question of law to be decided by the court. In the event there is a question of fact as to whether the person having custody of the defendant is a peace officer a special instruction would have to be drafted.

ANNOTATIONS

Cross references. — *See* Section 30-22-11A NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 5, 6.

30A C.J.S. Escape § 19.

14-2225. Assisting escape; officer, jailer or employee permitting escape; essential elements.

For you to find the defendant guilty of assisting escape [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in custody of the defendant;

2. The defendant was _____ *(official title or position)*;

3. _____ *(name of prisoner)* escaped;

4. The defendant permitted the escape of _____ *(name of prisoner)* from his custody;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

Committee commentary. — *See* Section 30-22-11B NMSA 1978.

The crime of assisting an escape may be committed by an officer, jailer or employee permitting a prisoner in his custody to escape.

ANNOTATIONS

Cross references. — *See* Section 30-22-11B NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 23, 24, 25.

30A C.J.S. Escape §§ 6 to 9.

14-2226. Furnishing articles for escape; essential elements.

For you to find the defendant guilty of furnishing articles for escape [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of prisoner)* was in custody or confinement;

2. The defendant gave to _____ *(name of prisoner)*

[(a _____[2])[3] (an explosive substance) without the express consent of the officer in charge of _____;[4]][3]

[OR]

[a _____[5] which would be useful in aiding an escape;]

3. The defendant intended to assist _____ *(name of prisoner)* to escape;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12B NMSA 1978, or use the phrase "an instrument or object which, when used as a weapon, could cause death or very serious injury."

3. Use only applicable element established by the evidence.

4. Identify the place of confinement.

5. Identify the disguise, instrument or tool or other item which would be useful in gaining escape.

Committee commentary. — *See* Section 30-22-12 NMSA 1978.

Assisting escape is most often committed by furnishing articles for a prisoner's escape.

The cooperation of the prisoner is not an element of the offense of furnishing articles for prisoner's escape. *See* commentary to UJI 14-2220.

If a question is raised concerning the lawfulness of the custody or confinement of the prisoner, this question will almost always be a question of law to be decided by the judge.

The third element of UJI 14-2226, requiring the jury to find that the defendant intended to assist the prisoner to escape, is implicit in Section 30-22-12 NMSA 1978, supra.

ANNOTATIONS

Cross references. — *See* Section 30-22-12 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 5.

30A C.J.S. Escape § 25.

14-2227. Assault on a jail; essential elements.

For you to find the defendant guilty of assault on a jail [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant assaulted[2] or attacked _____,[3] [a jail][4] [a prison] [place of confinement of prisoners];

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the jury asks for a definition of "assaulted," use a non-law dictionary definition.

3. Identify the place of the attack.

4. Use only the applicable bracketed element established by the evidence.

Committee commentary. — *See* Section 30-22-19 NMSA 1978. Although the statutory elements do not include any specific intent to procure the escape of prisoners, that intent was included in jury instructions in the prosecution for the Tierra Amarilla courthouse raid of 1967. *See State v. Tijerina*, 86 N.M. 31, 519 P.2d 127 (1973), aff'g 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974), and *State v. Tijerina*, 84 N.M. 432, 441, 504 P.2d 642, 651 (Ct. App. 1972), aff'd, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974). The instruction was not the subject of a direct appeal in that case because the defendants were acquitted of the charge.

If a question is raised concerning whether the place of confinement is a place where prisoners are held in lawful custody, this question will almost always be a question of law to be decided by the judge.

ANNOTATIONS

Cross references. — *See* Section 30-22-19 NMSA 1978.

The district court did not commit fundamental error in instructing the jury regarding assault on a jail. — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, and where defendants claimed that the absence of a definition of "assault" in the jury instruction rendered the range of proscribed conduct unknowable under § 30-22-19 NMSA 1978, and that the vagueness of the jury instruction was akin to a missing elements instruction because there was no way to know whether the jury actually found the statutory elements of an assault on a jail beyond a reasonable doubt, the given instruction did not constitute fundamental error because the use notes make clear that the meaning of "assaulted" in § 30-22-19 represents the lay meaning of the word and therefore the instruction provided the jury with the opportunity to decide whether there was an assault applying their common sense as to the word's meaning. Moreover, the district court's failure to clarify the definition of "assault," despite the jury's request to do so, did not result in fundamental error because given the overwhelming trial evidence that defendants refused to lock down, poured liquid soap onto the floor near the stairs, misused a mattress and a plastic cot to attempt to block the pod entrance, and physically resisted the advance of law enforcement officers attempting to restore order in the pod and enforce a lockdown, defendants' convictions do not shock the conscience. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30A C.J.S. Escape § 25.

14-2228. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 22-8300-031, UJI 14-2228 NMRA, relating to escape, inmate-release program, essential elements, was withdrawn effective December 31, 2022. For provisions of former instruction, *see* the 2022 NMRA on *NMOneSource.com*.

14-2228A. Escape; jail release program; essential elements.[1]

For you to find the defendant guilty of escape from a jail release program [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed to _____ (*identify institution*);

2. The [sheriff] [jail administrator][3] of _____ (*identify institution*), with the approval of the [board of county commissioners of _____ (*name of county*)] [governing body of _____ (*name of municipality*)] had established a release program to allow prisoners to [attend school] [or] [be employed];

3. The defendant was released from _____ (*identify institution*) to _____ (*describe purpose for release*);

4. The defendant failed to return to confinement within the time fixed for the defendant's return;

5. The defendant's failure to return was willful, without sufficient justification or excuse;[4]

6. The defendant intended not to return within the time fixed;[4]

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is to be used when a prisoner escapes from a prisoner-release program established in a county or municipal jail or detention center under NMSA 1978, Section 33-3-24 (1981). For escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999), use UJI 14-2228C NMRA. For escape from a penitentiary inmate-release program under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980), use UJI 14-2228B NMRA.

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

3. Use only the applicable alternatives.

4. This element is necessary to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-8 (1963); NMSA 1978, § 33-3-24 (1981); *see also* NMSA 1978, §§ 33-2-43 (1969) and 33-2-44 (1971) (penitentiary inmate-release program provisions incorporated into Section 33-3-24); NMSA 1978, § 30-22-8.1 (1999) (escape from a community custody release program); UJI 14-2228B NMRA (escape from a penitentiary release program); UJI 14-2228C NMRA (escape from a community custody release program).

This instruction is to be used when a defendant is charged with escape from a prisoner-release program initiated in a jail or detention center; it is not to be used when the defendant is charged with other types of escape from jail, § 30-22-8, escape from a penitentiary inmate-release program, NMSA 1978, § 33-2-46, or escape from a community custody release program, § 30-22-8.1. *See State v. Grubb*, 2020-NMCA-003, ¶¶ 12-16, 455 P.3d 877 (stating UJI 14-2221 NMRA (escape from jail) and UJI 14-2228 NMRA (escape from an inmate-release program)—withdrawn and replaced with UJIs 14-2228A, 14-2228B, and 14-2228C NMRA in response to *Grubb*—cannot be used interchangeably); *see also Grubb*, 2020-NMCA-003, ¶ 16 (concluding that the 1999 version of "UJI 14-2228 was intended to be used when a prisoner escapes from a release program initiated in a jail rather than a penitentiary"); *but see State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (concluding that the 1997 version of UJI 14-2228 (escape; inmate-release program) used in a case where a defendant was committed to a state penitentiary, erroneously failed to require that the defendant's failure to return be willful in order to constitute a violation of Section 33-2-46).

Unlike escape from a community custody release program under Section 30-22.8.1, escape from a jail initiated prisoner-release program requires that the board of county commissioners or the governing body of a municipality approved the program established by the sheriff or jail administrator. *See* § 33-3-24; *State v. Duhon*, 2005-NMCA-120, ¶¶ 9-13, 138 N.M. 466, 122 P.3d 50 (distinguishing between a county-authorized community release program and a judicially-approved community custody release program); *compare* § 33-3-24, *with* § 30-22-8.1. Section 33-3-24 explicitly incorporates the provisions of Section 33-2-44, which provides that the release program only applies to work at paid employment in a private business or in public employment or to attend school. *See Grubb*, 2020-NMCA-003, ¶ 17 (explaining that release for "furlough purposes" was not one of the specific purposes authorized by Section 33-2-44 and there was no evidence to support instructing the jury on escape from jail using UJI 14-2228 in lieu of UJI 14-2221).

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

14-2228B. Escape; penitentiary release program; essential elements.[1]

For you to find the defendant guilty of escape from a penitentiary release program [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was committed to _____ (*identify institution*);

2. The defendant was released from _____ (*identify institution*) to _____ (*describe purpose for release*);

3. The defendant failed to return to confinement within the time fixed for the defendant's return;

4. The defendant's failure to return was willful, without sufficient justification or excuse;[3]

5. The defendant intended not to return within the time fixed;[3]

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is to be used for escape from a penitentiary inmate-release program established under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980). For escape from a county or municipal jail initiated prisoner-release program established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. For escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999), use UJI 14-2228C NMRA.

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

3. This element is necessary to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 33-2-46 (1980). The penitentiary inmate-release program is described in NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980).

Escape from a penitentiary is a second-degree felony. NMSA 1978, § 30-22-9 (1963). Escape from a penitentiary inmate-release program is a third-degree felony. Section 33-2-46. The essential elements of these statutes are different. Unless the prisoner was released for one of the specific limited purposes set out in Section 33-2-44, such as paid work or attending school, or Section 33-2-45, such as time to contact prospective employers or attend job or school interviews, UJI 14-2222 NMRA must be used instead of this instruction. *See State v. Grubb*, 2020-NMCA-003, ¶ 17, 455 P.3d 877 (stating that only the specific statutory purposes for release reduce the more serious offense of escape from a penitentiary to escape from an inmate-release program).

The penitentiary inmate-release enabling statute states that the program applies to prisoners "under sentence of confinement in the penitentiary." Section 33-2-43. Since its inception, Element 1 of UJI 14-2228 NMRA (now withdrawn) has used the term "committed." The Committee believes that decades-used term adequately informs the

jury, without the possibility of distracting the jury to consider or speculate about the defendant's prior sentence and without injecting sympathy or prejudice into the current case. *See, e.g.*, *State v. Brown*, 1997-NMSC-029, ¶¶ 12-13, 123 N.M. 413, 941 P.2d 494 (reiterating that information about the consequences of a current verdict invites jurors to "ponder matters that are not within their province" and may improperly inject sympathy and prejudice into the jurors' decision making (internal quotation marks and citation omitted)).

In 1999, the Committee added Element 4 of UJI 14-2228 (now withdrawn) to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66 (holding instruction at trial of penitentiary work release inmate convicted under NMSA 1978, Section 33-2-46 was defective by not requiring a finding that the defendant's failure to return on time was willful as well as intentional). That element is retained in this instruction. Element 5 is also required by the conclusion in *Rosaire*, 1997-NMSC-034, ¶¶ 11-12, that Section 33-2-46 requires both a willful failure to return and an intent not to return within the time prescribed.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

14-2228C. Escape; community custody release program; essential elements.[1]

For you to find the defendant guilty of escape from a community custody release program [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was charged with a [misdemeanor] [felony][3] offense[4];

2. The defendant was not on probation or parole;[4]

3. The defendant was committed to a judicially approved community custody release program;

4. Under the procedures and conditions of the program, the defendant was required to _____ (*describe the program requirement(s) allegedly violated*);

5. The defendant [failed to comply] [attempted to avoid complying][3] with the requirement to _____ (*describe the program requirement*) [by _____ (*describe the substantial step toward attempting to escape*)][5];

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is to be used for escape from a community custody release program under NMSA 1978, Section 30-22-8.1 (1999). For escape from a county or municipal jail-initiated prisoner-release program established under NMSA 1978, Section 33-3-24 (1981), use UJI 14-2228A NMRA. For escape from a penitentiary inmate-release program established under NMSA 1978, Sections 33-2-43 to -47 (1969, as amended through 1980), use UJI 14-2228B NMRA.

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

3. Use the applicable alternative.

4. Essential element, but rarely at issue; *see* Committee commentary.

5. For attempts to escape, specify the act(s) allegedly constituting a substantial step toward escape and give UJI 14-2801 NMRA following this instruction. For completed offenses, UJI 14-141 NMRA must be given following this instruction.

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-22-8.1 (1999); *see also* NMSA 1978, § 30-22-8 (1963) (escape from jail); NMSA 1978, § 33-2-46 (1980) (escape from a penitentiary inmate release program); NMSA 1978, § 33-3-24 (1981) (jail operated prisoner release program).

The charge pending against the defendant placed in the community custody release program controls the statutory punishment for escape from the program. *See* § 30-22-8.1(B), (C). Because Section 30-22-8.1 does not specify the degree or punishment for misdemeanor or felony escape, misdemeanor violations are punished as petty misdemeanors and felony violations are punished as fourth-degree felonies. *See* NMSA 1978, § 31-18-13 (1993). The fact the defendant faced a felony charge is an essential element of the offense. *State v. Sanchez*, 2019-NMCA-006, ¶ 10, 458 P.3d 428 ("For a defendant to be found guilty of felony escape from [a community custody release program] the state must show that a felony charge led to the defendant's commitment to the program."). *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also State v. Radosevich*, 2018-NMSC-028, ¶¶ 15-27, 419 P.3d 176 (applying *Apprendi* and holding that New Mexico's tampering with evidence statute cannot be constitutionally applied to impose greater punishment for committing tampering where the underlying crime is indeterminate than the punishment for committing tampering where the underlying crime is a misdemeanor).

The jury should not be told the nature of the predicate charge leading to the defendant's placement in the community custody release program. *See State v. Tave*, 1996-NMCA-056, ¶¶ 13-18, 122 N.M. 29, 919 P.2d 1094 (concluding that the trial court erred in admitting, as proof of felon in possession charge, the name and details of the prior felony), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110; *see also State v. Rackley*, 2000-NMCA-027, ¶ 19, 128 N.M. 761, 998 P.2d 1212 ("In an apparent effort to reduce the potential impact of evidence revealing the nature of his prior felonies [in a felon in possession trial], [the d]efendant stipulated to the fact of a prior, unidentified felony conviction.").

The Committee believes the requirement that the defendant not be on probation or parole when placed in a community correction release program is jurisdictional; the enabling statute specifically "exclud[es] a person on probation or parole." Section 30-22-8.1(A).

Section 30-22-8.1's requirement that the defendant was "lawfully committed" appears in other escape statutes. Section 30-22-8 (escape from jail); NMSA 1978, § 30-22-9 (1963) (escape from penitentiary). Since adoption of corresponding UJI 14-2221 NMRA (escape from jail) and UJI 14-2222 NMRA (escape from the penitentiary, UJI 14-2228 NMRA (escape; inmate-release program, which has been withdrawn and reconfigured in response to *State v. Grubb*, 2020-NMCA-003, 455 P.3d 877, has used the term "committed." The Committee believes that challenges to prima facie proof of lawful commitment are likely to be rare and that "committed" remains the appropriate term. *See Grubb*, 2020-NMCA-003, ¶ 19 (finding sufficient evidence for retrial where the state had presented a certified copy of an order revoking probation committing the defendant to the penitentiary and granting the defendant furlough—from which the jury "could reasonably conclude that [the d]efendant was committed to the [detention center] for transport to the Department of Corrections" (internal quotation marks omitted)); *see also State v. Starr*, 1917-NMSC-092, ¶¶ 15-16, 24 N.M. 180, 173 P. 674 (finding no error in admitting jail records and commitments showing the prisoners charged with escape had been lawfully committed to the county jail).

Unlike a jail prisoner release program under Section 33-3-24, a community custody release program under Section 30-22-8.1 does not require formal adoption by the board of county commissioners; it may simply be a set of defined procedures and conditions, "judicially approved" on a case-by-case basis by the judge setting terms of release. *See State v. Duhon*, 2005-NMCA-120, ¶ 11, 138 N.M. 466, 122 P.3d 50.

Escape from a community custody release program includes but is not limited to a day detention or reporting program, an electronic monitoring program, or a community tracking program. *See* § 30-22-8.1(A). The particular release program requirements imposed on the defendant and the defendant's alleged acts or omissions should be described in ordinary terms, with sufficient specificity to preclude double jeopardy.

Section 30-22-8.1(A) does not contain an intent requirement: "Escape from a community custody release program consists of a person . . . escaping or attempting to

escape from the community custody release program." Absent explicit language negating a mental state, the Legislature is presumed not to have intended strict liability. Criminal intent is presumed an essential element, especially where the punishment is a third- or fourth-degree felony. *See State v. Nozie*, 2009-NMSC-018, ¶¶ 25-26, 30, 146 N.M. 142, 207 P.3d 1119 (holding that third-degree aggravated assault on a peace officer and fourth-degree battery on a peace officer require knowledge that the victim was a peace officer); *see also State v. Valino*, 2012-NMCA-105, ¶¶ 15-16, 287 P.3d 372 (applying the *Nozie* requirement to battery on a health care worker where a misdemeanor battery charge is elevated to a fourth-degree felony). The Committee believes that this presumption against strict liability requires the jury to be instructed on general criminal intent using UJI 14-141 NMRA for completed escapes and attempt to commit a felony using UJI 14-2801 NMRA for attempts to escape.

Escape from a penitentiary inmate-release program requires that the prisoner "willfully" failed to return to confinement and also had "the intent not to return." Section 33-2-46. Neither of these requirements appear in escape from the community custody release program. Section 30-22-8.1. Unlike escape from a penitentiary release program, the courts have not addressed whether the community custody release statute requires proving the defendant's actions were without excuse or justification. *Cf. State v. Rosaire*, 1997-NMSC-034, ¶ 7, 123 N.M. 701, 945 P.2d 66 (finding that Section 33-2-46's explicit requirement of willfully "denotes the doing of an act without just cause or lawful excuse" (internal quotation marks and citation omitted)).

[Adopted by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

Willfulness is not an essential element of escape from a community custody release program (decided prior to the adoption of Rule 14-2228C NMRA). — Where, as a condition of release from jail during the course of a separate criminal proceeding, defendant was enrolled in a community custody release program, and where defendant, following an altercation with the custodian to whom defendant was released, fled the custodian's residence, and where defendant's community custody release program officer filed a criminal complaint charging defendant with escape from a community custody release program, and where, at trial, defendant argued that willfulness is an essential element of the crime of escape from a community custody release program and that the jury should be instructed accordingly, the district court did not err in denying defendant's requested instruction, because the plain language of NMSA 1978, § 30-22-8.1(A) indicates the legislature did not intend to include willfulness as an element of escape from a community custody release program. *State v. Coble*, 2023-NMCA-079, cert. denied.

Defendant was not entitled to a duress instruction. — Where, as a condition of release from jail during the course of a separate criminal proceeding, defendant was enrolled in a community custody release program, and where defendant, following an

altercation with the custodian to whom defendant was released, fled the custodian's residence, and where defendant's community custody release program officer filed a criminal complaint charging defendant with escape from a community custody release program, and where, at trial, defendant claimed that he was entitled to a duress instruction as an affirmative defense to escape from a community custody release program and that his trial counsel's failure to request such an instruction amounted to ineffective assistance of counsel or alternatively, the district court's failure to sua sponte instruct on duress amounted to fundamental error, the district court did not err in failing to sua sponte instruct the jury on duress and trial counsel was not ineffective for failing to request a duress instruction, because duress is a continuing offense, and there was no evidence that any claimed duress continued during the entire thirty-four day period while defendant remained voluntarily at large. Defendant, therefore, was not entitled to a duress instruction. *State v. Coble*, 2023-NMCA-079, cert. denied.

14-2229. Failure to appear; bail.

For you to find the defendant guilty of failure to appear as required by conditions of release [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) was released pending [trial] [an appeal] [a probation revocation proceeding][2] in a criminal action related to a [misdemeanor or petty misdemeanor] [felony][2] offense on the condition that _____ (*name of defendant*) appear as required by the court;

2. _____ (*name of defendant*) failed to appear as required by the court;

3. The defendant's failure to appear was willful, without sufficient justification or excuse;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable alternative.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.29 NMSA 1978; UJI 14-2229 SCRA; as amended, effective January 1, 1999; as amended by Supreme Court Order No. 22-8300-035, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 31-3-9 (1999).

Section 31-3-9, provides that the defendant must willfully fail to appear. The third element of this instruction was added in 1998 to comply with *State v. Rosaire*, 1997-NMSC-034, 123 N.M. 701, 945 P.2d 66.

The pending charge or conviction on which the defendant was released controls the statutory punishment for failure to appear. *See* § 31-3-9(A) (fourth degree felony), (B) (petty misdemeanor). Whether the defendant was released in connection with a felony proceeding or a misdemeanor or petty misdemeanor proceeding is an element for the jury to determine. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also State v. Radosevich*, 2018-NMSC-028, ¶¶ 29-30, 419 P.3d 176 (instructing the district court to sentence for tampering with evidence of an indeterminate offense because the jury did not find beyond a reasonable doubt the level of the underlying offense); *State v. Sanchez*, 2019-NMCA-006, ¶ 10, 458 P.3d 428 ("For a defendant to be found guilty of felony escape from [a community custody release program] the state must show that a felony charge led to the defendant's commitment to the program.").

The jury does not need to know the specific charge or conviction connected to the defendant's failure to appear. *See State v. Tave*, 1996-NMCA-056, ¶¶ 14-17, 122 N.M. 29, 919 P.2d 1094 (concluding that there was error in admission of the name and details of the prior felony as proof of the charge of felon in possession of a firearm), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110; *State v. Rackley*, 2000-NMCA-027, ¶¶ 18-19, 128 N.M. 761, 998 P.2d 1212 ("In an apparent effort to reduce the potential prejudicial impact of evidence revealing the nature of his prior felonies [in a felon in possession of a firearm trial], [the d]efendant stipulated to the fact of a prior, unidentified felony conviction.").

[Amended November 12, 1998; as amended by Supreme Court Order No. 22-8300-035, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-035, effective December 31, 2022, added probation revocation proceedings to the list of alternatives for which the defendant was required to appear by the court, provided alternatives of pending charges or convictions on which the defendant was released, revised the Use Notes, and revised the committee commentary; in Element 1, after "[an appeal]", added "[a probation revocation proceeding]", and after "criminal action", added "related to a [misdemeanor or petty misdemeanor] [felony] offense"; and added Use Note 2.

The 1998 amendment, effective January 1, 1999, amended this instruction to conform language with 31-3-9 NMSA 1978, rewriting Elements 1 and 2, adding present Element 3, and redesignating former Element 3 as Element 4.

Cross references. — *See* Section 31-3-9 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Escape or prison breach as affected by means employed to effect it, 96 A.L.R.2d 520.

Part C
Obstruction of Justice

14-2240. Harboring a felon; essential elements.

For you to find the defendant guilty of harboring a felon [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

[1. _____ (*name of defendant*) was a not a husband or wife, parent or grandparent, child or grandchild, or brother or sister, by consanguinity or affinity, of _____ (*name of felon*)];[2]

2. _____ (*name of felon*) committed the crime of _____;[3]

3. _____ (*name of defendant*) knew that _____ (*name of felon*) had committed the crime of _____;[3]

4. The defendant [concealed][4] [gave aid to] _____ (*name of felon*), with the intent that _____ (*name of felon*) [escape][4] [avoid arrest, trial, conviction or punishment] for the crime of _____;[3]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. This bracketed element should only be given if there is a factual issue as to the defendant's relationship to the felon. *See* NMSA 1978, § 30-22-4 (1963) (exempting certain relatives from criminal liability for harboring or aiding a felon).

3. Identify the felony committed. If the jury has not already been given the instruction pertaining to the felony committed, the essential elements of applicable offense must be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. Use only the applicable bracketed elements established by the evidence.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-22-4 (1963). "[Section 30-22-4] requires that the state prove that a specific felony has been committed, whether or not the perpetrator has been arrested, prosecuted, or tried." *State v. Gardner*, 1991-NMCA-058, ¶ 14, 112 N.M. 280, 814 P.2d 458. Therefore, "in a prosecution for harboring a felon, the State may even be required to conduct a trial-within-a trial in order to establish that the person harbored was a felon." *State v. Maes*, 2003-NMCA-054, ¶ 6, 133 N.M. 536, 65 P.3d 584 (citing *Gardner*, 1991-NMCA-058). A conviction under this statute was upheld by the supreme court upon evidence that the defendant had witnessed the crime and then allowed the perpetrator to hide in her home. *See State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Section 30-22-4 provides that certain relatives, either by consanguinity or affinity, may harbor or aid a felon with impunity. The supreme court has held that the enumeration of certain persons does not deny a person who is only "living" with another person the equal protection of the law. *See Lucero*, 1975-NMSC-061, ¶ 19.

[As amended by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 3, added the last sentence.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-005, effective December 31, 2014, stated that the defendant is not the spouse, parent, grandparent, or sibling of the felon and that the felon committed the designated crime; added Paragraphs 1 through 3; restated former Paragraph 2 as current Paragraph 3; in Paragraph 4, after "[avoid arrest, trial, conviction or punishment]", added "for the crime of _____"; and in the Use Note, added Paragraphs 2 and 3 and deleted former Paragraph 3 which required that the felony committed be identified.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking and Rescue § 6.

Charge of harboring or concealing or assisting one charged with crime to avoid arrest, predicated upon financial assistance, 130 A.L.R. 150.

30A C.J.S. Escape §§ 26, 27; 67 C.J.S. Obstructing Justice § 14.

14-2241. Tampering with evidence; essential elements.

For you to find the defendant guilty of tampering with evidence [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [destroyed][2] [changed] [hid] [fabricated] [placed] _____ (*identify physical evidence*);

2. By doing so, the defendant intended to [prevent the apprehension, prosecution, or conviction of _____ (*name*) for the crime of _____ (*identify crime*)[3], [4]][2] [create the false impression that _____ (*name*) had committed the crime of _____ (*identify crime*)[4]];

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

You must complete the special verdict [form][2] [forms] to indicate your findings and report your determination.[3]

USE NOTES

1. If the defendant is charged with more than one count of tampering with evidence, this instruction must be repeated for each count. Likewise, if the defendant is charged with one count of tampering with evidence but the tampering with evidence is alleged to involve more than one crime, this instruction must be repeated for each category of crime for which tampering with evidence is alleged to have been committed. *See* Use Note 3.

2. Use only the applicable bracketed elements established by the evidence.

3. If the defendant is charged with tampering with evidence involving multiple crimes, list all crimes. If the defendant is charged with tampering with evidence of crimes that fit into more than one category as defined in NMSA 1978, Section 30-22-5(B), the special verdict in UJI 14-6019 NMRA must be repeated for each category of offense. For example, if the defendant is charged with tampering with evidence involving three crimes, two of which fit in category one and the third that fits in category two, the jury should receive a special verdict instruction for the category one crimes and a separate instruction for the category two crime.

4. If a violation for probation or parole is at issue, the instruction must identify the underlying offense for which the defendant was serving probation or parole.

[As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court

Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, § 30-22-5. A verdict in a criminal case must be unanimous. N.M. Const. art. II, § 12. Because the permissible punishment range under Section 30-22-5 depends on the highest crime for which tampering with evidence is committed, the jury must be given the special verdict in UJI 14-6019 NMRA for each crime for which tampering with evidence is alleged to have been committed. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond reasonable doubt).

To comport with *Apprendi*, New Mexico cases previously provided that, where no special verdict clarified the associated crime, the "indeterminate crime" provision from Section 30-22-5(B)(4) applied, rendering the tampering penalty a fourth-degree felony. *See State v. Alvarado*, 2012-NMCA-089, __ P.3d __, *overruled by State v. Radosevich*, 2018-NMSC-028, ¶ 34, 419 P.3d 176. However, in *Radosevich*, this approach was repudiated because the associated crime in that case could well have been a misdemeanor offense and no special verdict form was submitted to the jury. *See* 2018-NMSC-028, ¶¶ 2-6, 20 (discussing the tension between constitutional principles and prior precedent).

Under Section 30-22-5(B)(3), tampering with evidence of a misdemeanor is punishable only as a petty misdemeanor. As a result, the Supreme Court found that application of the "indeterminate crime" provision to impose felony liability would violate *Apprendi* and due process. *Radosevich*, 2018-NMSC-028, ¶ 24. In cases where the associated crime is indeed "indeterminate," *Radosevich* limited tampering punishment to a petty misdemeanor. *Id*. ¶ 30 (overruling *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754).

Thus, under *Radosevich*, felony liability for tampering may only be accomplished through proper use of UJI 14-6019 to ensure express jury findings supporting the felony tampering provisions. *See* UJI 14-2241, Use Note 3. For tampering with evidence of a probation violation, *Radosevich* held that the penalty tracks the highest "offense of conviction for which the defendant is on probation." *Id*. ¶ 31. *Accord* UJI 14-2241, Use Note 4.

[As amended by Supreme Court Order No. 11-8300-037, effective for cases pending or filed in the district court on or after November 18, 2011; as amended by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, revised the Use Notes, and revised the committee commentary; in Use Note 3, after “involving multiple crimes”, added “, list all crimes. If the defendant is charged with tampering with evidence of crimes”, after “one category”, added “as defined in NMSA 1978, Section 30-22-5(B)”, and after “category of offense”, deleted “as defined in Section 30-22-5(B) NMSA 1978”; and in Use Note 4, after “probation or parole.”, deleted “*See State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754 (upholding tampering with evidence conviction for tampering with urine specimen required under terms of defendant’s probation).”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013, required that separate instructions be given for each crime with respect to which defendant was charged with tampering with evidence and that the crime be identified in the instruction; in Paragraph 2, after “conviction of ____ (name)” added “for the crime of ____ (identify crime)” and after “committed the crime”, added “of ____ (identify crime)”; added the last sentence of the instruction; and in the Use Note, in Paragraph 1, deleted the former sentence that instructed the user to insert the count number if more than one count was charged, added the current language of Paragraph 1, and added Paragraphs 3 and 4.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-037, effective November 18, 2011, required that the physical evidence be identified in Paragraph 1 by adding "(identify physical evidence)" at the end of Paragraph 1 of the instruction and deleted former Paragraph 3 of the Use Notes which required the user to "Identify the physical evidence"; and in Paragraph 2, added "By doing so" to indicate that by committing the act described in Paragraph 1 of the instruction, the defendant intended the consequences described in Paragraph 2 of the instruction.

Factors that determine punishment are elements of tampering with evidence. — The factors listed in Subsection B of Section 30-22-5 NMSA 1978 are elements of the offense of tampering with evidence, rather than mere sentencing factors. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Where, after defendant shot and killed the victim, defendant put the gun in a crawl space under the house; defendant was charged with second-degree murder and tampering with evidence of a capital crime or a first- or second-degree felony; and the jury instruction on tampering with evidence required the jury to find that defendant hid the gun in an effort to avoid being apprehended, prosecuted, or convicted, but did not require the jury to find that the evidence that was tampered with related to a first- or second-degree felony, the jury instruction omitted an essential element of the crime that the gun was evidence of a capital crime or a first- or second-degree felony and violated defendant’s right under the Sixth and Fourteenth Amendments to have a jury find all elements of the offense beyond a reasonable doubt. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Failure to give instruction on factors that determine punishment was not fundamental error. — Where defendant testified that defendant shot the victim and then placed the gun under the house; defendant was charged with second-degree murder and tampering with evidence of a capital crime or a first- or second-degree felony; and the jury instruction on tampering with evidence did not require the jury to find that the evidence that was tampered with related to a capital crime or a first- or second-degree felony; and the jury found that defendant hid the gun with intent to prevent apprehension, prosecution, or conviction and that the act of shooting and killing the victim was second-degree murder, although the omission in the jury instruction of the essential element that the gun was evidence of a capital crime or a first- or second-degree felony violated defendant's rights under the Sixth and Fourteenth Amendments, the omission was not fundamental error because the facts at trial established that the tampering related to a second-degree felony. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Standard for sufficiency of evidence to a support tampering conviction. — Absent either direct evidence of a defendant's specific intent to tamper or evidence from which the factfinder may infer such intent, the evidence cannot support a tampering conviction. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Where the state alleged that defendant tampered with evidence based on the fact that defendant had a weapon at the scene of the crime, defendant used the weapon to kill someone, the weapon was removed from the scene of the crime, and the weapon was never recovered, the evidence was insufficient as a matter of law to support defendant's conviction of tampering with evidence because the state cannot convict a defendant of tampering with evidence simply because evidence that must have once existed cannot be found. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Sufficient evidence to support a tampering conviction. — Where defendant's accomplices testified that the knife used to kill the victim belonged to defendant, and that after defendant learned that the victim had been killed, defendant let her accomplices into her house and allowed them to shower and change out of their bloody clothes, and that one of the accomplices cleaned the blood off of defendant's knife in defendant's restroom and in defendant's presence, and where there was evidence that the accomplice used bleach from defendant's home to clean the knife, the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that defendant intended the destruction of evidence, including the removal of the victim's blood from her knife, in order to avoid being prosecuted for murder, and that defendant helped the accomplice clean the knife by providing the accomplice with space and chemicals to do so. *State v. Montoya*, 2016-NMCA-098, cert. denied.

Unconstitutional application of tampering with evidence statute. — Section 30-22-5(B)(4) NMSA 1978 cannot be constitutionally applied to impose greater punishment for commission of tampering where the underlying crime is indeterminate than the punishment prescribed under 30-22-5(B)(3) NMSA 1978 where the underlying crime is a misdemeanor or petty misdemeanor. *State v. Radosevich*, 2018-NMSC-028, *rev'g*

2016-NMCA-060, 376 P.3d 871, and *overruling State v. Jackson*, 2010-NMSC-032, 237 P.3d 754 and *State v. Alvarado*, 2012-NMCA-089.

Where defendant was convicted of fourth-degree tampering with evidence pursuant to 30-22-5(B)(4) NMSA 1978, although the tampering jury instruction did not identify an underlying offense, defendant's conviction for fourth-degree felony tampering with evidence was a denial due process of law, because to impose a greater penalty for commission of tampering pursuant to Subsection (B)(4), where the evidence does not establish the underlying offense, than for commission of tampering pursuant to 30-22-5(B)(3) NMSA 1978, where the evidence establishes an underlying misdemeanor offense, is both a denial of due process of law and a violation of the accused's right to have a jury determine guilt beyond a reasonable doubt on every element that may establish the range of permissible penalties. *State v. Radosevich*, 2018-NMSC-028, *rev'g* 2016-NMCA-060, 376 P.3d 871, and *overruling State v. Jackson*, 2010-NMSC-032, 237 P.3d 754 and *State v. Alvarado*, 2012-NMCA-089.

Sentencing under the "indeterminate crime" provision. — When the state seeks a conviction under Section 30-22-5 NMSA 1978, tampering with evidence of a capital, first, or second degree felony, a determination that defendant tampered with evidence related to a capital, first, or second degree felony must be made by the jury. Absent this determination, the court is limited to sentencing defendant under the "indeterminate crime" provision. *State v. Alvarado*, 2012-NMCA-089, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where defendant was charged with first degree murder and tampering with evidence; and the jury acquitted defendant of murder and convicted defendant of tampering with evidence, defendant was properly sentenced under the indeterminate crime provision of Section 30-22-5 NMSA 1978. *State v. Alvarado*, 2012-NMCA-089, *overruled by State v. Radosevich*, 2018-NMSC-028.

Failure prove intent. — Where the state alleged that the defendant had a gun at the scene of the crime, a gun was used to murder the victim, the murder weapon was removed from the scene of the murder, and the murder weapon was never recovered, the state failed to meet its burden of proof because the state failed to offer direct evidence of the defendant's specific intent to tamper with evidence or evidence of an overt act from which the jury may infer such intent. *State v. Silva*, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

Insufficient evidence. — Where defendant was convicted of tampering with a gun that defendant had used to shoot into an occupied house; the state provided evidence that defendant took the gun when defendant left the crime scene; the state offered no evidence that defendant actively hid or disposed of the gun; the police recovered the gun from another person during a traffic stop a few weeks after the shooting; the state did not offer any evidence regarding how the other person acquired possession of the gun; and the only evidence that defendant tampered with the gun was that the police could not find the gun when they searched defendant's house, the evidence was

insufficient to support defendant's conviction. *State v. Arrendondo,* 2012-NMSC-013, 278 P.3d 517.

Where, in a case in which the victim died from multiple stab wounds, the only evidence presented by the state was that a knife or sharp object existed, that defendant's clothing might have been blood stained and that ten days passed between the murder and defendant's arrest, but there was no evidence of an overt act to destroy or hide any knife or blood stained clothing, the evidence was insufficient to support a finding beyond a reasonable doubt of intent by defendant to disrupt the police investigation or that defendant actively destroyed or hid evidence. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Sufficient evidence of tampering with evidence. — Where defendant lived with the victim for approximately one and a half months before the victim disappeared; a few weeks later, the victim's decomposed body was discovered wrapped in a blue air mattress and sheets, and covered with a mattress in an alley approximately 500 feet from defendant's apartment; defendant's parent testified that the parent sent a blue air mattress and a set of sheets to defendant; grid marks on the air mattress resembled the grid marks of a shopping cart; there was a shopping cart at the scene; shopping carts were found in defendant's apartment; DNA found on a pair of jeans near the body provided a possible link between the body and defendant; and the victims' blood was found on the carpet in defendant's apartment, the evidence was sufficient to permit the jury to find defendant guilty of tampering with evidence. *State v. Schwartz*, 2014-NMCA-066, cert. denied, 2014-NMCERT-006.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 C.J.S. Obstructing Justice §§ 8 to 10.

Part D
Prisoners

14-2250. Assault by a prisoner; essential elements.

For you to find the defendant guilty of assault by a prisoner [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe act, threat or menacing conduct)*;

2. This caused _____ *(name of officer, employee or visitor)*[2] to believe he was about to be killed or to receive great bodily harm[3];

3. A reasonable person in the same circumstances would have had the same belief;

4. At the time, the defendant was confined at _____[4];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. If there is a question of fact as to whether victim was an officer, employee or visitor, a special instruction must be drafted.

3. The definition of "great bodily harm," UJI 14-131, must also be given.

4. Identify the place of custody or confinement.

Committee commentary. — *See* Section 30-22-17A NMSA 1978. This crime, one of four different crimes designated as an assault by a prisoner, is in effect an assault by threat or menacing conduct putting one in apprehension of receiving an aggravated battery. Compare with UJI 14-305 and 14-323.

14-2251. Aggravated assault by a prisoner; attempting to cause great bodily harm; essential elements.

For you to find the defendant guilty of aggravated assault by a prisoner attempting to cause great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [tried to][2] _____ *(describe act and insert name of victim)*[3] who was an [officer] [employee] [visitor][4] at _____[5];

2. The defendant intended to cause great bodily harm[6] to _____ *(name of officer, employee or visitor)*;

3. At the time, the defendant was confined at _____[5];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use bracketed material only if no battery occurs.

3. Use laymen's language to describe the touching or application of force.

4. Use only the applicable bracketed element established by the evidence.

5. Identify place of custody or confinement.

6. The definition of "great bodily harm," UJI 14-131, must also be given.

Committee commentary. — *See* Section 30-22-17B NMSA 1978. This crime is essentially as assault by an attempt to commit a modified aggravated battery. Compare UJI 14-304 and UJI 14-323.

14-2252. Aggravated assault by a prisoner; causing great bodily harm; essential elements.

For you to find the defendant guilty of aggravated assault by a prisoner causing great bodily harm [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ *(describe act and insert name of victim)*[2] who was an [officer][3] [employee] [visitor] at _____[4];

2. The defendant caused great bodily harm[5] to _____ *(name of officer, employee or visitor)*;

3. At the time, the defendant was confined at _____[4];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use laymen's language to describe the touching or application of force.

3. Use only the applicable bracketed element established by the evidence.

4. Identify the place of custody or confinement.

5. The definition of "great bodily harm," UJI 14-131, must also be given.

Committee commentary. — *See* Section 30-22-17B NMSA 1978. This crime is essentially a modified aggravated battery. Compare UJI 14-323.

14-2253. Assault by a prisoner; taking a hostage; essential elements.

For you to find the defendant guilty of assault by a prisoner taking a hostage [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [confined][2] [restrained] _____ *(name of victim)* who was an [officer][2] [employee] [visitor] at _____[3];

2. The defendant intended to use _____ *(name of victim)* as a hostage;

3. At the time, the defendant was confined at _____[3];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable bracketed element established by the evidence.

3. Identify the place of custody or confinement.

Committee commentary. — *See* Section 30-22-17C NMSA 1978. Although included within the statute describing assault by a prisoner, this crime is more nearly like the crime of kidnapping. The specific intent to use the person confined or restrained as a hostage probably indicates that the crime is committed for the purpose of gaining escape.

14-2254. Possession of a deadly weapon by a prisoner; essential elements.

For you to find the defendant guilty of possession of a deadly weapon by a prisoner [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was in custody or confinement[2] at _____[3];

2. The defendant was in possession[4] of a [_____ *(a deadly weapon)*[5]].

[OR]

The defendant possessed a _____ *(name of object)*. A _____ *(name of object)* is as deadly weapon only if you find

that if used as a weapon, a _____ *(name of object)* could cause death or great bodily harm[6]][7];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If there is a question of fact involving the lawfulness of the custody or confinement, an appropriate instruction must be prepared.

3. Identify the place of custody or confinement.

4. Use UJI 14-130 if possession is in issue.

5. Insert the name of the weapon. Use this alternative only if the deadly weapon is specifically listed in Section 30-1-12B NMSA 1978.

6. UJI 14-131, the definition of "great bodily harm", must also be given.

7. This alternative is given only if the instrument or object possessed is not specifically listed as a deadly weapon in Section 30-1-12B NMSA 1978.

[As amended, effective February 1, 2000.]

Committee commentary. — The committee rewrote this instruction in 1999 to apply only to charges that a prisoner possessed a deadly weapon. The committee drafted a new Instruction 14-2255 for cases in which the defendant is charged with possession of an explosive by a prisoner.

This instruction was revised in 1999 to address the issue raised in *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861 and *State v. Bonham*, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154.

ANNOTATIONS

The 1999 amendment, effective February 1, 2000, in the first pagagraph, substituted "a deadly weapon" for "[a deadly weapon] [an explosive]"; rewrote element 2 which read: "The defendant was in possession of .....;[5]" and, in the Use Note, rewrote Paragraph 5 to correspond to the amendment of element 2, and renumbered the paragraphs.

Cross references. — *See* Section 30-22-16 NMSA 1978.

14-2255. Possession of an explosive by a prisoner; essential elements.

For you to find the defendant guilty of possession of an explosive by a prisoner [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was in custody or confinement[2] at _____[3];

2. The defendant was in possession[4] of [_____ *(name of explosive)*[5]].

[OR]

A _____ *(name of substance)* is an explosive substance if it is a chemical compound or mixture, the primary purpose of which is to explode][6];

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If there is a question of fact involving the lawfulness of the custody or confinement, an appropriate instruction must be prepared.

3. Identify the place of custody or confinement.

4. Use UJI 14-130 if possession is in issue.

5. Insert the name of the explosive. Use this alternative only if it is an explosive specifically listed in Section 30-7-18 NMSA 1978.

6. This alternative is given only if the item possessed is not specifically listed in Section 30-7-18 NMSA 1978.

[Approved, effective February 1, 2000.]

Committee commentary. — The committee drafted this new instruction to apply only to charges that a prisoner possessed an explosive. Although the term "explosive" is defined in the criminal code, it applies only to Section 30-7-17 NMSA 1978. The definition in this instruction was modified after the statutory definition found in Section 30-7-18 NMSA 1978.

ANNOTATIONS

Cross references. — *See* Section 30-22-16 NMSA 1978.

Recompilations. — Former Instruction 14-2255, relating to furnishing drugs or liquor to a prisoner, was recompiled as Instruction 14-2256, effective February 1, 2000.

14-2256. Furnishing drugs or liquor to a prisoner; essential elements.

For you to find the defendant guilty of furnishing [narcotic drugs][1] [intoxicating liquor] to a prisoner [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant furnished _____ *(name of narcotic drug or intoxicating liquor)* to _____ *(name of prisoner)*;

2. _____ *(name of prisoner)* was in custody or confinement;[3]

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

USE NOTES

1. Use only the applicable bracketed element established by the evidence.

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

3. If there is a question of fact involving the lawfulness of the custody or confinement, an appropriate instruction must be prepared.

[14-2255 NMRA; as recompiled, effective February 1, 2000.]

Committee commentary. — *See* Section 30-22-13 NMSA 1978.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 72 C.J.S. Prisons § 22.

CHAPTER 23
(Reserved)

CHAPTER 24
Witnesses

14-2401. Bribery of a witness by giving anything of value.

For you to find the defendant guilty of bribery of a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of witness)* was [a witness][2] [likely to become a witness] in a [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

2. The defendant knowingly [gave] [or] [offered to give] _____ *(describe item of value)* to _____ *(name of witness)* for the purpose of causing _____ *(name of witness)* [to testify falsely] [or] [to abstain from testifying] to any fact in the [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

[3. _____ *(name of proceeding)* was an official proceeding;][3]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed alternatives.

3. This alternative must be given if the official proceeding was not a judicial, administrative or legislative proceeding.

[Approved, effective October 1, 2001.]

ANNOTATIONS

Cross references. — *See* Section 30-24-3A(1) NMSA 1978.

14-2402. Intimidation or threatening a witness.

For you to find the defendant guilty of intimidating or threatening a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ *(name of witness)* was a [witness][2] [person likely to become a witness] in a [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

2. The defendant knowingly [intimidated] [or] [threatened] _____ *(name of witness)* for the purpose of [preventing _____ *(name of witness)* from testifying to any fact] [causing _____ *(name of witness)* to abstain from testifying] [or] [causing _____ *(name of witness)* to testify falsely] in the [judicial proceeding] [administrative proceeding] [legislative proceeding] [or] [_____ *(name of official proceeding)*];

[3. _____ *(name of proceeding)* was an official proceeding;][3]

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use applicable bracketed alternatives.

3. This alternative must be given if the official proceeding was not a judicial, administrative or legislative proceeding.

[Approved, effective October 1, 2001.]

ANNOTATIONS

Insufficient evidence of intimidation or threatening of a witness. — Where defendant was charged with criminal sexual penetration of a minor and intimidation or threatening of a witness, and where the State relied on testimony elicited from the victim that defendant's son called her on the telephone after the incident and threatened her, there was insufficient evidence to support defendant's conviction for intimidation or threatening of a witness, because the State did not present any evidence that defendant helped or encouraged his son to intimidate or threaten the victim, nor did it establish that defendant requested his son place the call to the victim or was even aware that his son had called the victim. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Cross references. — *See* Section 30-24-3A(2) NMSA 1978.

14-2403. Intimidation of a witness to prevent reporting.

For you to find the defendant guilty of intimidation of a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly [intimidated] [threatened] [gave _____ *(describe item given)*] [or] [offered to give a

_____ *(describe item offered to be given)*] with the intent to keep _____ *(name of witness)* from truthfully reporting to [a law enforcement officer] [or] [any agency that is responsible for enforcing criminal laws] information relating to:

[the commission or possible commission of _____ *(name of felony)*[2];]

[a violation of conditions of probation;]

[a violation of conditions of parole;] [or]

[a violation of conditions of release pending judicial proceedings;]

2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction, generally worded as follows:

"In New Mexico, the elements of the crime of _____ *(name of felony)* are as follows: _____ *(summarize elements of the felony)*". *See State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276.

[Approved, effective October 1, 2001.]

ANNOTATIONS

Sufficient evidence of intimidation of a witness. — In defendant's trial for criminal sexual contact of a minor and intimidation of a witness, where, in response to the prosecutor's leading questions, the nine-year-old child testified that defendant told the child not to tell anyone what happened, that defendant said that if the child told someone, defendant would take the child far away and leave him there, and that the child was afraid of defendant, there was a factual basis upon which the jury could conclude that defendant threatened the child, and the jury could reasonably infer that defendant intimidated the child with the intent to keep him from reporting the incident to law enforcement. *State v. Luna*, 2018-NMCA-025, cert. denied.

Sufficient evidence of bribery of a witness. — Where defendant was charged with criminal sexual penetration of a minor and bribery of a witness, and where the State relied on testimony elicited from the victim that after the assault, defendant threw her

pants at her, instructed her to put them on, and stated, “remember, if you say anything, I’ll get you again,” there was sufficient evidence to prove beyond a reasonable doubt that defendant intended to keep the victim from truthfully reporting to a law enforcement officer or any agency of governing information relating to the commission of the felony of criminal sexual penetration. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Cross references. — *See* Section 30-24-3A(3) NMSA 1978.

14-2404. Retaliation against a witness.

For you to find the defendant guilty of retaliation against a witness [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

[1. The defendant knowingly engaged in conduct that caused:

[[bodily injury to _____ *(name of person)*] [or]

[damage to the tangible property of _____ *(name of person)*

[OR]

[1. The defendant knowingly threatened:

[bodily injury to _____ *(name of person)*] [or]

[damage to the tangible property of _____ *(name of person)*];

2. The defendant engaged in the conduct with the intent to retaliate against _____ *(name of witness)* for providing any information to a law enforcement officer relating to:

[the commission or possible commission of _____ *(name of felony)*[2];] [or]

[a violation of conditions of probation;] [or]

[a violation of conditions of parole;] [or]

[a violation of conditions of release pending judicial proceedings;]

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction, generally worded as follows: "In New Mexico, the elements of the crime of _____ *(name of felony)* are as follows: _____ *(summarize elements of the felony)*". *See State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276.

[Approved, effective October 1, 2001.]

ANNOTATIONS

Cross references. — *See* Section 30-24-3(B) NMSA 1978.

CHAPTER 25
Perjury and False Affirmations

14-2501. Perjury; essential elements.

For you to find the defendant guilty of perjury [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made a false statement under oath or affirmation to the _____[2];

2. The defendant knew the statement to be untrue;

3. The false statement was material to the issue or matter involved in the [judicial] [administrative] [legislative] [or] [official] proceeding, which means the statement had a natural tendency to influence the decision of the _____[2];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Insert the specific name of the judicial, administrative, legislative or other official body before which the statement was made.

Committee commentary. — The 1997 amendment of this instruction added element 3 to make the materiality of the false statement a jury question. This is required by the sixth amendment right to a jury trial. *See United States v. Gaudin,* 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).

ANNOTATIONS

The 1997 amendment, effective August 1, 1997, made stylistic changes in Paragraphs 1 and 2, added Paragraph 3 and redesignated former Paragraph 3 as Paragraph 4, and rewrote Use Note 2 which formerly provided that the issue of materiality is a matter of law to be decided by the judge.

Cross references. — *See* Section 30-25-1 NMSA 1978.

Materiality essential element of perjury. — Under the Fifth and Sixth Amendments of the United States constitution, a defendant is entitled to have the question of materiality submitted to the jury, and *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256 and *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 546 are overruled to the extent they hold that materiality is an element for the trial court to decide as a matter of law. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury - state cases, 41 A.L.R.5th 1.

CHAPTER 26 and 27
(Reserved)

CHAPTER 28
Initiatory Crimes; Accomplices

Part A
Attempt Crimes

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

For you to find the defendant guilty of an attempt to commit the crime of _____[1] [as charged in Count _____],[2] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of _____;[1]

2. The defendant began to do an act which constituted a substantial part of the _____[1] but failed to commit the _____;[1]

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

USE NOTES

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

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

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

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

This instruction sets forth the essential elements of an attempt to commit a felony. The instruction should be given only when there is sufficient evidence to establish an attempted crime which failed to be completed. In *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App. 1971), *cert. denied*, 82 N.M. 534, 484 P.2d 754 (1971), the court rejected the defendant's claim that a jury should always be instructed on attempt as a lesser offense, stating that when there is no evidence of failure to complete the crime such an instruction presents a false issue.

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

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

There is no crime of attempt to commit a felony when the underlying charge upon which the attempt is based has the element of negligence or recklessness, since the first

element has an intent requirement. *See* committee commentary following UJIs 14-210 NMRA and 14-211 NMRA, second degree murder, which refer to *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611.

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

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020, in Use Note 1, added the last sentence.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-039, effective December 31, 2010, in the committee commentary, changed "Section 30-28-1 NMSA 1978" to "NMSA 1978, § 30-28-1 (1963)"; and added the last paragraph.

An instruction to the jury that the defendant must have intended to commit the crime of second degree murder to be guilty of attempted second degree murder adequately informed the jury of the issue of intent and enabled the jury to properly reach its verdict. *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611. cert. granted, 2007-NMCERT-11.

Attempt to manufacture methamphetamine. — The jury was properly instructed that, to convict defendant of an attempt to manufacture methamphetamine, it had to find beyond a reasonable doubt that defendant intended to commit the crime of manufacturing methamphetamine and that she began to do an act which constituted a substantial part of the manufacturing but failed to commit the act of manufacturing. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010.

This instruction may be modified to fit the evidence offered at trial and the theory on which the defendant's culpability rests, e.g., doctrine of transferred intent in charge of attempted murder by poison. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 110 to 113.

22 C.J.S. Criminal Law §§ 74 to 77.

Part B
Conspiracy

14-2810. Conspiracy; single or multiple objectives; essential elements.

For you to find the defendant guilty of conspiracy to commit _____[1] [or _____ [or _____]],[2] [as charged in Count _____],[3] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant and another person by words or acts agreed together to commit _____;[1] [or _____ [or _____]];[2]

[2. That other person was not a state or federal agent acting in the agent's official capacity at the time];[4]

[3. The conspiracy alleged in this Count must be separate, distinct, and not a continuation of Count _____];[5]

4. The defendant and the other person intended to commit _____[1] [or _____ [or _____]];[2]

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. For a conspiracy with a single objective, insert the name of the felony. Unless the court has instructed on the essential elements of the named felony, give the essential elements of the named felony, other than venue, immediately after this instruction.

2. For a conspiracy to commit multiple felonies, insert the names of the felonies in the alternative. Unless the court has instructed on the essential elements of the named felonies, give the essential elements of the named felonies, other than venue, immediately after this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. Where the state charges multiple objectives, the jury must unanimously agree about which of the named felonies, if any, was the object of the conspiracy and the unanimity and special verdict instructions, UJI 14-2810A NMRA and UJI 14-6019B NMRA, must be given.

3. Insert the count number if more than one count is charged.

4. Insert bracketed language if the co-conspirator's status as a governmental agent is an issue.

5. Insert bracketed language if multiple conspiracy counts are charged and identify all other conspiracy counts. UJI 14-2810B NMRA must also be given.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* NMSA 1978, § 30-28-2.

This instruction sets forth the essential elements of the crime of conspiracy. The offense is complete when the defendant combines with another for felonious purpose. In New Mexico, as at common law, no overt act in furtherance of the conspiracy need be proved. 4 *Wharton's Criminal Law* § 681 (15th ed. 2014); Perkins, *Criminal Law* 616 (2d ed. 1969); *see State v. Gallegos*, 2011-NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655 (citing *State v. Lopez*, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 (no overt act required) and *State v. Villalobos*, 1995-NMCA-105, ¶ 11, 120 N.M. 694, 905 P.2d 732 ("conspiracy is complete when the agreement is reached")).

Because Section 30-28-2 links the penalty for conspiracy to the penalty for the felony object(s) of the conspiracy, when the State charges multiple objectives that would result in differing penalties, the general verdict form, UJI 14-6014 NMRA, is not sufficient. Instead, UJI 14-2810A NMRA and a special verdict, UJI 14-6019B, should be used to ensure jury unanimity beyond a reasonable doubt regarding *which* felonies, if any, the defendant agreed to commit. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts—other than prior convictions—that increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt); *Gallegos*, 2011-NMSC-027, ¶ 53 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed.)

New Mexico law appears to accept that a defendant cannot be found guilty of conspiracy where the agreement is solely with an agent of the State, such as an undercover officer, an informant, or a person who is a de facto agent, despite ostensible private status (*e.g*. parcel service deliverer who routinely is rewarded for opening suspicious packages for law enforcement purposes). *See Villalobos*, 1995-NMCA-105, ¶¶ 20-27 (assuming without deciding that New Mexico law follows *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985), which held that a defendant cannot be convicted of conspiring with only government agents or informers and supported defendant's tendered instruction that he could not be convicted of conspiracy with government agents); *see also State v. Dressel*, 1973-NMCA-113, ¶ 3, 85 N.M. 450, 513 P.2d 187 ("It takes at least two persons to effect a conspiracy. The essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means." (internal citations omitted)). Where there is some evidence to support a defendant's theory that the only other alleged co-conspirator was a de jure or de facto state agent, the additional phrase in element 2 should be included. *See Villalobos*, 1995-NMCA-105, ¶¶ 20-27; *see also State v. Privett*, 1986-NMSC-025, ¶ 20, 104 N.M. 79, 717 P.2d 55 (defendant's requested instruction on intoxication requires "some evidence"; the court does not weigh that evidence but merely determines whether it exists).

The agreement need not be verbal but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme. The agreement may be established by circumstantial evidence. *State v. Deaton*, 1964-

NMSC-062, ¶ 5, 74 N.M. 87, 390 P.2d 966; *State v. Sellers*, 1994-NMCA-053, ¶ 17, 117 N.M. 644, 875 P.2d 400.

A defendant may be charged with conspiracy to commit a single felony or multiple felonies. However, a single *agreement* to commit two felonies constitutes only a single conspiracy. *State v. Ross*, 1974-NMCA-028, ¶ 17, 86 N.M. 212, 521 P.2d 1161 ("'Whether the object of a single *agreement* is to commit one or many crimes, it is in either case the agreement which constitutes the conspiracy which the statute punishes.'" (emphasis added) (quoting *Braverman v. United States*, 317 U.S. 49, 54 (1942))); *see also Gallegos*, 2011-NMSC-027, ¶ 38 (accepting *Braverman* that the number of prosecutable conspiracies is based on the number of agreements), ¶ 49 (cautioning against conflating the existence of multiple objectives in a single conspiracy with multiple conspiracies). If the single conspiracy is alleged to be for the purpose of committing more than one felony, the essential elements of each felony must be given.

There is a "rebuttable presumption" that despite the commission of multiple crimes, there is only one, overarching, conspiratorial agreement and thus only one count of conspiracy. *Gallegos*, 2011-NMSC-027, ¶ 55. Nevertheless, distinct from a single conspiracy count alleging multiple objectives, a defendant may be charged with more than one count of conspiracy, with each count alleging a separate agreement to commit one or more felonies. Where the defendant is charged with more than one conspiracy, UJI 14-2810B NMRA must be given.

In a multi-defendant trial, evidence may be admitted regarding only one or fewer than all of the defendants. Where certain evidence—such as co-conspirators' statements—is admitted as to only a particular defendant, an appropriate limiting instruction should be given. *See* UJIs 14-5007, 14-5008 NMRA.

Although the gist of the offense is the combination between two or more persons, conviction of all the conspirators is not required. *State v. Verdugo*, 1969-NMSC-008, ¶ 9, 79 N.M. 765, 449 P.2d 781.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 2, added "To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.".

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, modified the essential elements of conspiracy, revised the Use Notes and revised the committee commentary; after "Conspiracy;", added "single or multiple objectives"; after Use Note reference "1", added "[or _____ [or _____]][2]", and after "[as charged in Count _____]", changed Use Note

reference “2” to “3”; in Element 1, after the first semicolon, added “[or _____[_____]][2];”; added Elements 2 and 3 and redesignated former Elements 2 and 3 as Elements 4 and 5, respectively; in Element 4, after Use Note reference “1”, added “[or _____[or _____]][2]”; in Use Note 1, deleted “Insert” and added “For a conspiracy with a single objective, insert”, after “name of the felony”, deleted “or felonies in the alternative and” and added “Unless the court has instructed on the essential elements of the named felony”, after “essential elements”, added "of the named felony”, and after “immediately after this instruction”, deleted “unless they are covered by essential element instructions relating to substantive offenses”; added Use Note 2 and redesignated former Use Note 2 as Use Note 3; and added Use Notes 4 and 5.

Facts sufficient to find guilt of conspiracy. — Where there was evidence that defendant was found in the stash house, that the smell of marijuana was strong and obvious, that there was a large quantity of marijuana in the basement, and that defendant tried to escape from the police when the investigation turned up marijuana, even punching one of the officers, and once subdued, defendant threw up, and slammed his head on the floor like a “child throwing a temper tantrum,” these facts are sufficient to allow a rational jury to find defendant guilty of possession with intent to distribute and conspiracy. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

Conspiracy to commit kidnapping. — Evidence that defendants, following an argument with the victims about missing drugs, made the victims strip to their underwear and sit on a couch, that one defendant held a knife to the throat of one victim, that defendants searched the victims’ clothes for the missing drugs, and that defendants removed money and identification from the victims’ clothes, was sufficient to support an inference that the defendants worked together to confine the victims in the apartment and was sufficient to support the convictions for conspiracy to commit kidnapping. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

Conspiracy to commit forgery. — In defendant’s trial for forgery, where the evidence established beyond a reasonable doubt that four personal checks belonging to four different people were washed and passed at four different times, and where there was testimony that defendant had entered into an agreement with others to change genuine checks so that their effect was different from the original, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed conspiracy to commit forgery. *State v. Estrada*, 2016-NMCA-066, cert. denied.

Conspiracy to commit burglary. — Where defendant, a former employee of a motel, asked the motel desk clerk to attend to an internet problem in the motel by implying that he was a motel guest, which he was not, and where defendant remained in the lobby while his co-conspirator climbed over the desk clerk’s counter, broke the lock on a cash drawer and removed cash, and where defendant immediately followed the co-conspirator out of the motel lobby after the co-conspirator took the cash, there was sufficient evidence for a rational trier of fact to infer that defendant, as a former

employee of the motel, knew the location of the cash drawer, that asking the desk clerk to reset the wireless router would require the clerk to be away from the office for a sufficient amount of time to create an opportunity to steal the cash and escape without notice, and that defendant and his accomplice agreed and intended to commit the crime of burglary. *State v. Mestas*, 2016-NMCA-047.

Conspiracy to commit trafficking of methamphetamine. — Where defendant was convicted of conspiracy to commit drug trafficking by distribution, defendant's statements assuring the undercover officer of the existence of an agreement to sell him methamphetamine and his actions attempting to achieve the sale were sufficient evidence to prove beyond a reasonable doubt that defendant committed conspiracy to commit drug trafficking by distribution, and it was irrelevant that defendant did not receive money from the undercover officer, no drugs were ever produced or verified, and no co-conspirator was ever seen, identified, or verified. *State v. Saiz*, 2017-NMCA-072, cert. denied.

Evidence that defendant used his truck to block the victim from leaving defendant's property; that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim; and, that when the other defendants arrived, the defendant became involved in the beating of the victim, permitted the jury to conclude that the defendants shared an intent to hold the victim and then beat him. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007.

Erroneous instruction on conspiracy to bring contraband into a jail resulted in fundamental error. — Where defendant was tried on a single charge of conspiring to bring contraband into jail, and where the district court did not instruct the jury in accordance with UJI 14-2810 NMRA, but instead gave a hybrid instruction that incorporated aspects of the crime of conspiracy as well as the conspiracy's target offense of bringing contraband into a jail, fundamental error occurred because the instruction given to the jury in this case omitted the essential elements of conspiracy, did not fairly and accurately state the applicable law of conspiracy, and did not fall within an exception to the general rule of fundamental error because it cannot be concluded that the jury implicitly found the essential elements of conspiracy or that the parties' legal and factual presentations left no doubt that the jury would have found the omitted elements if properly instructed. *State v. Sivils*, 2023-NMCA-080.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy §§ 7 to 11.

Prosecution or conviction of one conspirator as affected by disposition of case against co-conspirators, 19 A.L.R.4th 192.

15A C.J.S. Conspiracy § 35(1).

14-2810A. Conspiracy; multiple objectives; unanimity.[1]

For you to find [the][2] [a] defendant guilty of conspiracy to commit more than one crime [as charged in Count _____][3], it is not necessary for the State to prove a conspiracy to commit [both][2] [all] of those crimes. It would be sufficient if the State proves beyond a reasonable doubt a conspiracy to commit any one of those crimes.

But if you do not agree that the State has proven conspiracy to commit [both][2] [all] of those crimes, in order to return a verdict of guilty, you must unanimously agree upon which of the [two][2] [three, etc.] crimes, if any, was the subject of the conspiracy. If you are unable to unanimously identify at least one (1) of the specified crimes as the subject of a conspiracy, you must find the defendant not guilty of conspiracy.

In this case, you must record your unanimous verdict[s] on the form[s][4] provided.

USE NOTES

1. For use where the defendant is charged with a single conspiracy with multiple objectives.

2. Use applicable alternative.

3. Where the defendant is charged with more than one conspiracy and at least one conspiracy alleges multiple objectives, this instruction should be given for each conspiracy count alleging multiple objectives.

4. Use the special verdict form, UJI 14-6019B NMRA, to determine whether there is unanimity on each criminal objective.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* Eighth Circuit Manual of Model Criminal Jury Instructions 5.06F (rev. ed. 2013) (general requirement for jury unanimity regarding the criminal object of the conspiracy); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts—other than prior convictions—that increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt).

The instruction serves two distinct purposes: (1) ensuring unanimity that there was an agreement to commit at least one of the specific objects of the conspiracy charged, regardless of the penalties for committing the offenses; and (2) identifying the highest crime conspired to, to determine the penalty under *Apprendi*.

This instruction and the special verdict form, UJI 14-6019B NMRA, should be used to ensure jury unanimity regarding defendant's agreement to commit which felonies, if any, have been proven beyond a reasonable doubt. *See also State v. Gallegos*, 2011-

NMSC-027, ¶ 53, 149 N.M. 704, 254 P.3d 655 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed).

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-2810B. Multiple conspiracies; distinct agreements.[1]

The Defendant[s] [_____, and _____] [is][2] [are] charged in Counts _____ and _____ with _____ separate conspiracies. Each of these Counts requires a separate verdict and must be considered separately.

For you to find [the][2] [a] Defendant[s] guilty of one or more conspiracies, as charged in Counts _____ and _____, the State must prove to your satisfaction beyond a reasonable doubt that [the][2] [a] Defendant entered into an agreement to commit [one or more of] the crime[s] alleged in that specific count.

It is not enough to return a verdict of guilty on a particular count for you to find [the][2] [a] Defendant is guilty of some other conspiracy count or entered into some other agreement to commit a crime not charged in that specific count of the indictment. Each conspiracy count must be considered separately. Each verdict of guilty must be supported by evidence—beyond a reasonable doubt—of a separate and distinct agreement to commit the crime[s] alleged in that specific count and not a continuation of Count ____ . Otherwise you must find the defendant not guilty of that count, regardless of your verdict on other counts of the indictment.

If you conclude that [the][2] [a] Defendant conspired and agreed to commit more than one (1) crime, to assist you in determining whether the defendant entered into two (2) or more separate agreements with different criminal objects, or whether [the][2] [a] Defendant entered into only a single conspiracy agreement to commit multiple crimes, you may consider all the evidence [that I have admitted with regard to Count ___ and Defendant[s] [_____, and _____][3]] and the totality of the circumstances.

USE NOTES

1. Use when the evidence indicates the defendant participated in more than one conspiracy agreement. If not supported, UJI 14-2810 NMRA should be given instead.

2. Use applicable alternative.

3. Use when the Court has limited evidence regarding a particular count and/or defendant. *See* UJIs 14-5007, 14-5008 NMRA.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See State v. Gallegos*, 2011-NMSC-027, ¶¶ 48-49, 149 N.M. 704, 254 P. 3d 655 (jury must be instructed that separate/multiple conspiracy convictions must be supported by evidence beyond a reasonable doubt of separate/multiple agreements); *see also* Tenth Circuit Criminal Pattern Jury Instruction 2.20 (2011) (proof of separate conspiracies is not proof of a single, overall, conspiracy; proof of involvement in some other conspiracy not enough to convict on the charged conspiracy); Eighth Circuit Manual of Modern Criminal Jury Instructions, 5.06D (rev. ed. 2013) (same).

A defendant may be charged with more than one count of conspiracy, with each count alleging agreement to commit one or more felonies. Conviction of multiple conspiracies—as opposed to a single conspiracy with multiple objectives—requires the Court to conduct a double jeopardy analysis, de novo, as a matter of law. *Gallegos*, 2011-NMSC-027, ¶¶ 50-51.

To avoid the risk of conflating the existence of multiple conspiracies with the existence of multiple objects in a single conspiracy, the jury must be instructed that conviction for multiple conspiracies requires finding beyond a reasonable doubt that the defendant distinctly agreed to (one or more of) the objective(s) of each separate conspiracy charged. *See id*. ¶¶ 48-49; *see also State v. Sanders*, 1994-NMSC-043, ¶ 16, 117 N.M. 452, 872 P.2d 870 (citing *State v. Hernandez*, 1986-NMCA-040, ¶ 40, 104 N.M. 268, 720 P.2d 303, which states that “determination of number of conspiracies is a fact question for the jury”). Where the indictment charges more than one conspiracy, regardless of the number of objectives, use this instruction.

In *Gallegos*, the New Mexico Supreme Court communicated the need for explicitly instructing the jury that "multiple conspiracy convictions require multiple agreements." 2011-NMSC-027, ¶ 49. In determining whether there are two (or more) agreements or only one, the Court noted the majority of the federal circuits’ practice of using a five-factor totality of the circumstances test that considers (1) location, (2) temporal overlap, (3) overlap of participants, (4) similarity of overt acts charged, and (5) similarity of roles played by the defendant. *See Gallegos*, 2011-NMSC-027, ¶ 42; *see also, e.g*., Eighth Circuit Manual of Model Criminal Jury Instructions, 5.06B, p. 158 (2014).

However, the Court stopped short of adopting particular factors for the jury's consideration and noted that the Tenth Circuit does not use such a test. *Gallegos*, 2011-NMSC-027, ¶ 42 (citing *United States v. Sasser*, 974 F.2d 1544, 1549 n.4 (10th Cir. 1992)). Nor does the Ninth Circuit. *See* Ninth Circuit *Manual of Model Criminal Jury Instructions*, 8.22, p. 142 (2010; updated electronically through June 2018) *available at* http://www3.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2018_6.pdf.

For these reasons, the Committee recommends that trial courts conduct a preliminary analysis consistent with *Gallegos* and only permit the jury to consider multiple conspiracies upon finding sufficient evidence thereof. *See Gallegos*, 2011-NMSC-027, ¶

50. If the trial court finds sufficient evidence, this instruction should be given. If not, UJI 14-2810 NMRA should be given.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-2811. Liability as a co-conspirator.[1]

The defendant [also] may be found guilty of _____ [attempt to commit _____] [as charged in Count _____], as a [co-conspirator] [partner in crime] even though he himself did not do the acts constituting the [crime], [attempt] if the state proves to your satisfaction beyond a reasonable doubt that:

1. The defendant and _____ by words or acts agreed together to commit the _____ and intended to commit the _____; and

2. The defendant or _____, or both of them, [committed] [attempted to commit] the crime.

USE NOTES

1. No instruction on this subject shall be given.

Committee commentary. — This instruction is a statement of the theory of liability as a co-conspirator for crimes committed by others. It applies whether the crime of conspiracy is charged, *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974), or not charged. *Territory v. McGinnis*, 10 N.M. 269, 61 P. 208 (1900); *Territory v. Neatherlin*, 13 N.M. 491, 85 P. 1044 (1906); *State v. Armijo*, 90 N.M. 10, 12, 558 P.2d 1149, 1151 (Ct. App. 1976). If the existence of a conspiracy is established, then all members of a conspiracy are equally guilty whether present or not and irrespective of physical participation, aid or encouragement extended at the time of the offense. *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937).

The court in *Ochoa* noted that, although aiding and abetting and conspiracy usually accompany each other, they are two different theories of liability. *See also State v. Armijo*, supra. However, the language of UJI 14-2820, 14-2821, and 14-2822 is broad enough to include liability as an aider or abettor or co-conspirator or both. Therefore, a separate instruction on this subject should not be given.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy § 14.

15A C.J.S. Conspiracy § 74.

14-2812. Conspiracy; multiple defendants; each defendant entitled to individual consideration.[1]

In this case, you must consider separately whether each of the defendants is guilty or not guilty of conspiracy [and the other charge][2] [and each of the other charges]. Even if you cannot agree upon a verdict as to one or more of the defendants [or charges][3], you must return the verdict or verdicts upon which you agree.

USE NOTES

1. This instruction is appropriate for a multiple-defendant trial in which a charge of conspiracy is submitted to the jury. UJI 14-6003 should not be used in such cases.

2. Use one or the other or neither of these bracketed phrases, as applicable.

3. Use if applicable.

Committee commentary. — This instruction replaces UJI 14-6003 in cases in which a charge of conspiracy is being submitted to the jury. UJI 14-6003 is not appropriate for conspiracy cases because the second sentence of that instruction directs the jury to " . analyze . the evidence . with respect to each individual defendant separately." That direction conflicts with the rule that the acts and declarations of a conspirator may be the acts and declarations of all of the members of the conspiracy.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy § 42.

Right of defendants in prosecution for criminal conspiracy to separate trials, 82 A.L.R.3d 366.

14-2813. Conspiracy; proof of express agreement not necessary.

It is not necessary in proving a conspiracy to show a meeting of the alleged conspirators or the making of an express or formal agreement. The formation and existence of a conspiracy may be inferred from all circumstances tending to show the common intent and may be proved in the same way as any other fact may be proved, either by direct testimony of the fact or by circumstantial evidence, or by both direct and circumstantial evidence.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — This instruction is California Jury Instructions, Criminal, No. 6.12, p. 171 (3rd ed. 1970). No instruction on this subject is necessary to guide the

jury because the subject is covered in the essential elements instruction. It is better to leave the subject matter to the argument of counsel. Moreover, an instruction on this subject may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy § 7.

15A C.J.S. Conspiracy § 40.

14-2814. Conspiracy; evidence of association alone does not prove membership in conspiracy.

Evidence that a person was in the company of or associated with one or more other persons alleged or proved to have been members of a conspiracy is not, in itself, sufficient to prove that such person was a member of the alleged conspiracy.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — This instruction is California Jury Instructions, Criminal, No. 6.13, p. 172 (3rd ed. 1970). No instruction on this subject is necessary to guide the jury because the subject is covered in the essential elements instruction. It is better to leave the subject matter to the argument of counsel. Moreover, an instruction on this subject may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A C.J.S. Conspiracy § 39.

14-2815. Acts or declarations of co-conspirators; conditional admissibility; limiting instruction; withdrawal.

Evidence has been admitted concerning _____. You may consider such [acts] [remarks] against the [other] defendants if you find that the [acts] [remarks] were authorized by them.

The [acts] [remarks] were authorized by a defendant if the defendant and the one [doing the acts] [making the remarks] were in a [conspiracy to commit crime] [partnership in crime] and the [acts] [remarks] were during and for the purpose of helping in carrying out the [conspiracy] [partnership].

Unless you find by other evidence that the [acts] [remarks] were authorized by a defendant, then you should not consider them against that defendant.

[If a (co-conspirator) (partner in crime) withdraws from a (conspiracy) (partnership in crime), then the (acts) (remarks) of the others made after the withdrawal are not authorized by, and should not be considered against, the one who withdraws.

In order to withdraw, a person must

(in good faith notify the others he knows are involved that he is no longer involved in the [conspiracy] [partnership] and urge them to give it up.)

(make proper efforts to prevent the carrying out of the [conspiracy] [partnership in crime] and end his participation in such a way as to remove the effect of his assistance).]

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — This instruction sets forth the standard of conditional admissibility of evidence which is admitted subject to the condition precedent that a conspiracy be established by evidence aliunde. *See* Rule 11-104 NMRA. If the conspiracy is shown to have existed, then declarations of a co-conspirator during the course of and in furtherance of the conspiracy are not hearsay. Rule 11-801 D(2)(e) NMRA. *See also State v. Armijo*, 90 N.M. 10, 12, 558 P.2d 1149, 1151 (Ct. App. 1976), which recognizes that the rule applies to acts as well as declarations, and applies whether conspiracy is charged or not charged.

The portion of the instruction on withdrawal sets forth the defense theory that such declarations, made after effective withdrawal, are not admissible against the co-conspirator who has withdrawn.

The standards for admissibility of co-conspirator acts or declarations are the same whether conspiracy is charged (in which case the defendant would be referred to as "co-conspirator") or not charged (in which case the defendant would be referred to as a "partner in crime").

The committee was of the opinion that no instruction on this subject should be given. The issue of admissibility of evidence is a preliminary question of law to be decided by the judge. *See* Rule 11-104(A) NMRA. Questions of admissibility of evidence are not to be decided beyond a reasonable doubt or by a preponderance of the evidence. Substantial evidence in support of the preliminary fact suffices. *United States v. Herrera*, 407 F. Supp. 766 (N.D. Ill., 1975). When the preliminary question is the existence of a conspiracy, a prima facie case must be made out by substantial, independent evidence of the conspiracy. Whether the standard has been satisfied is a question of the admissibility of evidence to be decided by the trial judge. *United States v. Herrera*, supra. *See also* n. 14 in *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

The comments to Evidence Rule 104(b), Rules of Evidence for United States Courts and Magistrate Courts, suggest that the judge makes a preliminary determination as to whether the foundation is sufficient to support a finding that the condition has been fulfilled and then submits to the jury the issue of whether the condition has been fulfilled and instructs on conditional admissibility to guide the jury in its deliberations. However, the problem with this approach was pointed out in *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 2d 498 (1964), rehearing denied, 377 U.S. 1010, 84 S. Ct. 1902, 12 L. Ed. 2d 1058 (1964), aff'd, 357 F.2d 800 (9th Cir. 1966). When conspiracy is charged, the admissibility of the evidence depends upon a disputed preliminary question of fact which coincides with the ultimate determination on the merits. Carbo, supra, p. 736. In effect, the jury must find a prima facie conspiracy prior to considering the evidence on the question of whether the conspiracy has been proved beyond a reasonable doubt. Such mental compartmentalization has been recognized as a practical impossibility. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), aff'd on other grounds, 341 U.S. 494 (1951).

Submitting the issue to the jury in cases where conspiracy is not charged does not result in such a circular reasoning process. The jury must only consider the conspiracy question for one purpose. Because admissibility of co-conspirator declarations is not dependent upon a charge of conspiracy in the indictment, *State v. Armijo*, supra, *United States v. Herrera*, supra, the procedure for handling the issue of admissibility should be the same whether conspiracy is charged or not charged.

The authorities are split on the requirement of an instruction on conditional admissibility, and the rules of evidence in some jurisdictions expressly require such an instruction. The Rules of Evidence expressly require instructions in certain instances, but Rule 11-104(B) NMRA does not expressly require such an instruction and no New Mexico case requires such an instruction. Therefore, the decision as to admissibility should be left to the judge and no instruction should be given. *See* Morgan, Basic Problems of Evidence, p. 48. Such a procedure was tacitly approved in *United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965), aff'd, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), motion to vacate judgment denied, 386 U.S. 940, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1967), rehearing denied, 386 U.S. 951, 87 S. Ct. 970, 17 L. Ed. 2d 880 (1967), motion for new trial denied, 382 F.2d 856 (6th Cir. 1967), where the court in dictum said that a prima facie case linking the appellants with the conspiracy would have justified the court ruling that the evidence was admissible. *Carbo v. United States*, supra, expressly states that no instruction is necessary. The supreme court in *United States v. Nixon*, supra, indicates that no instruction is necessary, by citing with approval the *Hoffa* and *Carbo* cases.

The judge may make the determination of admissibility at the time the evidence is offered or may admit the evidence subject to a further ruling as to whether the necessary foundation has been established. The order of proof is within the discretion of the trial judge. Rule 11-104(B) NMRA. If the judge concludes at the close of the evidence that the necessary foundation has not been established, the evidence should be withdrawn from the consideration of the jury. *See* commentary to UJI 14-5042.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy §§ 29, 38 to 40.

15A C.J.S. Conspiracy §§ 78, 92.

14-2816. Withdrawal from conspiracy; termination of complicity.

Evidence has been admitted concerning a [conspiracy] [partnership in crime] and withdrawal by the defendant from any such [conspiracy] [partnership].

A person may withdraw from a [conspiracy] [partnership in crime]. If a member of a [conspiracy] [partnership in crime] has withdrawn, he is not liable for any act of the other [conspirators] [partners] after the withdrawal.

In order to withdraw, a person must

[in good faith notify the others he knows are involved that he is no longer in the (conspiracy) (partnership) and urge them to give it up.]

[make proper efforts to prevent the carrying out of the (conspiracy) (partnership in crime) and end his participation in such a way as to remove the effect of his assistance.]

The burden is on the state to prove beyond a reasonable doubt that the defendant did not withdraw from any such [conspiracy] [partnership].

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — No instruction on this subject is necessary because the theory of liability as a co-conspirator for the acts of others is not expressly submitted to the jury. UJI 14-2811, liability as a co-conspirator, is not to be given. The theory of liability is covered in the instructions on aiding or abetting (*see* commentary to UJI 14-2822) and the concept of withdrawal as a defense is covered in those instructions. If the defendant has effectively withdrawn, then he has not helped, encouraged or caused the commission of the offense, and he is not guilty.

Withdrawal may commence the running of the statute of limitations as to the conspirator who withdraws. *Eldredge v. United States,* 62 F.2d 449 (10th Cir. 1932). However, under state law, that problem is too remote to warrant a UJI instruction. If withdrawal in relation to limitations becomes an issue, an instruction on the issue will need to be drafted by the court. *See Eldredge v. United States, supra*.

Withdrawal may affect the admissibility of acts and declarations of co-conspirators. However, the jury will not be instructed on the admissibility issue (UJI 14-2815, conditional admissibility, is not to be given), and therefore no instruction is necessary on withdrawal as it pertains to admissibility.

Withdrawal may constitute a defense to the charge of conspiracy in some jurisdictions, but the defense is not available in jurisdictions in which conspiracy is complete as soon as the agreement is reached, and without an overt act. *See* the commentary to Section 5.03(b), Model Penal Code (tentative draft No. 10). UJI 14-2810, the essential elements of conspiracy, does not require an overt act, and therefore no instruction is necessary on withdrawal as a defense to the charge of conspiracy.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy § 29.

15A C.J.S. Conspiracy § 78.

14-2817. Criminal solicitation; essential elements.

For you to find the defendant guilty of criminal solicitation [as charged in Count _____],[1] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended that another person commit _____ (*name of felony*);[2]

2. The defendant [solicited][3] [commanded] [requested] [induced] [employed] the other person to commit the crime;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Give the essential elements of the felony, if not covered by other instructions. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Use applicable alternative.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Section 30-28-3 NMSA 1978 sets out not only the essential elements of the crime of criminal solicitation, but also what is and is not a defense. To be guilty of solicitation the crime intended to be committed must be a felony. New Mexico law makes no provision for soliciting someone to commit a lesser offense than a felony. The same is true for the crimes of attempt and conspiracy. The underlying crime must be punishable as a felony.

There is much confusion over the distinctions between solicitation, attempt and conspiracy. Under the Model Penal Code a solicitation may be "a substantial step in a course of conduct planned to culminate in [the] commission of the crime" for the purpose of proving an attempt. Model Penal Code § 5.01(1)(c) and (2)(g) (1962). There is some disagreement with this view, however. The Memorandum to Virginia Model Jury Instructions - Criminal, Attempts and Solicitations No. 6, states, "[s]olicitation *does not* amount to a direct act towards the commission of the crime. . . . Where the inciting to crime does proceed to the point of some overt act in the commission of the offense, it becomes an attempt. . . ." (Citing *Wiseman v. Commonwealth*, 143 Va. 631, 130 S.E. 249 (1925).) (Emphasis added.) It is unclear which view prevails in New Mexico due to the lack of case law on solicitation, but the committee was of the opinion that mere solicitation is not enough of an overt act to constitute an attempt. As stated by Perkins, "[t]he usual statement is to the effect that, although a few cases have held otherwise, a solicitation is not an attempt. . . ." R. Perkins, Perkins on Criminal Law, p. 585 (2d ed. 1969). A more definite distinction can be drawn when the solicitor does not merely solicit another to commit the crime, but plans to actually assist in the commission of the crime. In these instances there is a specific intent to commit the crime, which may rise to the level of attempt. To prove solicitation, one must only show the solicitor intended someone else to commit the crime.

The solicitation of another to commit a crime is an attempt to commit that crime if, but only if, it takes the form of urging the other to join with the solicitor in perpetrating that offense, - not at some future time or distant place, but here and now, and the crime is such that it cannot be committed by one without the cooperation or submission of another, such as bribery or buggery. Where such cooperation or submission is an essential feature of the crime itself, the request for it now is a step in the direction of the offense.

Id. at 586-7.

To be guilty of solicitation, the crime need not be committed. It must only be proven that the defendant intended that the other person commit the crime.

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 2, deleted “See UJI 14-140 for example of how essential elements instructions are to be modified when not given as separate offense.”, and added the last sentence.

Sufficient evidence of criminal solicitation to commit tampering with evidence. — Where defendant was charged with voluntary manslaughter in the stabbing death of his friend, and where the evidence established that defendant called his girlfriend from the jail knowing that the police were investigating the stabbing, and told her to take his backpack, which contained cans of Dust-Off that the victim had been sniffing or "huffing", and when defendant's girlfriend told defendant that she could not because the police were everywhere, defendant asked her to take the Dust-Off cans out of the backpack and tell the police the backpack belonged to someone else, the evidence supports findings that defendant intended his girlfriend to tamper with evidence consisting of his backpack and the Dust-Off cans inside it and that defendant requested his girlfriend to tamper with evidence by concealing it and lying about ownership of the backpack, for the purpose of preventing his prosecution or conviction for stabbing the victim. *State v. Fox*, 2017-NMCA-029, cert. granted.

Part C
Accomplices

14-2820. Aiding or abetting; accessory to crime of attempt.[1]

The defendant may be found guilty of an attempt even though the defendant did not do the acts constituting the attempt, if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant intended that another person commit the crime;

2. Another person attempted to commit the crime; and

3. The defendant helped, encouraged, or caused the attempt to commit the crime.

[This instruction does not apply to the charge of felony murder.][2]

USE NOTES

1. For use if the evidence supports liability of the defendant as an aider or abettor for any crime of attempt. This instruction should not be used for felony murder. The essential elements of the attempt or attempts must also be given.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* Section 30-1-13 NMSA 1978.

See commentary to UJI 14-2822.

This instruction sets out the theory of liability as an aider or abettor for crimes of attempt to commit a felony. It may be used if the defendant is charged as a principal, as an aider and abettor, or as both.

This instruction does not define "attempt," and therefore it is necessary that UJI 14-2801, the essential elements of attempt, be given along with this instruction on aiding and abetting. Further, since UJI 14-2801 is incomplete without the essential elements of the felony that was attempted, those essential elements must also be given to make this instruction complete. Therefore, when this instruction is given, UJI 14-2801 should also be given, and the essential elements of the felony attempted should be given in some form.

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-012, effective December 31, 2017, in the introductory sentence, deleted "he himself" and added "the defendant", and after "reasonable doubt", added "each of the following elements"; in Element 1, after "intended that", added "another person commit" and deleted "be committed"; in Element 2, deleted "An attempt" and added "Another person attempted", after "crime", deleted "was committed", and at the end, added "and"; and in Use Note 1, after "abettor", deleted "or co-conspirator regardless of whether conspiracy is charged".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory or aider and abettor, 9 A.L.R.4th 972.

Attempt to manufacture methamphetamine. — The jury was properly instructed that it could convict defendant of attempt to manufacture methamphetamine under the theory of accessory liability if it found, beyond a reasonable doubt, that defendant intended that the crime of manufacturing be committed, an attempt to commit the crime was committed, and defendant helped, encouraged, or caused the attempt to commit the crime. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010.

14-2821. Aiding or abetting accessory to felony murder.[1]

The defendant _____ (*name of defendant*) may be found guilty of felony murder [as charged in Count _____],[2] even though the defendant did not commit the murder if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant _____ (*name of defendant*) intended that another person commit the felony of _____ (*name of felony*);

2. Another person committed [or] [attempted][3] the felony of _____ [under circumstances or in a manner dangerous to human life];[3]

3. The defendant _____ (*name of defendant*) helped, encouraged, or caused the felony of _____[4] (*name of felony*) to be committed [or attempted];

4. During the [commission] [attempted commission] of the felony _____ (*name of deceased*) was killed;

5. The defendant _____ (*name of defendant*) helped, encouraged, or caused[5] the killing to be committed;

6. The defendant _____ (*name of defendant*) intended the killing to occur or knew that the defendant was helping to create a strong probability of death or great bodily harm; and

7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. For use if the evidence supports liability as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for felony murder.

2. Insert the count number to which this instruction is applicable if more than one count is submitted to the jury on any theory.

3. Use applicable alternatives.

4. The essential elements of this felony or these felonies must also be given unless they are otherwise covered by the instructions. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

5. UJI 14-251 NMRA must also be used if causation is in issue.

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* Sections 30-1-13 and 30-2-1A(2) NMSA 1978.

This instruction sets out the theory of liability as an aider or abettor for a felony murder. A separate instruction was appropriate because the requisite intent in felony murder is

different from that in other crimes. *See* committee commentary to UJI 14-202 (felony murder).

See also the committee commentary to UJI 14-2822.

This instruction is considerably different from UJI 14-2822, because under that instruction the defendant must have intended the crime that was committed, and in this instruction on felony murder, the defendant need only intend that the underlying felony be committed. *State v. Smelcer*, 30 N.M. 122, 125, 228 P. 183 (1924). *See also* Perkins, Criminal Law 37-44 (2d ed. 1969). In order to make that distinction, the committee merged into this instruction the essential elements of felony murder from UJI 14-202.

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 4, added the last sentence.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-012, effective December 31, 2017, in the introductory sentence, after “reasonable doubt”, added “each of the following elements”; added a new Element 1 and redesignated former Elements 1 and 2 as Elements 2 and 3, respectively; in Element 2, added “Another person committed [or] [attempted][3]”, and deleted “was committed [or] [attempted][3]”; deleted former Element 3, which provided “The defendant (*name of defendant*) intended that the (*name of felony*) be committed”; and in Element 6, after “knew that”, deleted “[he] [she]” and added “the defendant”.

The 1995 amendment, effective March 15, 1995, rewrote the instruction, deleted "Insert the name of the felony or felonies underlying the felony murder charge" from the beginning of Use Note 4, deleted former Use Note 5 which read "Use bracketed phrase unless the felony is a first degree felony", and redesignated former Use Note 6 as Use Note 5.

"Helped, encouraged, or caused" the crime to be committed. — The terms "help", "cause", and "encourage" are words with common meanings, thus not requiring definition for the jury, and the court's failure to give a definitional jury instruction was not error. *State v. Gonzales*, 1991-NMSC-075, 112 N.M. 544, 817 P.2d 1186.

It is not enough for "someone" to cause the death of the victim; it is necessary that the defendant cause the death, either through his own acts or through the acts of an accomplice whom the defendant "helped, encouraged or caused" to commit the crime, and only if the defendant intends the crime to be committed. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Abolition of the distinction between principal and accessory places defendant on notice that he or she could be charged as a principal and convicted as an accessory or vice versa. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Conspiracy §§ 119, 124.

22 C.J.S. Criminal Law §§ 74 to 77.

14-2822. Aiding or abetting; accessory to crime other than attempt and felony murder.[1]

The defendant may be found guilty of a crime even though the defendant did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant intended that another person commit the crime;

2. Another person committed the crime;

3. The defendant helped, encouraged, or caused the crime to be committed.

[This instruction does not apply to the charge of felony murder.][2]

USE NOTES

1. For use if the evidence supports liability of the defendant as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for any crime except attempt and felony murder. This instruction should not be used for attempt or felony murder. The essential elements of the crime or crimes must also be given.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-1-13 (1972).

This instruction sets out the theory of liability as an aider and abettor for crimes other than attempt or felony murder. It may be used if the defendant is charged as a principal, as an aider or abettor, or as both.

One who aids or abets the commission of a crime is guilty as a principal. It is not necessary that there be a charge of aiding or abetting. The distinction between principal and accessory has been abolished. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

"[A]n accessory must share the criminal intent of the principal." *See State v. Jim*, 2014-NMCA-089, ¶ 10, 332 P.3d 870 (quoting *State v. Carrasco*, 1997-NMSC-047, ¶ 7, 124 N.M. 64, 946 P.2d 1075); *see also State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609. While a shared criminal intent for accomplice liability may be proved by circumstances "as broad and varied as are the means of communicating thought from one individual to another, . . . [m]ere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient." *State v. Johnson*, 2004-NMSC-029, ¶ 34, 136 N.M. 348, 98 P.3d 998 (quoting *Ochoa*, 1937-NMSC-051, ¶ 31).

The element of intent must be evaluated independently for each party charged with participation in criminal conduct. The liability of the aider and abettor for the crime depends that person's own acts and intent, and not on the intent of the other, entertained without knowledge of the aider and abettor. *State v. Wilson*, 1935-NMSC-044, ¶ 11, 39 N.M. 284, 46 P.2d 57; *accord State v. Gaitan*, 2002-NMSC-007, ¶ 19, 131 N.M. 758, 42 P.3d 1207 (procuring a beating that inadvertently results in death satisfies accessory intent that a crime be committed, but "amount[s] to the lesser included offense of accessory to involuntary manslaughter.") (citing *State v. Holden*, 1973-NMCA-092, ¶¶ 11-14, 85 N.M. 397, 512 P.2d 970 (upholding conviction for accessory to involuntary manslaughter for procuring a misdemeanor battery by a third party who instead shot and killed the victim and was convicted of voluntary manslaughter)). Where "the intent required for conviction as an accessory is the same level of intent contained in the element instruction for the underlying crime, . . . 'we presume that the jury looked to the element instruction for each crime in order to determine the intent required for the underlying crime.'" *Jim*, 2014-NMCA-089, ¶ 10 (quoting *Carrasco*, 1997-NMSC-047, ¶¶ 45-56).

In all cases the aider and abettor must share the intent of the principal, but the essential element of intent is stated differently in the three types of cases: 1) felony murder; 2) attempts; and 3) completed offenses other than felony murder. In felony murder, the intent of the aider and abettor is that the felony be committed, not that the crime (felony murder) be committed. In attempts, the intent of the aider and abettor is that the crime that was attempted be committed, rather than that the crime charged (attempt) be committed. By reason of these different intent requirements, and the difficulty of setting them all out in the alternative in one instruction, the committee prepared three different instructions. This instruction covers the completed crimes except for felony murder; UJI 14-2820 NMRA covers the attempts; and UJI 14-2821 NMRA covers felony murder.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-012, effective December 31, 2017, in the introductory clause, deleted "he himself" and added "the defendant", and added "each of the following elements"; in Element 1, added "another

person commit", and after "crime", deleted "be committed"; in Element 2, added "Another person committed", and after "crime", deleted "was committed"; and revised the committee commentary.

Sufficient instruction on intent. — This instruction is sufficient to direct the jury on the issue of intent in accessory cases and the trial court did not err in refusing to add an instruction that the defendant's intent must be the intent that is specified in the specific elements instruction for the crime itself. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Intent for accessory crimes not required in instruction on principal's crime. — Where the defendants were charged with aiding and abetting the crime of sexual penetration in the second degree, the required intent for accessory crimes was not required to be included in the instruction setting forth the elements of the principal's crime. *State v. Urioste*, 1979-NMCA-119, 93 N.M. 504, 601 P.2d 737, cert. denied, 93 N.M. 683, 604 P.2d 821.

The terms "help", "cause", and "encourage" are words with common meanings, thus not requiring definition for the jury, and the court's failure to give a definitional jury instruction was not error. *State v. Gonzales*, 1991-NMSC-075, 112 N.M. 544, 817 P.2d 1186.

Definition of accessory liability. — New Mexico has adopted the Model Penal Code definition of accessory liability. *Valdez v. Bravo*, 373 F.3d 1093 (10th Cir. 2004).

Jury might find that defendant aided and abetted, but did not commit, murder. — That the jury could have refused to find that the defendant personally committed the murder is not alone a sufficient reasonable hypothesis that he did not aid and abet its commission. *State v. Ballinger*, 1983-NMCA-034, 99 N.M. 707, 663 P.2d 366, *rev'd on other grounds*, 100 N.M. 583, 673 P.2d 1316.

Accomplice's drug trafficking conviction upheld despite no actual possession. — Since the evidence showed a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and that the defendant is the third party's accomplice, the evidence is sufficient to support a conviction under 30-31-20 NMSA 1978. The fact the defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. The defendant's actions as financier of the endeavor and transporter via his personal vehicle sufficiently demonstrated accomplice status. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

Submission of alternative instructions not error. — Where an indictment charged that the defendants "did intentionally distribute, possess with intent to distribute, or aided and abetted one another in the distribution of a controlled substance," and where two of the alternatives, distribution or aiding and abetting in distribution, were submitted to the jury, there was no error in either the charges or the submission of the alternatives to the jury. *State v. Turner,* 1982-NMSC-040, 97 N.M. 575, 642 P.2d 178.

Instruction properly given as written. — Where defendant's co-defendant was arguing with the victim over money owed by the victim to the co-defendant; the co-defendant pulled a gun and told the victim to go with the co-defendant; the victim got into the victim's car and while the co-defendant was standing outside the car, the victim started the car and hit the gas; defendant and the co-defendant shot and killed the victim; defendant was charged with first degree murder, attempted first degree kidnapping, attempted armed robbery, and three separate counts of conspiracy to commit first degree murder, robbery, and first degree kidnapping; during the preparation of jury instructions, the State argued that the UJI 14-2822 should say "murder" instead of "crime", but defense counsel objected to the word change; the district court followed the uniform jury instruction and placed it immediately following the murder instructions; and defendant objected to reinstructing the jury after the jury asked the district court whether the accessory instruction applied to all counts or only to the murder count, the jury was properly instructed and any error regarding the accessory instruction was invited by defense counsel. *State v. Ortega*, 2014-NMSC-017.

Instruction properly refused. — An instruction stating there was no presumption that the defendant was an accessory and that the defendant did not have the burden of proving that he was not an accessory was refused as it did not state a theory of the case. *State v. Gunzelman,* 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54.

The trial court did not err in refusing to give defendant's requested instruction on self-defense against an accessory in conjunction with an instruction on self-defense based on UJI 14-5171. *State v. Coffin,* 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Defendant need not intend particular result. — In a prosecution for aggravated battery, the defendants requested the following instruction, which was properly refused: "A defendant may not be held guilty as aider and abettor for independent act of another person, even though same victim was assaulted by both, since sharing of criminal intent is absent." The evidence demonstrated that the defendants and the principal defendant did not act independently of each other, even if the defendants did not intend or foresee the stabbing of the victim by the principal defendant. *State v. Dominguez,* 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147.

Knowledge of the method of the crime and presence when the crime is committed are not required. — There is no legal requirement that an accessory know in advance the exact method by which a crime is to be carried out or even that the accessory be physically present when the crime is committed. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Sufficient evidence. — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; defendant chided a secondary co-conspirator for being nervous and smoked marijuana with co-conspirator to calm the co-conspirator's nerves; defendant did not object when the primary co-conspirator considered killing the victim and burning the victim's car, but defended a secondary co-conspirator against the

primary co-conspirator's violence; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant demanded that the primary co-conspirator determine what to do with the victim before defendant's child returned from school; defendant left the residence to take the child to a store where, at the direction of the primary co-conspirator, defendant purchased charcoal liter fluid; and while defendant remained at the residence with the child, defendant's co-conspirators put the victim in the trunk of the victim's car, drove the car to a school, doused the car with the liter fluid, and burned the car, there was sufficient evidence to convict defendant of kidnapping, second-degree murder and aggravated arson, as an accessory, beyond a reasonable doubt. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Sufficient evidence of intentional child abuse by torture. — Where a child victim testified that defendant, the child's foster father, purchased a stun gun and gave it to his son, that the child was stunned by defendant's son approximately fifteen times, was stunned by defendant's other son approximately three times, that defendant was present during the assaults by one of the sons and would laugh in response, and where there was corroborating testimony from the child's sister, a rational jury could have found defendant guilty beyond a reasonable doubt as an accessory to child abuse inflicted by another. *State v. Vargas*, 2016-NMCA-038.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Conspiracy §§ 119, 124.

Propriety of specific jury instructions as to credibility of accomplices, 4 A.L.R.3d 351.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory or aider and abettor, 9 A.L.R.4th 972.

22 C.J.S. Criminal Law §§ 85 to 89.

14-2823. Accessory to the crime; not established by mere presence; circumstantial evidence sufficient.

Mere presence of the defendant, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient to establish that the defendant aided and abetted a crime. However, the evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs or by any means sufficient to incite, encourage or instigate commission of the crime.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction is taken from *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937). No instruction on this subject is necessary to guide the jury because the subject is covered in the essential elements instruction. It is better to leave the subject matter to the argument of counsel. Moreover, an instruction on this subject may constitute a comment on the evidence. *See* Evidence Rule 11-107.

ANNOTATIONS

Use notes. — The trial court did not commit error by following the use note for this instruction, which states that "no instruction on this subject shall be given", and refusing to give this instruction. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Refusal to give instruction. — Trial court did not err when it refused defendant's tendered jury instruction on "mere presence" at a crime because the jury was properly instructed on the essential elements of the crimes charged. *State v. Smith*, 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

Relationship to victim relevant. — Although mere presence is insufficient to establish that defendant aided and abetted a crime, defendant's relationship with victim is a factor invoking criminal liability. Where defendant was charged with care and welfare of child, he stood in position of parent and was convicted on the basis that he failed to take reasonable steps to prevent the molestation, coupled with his friendship with perpetrator. *State v. Orosco,* 1991-NMCA-084, 113 N.M. 789, 833 P.2d 1155, *aff'd*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Conspiracy §§ 121 to 123.

22 C.J.S. Criminal Law § 88.

CHAPTER 29 and 30
(Reserved)

CHAPTER 31
Controlled Substances

Part A
Possession, Distribution and Possession with Intent to Distribute

14-3101. Marijuana; possession; essential elements.[1]

For you to find the defendant guilty of possession of marijuana [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had [one ounce or less][3] [more than one ounce but less than eight ounces] [eight ounces or more] of marijuana in his possession[4];

2. The defendant knew it was marijuana;

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

USE NOTES

1. This instruction may be used for any of the three degrees of possession of marijuana.

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

3. Use only the applicable alternative.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue. UJI 14-3131, the definition of marijuana, should be given if there is an issue as to whether the substance is marijuana.

Committee commentary. — *See* Sections 30-31-23B(1), 30-31-23B(2) & 30-31-23B(3) NMSA 1978.

See generally Annot. 91 A.L.R.2d 810 (1963). The New Mexico Controlled Substances Act was derived from the Uniform Controlled Substances Act.

The three crimes of possession of marijuana are based upon the amount of marijuana possessed. The weight of the marijuana must be determined as of the time of the occurrence of the crime, whether or not the plant is green or is dried. *See State v. Olive,* 85 N.M. 664, 515 P.2d 668 (Ct. App.), *cert. denied,* 85 N.M. 639, 515 P.2d 643 (1973).

Marijuana is defined in Section 30-31-2O NMSA 1978 as "all parts of the plant Cannabis," with certain exceptions. The instruction requires the jury to find that the defendant had "marijuana" in his possession. Case law supports the conclusion that marijuana is the correct term for use in the instruction.

In *State v. Esquibel,* 90 N.M. 117, 560 P.2d 181 (Ct. App.), *cert. denied,* 90 N.M. 254, 561 P.2d 1347 (1977), the appellant contended that the legislature has narrowed the definition of marijuana to include only the plant cannabis sativa L., and not other cannabis. The court declined to consider this argument because there was evidence from which the jury could find that the substance was "cannabis sativa L." In *State v.*

Romero, 74 N.M. 642, 397 P.2d 26 (1964), the court construed the prior statute and concluded that marijuana was identical to cannabis, cannabis sativa L. and cannabis indica. In accord are *State v. Tapia,* 77 N.M. 168, 420 P.2d 436 (1966); and *State v. Everidge,* 77 N.M. 505, 424 P.2d 787, cert. denied, 386 U.S. 976, reh. denied, 386 U.S. 1043 (1967). *See also State v. Claire,* 193 Neb. 341, 227 N.W.2d 15 (1975) (cannabis sativa L., construed to include any species of genus cannabis), *United States v. Gaines,* 489 F.2d 690 (5th Cir. 1974) (refusal to instruct on statutory definition of marijuana not error), and 75 A.L.R.3d 717, 727-735. Contra, dictum in *State v. Benavidez,* 71 N.M. 19, 23, 375 P.2d 333 (1962).

Although the statute contains no requirement that the defendant know that the substance is marijuana, *State v. Giddings,* 67 N.M. 87, 89, 352 P.2d 1003 (1960), requires that the defendant have actual knowledge of the presence of the drug. Knowledge may be inferred from all of the surrounding facts and circumstances. *See, e.g.*, *State v. Elam,* 86 N.M. 595, 526 P.2d 189 (Ct. App.), *cert. denied,* 86 N.M. 593, 526 P.2d 187 (1974). *See also Hacker v. Superior Court,* 268 Cal. App. 2d 387, 73 Cal. Rptr. 907 (1968). Note that this crime requires only a general criminal intent. Therefore, UJI 14-141 must be given.

UJI 14-3130, the definition of possession, need only be given when the element of possession is in issue.

The state need not prove that the substance is not included in the exceptions to the definition of marijuana. *See State v. Everidge,* 77 N.M. 505, supra.

The statute excepts possession from criminal punishment if such possession is authorized. Authority is granted by the statute to registered persons or to persons who have obtained the substance by a valid prescription from a practitioner acting in the ordinary course of business. However, the state need not prove a negative status created by a statutory exclusion. *See State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977). The burden is on the defendant to go forward with evidence to show that he has authority. Section 30-31-37 NMSA 1978. *See* commentary to UJI 14-3132. *See generally State v. Everidge,* supra. Consequently, these instructions do not require the state to prove the absence of authority or the jury to find that the person did not have authority as one of the essential elements. The existence of such exceptions in the case of marijuana would be rare. *See Commonwealth v. Stawinsky,* 339 A.2d 91 (Pa. Super. 1975); *State v. White,* 213 Kan. 276, 515 P.2d 1081 (1973); *People v. Meyers,* 182 Colo. 21, 510 P.2d 430 (1973) (information was not defective for failure to allege defendant not a pharmacist); *State v. Jung,* 19 Ariz. App. 257, 506 P.2d 648 (1973) (state not required to prove defendant did not possess a license); *State v. Karathanos,* 158 Mont. 461, 493 P.2d 326 (1972); *Cartwright v. State,* 289 N.E.2d 763 (Ind. App. 1972); *State v. Conley,* 32 Ohio App. 2d 54, 288 N.E.2d 296 (1971); *State v. Bean,* 6 Ore. App. 364, 487 P.2d 1380 (1971); *State v. Winters,* 16 Utah 2d 139, 396 P.2d 872 (1964); *People v. Marschalk,* 206 Cal. App. 2d 346, 23 Cal. Rptr. 743 (1962) (claimed privilege must be affirmatively shown by defendant); *Contra, State v. Segovia,* 93 Idaho

208, 457 P.2d 905 (1969); *People v. Rios,* 386 Mich. 172, 191 N.W.2d 297 (1971). *See also* Uniform Controlled Substances Act, Section 506, and commentary to UJI 14-3132.

ANNOTATIONS

Where instruction given and defendant found guilty of higher offense, retrial prevented. — Where two counts are charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury should disregard the former count if it finds the defendant guilty under the latter operates as an acquittal of the former count and prevents retrial of this issue when the verdict on the latter is overturned. *State v. Moreno,* 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 141.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

28A C.J.S. Drugs and Narcotics § 265.

14-3102. Controlled substance; possession; essential elements.[1]

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

1. The defendant had _____[2] in his possession[4];

2. The defendant knew it was _____[2] [or believed it to be _____[2]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

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

USE NOTES

1. This instruction is appropriate for possession cases other than possession of marijuana.

2. Identify the substance.

3. Insert the count number if more than one count is charged.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Sections 30-31-23B(4) and 30-31-23B(5) NMSA 1978.

This instruction may be used for either the crime of possession of a narcotic drug from Schedule I or II or possession of any other controlled substance from Schedules I through IV. Knowledge of the defendant is an essential element of the crime. Therefore, if the evidence supports the theory that the defendant believed the substance to be other than that charged, the applicable alternative must be given. Note, however, that accurate knowledge of the identity of the controlled substance is not controlling; the crime is complete if the defendant believed he possessed *some* controlled substance.

In *People v. James,* 38 Ill. App. 3d 594, 348 N.E.2d 295 (1976), appeal dismissed, 429 U.S. 1082, 97 S. Ct. 1087, 51 L. Ed. 2d 528 (1977), the defendant appealed his conviction of selling LSD on the grounds that he believed the substance to be mescaline. The court affirmed the conviction and stated "If the accused knows he is delivering a controlled substance, he commits the criminal act specified. . . ." *See also People v. Garringer,* 48 Cal. App. 3d 827, 121 Cal. Rptr. 922 (1975) (it is no defense to the charge of possession of phenobarbital that the defendant believed he possessed secobarbital); *State v. Barr,* 237 N.W.2d 888 (N.D., 1976); *United States v. Davis,* 501 F.2d 1344 (9th Cir. 1974), and *United States v. Jewell,* 532 F.2d 697 (9th Cir.), *cert. denied,* 426 U.S. 951, 96 S. Ct. 3173, 49 L. Ed. 2d 1188 (1976). Compare *United States v. Moser,* 509 F.2d 1089 (7th Cir. 1975) (jury could infer that defendant knew drug was LSD even though defendant told buyer defendant was selling psilocybin and mescaline); but compare *State v. Pedro,* 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971) (defendant thought the bag of anhalonium [peyote] was "medicine," and court found no evidence of intent to possess peyote).

Note that this crime requires only a general criminal intent. Therefore, UJI 14-141 must be given.

This instruction requires the state to prove only that the defendant possessed a substance which is listed in one of the controlled substances schedules. *See State v. Atencio,* 85 N.M. 484, 513 P.2d 1266 (Ct. App.), *cert. denied,* 85 N.M. 483, 513 P.2d 1265 (1973). For example, heroin is a narcotic drug by statutory definition and proof that the defendant possessed heroin is sufficient without evidence that heroin is a narcotic drug. *See State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

The amount of the substance is not relevant to the charge of possession of a controlled substance. *See State v. Grijalva*, 85 N.M. 127, 509 P.2d 894 (Ct. App. 1973).

For additional discussion of the requirement of knowledge, and a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101.

ANNOTATIONS

Jury unanimity as to the form of cocaine involved in a lesser included offense was not required. — Where police officers found crack cocaine in defendant's vehicle and powder cocaine that belonged to defendant in the vehicle of defendant's friend; defendant was charged with one count of trafficking and one count of the lesser included offense of possession; the jury found defendant guilty of possession of cocaine; defendant claimed that there were two substances at issue and that the trial court failed to instruct the jury that any conviction of possession had to be based on the same substance considered by the jury for the trafficking offense; the state's theories of possession were based on the crack cocaine found in defendant's vehicle and the powder cocaine found in the friend's vehicle; and witnesses testified that a lab analysis does not distinguish between crack cocaine and powder cocaine and that both forms of cocaine were in quantities large enough to qualify for a count of trafficking, jury unanimity was not required as to the specific form of cocaine involved, jury unanimity was required only on the overall verdict. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Sufficient evidence of possession of methamphetamine. — Evidence that the arresting officer discovered methamphetamine in a pack of cigarettes removed from defendant's shirt pocket was sufficient to support defendant's conviction for possession of controlled substances. *State v. Howl*, 2016-NMCA-084, cert. denied.

A trace amount of a controlled substance is sufficient to support a conviction for possession. — Where police responded to a report that someone was trying to kick in the door of an apartment and encountered defendant at the scene, apparently agitated and yelling loudly, and where, after placing defendant under arrest for disorderly conduct, the officers found a clear glass pipe containing a white crystalline residue, which later tested positive for methamphetamine, in defendant's left front pocket, and where defendant challenged the sufficiency of evidence of a trace amount of a controlled substance found inside a glass pipe to support a conviction for possession of methamphetamine, there was sufficient evidence to support defendant's conviction, because the legislature intended possession of any amount of a controlled substance to violate § 30-31-23(E) NMSA 1978, and the State's evidence conclusively established that defendant was in possession of a clear glass pipe containing the white crystalline residue that proved to be methamphetamine. Moreover, defendant's possession of a glass pipe in his pocket, with a visible white residue inside the pipe, was sufficient to create a reasonable inference that defendant knew that the residue was a controlled substance. *State v. Moncayo*, 2022-NMCA-067, cert. granted.

No instruction on possession warranted. — Although possession of heroin is a lesser included offense of trafficking in heroin, it should not be instructed on when the evidence does not support the defendant's claim that possession was the highest crime which occurred. *State v. Hernandez,* 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33.

Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

28A C.J.S. Drugs and Narcotics § 265.

14-3103. Controlled substance; distribution; essential elements.

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

1. The defendant [transferred][4] [caused the transfer of] [attempted to transfer] _____[2] to another;

2. The defendant knew it was _____[2] [or believed it to be _____[2]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

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

USE NOTES

1. This instruction is not applicable to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

2. Identify the substance.

3. Insert the count number if more than one count is charged.

4. Use only the applicable alternatives.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Section 30-31-22A NMSA 1978.

This instruction is to be used for distribution of any controlled substance, including marijuana. Although the amount of the substance is not relevant for conviction for the crime of distribution, giving away of a "small amount" of marijuana is treated as if it were possession of more than eight ounces, Section 30-31-22C NMSA 1978, and therefore is punishable by a fine of only $5,000 or imprisonment for 1 to 5 years or both, Section 30-31-23B(3) NMSA 1978.

The introductory paragraph of this instruction gives the crime its statutory name, "distribution." Section 30-31-2J NMSA 1978 defines "distribute" as "deliver." Section 30-31-2G NMSA 1978 defines "deliver" as "actual, constructive or attempted transfer." "Transfer" is a word in common usage which will not ordinarily require further definition. If a definition is requested by the jury, a dictionary definition should be given.

Section 30-31-2G NMSA 1978 includes "attempted transfer" in the definition of "deliver." Therefore, the crime of "attempted distribution" is included in this instruction. Apparently, UJI 14-2801 is not appropriate for an attempted distribution because the legislature, in defining this offense, has specifically included an attempt within the definition of the substantive crime. *See State v. Vinson,* 298 So.2d 505 (Fla. App. 1974) (one who attempts to make a transfer is guilty of the substantive offense).

Unlike the crime of trafficking a controlled substance, the statute prohibiting distribution of a controlled substance does not specifically include a provision for penalizing a gift of the controlled substance. However, the court of appeals has held that the definition of "distribute" and the definition of "delivery" do not require any remuneration for the transfer. *See State v. Montoya,* 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

Possession is a necessarily included offense to the crime of distribution because one cannot commit the crime of distribution without also committing the crime of possession. *See State v. Medina,* 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). *See also State v. Romero,* 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974). *See* Rule 5-608 NMRA and UJI 14-6002 [withdrawn] and commentary. Distribution may be by constructive transfer, for example, by mailing the substance. *State v. McHorse,* 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973). Consequently, constructive possession would be sufficient for a constructive distribution. *See* State v. Wesson, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3102.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-6002 NMRA was withdrawn, effective December 31, 2020. The bracketed material was inserted by the compiler and is not part of the rule.

Ownership not element of crime. — Section 30-31-20 NMSA 1978 prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: ownership is not an element. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19.

28A C.J.S. Drugs and Narcotics § 266.

14-3104. Controlled substance; possession with intent to distribute; essential elements.[1]

For you to find the defendant guilty of "possession with intent to distribute _____[2]" [as charged in Count _____]3, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[2] in his possession[4];

2. The defendant knew it was _____[2] [or believed it to be _____[2]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The defendant intended to transfer it to another;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is not applicable to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

2. Identify the substance.

3. Insert the count number if more than one count is charged.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Section 30-31-22A NMSA 1978.

This instruction is for use for possession with intent to distribute of any controlled substance except a narcotic drug in Schedules I or II. An essential element of this offense is the intent to transfer. *State v. Tucker,* 86 N.M. 553, 525 P.2d 913 (Ct. App.), *cert. denied,* 86 N.M. 528, 525 P.2d 888 (1974).

Mere possession alone is insufficient to prove an intent to distribute. *State v. Moreno,* 69 N.M. 113, 364 P.2d 594 (1961). The intent to distribute may be inferred from the facts and circumstances. *State v. Ortega,* 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968). For example, it may be shown by the possession of a large quantity of the substance. *State v. Bowers,* 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974). It may also be shown if the person in possession is not, nor ever has been, a user of the substance. *State v. Quintana,* 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

The crime of possession with intent to distribute is complete if there is possession with intent to transfer. The place of the intended transfer is not an essential element of the crime. *State v. Bowers, supra*. The necessary intent may be proved by intent to complete any of the types of transfer which are set forth in Section 30-31-2G NMSA 1978.

Although this instruction is also applicable to marijuana, it will probably be seldom used for that substance. The statute provides the same penalty for a first offense of possession with intent to distribute marijuana and the offense of possession of more than eight ounces of marijuana.

For a discussion of use of the word "transfer" to define "distribute," *see* commentary to UJI 14-3103.

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

ANNOTATIONS

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Conviction of possession of illicit drugs found in premises of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

28 C.J.S. Drugs and Narcotics § 175 et seq.

14-3105. Controlled substance; distribution to a minor; essential elements.

For you to find the defendant guilty of "distribution of _____[1] to a minor" [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][3] [caused the transfer of] [attempted to transfer] _____[1] to _____ *(name of transferee);*

2. The defendant knew it was _____[1] [or believed it to be _____[1]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The defendant was 18 years of age or older;

4. _____ *(name of transferee)* was 17 years of age or younger;

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Identify the substance.

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

3. Use only the applicable alternatives.

4. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Section 30-31-21 NMSA 1978.

This crime may be committed by distribution of marijuana or any controlled substance enumerated in Schedules I through IV. The statute does not require that the distributor have knowledge of the age of the distributee. A reasonable construction of the statute supports the conclusion that the legislative intent was the protection of minors. Therefore, the crime is one of strict liability. With respect to the element of attempted transfer this instruction would be appropriate if there is evidence to support an attempt to transfer to a person under the age of 18. *Cf. United States v. Leazer,* 460 F.2d 864 (D.C. Cir. 1972). In adopting the Uniform Controlled Substances Act, New Mexico did not follow the suggestion of the uniform commissioners that there be at least a three year age difference between the distributor and distributee. *See* Uniform Controlled Substances Act, Section 406 and commissioners note.

For a discussion of exceptions and exemptions, *see* commentary to UJI 14-3101.

See also commentary to UJI 14-3103.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 82, 83.

Giving, selling or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

28 C.J.S. Drugs and Narcotics § 159 et seq.

14-3106. Possession of a dangerous drug.

For you to find the defendant guilty of possession of a dangerous drug [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant possessed[2] a drug called _____[3];

2. _____[3] [has been determined to be a dangerous drug by the New Mexico Board of Pharmacy;][4]

[OR]

[only may be used under the supervision of a practitioner licensed by law to administer or prescribe the drug under federal law;]

[OR]

[Is dispensed bearing the legend ["Caution: federal law prohibits dispensing without a prescription"][4] [or] ["Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian"] [or] ["RX only"];]

3. The defendant knew it was _____[3] [or believed it to be _____[3]];

[4. The defendant knew that _____[3] [has been determined to be a dangerous drug by the New Mexico Board of Pharmacy;][4] [OR] [only may be used under the supervision of a practitioner licensed by law to administer or prescribe the drug under federal law;] [OR] [Is dispensed bearing the legend ["Caution: federal law prohibits dispensing without a prescription"][4] [or] ["Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian"] [or] ["RX only"];];][5]

[5. The defendant [did not have a valid prescription for _____[3];][4] [or] [was not licensed] [or] [was not legally authorized to possess a dangerous drug because _____[6];]]

6. This happened in New Mexico, on or about _____[7].

USE NOTES

1. Insert the count number if more than one count is charged.

2. UJI 14-130 NMRA, the definition of possession in controlled substance cases, should be given if possession is in issue.

3. Use chemical name for drug.

4. Use applicable alternative or alternatives.

5. Element 4 distinguishes the penalties as defined in NMSA 1978, Section 26-1-26(A) and (B). Thus, this instruction may be used to instruct on the lesser-included offense defined in Section 26-1-26(B) by removing element 4. *See* Committee commentary.

6. If evidence is presented that possession of the drug was legal under NMSA 1978, Section 26-1-18, describe the factual basis for the claim. *See* Committee commentary.

7. Insert date on which offense occurred.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — NMSA 1978, Section 26-1-2(F) defines a "dangerous drug" to mean "a drug, other than a controlled substance enumerated in Schedule I of the Controlled Substances Act, that because of a potentiality for harmful effect or the method of its use or the collateral measures necessary to its use is not safe except under the supervision of a practitioner licensed by law to direct the use of such drug and hence for which adequate directions for use cannot be prepared." Therefore, a charge of unlawfully possessing a dangerous drug presupposes the substance is not enumerated in Schedule I. *See State v. Reams*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

The Legislature created three levels of penalties for illegal possession of a dangerous drug, stating that a person who "knowingly" violates Section 26-1-16, the prohibition against possession of a dangerous drug, "is guilty of a fourth degree felony and shall be punished by a fine of not less than one thousand dollars ($1,000) or more than five thousand dollars ($5,000) or by imprisonment for not less than one year or both." NMSA 1978, § 26-1-26(A). Meanwhile, all other violations of the Drug, Device, and Cosmetic Act, including Section 26-1-16, are punishable as a misdemeanor for the first offense and for second and subsequent offenses as a basic fourth degree felony. NMSA 1978, § 26-1-26(B).

UJI 14-3106, element 4, includes the requisite knowledge for Section 26-1-26(A) and instruction without element 4 therefore only supports the penalty defined in Section 26-1-26(B). New Mexico has long recognized a two-tiered knowledge requirement for drug possession crimes, as captured by UJIs 14-3102 and -3130 (requiring knowledge that "it is on his person or in his presence," and knowledge or belief that it was the particular substance charged). The Committee seeks to give meaning to the Legislature's separate inclusion of "knowledge" for the heightened felony penalty in Section 26-1-26(A), while avoiding strict liability for the misdemeanor and basic felony penalties contained in Section 26-1-26(B), by requiring the violation itself to be knowing to incur the heightened penalty. *See State v. Nozie*, 2009-NMSC-018, ¶¶ 25-26, 146 N.M. 142, 207 P.3d 1119 (New Mexico seeks to avoid strict liability crimes by imputing a knowledge requirement). Thus, a knowing *possession*, even without subjective knowledge that such possession violates Section 26-1-16, constitutes a lesser-included offense under Section 26-1-26(B).

Section 26-1-2(F) further provides a "drug shall be dispensed only upon the prescription or drug order of a practitioner licensed by law to administer or prescribe the drug if it:

(1) is a habit-forming drug and contains any quantity of a narcotic or hypnotic substance or a chemical derivative of such substance that has been found under the federal act and the board to be habit forming;

(2) because of its toxicity or other potential for harmful effect or the method of its use or the collateral measures necessary to its use is not safe for use except under the supervision of a practitioner licensed by law to administer or prescribe the drug;

(3) is limited by an approved application by Section 505 of the federal act to the use under the professional supervision of a practitioner licensed by law to administer or prescribe the drug;

(4) bears the legend: “Caution: federal law prohibits dispensing without prescription.”;

(5) bears the legend: “Caution: federal law restricts this drug to use by or on the order of a licensed veterinarian.”; or

(6) bears the legend “RX only.”

Subsections (3) through (6) of this definition refer to the type of factual elements that traditionally have been within the province of a jury. However, in the Committee’s judgment subsections (1) and (2) set forth criteria to be used by the Board of Pharmacy in determining whether a particular drug should be expressly regulated as a dangerous drug pursuant to Section 26-1-18(B) (providing that the Board “shall, by regulation, declare a substance a ‘dangerous drug’ when necessary, and notification shall be sent to all registered pharmacies in the state within sixty days of the adoption of the regulation”).

Indeed, Subsection (1) directly requires administrative action by the Board. Subsection (2) requires a determination that use of the drug “is not safe ... except under the supervision of a practitioner.” In the Committee’s view, this is a policy determination that lies within the delegated authority and expertise of the Board. Conversely, were this provision interpreted instead to create a self-effecting element of a criminal offense of unlawful possession it might be subject to constitutional challenge for vagueness. A person of common intelligence would have little means of ascertaining before the fact whether a lay jury would find a particular drug sufficiently dangerous to require the supervision of a practitioner. *See generally State v. Laguna*, 1999-NMCA-152, ¶¶ 25-26, 128 N.M. 345, 992 P.2d 896 (two arms of vagueness test are whether the statute provides a person of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited and whether it the statute has no standards or guidelines and therefore allows, if not encourages, subjective and ad hoc application); *see also Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 775 P.2d 709 (“It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.”).

For this reason, element 2 of UJI 14-3106 contains, as an alternative element of the crime of unlawful possession of a dangerous drug, the language that the substance “has been determined to be a dangerous drug by the New Mexico Board of Pharmacy.” *See* § 26-1-2(F)(1), (2). The remaining alternatives track the statutory language of subsections (3) through (6) inclusive.

Element 3 and Use Note 5 contain a list of possible exceptions to the prohibition against possessing a dangerous drug and the jury should be instructed on these exceptions

when the evidence creates a jury issue. NMSA 1978, Section 26-1-16 provides, generally, that possession of a dangerous drug requires a prescription or that the drug be dispensed by a licensed practitioner who has a valid practitioner-patient relationship with the person possessing the drug. Section 26-1-16(E). This Section also, however, contains exemptions for entities and individuals licensed by the Board to possess or dispense dangerous drugs. These include manufacturers, wholesalers or distributors, hospitals, nursing homes, clinics or pharmacies, the University of New Mexico College of Pharmacy or a public health laboratory, and licensed practitioners. Section 26-1-16(A), (B). Subsection (H) creates an exception livestock owners, employees, and consignees of livestock.

[Adopted by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

14-3107. Drug paraphernalia; possession; essential elements.

For you to find the defendant guilty of possession of drug paraphernalia, [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[2] in his or her possession[3];

2. The defendant intended to use the _____[2] to [plant, propagate, cultivate, grow, harvest][,] [manufacture, compound, convert, produce, process, prepare, test, analyze][,] [pack, repack, store, contain, conceal][,] [or] [inject, ingest, inhale or otherwise introduce into the human body][4] a controlled substance;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. Identify the items of alleged drug paraphernalia.

3. UJI 14-130 NMRA, the definition of possession, should be given if possession is in issue.

4. Choose applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* NMSA 1978, § 30-31-25.1.

The Legislature did not intend to punish a defendant for possession of a controlled substance and possession of paraphernalia when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance. Where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant's conviction of possession of drug paraphernalia violated double jeopardy. *State v. Almeida*, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

Where police officers testified that they found a glass pipe containing a white substance in the center console of the vehicle the defendant was driving and subsequent forensic testing revealed that the substance was methamphetamine, the circumstantial evidence was sufficient (1) to establish that the defendant possessed or constructively possessed the methamphetamine and the pipe, and (2) to permit the jury to infer that the defendant knew the substance was methamphetamine and that the defendant intended to use the pipe to inhale methamphetamine. *State v. Lopez*, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361.

Sufficient evidence supported the defendant’s conviction for possession of drug paraphernalia where a reasonable jury could infer that the defendant had knowledge of and control over drug paraphernalia based on evidence that a glass pipe similar to those used to ingest methamphetamine was found in the defendant's vehicle and methamphetamine was found on the defendant’s person. *State v. Howl*, 2016-NMCA-084, 381 P.3d 684.

In cases where drug possession is premised on the drugs contained within an item of paraphernalia, paraphernalia possession may be a lesser-included offense of drug possession. *State v. Darkis*, 2000-NMCA-085, ¶¶ 12, 21, 129 N.M. 547, 10 P.3d 871 (noting the defendant "could not have committed possession of cocaine without also committing possession of drug paraphernalia," and the court should have instructed on a lesser offense of paraphernalia possession).

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Part B
Trafficking

14-3110. Controlled substance; trafficking by distribution; narcotic drug; essential elements.

For you to find the defendant guilty of "trafficking a controlled substance by distribution" [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][3] [caused the transfer of] [attempted to transfer] _____[4] to another;

2. The defendant knew it was _____[4] [or believed it to be _____[4]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

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

USE NOTES

1. This instruction is applicable only to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

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

3. Use only the applicable alternatives.

4. Identify the substance.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Section 30-31-20A(2) NMSA 1978.

This instruction is to be used for the crime of trafficking by distribution, sale, barter or giving away any controlled substance in Schedule I or II which is a narcotic drug. The statutory term "trafficking" is used in the introductory paragraph. However, sale (the transfer of ownership of and title to property from one person to another for a price), barter (to trade by exchanging one commodity for another) and give away (to make a present of) each have definitions which can be classified as subsets of distribute. Therefore, the term "transfer" is applicable to describe all types of trafficking by distribution. For a discussion of the use of "transfer," *see* commentary to UJI 14-3103.

Note that this crime requires only a general criminal intent. Therefore, UJI 14-141 must be given.

The definition of "deliver" includes an attempted transfer. Apparently UJI 14-2801 is not appropriate for an attempted distribution because the definition of the substantive offense specifically includes an attempt.

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

ANNOTATIONS

Ownership not element of crime. — Section 30-31-20 NMSA 1978 prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: ownership is not an element. *State v. Hernandez,* 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

Trafficking in a controlled substance by distribution is not a specific intent crime. — Since that portion of 30-31-20 NMSA 1978 which prohibits trafficking by "distribution, sale, barter or giving away any controlled substance . which is a narcotic drug" only describes a particular act without reference to a defendant's intent to do some further act or achieve some additional consequence, the crime is properly one of general intent. *State v. Bender,* 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

Giving of alternative instructions not error. — Where an indictment charged that the defendants "did intentionally distribute, possess with intent to distribute, or aided and abetted one another in the distribution of a controlled substance," and where two of the alternatives, distribution or aiding and abetting in distribution, were submitted to the jury in accordance with UJI 14-2822 and this instruction, there was no error in either the charges or the submission of the alternatives to the jury. *State v. Turner,* 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178.

Court properly refused instruction on penalties. — Where the jury was instructed as to the elements of the alleged heroin offenses in substantial compliance with this instruction and certain definitions, taken from the statutory provision, were included in the instruction, the court did not commit error in refusing the defendant's requested instruction based on 30-31-23B NMSA 1978 (relating to penalties for possession). *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 A.L.R.5th 464.

28 C.J.S. Drugs and Narcotics § 178.

14-3111. Controlled substance; trafficking by possession with intent to distribute; narcotic drug; essential elements.[1]

For you to find the defendant guilty of "trafficking a controlled substance by possession with intent to distribute" [as charged in Count _____][2], the state must

prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[3] in his possession[4];

2. The defendant knew it was _____[3] [or believed it to be _____[3]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The defendant intended to transfer it to another;

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. This instruction is applicable only to narcotic drugs in Schedules I or II of 30-31-6 and 30-31-7 NMSA 1978.

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

3. Identify the substance.

4. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Section 30-31-20A(3) NMSA 1978. *See also* commentary to UJI 14-3104.

This instruction is for use for the crime of "trafficking" by possession with intent to distribute a narcotic drug in Schedule I or II.

Trafficking by possession with intent to distribute requires proof of a specific intent to transfer. *State v. Gonzales*, 86 N.M 556, 525 P.2d 916 (Ct. App. 1974).

There is authority that it is no defense to this charge that the defendant believed the substance to be a controlled substance other than a Schedule I or II narcotic. *See People v. James,* 38 Ill. App. 3d 594, 348 N.E.2d 295 (1976), appeal dismissed, 429 U.S. 1082, 17 S. Ct. 1087, 51 L. Ed. 2d 528 (1977). *See also* commentary to UJI 14-3101 and 14-3102. *But compare Mullaney v. Wilbur,* 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (due process requires that prosecution prove every fact necessary to constitute the crime charged).

For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

For a discussion of the requirement of knowledge, *see* commentary to UJI 14-3101 and 14-3102.

For a discussion of the use of the word transfer, *see* commentary to UJI 14-3103.

ANNOTATIONS

Actual possession not required. — Since the evidence showed a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and that the defendant is third party's accomplice, the evidence is sufficient to support a conviction under 30-31-20 NMSA 1978. The fact the defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

Facts sufficient to find guilt of possession with intent to distribute. — Where there was evidence that defendant was found in the stash house, that the smell of marijuana was strong and obvious, that there was a large quantity of marijuana in the basement, and that defendant tried to escape from the police when the investigation turned up marijuana, even punching one of the officers, and once subdued, defendant threw up, and slammed his head on the floor like a “child throwing a temper tantrum,” these facts are sufficient to allow a rational jury to find defendant guilty of possession with intent to distribute and conspiracy. *State v. Duarte*, 2004-NMCA-117, 136 N.M. 404, 98 P.3d 1054.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 60 A.L.R.3d 1128.

28 C.J.S. Drugs and Narcotics § 175 et seq.

14-3112. Controlled substance; trafficking by manufacturing; essential elements.

For you to find the defendant guilty of "trafficking a controlled substance by manufacturing" [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [manufactured*][2] [packaged or repackaged] [labelled or relabelled] _____[3];

2. The defendant knew it was _____[3];

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

* "Manufactured" means produced, prepared, compounded, converted or processed.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Identify the controlled substance.

Committee commentary. — *See* Section 30-31-20A(1) NMSA 1978. *See also* Uniform Controlled Substances Act, Section 401.

This instruction is for use in the charge of trafficking a controlled substance by manufacturing. The instruction uses the statutory term "manufacture" to include those activities included in the ordinary meaning of that term. The alternative activities of packaging and labelling are included in the statutory definition of "manufacture" and are only to be used when there is evidence of this type of activity. *See* Section 30-31-2N NMSA 1978.

The definition of manufacture excepts the preparation or compounding of a controlled substance for the defendant's own use. *See State v. Whitted,* 21 N.C. App. 649, 205 S.E.2d 611, cert. denied, 285 N.C. 669, 207 S.E.2d 761 (1974), *cert. denied,* 419 U.S. 1120, 95 S. Ct. 803, 42 L. Ed. 2d 820 (1975). For a discussion of exceptions and exemptions as a defense, *see* commentary to UJI 14-3101 and 14-3140.

Any controlled substance enumerated in Schedules I through V may be manufactured.

ANNOTATIONS

Although possession is not an element of trafficking by manufacture and a jury instruction on possession was not required to be given with the instruction on trafficking by manufacture, where possession is an issue in dispute, it would be error not to give the instruction on possession. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 C.J.S. Drugs and Narcotics § 160 et seq.

14-3113. Controlled substance; acquisition or attempt to acquire by misrepresentation; essential elements.

For you to find the defendant guilty of [intentionally acquiring or obtaining][1] [attempting to acquire or obtain] possession of _____[2] by misrepresentation or deception, [as charged in Count _____][3], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant did [intentionally acquire or obtain][1] [attempt to acquire or obtain] possession of _____[2];

2. The defendant did so by misrepresentation or deception;

3. The defendant knew it was _____[2] [or believed it to be _____[2]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use applicable alternative.

2. Identify the controlled substance.

3. Insert the count number if more than one count is charged.

4. If there is evidence that the defendant believed the substance to be some controlled substance other than that charged, use applicable alternative or alternatives.

Committee commentary. — The 1979 amendment to 30-31-25 NMSA 1978 added "or attempt to acquire or obtain" after "to intentionally acquire or obtain" in Subsection A(3). This indicates a legislative intent to make the attempt to obtain possession of a controlled substance by the proscribed conduct a separate substantive offense from that of actually obtaining a controlled substance by such conduct. The offenses are different, although of equal magnitude. For purposes of specificity, the jury should be instructed on one offense or the other, or instructed on both offenses alternatively when there is an issue as to whether the defendant actually obtained possession of the controlled substance.

The statute provides that the acquisition or attempt to acquire may be committed by misrepresentation, fraud, forgery, deception or subterfuge. The committee was of the opinion that the terms misrepresentation or deception adequately cover fraud, forgery or subterfuge and that the terms fraud, forgery or subterfuge would only confuse the jury.

The question of whether or not the substance is a controlled substance is a question of law to be decided by the judge.

Part C
Counterfeit Substances

14-3120. Counterfeit substance; creation; essential elements.

For you to find the defendant guilty of creating a counterfeit substance [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant placed an unauthorized _____[2] on _____[3];

2. The unauthorized _____[2] falsely represented the manufacturer, distributor or dispenser of the _____[3];

3. The defendant knew that the use of the _____[2] was unauthorized;

4. The defendant knew the substance was _____[3] [or believed it to be _____[3]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Insert one or more of the following terms in the alternative: trademark, trade name, imprint, number, device, identifying mark.

3. Identify the substance.

4. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* Section 30-31-22B NMSA 1978.

These instructions incorporate the statutory definitions of "counterfeit substance" from Section 30-31-2F NMSA 1978. The instructions are appropriate for use with any controlled substance in Schedules I through V. For a discussion of the use of the word "transfer," *see* commentary to UJI 14-3103. *See also* commentary to UJI 14-3102 and 14-3104.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 C.J.S. Drugs and Narcotics § 192.

14-3121. Counterfeit substance; delivery; essential elements.

For you to find the defendant guilty of "delivering a counterfeit substance" [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [transferred][2] [caused the transfer of] [attempted to transfer] _____[3] to another;

2. The _____[3] had an unauthorized _____[4] which falsely represented its manufacturer, distributor or dispenser;

3. The defendant knew that the use of the _____[4] was unauthorized;

4. The defendant knew the substance was _____[3] [or believed it to be _____[3]][5] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use only the applicable alternatives.

3. Identify the substance.

4. Insert one or more of the following terms in the alternative: trademark, trade name, imprint, number, device, identifying mark.

5. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

Committee commentary. — *See* committee commentary under UJI 14-3120.

ANNOTATIONS

Cross references. — *See* Sections 30-31-22B, 30-31-2F and 30-31-2G NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 C.J.S. Drugs and Narcotics § 159.

14-3122. Counterfeit substance; possession with intent to deliver; essential elements.

For you to find the defendant guilty of "possession with intent to deliver a counterfeit substance" [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had _____[2] in his possession[3];

2. The defendant knew the substance was _____[2] [or believed it to be _____[2]][4] [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The _____[2] had an unauthorized _____[5] which falsely represented its manufacturer, distributor or dispenser;

4. The defendant knew that the use of the _____[5] was unauthorized;

5. The defendant intended to transfer the _____[2] to another;

6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Identify the substance.

3. UJI 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue.

4. Use applicable alternative or alternatives if there is evidence that the defendant believed the substance to be some controlled substance other than that charged.

5. Insert one or more of the following terms in the alternative: trademark, trade name, imprint, number, device, identifying mark.

Committee commentary. — *See* committee commentary under UJI 14-3120.

ANNOTATIONS

Cross references. — *See* Sections 30-31-22B and 30-31-2F NMSA 1978.

Part D
Definitions

14-3130. Possession of controlled substance; defined.[1]

A person is in possession [of] _____ *(name of substance)* when he knows it is on his person or in his presence, and he exercises control over it.

[Even if the substance is not in his physical presence, he is in possession if he knows where it is, and he exercises control over it.][2]

[Two or more people can have possession of a substance at the same time.]

[A person's presence in the vicinity of the substance or his knowledge of the existence or the location of the substance, is not, by itself, possession.]

USE NOTES

1. This instruction is designed to be used in controlled substance cases in which possession is an element and is in issue.

2. One or more of the following bracketed sentences may be used depending on the evidence.

Committee commentary. — This instruction defines the various methods by which possession of a controlled substance may occur. This instruction must be given if possession is in issue and its use replaces UJI 14-130 which should not be used in controlled substance cases.

Possession may be constructive. *See State v. Bowers,* 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974); *State v. Bauske,* 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974); *State v. Montoya,* 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973). *See also State v. Perry,* 10 Wash. App. 159, 516 P.2d 1104 (1973). Possession need not be exclusive. *See State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974). The definition of "possession," if given, should include only those alternatives which are supported by the evidence.

Possession need not be defined unless its definition is in issue. *Brothers v. United States,* 328 F.2d 151 (9th Cir.), cert. denied, 377 U.S. 1001, 84 S. Ct. 1934, 12 L. Ed. 2d 1050 (1964); *Johnson v. United States,* 506 F.2d 640 (8th Cir. 1974), *cert. denied,* 420 U.S. 978, 95 S. Ct. 1404, 43 L. Ed. 2d 659 (1975).

ANNOTATIONS

Constructive possession. — Evidence that the defendant fled from the police wearing a Lakers jersey, the defendant hid behind an abandoned refrigerator, cocaine was found under the refrigerator and near the place where the defendant dropped the Lakers jersey, and the defendant's phone calls from jail indicated that he knew the location of the cocaine, was substantial evidence that the defendant had constructive possession of the cocaine. *State v. Templeton*, 2007-NMCA-108, 142 N.M. 369, 165 P.3d 1145.

First sentence of this instruction is designed to be used in a controlled substance case in which possession is an element and is in issue. *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

One or more of the second, third, and fourth sentences of this instruction "may" be used, "depending on the evidence." *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

No error in not giving last sentence from instruction. — Where the whole issue in the case was whether defendant threw a Tylenol bottle out of the bathroom window, knowing that the bottle contained cocaine, under these circumstances, defendant would not have been entitled to the instruction, even if she had requested it. Therefore, there was no fundamental error in not giving the last sentence from the instruction on possession. *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

Failure to tender instruction did not constitute ineffective assistance of counsel. — Counsel's failure to tender an instruction concerning the last sentence of this instruction did not constitute ineffective assistance of counsel where it was rational for defense counsel to conclude that the best defense to both charges was that defendant did not throw a Tylenol bottle outside a bathroom window when the police arrived, knowing that cocaine was inside it, and substantial evidence was available and used at trial which, if believed by the jury, would have resulted in an acquittal. *State v. Franco*, 2004-NMCA-099, 136 N.M. 204, 96 P.3d 329, cert. denied, 2004-NMCERT-008, cert. granted, 2004-NMCERT-008.

"Possession" may be actual or constructive. *State v. Montoya,* 1979-NMCA-044, 92 N.M. 734, 594 P.2d 1190, cert. denied, 92 N.M. 675, 593 P.2d 1078.

Elements of constructive possession. — "Constructive possession" requires no more than knowledge of a narcotic and control over it; "control," in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Montoya,* 1979-NMCA-044, 92 N.M. 734, 594 P.2d 1190, cert. denied, 92 N.M. 675, 593 P.2d 1078.

In a prosecution of a physician for violation of 30-31-25A(3) NMSA 1978, constructive possession requires no more than knowledge of a narcotic and control over it; control, in turn, requires no more than the power to produce or dispose of the

narcotic. *State v. Carr,* 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds*, *State v. Olguin,* 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92.

Evidence sufficient to infer knowledge. — Evidence of defendant's exclusive control of the vehicle in which marijuana was found, his lies to the arresting officer, and his nervous demeanor were sufficient to allow a jury to find that he had knowledge of the marijuana. *State v. Hernandez,* 1998-NMCA-082, 125 N.M. 661, 964 P.2d 825.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28A C.J.S. Drugs and Narcotics § 265.

14-3131. Marijuana; definition.[1]

"Marijuana" means any part of the cannabis plant, whether growing or not; or the seeds of the plant; or any substance made from the plant or its seeds; [except][2]:

[the mature stalks of the plant][3]

[hashish];

[tetrahydrocannabinols extracted or isolated from the plant];

[fiber produced from the stalks];

[oil or cake made from the seeds of the plant];

[any substance made from the mature stalks];

[any substance made from the fiber];

[any substance made from the oil];

[any substance made from the cake];

[any substance made from the sterilized seed].

USE NOTES

1. This instruction is to be used if there is an issue as to whether the substance is marijuana.

2. Use the bracketed word if there is an issue involving one or more of the listed exceptions.

3. Use only the alternatives required by the evidence.

ANNOTATIONS

Cross references. — *See* Section 30-31-2O NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 8.

28A C.J.S. Drugs and Narcotics § 1.

Part E
Exceptions and Exemptions

14-3140. Exceptions and exemptions; burden of proof.

If _____[1], the defendant is not guilty of _____[2] [as charged in Count _____][3], the burden is on the state to prove beyond a reasonable doubt that _____[4].

USE NOTES

1. Describe the exemption or exception in issue: e.g., the drug was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice.

2. Insert the name of the offense or offenses to which the exception or exemption is applicable.

3. Use this bracketed phrase and insert the count number or count numbers if more than one count is charged.

4. Restate the exception or exemption in the negative: e.g., the drug was not obtained pursuant to a valid prescription, etc.

Committee commentary. — *See* Section 30-31-37 NMSA 1978.

This instruction is for use when an exception or exemption is at issue. Although the statute states that the burden of proof is on the defendant, such burden never shifts from the state in a criminal trial. The defendant has the burden of going forward with evidence sufficient to raise the issue of the exception or exemption, and then the state must disprove the existence or validity of such exception or exemption beyond a reasonable doubt. 28 C.J.S. Supp., Drugs & Narcotics, § 190, p. 278 (1974). *In accord, State v. Jourdain,* 225 La. 1030, 74 So.2d 203 (1954), cited with approval in *State v. Everidge,* 77 N.M. 505, 424 P.2d 787, cert. denied, 386 U.S. 976, reh. denied, 386 U.S. 1043 (1967). Other cases cited with approval in *Everidge* are consistent with the Jourdain case. Compare *State v. Bell,* 90 N.M. 134, 560 P.2d 925 (1977) (in a rape

case, the defense has the burden of going forward with evidence of spousal relationship, and then the burden of proof shifts to the state to prove beyond a reasonable doubt that the victim was not the spouse of the defendant); *Mullaney v. Wilbur,* 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (due process requires that the state prove all facts necessary to establish guilt); and *United States v. Rosenberg,* 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031, 96 S. Ct. 562, 46 L. Ed. 2d 404 (1975) (due process objection to federal statute is rejected because statute does not shift burden of proof).

Although the rule states that the defendant has the burden of going forward with the evidence, and the statute itself states that the defendant has the burden of proof, the burden may be satisfied by evidence that comes in on the government's case in chief. *United States v. Black*, 512 F.2d 864 (9th Cir. 1975) (construing the federal narcotic statute, 21 U.S.C.A. 885(2)(1), which imposes on the defendant the burden of ". . . going forward with the evidence.")

For a discussion of the difference between burden of proof and burden of going forward in cases involving the defense of insanity, *see State v. James,* 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971), and *State v. Wilson,* 85 N.M. 552, 514 P.2d 603 (1973); and for a general discussion of the difference between these burdens, *see* 22A C.J.S. Criminal Law, § 573, p. 317 (1961). *See also* commentary to UJI 14-3101.

ANNOTATIONS

Defendant must prove that he is within exception to penal statute in order to take advantage of it; the state is generally not required to negate those exceptions. *State v. Roybal*, 1983-NMCA-085, 100 N.M. 155, 667 P.2d 462.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 211.

28A C.J.S. Drugs and Narcotics § 232.

CHAPTER 32 to 41
(Reserved)

CHAPTER 42
Money Laundering

14-4201. Money laundering; financial transaction to conceal or disguise property, OR to avoid reporting requirement; essential elements.

For you to find the defendant guilty of money laundering [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [conducted] [structured] [engaged in] [participated in][2] a financial transaction[3] by _____ (*describe the financial transaction*);

2. The defendant knew that the property[4] involved in the financial transaction [was] [was represented to be][2] the proceeds of _____ (*name the specified unlawful activity*)[5];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][6]

4. The defendant knew that the financial transaction was designed, in whole or in part, to [[conceal][2] [or] [disguise] the nature, location, source, ownership, or control of the property][2]

[OR]

[avoid a transaction reporting requirement under state or federal law];

[5. The financial transaction involved over $ _____[7];] and

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use the applicable alternative or alternatives.

3. Unless the parties stipulate that the transaction was a "financial transaction," give the definitions in UJI 14-4205(D) & (E) NMRA.

4. Unless the parties stipulate that the transaction involved "property," give the definition in UJI 14-4205(F) NMRA.

5. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

6. Rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed

element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

7. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 5.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-4(A)(1) (1998).

This instruction sets forth the essential elements of two distinct prongs of the first of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 1956(a)(1)(B)(ii), respectively. Although not directly instructive, reference to the analogous Tenth Circuit and Eighth Circuit instructions and committee commentary, as well as to the Department of Justice's money laundering guidance to federal prosecutors, may be useful.

Unlike the federal money laundering statute, 18 U.S.C. § 1956, in the New Mexico Money Laundering Act, NMSA 1978, Sections 30-51-1 to -5, there is no explicit prohibition on attempts. *See* § 30-51-4(A).

Unlike 18 U.S.C. § 1956(a)(3), there is no separate "sting" provision, *i.e*., a deception operation where a law enforcement agent or person acting under the agent's authority falsely represents money or property to be proceeds of an unlawful activity. Instead, Section 30-51-4(A) directly addresses representation of property to be proceeds from specified unlawful activity.

Also unlike the federal statute, New Mexico does not distinguish between "unlawful activity" and "specified unlawful activity." *Cf.* § 30-51-2(G) *with* 18 U.S.C. §§ 1956(a)(1) and (c)(7).

There is no definition of "structured" in the New Mexico Money Laundering Act. *See* § 30-51-2. Nor is the term defined in the federal money laundering statute, 18 U.S.C. § 1956. *See* Commentary to UJI 14-4205 NMRA (Definitions).

Because under Section 30-51-2(B)(1)-(4) the statutory maximum penalty is controlled by the amount of the illegal transaction, the amount is a sentencing fact which must be found beyond a reasonable doubt by the jury. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901 (Sixth Amendment right to trial by jury guarantees that all facts essential to a defendant's sentence must be determined by a jury); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Where the property involved in the financial transaction is currency or checks, the face value constitutes the amount involved and the state need not prove that its value is something else. *See, e.g., Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583 (currency); *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226 (checks).

The Legislature did not include in the Money Laundering Act that each financial transaction is a separate and distinct offense. *Cf. State v. Faubion*, 1998-NMCA-095, ¶ 11, 125 N.M. 670, 964 P.2d 834 (following *State v. Brooks*, 1994-NMSC-062, 117 N.M. 751, 877 P.2d 557, the Legislature amended the embezzlement statute to exclude the single larceny doctrine to make each incident a separate and distinct offense, thereby overruling the prior practice permitting a series of takings from a single victim to be treated as a single offense).

UJI 14-4205 (Definitions) contains multiple terms of art incorporated in this instruction. In many cases, the jury will not require a specific definition: A term or description in layman's language also satisfies the detailed - and often expansive - legal definition. For example, in most cases there will be no question or confusion about whether the transfer of U.S. currency was a "financial transaction" which involved "property." *See* UJI 14-4205(D) & (F). However, where the applicability is neither obvious nor stipulated - such as "proceeds" (*see* UJI 14-4205(G)) that are property "delivered," "indirectly," "by an . . . omission," the jury may require more guidance.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4202. Money laundering; financial transaction to further or commit another specified unlawful activity; essential elements.

For you to find the defendant guilty of money laundering [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [conducted] [structured] [engaged in] [participated in][2] a financial transaction[3] by _____ (*describe the financial transaction*);

2. The defendant knew that the property[4] involved in the financial transaction [was] [was represented to be][2] the proceeds of _____ (*name the specified unlawful activity*)[5];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][6]

4. The defendant _____ (*name the action(s) from Element 1*) the financial transaction for the purpose of [committing] [or] [furthering the commission of][2] _____ (*name the specified unlawful activity*)[7];

[5. The financial transaction involved over $_____[8];] and

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Use the applicable alternative or alternatives.

3. Unless the parties stipulate that the transaction was a "financial transaction" give the definitions in UJI 14-4205(D) and (E) NMRA.

4. Unless the parties stipulate that the transaction involved "property," give the definition in UJI 14-4205(F) NMRA.

5. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony offense(s) should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

6. This element is rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

7. If the object of the financial transaction was a specified unlawful activity different from element 2, *supra*, unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

8. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 5.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-4(A)(2) (1998).

This instruction sets forth the essential elements of the second of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(1)(A)(I). *See* commentary to UJI 14-4201 NMRA (concealing or disguising).

It is possible that the property involved in the financial transaction derived (or represented to be the proceeds) from one form of specified unlawful activity, *e.g*., human trafficking is used to further a different specified unlawful activity, *e.g*., drug trafficking. Note 7, *supra*, alerts to the requirement that the jury must be instructed on the essential elements of all alleged specified unlawful activities.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4203. Money laundering; transporting instruments to conceal or disguise OR to avoid reporting requirement; essential elements.

For you to find the defendant guilty of money laundering [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant transported property, that is _____ (*name the monetary instrument*)[2];

2. The defendant knew that the _____ (*name the monetary instrument*) [was] [was represented to be][3] the proceeds of _____ (*name the specified unlawful activity*)[4];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][5]

4. The defendant knew that the transport was designed, in whole or in part, to [[conceal] [or] [disguise][3] the nature, location, source, ownership or control of the monetary instrument]

[OR]

[avoid a transaction reporting requirement under state or federal law][3];

5. The defendant transported the _____ (*name the monetary instrument*) with the intent to further _____ (*name the specified unlawful activity*)[4];

[6. The _____ (*name the monetary instrument*) involved over $_____[6];] and

7. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. *See* UJI 14-4205(D) and (G) NMRA.

3. Use applicable alternative or alternatives.

4. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

5. This element is rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

6. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 6.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-4(A)(3) (1998).

This instruction sets forth the essential elements of the two distinct prongs of the third of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(2)(B). *See* commentary to UJI 14-4201 NMRA.

Although in all but one place Section 30-51-4(A)(3) speaks of transporting "property," the concluding reference to "the monetary instrument" appears to restrict the prohibition on transporting the large class of items defined as "property" to the more limited – but still broad – definition of "monetary instrument." *Cf.* NMSA 1978, § 30-51-2(F)(1998) *with* § 30-51-2(C). The analogous federal statute, 18 U.S.C. § 1956(a)(2), penalizes transportation etc., of "a monetary instrument or funds."

The specified unlawful activity of which the monetary instrument is proceeds will often, but not always be the same type of specified unlawful activity which the transportation is intended to further. Use Notes 3 and 5 alert to the requirement that, where different, the jury must be instructed on the essential elements of both the specified unlawful activity from which the monetary instrument was derived and the specified unlawful activity that the transportation is designed to further.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4204. Money laundering; making property available to another by financial transaction OR transporting; essential elements.

For you to find the defendant guilty of money laundering [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant made property, that is _____ (*name the property*)[2], available to another person, [that is _____][3] by means of [a financial transaction[4]]

[OR]

[transporting the property][5];

2. The defendant knew that the _____ (*name the property*) [was] [was represented to be][5] the proceeds of _____ (*name the specified unlawful activity*)[6];

[3. The _____ (*name the alleged activity*) was committed for financial gain;][7]

4. The defendant knew that the other person, [that is _____][3] intended to use _____ (*name the property*) to [commit] [or] [further the commission of][5] _____ (*name the specified unlawful activity*)[8];

[5. The [financial transaction] [or] [transported property][5] involved over $_____[9];] and

6. This happened in New Mexico on or about the ____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.

2. Unless the parties stipulate that the transaction or transporting involved "property," give the definition in UJI 14-4205(F) NMRA.

3. Name the person(s), if known.

4. Unless the parties stipulate that the transaction was a "financial transaction," give the definitions in UJI 14-4205(D) and (E) NMRA.

5. Use applicable alternative or alternatives.

6. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony should be given immediately following this instruction. *See* UJI 14-4205(H), Use Note 8.

7. Rarely applicable. Consult UJI 14-4205(H) NMRA ("specified unlawful activity") to determine if the jury must make an additional factual finding under this bracketed element that the transaction involved proceeds from conduct which constitutes a felony only if committed "for financial gain."

8. Unless the court already has instructed on the specified unlawful activity, the essential elements of the felony must also be given immediately following this instruction.

9. If the charge is a second degree felony (over $100,000), use $100,000 in the blank. If the charge is a third degree felony (over $50,000), use $50,000 in the blank. If the charge is a fourth degree felony (over $10,000), use $10,000 in the blank. If the charge is a misdemeanor ($10,000 or less), omit element 5.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978 § 30-51-4(A)(4) (1998).

This instruction sets forth the essential elements of the two prongs of the fourth of four methods of violating New Mexico's money laundering statute. It is similar, but not identical, to 18 U.S.C. § 1956(a)(2)(A). *See* commentary to UJI 14-4201 NMRA.

The Committee recommends the identity of the "another person" to whom the property is made available, by financial transaction or transporting, be set out if known and supported by the evidence. However, the statute does not specifically require that identification. The Committee believes the statute is satisfied as long as there is evidence beyond a reasonable doubt that the property was made available to "another person" – as broadly defined by Section 30-51-2(D).

Also unlike Section 30-51-4(A)(3), which also applies to transporting "property," Section 30-51-4(A)(4) does not contain an explicit limitation to "property" which meets the more limited definition of "monetary instrument." Because the Legislature passed both sections in one act, the presumption is that it intended to use "monetary instrument" in the former section but not the latter. However, unless the parties stipulate that Section 30-51-4(A)(4) applies to the property made available to another, the court should make a pretrial legal determination of the issue.

The specified unlawful activity of which the property is or is represented to be proceeds will often, but not always be the same type of specified unlawful activity which the property made available is intended by another person to further. Use Notes 5 and 7 alert to the requirement that, where different, the jury must be instructed on the essential elements of both the specified unlawful activity from which the property was derived and the specified unlawful activity that the financial transaction or transportation is designed to further.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-4205. Money laundering; definitions.[1]

A. **"Person"** means an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, unincorporated organization or group, or other entity.[2]

B. **"Conducted"** means initiating, concluding, or participating in initiating or concluding a "financial transaction."[3]

C. **"Structured"** means a series of transactions conducted in a specific pattern that could have been conducted as one transaction.

D. **"Financial transaction"**[4]means a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition of

[any "monetary instrument"]

[OR]

[the movement of funds by wire or other means].

E. **"Monetary instrument"** means coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in bearer form or in such other form that title passes on delivery of the security and negotiable instruments in bearer form or in such other form that title passes on delivery of the instrument.[5]

F. **"Property"** means anything of value, including real, personal, tangible, or intangible property.[6]

G. **"Proceeds"** means property that is acquired, delivered, produced or realized, whether directly or indirectly, by an act or omission.[7]

H. **"Specified unlawful activity"** means an act or omission, including any initiatory, preparatory, or completed offense or omission, committed for financial gain that is punishable as a felony under the laws of New Mexico or, if the act occurred outside New Mexico, would be punishable as a felony under the laws of the state in which it occurred and under the laws of New Mexico.[8]

I. **"Transaction reporting requirement"** includes _____ (*brief description of the requirement, e.g., under 31 U.S.C. § 5316 (a)(1), "Knowingly transporting more than $10,000 at one time from a place within the United States to a place outside the United States."*).[9]

J. **"Financial institution"** includes _____ (*applicable definition(s) from NMSA 1978, § 30-51-2 A(1)-(17)*).[10]

USE NOTES

1. Give each of the applicable definitions after the money laundering charge to which they pertain. Additional definitions may also be required under the facts of the case.

2. Section 30-51-2(D) NMSA 1978. Use as necessary to instruct on whether a person engaged in a transaction to avoid a transaction reporting requirement under state law, Section 30-51-2(A) NMSA 1978, or whether a person fails to properly report a financial transaction, Section 30-51-3(B) NMSA 1978.

3. Use applicable alternatives. *See* Section 30-51-2(B) NMSA 1978; *see also* 18 U.S.C. § 1956(c)(2) (defining "conducts") and 18 U.S.C. § 1956(c)(3) (defining "transaction" as substantially the same as New Mexico's definition of "financial transaction").

4. Section 30-51-2(B) NMSA 1978.

5. Section 30-51-2(C) NMSA 1978.

6. Section 30-51-2(F) NMSA 1978.

7. Section 30-51-2(E) NMSA 1978.

8. Section 30-51-2(G) NMSA 1978. It is for the court, as a question of law, to decide and, if requested, instruct the jury whether a particular New Mexico statute or statute from another state meets the legal definition of "specified unlawful activity." (SUA). If there is no question requiring the court to instruct the jury regarding whether alleged conduct is a felony under New Mexico or other state law, do not instruct on specified unlawful activity; instead instruct on the essential elements of the alleged felony.

Unless the money laundering defendant is also charged with the substantive, predicate SUA, the uniform instruction on the essential elements of the SUA should be modified to inform the jury that it does not need to determine *who* committed the SUA - but only beyond a reasonable doubt that *someone* committed the predicate offense.

Because whether the act was committed for financial gain is a jury question of fact, in the infrequent cases where a specified unlawful activity does not exist without that motive, an optional factual element should be added to the substantive instruction.

9. "Transaction reporting requirement" is not defined in Section 30-51-2 NMSA 1978. If there is no stipulation by the parties, the court should give a definition tailored to the facts in evidence.

10. Section 30-51-2(A)(1)-(17) NMSA 1978. Use as necessary to instruct on whether a financial institution failed to properly report a financial transaction or whether a person engaged in a transaction to avoid a transaction reporting requirement under state law. If there is no stipulation by the parties, instruct as a matter of law whether a particular entity meets the statutory definition.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — *See* NMSA 1978, § 30-51-2(A)-(G)(1998).

New Mexico's money laundering statutory definitions include some, but not all, of the terms found in the federal money laundering statutes, *e.g.*, 18 U.S.C.§ § 1956 (a)(1) and (3), (c)(1)-(9); 1957(f); 31 U.S.C. §§ 5312(a)-(c); 31 U.S.C. § 5313(e)(2) and (g); 31 U.S.C. § 5316(d); 31 U.S.C. § 5330(d); 31 U.S.C. § 5331(d); 31 U.S.C. § 5340. Even where the terms are identical, their definitions may vary.

One critical difference is the definition of "financial transaction." Under 18 U.S.C. § 1956(c)(4), a financial transaction includes transactions involving (i) movement of funds by wire or other means, (ii) one or more monetary instruments, or (iii) transfer of title to any real property, vehicle, vessel, or aircraft. Under Section 30-51-2(B), the definition is limited to the first two categories (monetary instruments or the movement of funds) and does not include the much broader category of real property, vehicles, vessels, and aircraft. This would appear to exclude "barter" transactions such as an exchange of drugs for firearms.

Further, many of the federal definitions have been modified and expanded over time. Therefore, while federal case law may prove useful and persuasive, close attention should be paid to the precise definition in force.

Because of multiple changes in not just federal statutes but also Treasury Department reporting requirements over time, charges of money laundering to avoid a transaction reporting requirement under federal law require especially careful review of the statutory and regulatory requirements in effect on a given date.

Although New Mexico statutes do not define "structured," an explanation of what constitutes a financial transaction involving the proceeds of specified unlawful activity, found in 18 U.S.C. § 1956(a)(1), refers to "part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement." Thus, under the federal statute there is no requirement to prove that all of the property is criminal proceeds; the gravamen is a transaction involving any criminal proceeds which are part of a common plan or arrangement. Further federal explanation of structuring is found in 31 U.S.C. § 5324, 31 CFR § 1010.100 (xx), and the 2016 IRS Manual 4.26.13. 1, as well as at https://www.fincen.gov/financial_institutions/msb/materials/en/bank_reference.html. The Committee believes that the concept of transactions in support of a single plan to avoid

the creation of records or reporting requirements appropriately defines a “structured” transaction.

A defendant can be found guilty of money laundering without having personally committed the SUA - as long as the jury finds beyond a reasonable doubt that *someone* committed the predicate offense. *See, e.g., United States v. Martinelli*, 454 F.3d 1300 (11th Cir. 2006); *United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997). The court should instruct on the elements of the SUA.

Under federal statutes and Treasury regulations, transaction reporting requirements are numerous and have frequently changed over the years. Whether a particular transaction is or was at the time of the alleged offense reportable under New Mexico of federal law or regulation is a question of law; however, the underlying facts of the transaction making the transaction subject to the reporting requirement are for the jury to determine.

In addition to penalizing transactions which are designed to prevent a transaction reporting requirement, under NMSA 1978, Section 30-51-4, New Mexico’s money laundering statutes also penalize knowing failure to file a transaction report by “financial institutions” and “certain persons” under NMSA 1978, Section 30-51-3. The statutory definition of “financial institution” is broad – with 17 distinct types – and not necessarily intuitive to a juror. Unless the parties stipulate whether a particular entity was a “financial institution,” the court should make the determination as a matter of law and so instruct the jury.

[Adopted by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

CHAPTER 43
Securities Offenses

Part A
Elements

14-4301. Offer or sale of unregistered securities; essential elements.

For you to find the defendant guilty of the [offer to sell][or][sale of][1] unregistered securities [as charged in Count _____][2], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [offered to sell] [or] [sold][1] a security;[3]

2. The security was required by the New Mexico Uniform Securities Act to be registered with the State of New Mexico prior to the [sale] [or] [offer for sale];[1, 4]

3. The security was not registered as required under the New Mexico Uniform Securities Act;

4. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. Use only the applicable alternatives.

2. Insert the Count Number if more than one count is charged.

3. UJI 14-4310 NMRA, the definition of “security”, must also be given immediately after this instruction.

4. If the defendant claims that the security was exempt and there is a factual basis for this claim, UJI 14-4320 NMRA must be given. If the defendant claims that the sales transaction or offer to sell transaction was exempt and there is a factual basis for this claim, UJI 14-4321 NMRA must be given.

5. UJI 14-141 NMRA, General criminal intent, must also be given with this instruction.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Criminal Intent.

The sale of unregistered securities is not a specific intent crime. *State v. Sheets,* 94 N.M. 356, 365, 610 P.2d 760 (Ct. App. 1980), cert. denied 94 N.M. 675, 615 P.2d 992 (1980). UJI 14-141, general criminal intent, must be given with this instruction. Security - Question of Fact - Question of Law

The question of what constitutes a "security" is a mixed question of law and fact. *See* Modern Federal Jury Instructions, Section 57.10; *United States v. Austin,* 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961) (cert den. 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29) (1961). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine.

Almost all cases stating that the question of what is a security is a matter of fact for the jury involve the sale of an "investment contract". *See* for example: *State v. Shade,* 104 N.M. 710, 726 P.2d 864 (Ct.App. 1986) (cert. quashed) (sale of time-share memberships - relying on *Roe v. United States,* supra, held question whether a time-share contract was an investment contract was question of fact); *Roe v. United States*, supra; (sale of mineral lease - question whether the mineral lease was sale of real

property or an investment contract was question of fact for the jury); *Ahrens v. American-Canadian Beaver Co., Inc.,* 428 F.2d 926 (10th Cir. 1970) (sale of beaver contracts by owner of beaver farm - held not error to submit to jury question of whether a beaver contract was an investment contract); *United States v. Johnson,* 718 F.2d 1317 (5th Cir. 1983) (sale of gold certificate contract purporting to assign quantity of gold); *Hentzner v. Alaska,* 613 P.2d 821 (Alaska 1980) (payment to defendant to find gold - question whether investment contract was question of fact for the jury).

All other cases stating that the question of whether the instrument was a security is a question of fact also involve the sale of some other novel type security. *See: People v. Figueroa,* 224 Cal. Rptr 719, 41 Cal.3rd 714, 715 P.2d 680 (Cal., 1986) (sale of promissory note); *Miller v. Florida,* 285 So.2d 41 (Fla., 1973) (sale of joint venture in Bogota, Columbia - question of whether personal loan or an investment in a joint venture question for jury).

In *SEC v. C. M. Joiner Corp.,* 320 U.S. 344, 64 S. Ct. 120, 88 L.Ed 88 (1943), the United States Supreme Court held that:

In the Securities Act the term "security" was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share", "investment contract", and "in general any interest or instrument commonly known as a security". We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as a matter of law, if on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in terms of courses of dealing which establish their character in commerce as 'investment contracts', or as 'any interest or instrument commonly known as a 'security'. (Emphasis added.)

Even though an instrument may be called by a name which is commonly considered to be a type of security, the instrument may not be a security if the "context otherwise requires". In *Marine Bank v. Weaver,* 455 U.S. 551, 71 L. Ed. 2d 409, 102 S. Ct. 1220 (1982), the United States Supreme Court held that a non-publicly traded certificate of deposit of a financial institution was not a security. The court said that profit alone is not enough.

In *United Housing Foundation Inc. v. Forman et al.*, 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975), the court held that even though the instruments involved were called shares of "stock", they were not securities as they did not confer rights to receive dividends contingent upon an apportionment of profits. The United Housing case involved a massive non-profit housing cooperative constructed and financed under New

York's Private Housing Finance Law to provide low income housing. Tenants were required to purchase 18 shares of "stock" for each room of an apartment at $25.00 per share ($1,800 for 4 room apartment). The shares could not be pledged, encumbered or bequeathed (except to surviving spouse). Shareholders had no voter rights. When the shares were sold to a new tenant, the seller could not receive more than $25.00 per share plus a fraction of the mortgage then paid off. No dividends were to be paid. The court held that the shares were not purchased for profit, but to participate in the project and were therefore not "securities".

In *Landreth v. Landreth Timber Co.,* 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985), the Supreme Court rejected the argument that the *Forman, Marine Bank and Tcherepnin v. Knight,* 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967), cases mandated a case by case determination as to whether the economic realities call for an application of the federal securities act, holding that if the instrument involved is "traditional stock" there is no need to look beyond the characteristics of the instrument. Landreth involved the sale of 100% of the stock of a business. The Supreme Court rejected the so-called "sale of business" doctrine. (*See*, however, committee commentary to UJI 14-4312.) The Supreme Court distinguished *Forman, Marine Bank and Tcherepnin* stating that:

these cases, like the other cases on which respondents rely, involved unusual instruments that did not fit squarely within one of the enumerated specific kinds of securities listed in the definition. Tcherepnin involved withdrawable capital shares in a state savings and loan association, and Weaver involved a certificate of deposit and a privately negotiated profit sharing agreement.

* * *

. . . Nor does Forman require a different result. Respondents are correct that in Forman we eschewed a "literal" approach that would involve the Acts' coverage simply because the instrument carried the label "stock." Forman does not, however, eliminate the Court's ability to hold an instrument is covered when its characteristics bear out the label.

* * *

As Professor Loss explains, "It is one thing to say that the typical cooperative apartment dweller has bought a home, not a security; or that not every installment purchase 'note' is a security; or that a person who charges a restaurant meal by signing his credit card slip is not selling a security even though his signature is an 'evidence of indebtedness.' But stock (except for the residential wrinkle) is so quintessentially a security as to foreclose further analysis."

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, made technical amendments, and revised the Use Notes; in the introductory clause, after "For you to find the defendant guilty of the", deleted "(offer to sell) (or) (sale of)" and added "[offer to sell] [or] [sale of]"; in Element 1, after "The defendant", deleted "(offered to sell) (or) (sold)" and added "[offered to sell] [or] [sold]"; in Element 2, after "The security was required by the", deleted "state securities law" and added "New Mexico Uniform Securities Act", and after "prior to the", deleted "(sale) (or) (offer for sale)" and added "[sale] [or] [offer for sale]"; in Element 3, after "The security was not registered as required", deleted "by the state securities law" and added "under the New Mexico Uniform Securities Act"; and in the Use Notes, added "NMRA" after each citation to a uniform jury instruction.

Cross references. — *See* Section 58-13C-301 NMSA 1978.

Offer or sale of an unregistered security is a general intent crime. — Where defendant was charged with one count of fraud over $20,000, one count of conspiracy to commit fraud over $20,000, one count of securities fraud, one count of sale of a security by an unlicensed agent and one count of offer or sale of an unregistered security, and where, at trial, defendant tendered jury instructions that added the term "purposefully" or "willfully" to the instructions for securities fraud, sale of an unregistered security, and sale of a security by an unlicensed agent, and where the district court denied defendant's specific intent jury instructions and provided the jury with a general criminal intent instruction for the securities offenses, the district court did not err in refusing defendant's instructions, because securities fraud, sale of an unregistered security, and sale of a security by an unlicensed agent only require that the state prove a defendant acted with general criminal intent. *State v. Hixon*, 2023-NMCA-048, cert. denied.

Ignorance of law. — The court did not err in refusing to give an ignorance or mistake-of-law instruction based on defendant's alleged reliance on the advice of defendant's attorney that the promissory notes defendant issued to investors who advanced funds to defendant for the purpose of buying investment properties from the Resolution Trust Corporation were lawful, because good faith reliance on the advice of counsel is not a defense to a charge of selling unregistered securities. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951.

14-4302. Fraudulent practices; sale of securities; essential elements.

For you to find the defendant guilty of fraudulent practices [as charged in Count _____],[1] the State must prove beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [offered to sell] [sold] [offered to purchase] [or] [purchased][2] a security;[3]

2. In connection with the [offer to sell] [sale] [offer to purchase] [or] [purchase][2] of the security, the defendant purposely and directly or indirectly:

[used a plan or scheme to deceive or cheat others;][2]

[OR]

[made an untrue statement of fact that under the circumstances would have been important or significant to the investment decision of a reasonable person;]

[OR]

[omitted a fact that under the circumstances would have been misleading to the investment decision of a reasonable person;]

[OR]

[engaged in an act, practice or course of business which would cheat or would operate as a fraud or deceit upon a reasonable person;]

3. This happened in New Mexico on or about the _____ day of _____, _____.[4]

USE NOTES

1. Insert the Count Number if more than one count is charged.

2. Use only the applicable alternatives.

3. UJI 14-4310 NMRA, the definition of "security", must also be given immediately after this instruction.

4. UJI 14-141 NMRA, General criminal intent, must also be given.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Unlike general "criminal fraud", the fraudulent sale of securities is not a specific intent crime. *State v. Ross*, 1986-NMCA-015, ¶¶ 14-18, 104 N.M. 23, 715 P.2d 471. UJI 14-141 NMRA, general criminal intent, must be given with this instruction.

The general rule is that the question of what constitutes a "security" is a mixed question of law and fact. *See* committee commentary to UJI 14-4301 NMRA.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, revised the Use Notes, and revised the committee commentary; in Element 1, after "The defendant", deleted "(offered to sell) (sold) (offered to purchase) (or) (purchased)" and added "[offered to sell] [sold] [offered to purchase] [or] [purchased]"; in Element 2, in the introductory clause, after "In connection with the", deleted "(offer to sell) (sale) (offer to purchase) (or) (purchase)" and added "[offer to sell] [sale] [offer to purchase] [or] [purchase]"; in Use Note 3, after "UJI 14-4310", added "NMRA"; and in Use Note 4, after "UJI 14-141", added "NMRA".

Cross references. — *See* Section 58-13C-501 NMSA 1978.

Exempt transaction as an element of the sale of unregistered securities. — Where defendant was charged with selling unregistered securities in a limited liability company in violation of Section 58-13B-20 NMSA 1978 of the New Mexico Securities Act of 1986; defendant proposed instructions that required the jury to acquit defendant if the jury found that defendant sold securities in the course of exempt transactions; and the issue of exemption was never raised at trial, the trial court did not err in denying defendant's instructions. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154 (decided under prior law).

Specific intent is not an element of securities fraud and the trial court did not err by refusing defendant's requested instruction that required the jury to find a specific intent. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951.

Securities fraud is a general intent crime. — Where defendant was charged with one count of fraud over $20,000, one count of conspiracy to commit fraud over $20,000, one count of securities fraud, one count of sale of a security by an unlicensed agent and one count of offer or sale of an unregistered security, and where, at trial, defendant tendered jury instructions that added the term "purposefully" or "willfully" to the instructions for securities fraud, sale of an unregistered security, and sale of a security by an unlicensed agent, and where the district court denied defendant's specific intent jury instructions and provided the jury with a general criminal intent instruction for the securities offenses, the district court did not err in refusing defendant's instructions, because securities fraud, sale of an unregistered security, and sale of a security by an unlicensed agent only require that the state prove a defendant acted with general criminal intent. *State v. Hixon*, 2023-NMCA-048, cert. denied.

Securities fraud instruction did not amount to fundamental error. — Where defendant was convicted of one count of fraud over $20,000, one count of conspiracy to commit fraud over $20,000, one count of securities fraud, one count of sale of a security by an unlicensed agent and one count of offer or sale of an unregistered security, and where defendant claimed that his conviction for securities fraud was legally insufficient

because the jury instruction allowed him to be convicted for his co-defendant's omissions and the jury instruction should require an affirmative fiduciary duty to exist for a defendant to be convicted of securities fraud based upon omissions, defendant's claim was without merit, because NMSA 1978, § 58-13C-501 does not require an affirmative duty to disclose information to commit securities fraud, and the jury at defendant's trial was instructed that each charge should be considered separately for each defendant. The jury is presumed to follow the court's limiting instructions. *State v. Hixon*, 2023-NMCA-048, cert. denied.

Part B
Definitions

14-4310. "Security"; defined.[1]

A "security" is any [ownership right] [right to an ownership position] [or] [creditor relationship] and includes any:[2]

[bond. A "bond" is any interest bearing instrument that obligates the issuer to pay the bondholder a specified sum of money, usually at specified intervals, and to repay the principal amount of the loan at maturity.]

[collateral-trust certificate. A "collateral-trust certificate" is a corporate debt instrument which is used to back collateral-trust bonds held by a bank or other trustee.]

[certificate of interest or participation in a security] [[temporary or interim certificate for] [receipt for] [guarantee of][2] the right to purchase a security.]

[warrant or right to subscribe to or purchase any security. A "warrant" or "subscription warrant" is a type of security which is usually issued together with a bond[3] or preferred stock,[4] that entitles the holder to buy a proportionate amount of stock, bonds or debentures at a specified price, usually higher than the market price at the time of issuance, for a period of years or to perpetuity.]

[right to subscribe to or purchase any security. A "right" or a "subscription right" is a privilege granted to existing shareholders of a corporation to subscribe to shares of a new issue of stock, bonds or debentures before it is offered to the public, which normally has a life of two to four weeks, is freely transferable and entitles the holder to buy the new stock, bonds or debentures below the public offering price.]

[debenture. A "debenture" is an unsecured general debt obligation or loan backed only by the integrity of the borrower and usually documented by an agreement known as an "indenture".]

[draft. A "draft" is a signed, written order by which one party (drawer) instructs another party (drawee) to pay a specified sum to a third party (payee). The payee and

drawer are usually the same person. A sight draft is payable on demand. A time draft is payable either on a definite date or at a fixed time after sight or demand.]

[evidence of indebtedness]

[interest or instrument commonly known as a security]

[investment contract. An "investment contract" means a contract:

1. where an individual invests his money;

2. in an undertaking or venture of two or more people or entities;

3. with an expectation of profit;

4. based primarily on the efforts of others.

An "investment" is the use of capital or money to create more money.]

[limited partnership interest. A "limited partnership" is an organization made up of a general partner, who manages a project, and limited partners, who invest money but have limited liability.]

[note. A "note" is a written promise to pay a specified amount to a certain person or entity on demand or on a specified date.]

[interest in oil, gas or other mineral rights other than a landowner royalty interest in the production of oil, gas or other minerals created through the execution of a lease of the lessor's mineral interest.]

[promissory note. A "promissory note" is a written promise committing the maker to pay the payee a specified sum of money either on demand or at a fixed or determined future date, with or without interest.]

[[put] [call] [straddle] [or] [option][5] entered into on a national securities exchange relating to foreign currency.]

[[put] [call] [straddle] [or] [option][5] on any [security] [group or index of securities including any interest therein or based on the value thereof].[2]]

[subscription. A "subscription"[6] is an agreement of intent to buy newly issued securities.]

[stock. "Stock" is the ownership of a corporation represented by shares that are a claim on the corporation's earnings and assets.]

[treasury stock. “Treasury stock” is stock reacquired by the issuing company and available for retirement or resale.[4]]

[voting-trust certificate. A “voting trust certificate” is a transferable certificate of beneficial interest in a voting trust, a limited-life trust set up to permit control of a corporation by a few individuals, called voting trustees. The certificates, which are issued by the voting trust to stockholders in exchange for their common stock,[4] represent all the rights of common stock except voting rights. The common stock is then registered on the books of the corporation in the names of the trustees.]

USE NOTES

1. It is generally a question of law as to whether or not a specific instrument is a security. If the instrument is a novel, uncommon or irregular device, the jury must be instructed on underlying factual disputes. An “investment contract” is a type of security which almost always requires a factual determination to be made. This instruction contains definitions of the common types of securities. It does not contain a definition of all of the terms set forth in the New Mexico Uniform Securities Act to describe a security. If a term is not provided in this instruction or Section 58-13C-102(DD) of the Act, the court may draft an appropriate definition for the jury.

2. Use only the applicable alternatives.

3. The definition of “bond” as set forth in this instruction should also be given with this definition.

4. The definition of “stock” as set forth in this instruction should also be given with this definition.

5. The definitions of “put”, “call”, “call option”, “option”, and “certificate” are set forth in UJI 14-4311 NMRA and should be given when any of these terms are used.

6. *See also* the definitions of “subscription rights” and “subscription warrants” set forth above.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — The question of whether a specific instrument is a "security" is a mixed question of law and fact. *See* committee commentary to UJI 14-4301; Modern Federal Jury Instructions, Section 57.10; *United States v. Austin*, 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961) (*cert. denied* 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29 (1961)). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine. These are usually cases involving an investment contract or a unique or novel type of instrument. *See State v. Shade* and *State v. Vincent,* 104

N.M. 710, 726 P.2d 864 (Ct. App. 1986) (sale of time-share memberships - question whether a time-share contract was an investment contract).

As a general rule, if the jury requests an instruction on the definition of a term used in UJI Criminal, the judge is to give a Webster's Dictionary definition of the term, however, the committee believed that because of the technical nature of many of the types of securities, definitions should be prepared by the committee for the more commonly used terms. In preparing the definitions found in UJI 14-4310, the committee relied upon numerous sources, including Barron's, Dictionary of Finance and Investment Terms, Barron's, Finance and Investment Handbook and securities decisions.

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, revised the Use Notes; in the introductory clause, after "A 'security' is any", deleted "(ownership right) (right to an ownership position) (or) (creditor relationship)" and added "[ownership right] [right to an ownership position] [or] [creditor relationship]", after "[certificate of interest or participation in a security]", deleted "(temporary or interim certificate for) (receipt for) (guarantee of)" and added "[temporary or interim certificate for] [(receipt for) [guarantee of]", after "with or without interest]", deleted "(put) (call) (straddle) (or) (option)" and added "[put] [call] [straddle] [or] [option]", after "relating to foreign currency.]", deleted "(put) (call) (straddle) (or) (option)" and added "[put] [call] [straddle] [or] [option]", after the next occurrence of "on any", deleted "(security) (group or index of securities including any interest therein or based on the value thereof)" and added "[security] [group or index of securities including any interest therein or based on the value thereof]"; and in Use Note 1, after "set forth in the", deleted "New Mexico Securities Act of 1986" and added "New Mexico Uniform Securities Act", and after "provided in this instruction", added "or Section 58-13C-102(DD) of the Act".

The federal investment contract test in the definition of "security" in the federal Securities Act of 1933 is not an element of the definition of the term "security" as defined in the New Mexico Securities Act of 1986, Sections 58-13B-1 et seq. NMSA 1978, and the jury is not required to apply the investment contract test in security violations cases. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154 (decided under prior law).

Security defined. — Where defendant was charged with violations of the New Mexico Securities Act of 1986, Sections 58-13B-1 et seq. NMSA 1978 for selling interests in a limited liability company; defendant's proposed a jury instruction to define "security" that did not actually define the term, but identified the circumstances under which an interest in a limited liability company constitutes a security; focused on the meaning of "common enterprise", not on the meaning of "security"; and required the jury to apply the federal investment contract test in the definition of "security" in the federal Securities Act of 1933, the court did not err in denying defendant's requested instruction. *State v. Soutar*, 2012-NMCA-024, 272 P.3d 154 (decided under prior law).

Investment contract defined. — This instruction defining "investment contract" as one in which the profits must be garnered "primarily" by a third party is a correct statement of the law. *State v. Danek*, 1994-NMSC-071, 118 N.M. 8, 878 P.2d 326.

14-4311. Securities; additional definitions.

"Call". A "call" is the right to buy a specific number of shares at a specified price by a fixed date.

"Call Option". A "call option" is an option that gives the owner the right to buy a specified number of shares at a definite price within a specified period of time.

"Certificate". A "certificate" is a formal declaration that can be used to document a fact. Examples of types of certificate include: a birth certificate, a stock certificate, a partnership certificate and a certificate of deposit.

"Option". An "option" is a right to buy or sell property within an agreed upon time in exchange for an agreed-upon sum.

"Put option". A "put option" is an option that gives the owner the right to sell a particular stock at a certain price within a designated period.

USE NOTES

The definitions in this Instruction may be used with the definitions set forth in UJI 14-4310 NMRA.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, after "An 'option' is", added "a"; in the Use Notes, after "UJI 14-4310", added "NMRA".

14-4312. "Isolated transaction"; definition.

An "isolated transaction" is a transaction which is unique, occurs only once or sporadically.

[Approved, effective September 1, 1988.]

Committee commentary. — Certain securities transactions are not required to be registered prior to sale. One common defense to the sale of unregistered securities is that the sale was an isolated sale. The Court of Appeals in a civil case held that the sale

of all of the stock of a business by a non-issuer may sell as an "isolated sale" a whole business by selling 100% of the securities without registration if the purpose of the sale is to pass complete ownership, including managerial control, of the business of the corporation to the buyer. *See White v. Solomon*, 1986-NMCA-136, 105 N.M. 366, 732 P.2d 1389; *see also State v. Sheets*, 1980-NMCA-041, 94 N.M. 356, 610 P.2d 760 for the definition of "isolated sale".

White v. Solomon, supra, adopts the sale of business doctrine. The New Mexico Court of Appeals relies upon the United States Supreme Court decision of *Tcherepnin v. Knight*, 389 U.S. 332 (1967) in holding that the sale of 100% of the stock of a business is not the sale of securities for purposes of registration. This interpretation of *Tcherepnin*, was specifically rejected by the United States Supreme Court in *Landreth v. Landreth*, 471 U.S. 681 (1985). *See* committee commentary to UJI 14-4301 NMRA for a discussion of the *Tcherepnin* and *Landreth* decisions.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, revised the committee commentary.

Part C
Defenses

14-4320. Defense; exempt security.[1]

An issue in this case is whether the security which was [sold] [offered for sale][2] [as charged in Count _____][3] was an exempt security and was not required to be registered under the New Mexico Uniform Securities Act. A security which is

[issued by] [insured by] [guaranteed by][2] a _____,[4]][2]

[an option issued by _____,[4]] [a _____,[4]]

is an exempt security and is not required to be registered under the New Mexico Uniform Securities Act.

If you find that the security was

[[issued by] [insured by] [guaranteed by][2] a _____,[4]][2]

[an option issued by _____,[4]] [a _____,[4]]

you must find the defendant not guilty of the sale of an unregistered security [as charged in Count _____][3].

The burden is on the state to prove beyond a reasonable doubt that the security [sold] [offered for sale][2] was not an exempt security.

USE NOTES

1. For use if there is an issue that the sale or offer for sale was an exempt security under the New Mexico Uniform Securities Act, Section 58-13C-201 NMSA 1978.

2. Use only the applicable alternative.

3. Insert the count number if more than one count is charged.

4. *See* Section 58-13C-201 NMSA 1978 for the types of exempt securities. Many of the terms set forth in Section 58-13C-201 NMSA 1978 have been defined in UJIs 14-4310 and 14-4311 NMRA.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Certain securities are not required to be registered prior to sale or offer for sale. It is a defense to the offense of selling or offering to sell an unregistered security if the security transaction is an exempt transaction or the security is an exempt security. Other defenses, such as “mistake of fact” and good faith reliance on the advice of counsel are not available to the charge of offer to sell or sale of unregistered securities. *See State v. Shafer*, 1985-NMCA-018, 102 N.M. 629, 698 P.2d 902.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, revised the Use Notes, and revised the committee commentary; in the first undesignated paragraph, after “the security which was”, deleted “(sold) (offered for sale)” and added “[sold] [offered for sale]”, after “registered under the”, deleted “State Securities Act” and added “New Mexico Uniform Securities Act”, after “A security which is”, deleted “(issued by) (insured by) (guaranteed by)” and added “[issued by] [insured by] [guaranteed by]”, and after “required to be registered”, deleted “by the state securities law” and added “under the New Mexico Uniform Securities Act”; in the second undesignated paragraph, after “If you find that the security was”, deleted “(issued by)

(insured by) (guaranteed by)" and added "[issued by] [insured by] [guaranteed by]", and after "a reasonable doubt that the security", deleted "(sold) (offered for sale)" and added "[sold] [offered for sale]"; in Use Note 1, after "an exempt security under the", deleted "State Securities Act" and added "New Mexico Uniform Securities Act, Section 58-13C-201 NMSA 1978"; and in Use Note 4, in two places, deleted "58-13B-26" and added "58-13C-201".

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in the first paragraph, deleted "Evidence has been presented that" and added "An issue in this case is whether"; and in the committee commentary, added the vendor neutral citation for State v. Shafer.

State Securities Act. — The reference in the first paragraph of the instruction to the State Securities Act is apparently a reference to the New Mexico Securities Act of 1986, which appears as Chapter 58, Article 13B NMSA 1978.

14-4321. Defense; exempt transaction.[1]

An issue in this case is whether the security which was [sold] [offered for sale][2] [as charged in Count _____][3] was an exempt transaction and was not required to be registered under the New Mexico Uniform Securities Act.

[An isolated transaction,[4]][2]

[OR]

[A transaction [by] [between] [in][2] _____,[5]]

is an exempt transaction which is not required to be registered under the New Mexico Uniform Securities Act.

If you find that the [sale] [offer to sell][2] of the unregistered security was

[an isolated transaction,][2]

[OR]

[a transaction [by] [between] [in][2] _____,[5]],

you must find the defendant not guilty of the sale of an unregistered security as charged in [Count _____].[3]

The burden is on the state to prove beyond a reasonable doubt that the security [sold] [offered for sale][2] was not an exempt transaction.

USE NOTES

1. For use if there is an issue that the sale or offer for sale was an exempt transaction. *See* Section 58-13C-202 NMSA 1978 for exempt transactions.

2. Use only the applicable alternative.

3. Insert the count number if more than one count is charged.

4. The definition of "isolated transaction", UJI 14-4312 NMRA, is to be given immediately following this alternative.

5. Set forth the elements of the exempt transaction. *See* Section 58-13C-202 NMSA 1978 for the type of exempt securities transactions.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 2020-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — Although the sale of all of the stock of a business is a transaction subject to the New Mexico Uniform Securities Act, apparently a non-issuer may sell as an "isolated sale" a whole business by selling 100% of the securities without registration if the purpose of the sale is to pass complete ownership, including managerial control, of the business of the corporation to the buyer. *See White v. Solomon*, 1986-NMCA-136, 105 N.M. 366, 732 P.2d 1389. *See also* the Committee commentaries to UJIs 14-4301 and 14-4312 NMRA.

[As amended by Supreme Court Order No. 21-8300-009, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-009, effective December 31, 2021, made technical amendments, revised the Use Notes, and revised the committee commentary; in the first undesignated paragraph, after "the security which was", changed "(sold) (offered for sale)" to "[sold] [offered for sale]", after "required to be registered under the", deleted "state securities law" and added "New Mexico Uniform Securities Act", after "A transaction", changed "(by) (between) (in)" to "[by] [between] [in]", after "which is not required to be registered", deleted "under the state securities law" and added "under the New Mexico Uniform Securities Act"; in the second undesignated paragraph, after "If you find that the", changed "(sale) (offer to sell)" to "[sale] [offer to sell]", and after "a transaction", changed "(by) (between) (in)" to "[by] [between] [in]"; in the third undesignated paragraph, after "beyond a reasonable doubt that the security", changed "(sold) (offered for sale)" to "[sold] [offered for sale]"; and in Use Notes 1 and 5, changed "58-13B-27" to "58-13C-202".

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in the first paragraph, deleted “Evidence has been presented that” and added “An issue in this case is whether”; and in the committee commentary, added vendor neutral citations for the cases cited.

CHAPTER 44
Medicaid Fraud & Criminal Corporate Responsibility

14-4401. Definitions for medicaid fraud instructions.

“Benefit” means money, treatment, services, goods or anything of value authorized under the program.

“Claim” means any communication, whether oral, written, electronic or magnetic, that identifies a treatment, good or service as reimbursable under the program.

“Department” means the human services department.

“Health care official” means 1) an administrator, officer, trustee, fiduciary, custodian, counsel agent or employee of a managed care health plan; 2) an officer, counsel, agent or employee of an organization that provides, proposes to or contracts to provide services to a managed health care plan; or 3) an official, employee or agent of a state or federal agency with regulatory or administrative authority over a managed health care plan.

“Managed health care plan” means a government-sponsored health benefit plan that requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with or employed by a health care insurer or provider service network. A “managed health care plan” includes the health care services offered by a health maintenance organization, preferred provider organization, health care insurer, provider service network, entity or person that contracts to provide or provides goods or services that are reimbursed by or are a required benefit of a state or federally funded health benefit program, or any person or entity who contracts to provide goods or services to the program.

“Program” means the medical assistance program authorized under Title XIX of the federal Social Security Act, 42 U.S.C. § 1396, et seq., and implemented under Section 27-2-12, NMSA 1978.

“Provider” means any person who has applied to participate or who participates in the program as a supplier of treatment, services or goods.

“Recipient” means any individual who receives or requests benefits under the program.

“Records” means any medical or business documentation, however recorded, relating to the treatment or care of any recipient, to services or goods provided to any recipient or to reimbursement for treatment, services or goods, including any documentation required to be retained by regulations of the program.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, Section 30-44-2 (1997) for a comprehensive list of terms utilized in the Medicaid Fraud Act, NMSA 1978, Sections 30-44-1 to -8.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4402. Falsification of documents.

For you to find the defendant guilty of falsification of documents as charged in Count ____, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly

[made or caused to be made a misrepresentation of a material fact required to be furnished under the program. A material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [unnecessary services] [services not provided in the stated quality or amount] [or] [services to a person not authorized to receive them.]

[or]

[failed or caused the failure to include a material fact required to be furnished under the program in any record required to be retained in connection with the program. A material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [unnecessary services] [services not provided in the stated quality or amount] [or] [services to a person not authorized to receive them.]

[or]

[submitted or caused to be submitted false or incomplete information for the purpose of receiving benefits or qualifying as a provider][1].

2. This happened in New Mexico on or about the _____ day of _____, _____[2].

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 22-8300-034, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-44-4 (1989).

The Medicaid Fraud Act, NMSA 1978, §§ 30-44-1 to 30-44-8 (1989, as amended through 2004), delegates to the Human Services Department the authority to establish broad and detailed record and reporting requirements by regulation—enforceable by civil and criminal penalties. *See, e.g.*, § 30-44-5(A)(4); § 30-44-8(F). Section 30-44-4(A) has two distinct provisions for falsification of documents: Section 30-44-4(A)(1) explicitly requires that the fact in question be "material." Section 30-44-4(A)(2) does not require that the false or incomplete information be "material." The Committee believes that this distinction was intentional because under Section 30-44-4(A)(2), in addition to the requirement that a defendant act knowingly, the Legislature also required a showing that the false or incomplete information was submitted for "the purpose of receiving benefits or qualifying as a provider."

Both subsections require knowing conduct, i.e., conscious behavior between general criminal intent and specific intent. *See State v. Ramos*, 2013-NMSC-031, ¶ 28, 305 P.3d 921 (discussing scienter required for violating an order of protection); *see also State v. Hernandez*, A-1-CA-32109, mem. op. ¶ 25 (N.M. Ct. App. Nov. 19, 2014) (nonprecedential) (construing *Ramos*, 2013-NMSC-031, in the context of Medicaid false document charge).

The Fifth and Sixth Amendments to the United States Constitution require trial courts to submit the issue of materiality to the jury. *United States v. Gaudin*, 515 U.S. 506, 508, 511, 522-23 (1995) (reviewing conviction of making false statements on loan documents); *State v. Benavidez*, 1999-NMCA-053, ¶¶ 14-16, 127 N.M. 189, 979 P.2d 234 (following *Gaudin* and holding materiality of a false statement is a mixed question of law and fact for the jury), *rev'd on other grounds*, 1999-NMSC-041, ¶¶ 2, 5, 128 N.M. 261, 992 P.2d 274.

The touchstone of materiality is whether the statement or omission "has a natural tendency to influence" the decision of the relevant agency or tribunal. *See, e.g.*, *State v. Silva*, 2007-NMCA-117, ¶ 16, 168 P.3d 1110 (quoting *Benavidez*, 1999-NMCA-053, ¶ 26), *rev'd on other grounds*, 2008-NMSC-051, 192 P.3d 1192; *State v. Watkins*, 1979-NMCA-003, ¶ 38, 92 N.M. 470, 590 P.2d 169 (citing *United States v. Abrams*, 568 F.2d 411 (5th Cir. 1978)).

The Medicaid Fraud Act does not provide a definition of "material." Sections 30-44-1 to -8; *cf.* NMSA 1978, § 30-16-29 (1971) (providing no definition of material in the offense of fraudulent taking, receiving, or transferring credit cards). Further, "not every regulatory deficiency constitutes actionable false or fraudulent conduct under the [Medicaid Fraud Act]." *State ex rel. King v. Behavioral Home Care, Inc.*, 2015-NMCA-035, ¶ 27, 346 P.3d 377.

To assist the jury in determining whether a misrepresentation or omission of fact was material, the Committee believes that, in addition to the "natural tendency" general definition of materiality, materiality in the context of the Medicaid Fraud Act requires a nexus to facts about "the nature, quality, amount, and medical necessity of services furnished to an eligible recipient" that affects payment of Medicaid funds. *See* 8.302.1.17 NMAC; *Behavioral Home Care, Inc.*, 2015- NMCA-035, ¶ 21 ("Section 30-44-7(A)(3) imposes a materiality element which requires that the false or fraudulent certification be *integral to the government's payment decision*." (emphasis added)).

Unlike the offense under the Medicaid Fraud Act of failure to retain records, § 30-44-5, or Medicaid fraud, § 30-44-7, falsification of documents (§ 30-44-4) does not predicate punishment on a dollar amount.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 22-8300-034, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-034, effective December 31, 2022, defined "material fact" for purposes of the falsification of documents charge, separated the alternative ways of proving the charge of falsification of documents, and revised the committee commentary; in Element 1, added "A material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [unnecessary services] [services not provided in the stated quality or amount] [or] [services to a person not authorized to receive them.]", after the first bracketed alternative of proving falsification of documents, added "[or]", added "A material fact is a fact that is integral to the right to Medicaid payments and that has a natural tendency to influence the Human Services Department to pay for [unnecessary services] [services not provided in the stated quality or amount] [or] [services to a person not authorized to receive them.]", and after the second bracketed alternative of proving falsification of documents, added "[or]".

14-4403. Failure to retain records; rates.

For you to find the defendant guilty of failure to retain records as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received payment for treatment, services or goods under the program.

2. The defendant [intentionally failed to retain records[1] for a period of at least five years from the date payment was received] [knowingly destroyed or caused those records t o be destroyed within the five years from the date payment was received][2].

3. The records not retained were used in whole or in part to determine a rate of payment under the program.

4. This happened in New Mexico on or about the _____ day of _____, _____.[3]

USE NOTES

1. The statute identifies four applicable categories of medical and business records as records relating to: 1) the treatment or care of any recipient; 2) services or goods provided to any recipient; 3) rates paid by the department under the program on behalf of any recipient; and 4) any records required to be maintained by regulation of the department for administration of the program. *See* NMSA 1978, § 30-44-5(A)(1)-(4) (1989). This instruction pertains to records relating to rates paid by the department under the program on behalf of the recipient.

2. Use only the applicable bracketed elements established by the evidence.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-5 (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4404. Failure to retain records; treatment, services or goods and value.

For you to find the defendant guilty of failure to retain records as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received payment for treatment, services or goods under the program.

2. The defendant [intentionally failed to retain records[1] for a period of at least five years from the date payment was received] [knowingly destroyed or caused those records to be destroyed within the five years from the date payment was received][2].

3. The treatment, services or goods for which records were not retained amounts to $_____[3].[4]

4. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. The statute identifies four applicable categories of medical and business records as records relating to: 1) the treatment or care of any recipient; 2) services or goods provided to any recipient; 3) rates paid by the department under the program on behalf of any recipient; and 4) any records required to be maintained by regulation of the department for administration of the program. *See* NSMA 1978, § 30-44-5(A)(1)-(4) (1989). This instruction applies to records relating to: 1) the treatment or care of any recipient or 2) services or goods provided to any recipient.

2. Use only the applicable bracketed elements established by the evidence.

3. Insert monetary value.

4. Whoever commits the crime of failure to retain records is guilty of a misdemeanor if the treatment, services or goods for which records were not retained amounts to not more than one thousand dollars ($1,000.00). If the value of the treatment, services or goods for which records were not retained is more than one thousand dollars ($1,000.00), the defendant is guilty of a fourth degree felony. *See* NMSA 1978, § 30-44-5(C)(1)-(2).

5. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-5 (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4405. Obstruction of investigation; providing or withholding information.

For you to find the defendant guilty of obstruction of investigation as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly [provided false information to] [withheld information from][1] any person authorized under the Medicaid Fraud Act to investigate violations of that Act or to enforce the criminal or civil remedies of that Act.

2. The information [provided] [withheld][1] was material to the investigation or enforcement of the Medicaid Fraud Act.

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

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-6(A)(1) (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4406. Obstruction of investigation; altering documents.

For you to find the defendant guilty of obstruction of investigation as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly altered any document or record.

2. The defendant intended the alteration to mislead an investigation.

3. The altered information was material to that investigation.

4. This happened in New Mexico on or about the _____ day of _____, _____.[1]

USE NOTES

1. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-6(A)(2) (1989).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4407. Medicaid fraud; soliciting or receiving kickbacks in connection with medicaid or a state or federally funded health care plan.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [paid] [solicited] [offered] [received][1] _____[2] in connection with the furnishing of treatment, services or goods.

2. The treatment, services or goods were or may have been covered, in whole or in part, by the program.

3. The _____[2] was [paid] [solicited] [offered] [received][1] with the intent to influence a decision or commit a fraud affecting a state or mandated managed health care plan.

4. This happened in New Mexico on or about the _____ day of _____, _____.[3]

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. Specify the remuneration or bribe alleged.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(a) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4408. Medicaid fraud; soliciting or receiving kickbacks in connection with medicaid or a state or federally funded health care plan to or from a health care official.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [offered] [promised] [solicited] [accepted] [paid] [received][1] _____[2], which is anything of value.

2. [The defendant made the [offer] [promise] [payment][1] to a health care official] or [The defendant was a health care official].[1]

3. The [offer] [promise] [solicitation] [acceptance] [payment] [receipt][1] was made with the intent to influence a decision or commit a fraud affecting a state or mandated managed health care plan.

4. This happened in New Mexico on or about the _____ day of _____, _____.[3]

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. Name item.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(a) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4409. Medicaid fraud; soliciting or receiving rebate for referral of recipient.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____[1] is a provider.

2. _____[2] is a recipient.

3. The defendant [paid] [solicited] [offered] [received][3] a rebate of a fee or charge made to _____[1].

4. The rebate was [paid] [solicited] [offered] [received][3] for referring _____[2] to _____[1].

5. This happened in New Mexico on or about the _____ day of _____, _____.[4]

USE NOTES

1. List the provider's name.

2. List the recipient's name.

3. Use only the applicable bracketed elements established by the evidence.

4. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(b) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4410. Medicaid fraud; receiving anything of value; precondition.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____[1], which is anything of value.

2. The defendant received _____[1] with the intent to retain it.

3. The defendant knew _____[1] was in excess of amounts authorized under the program.

4. The defendant's receipt of _____[1] was a [precondition of providing treatment, care, services or goods] [a requirement for continued provision of treatment, care, services or goods][2].

5. This happened in New Mexico on or about the _____ day of _____, _____.[3]

USE NOTES

1. Name the item(s).

2. Use only the applicable bracketed elements established by the evidence.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(c) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4411. Medicaid fraud; receiving anything of value; rates.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____[1], which is anything of value.

2. The defendant intended to retain _____[1].

3. The rates established under the program for providing treatment, services or goods are _____.[2]

4. The defendant knew the value of _____[1] was in excess of the rates established under the program for providing treatment, services or goods.

5. This happened in New Mexico on or about the _____ day of _____, _____.[3]

USE NOTES

1. Name the item(s).

2. List the established rate.

3. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(1)(d) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4412. Medicaid fraud; providing fraudulent claim.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant knowingly provided a claim for [treatment, services or goods that were not ordered by a treating physician] [treatment that was substantially inadequate when compared to generally recognized standards within the discipline or industry] [merchandise that was adulterated, debased, mislabeled or outdated][1].

2. The defendant provided the claim to a state or federally mandated managed health care plan.

3. The defendant intended the state or federally mandated managed health care plan to rely on the claim for the expenditure of public money.

4. This happened in New Mexico on or about the _____ day of _____, _____.[2]

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(2)(a-c) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4413. Medicaid fraud; presenting excessive, multiple or incomplete claim.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [presented] [caused to be presented][1] a claim for allowance or payment.

2. The claim was a [false] [fraudulent] [excessive] [multiple] [incomplete][1] claim for furnishing treatment, services or goods.

3. The defendant knew the claim was a [false] [fraudulent] [excessive] [multiple] [incomplete][1] claim for furnishing treatment, services or goods.

4. The defendant [presented] [caused to be presented][1] the claim for allowance or payment from a state or federally mandated managed health care plan.

5. The defendant intended the state or federally mandated managed health care plan to rely on the claim for the expenditure of public money.

6. This happened in New Mexico on or about the _____ day of _____, _____.[2]

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(3) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4414. Medicaid fraud; executing plan or conspiracy to execute plan to defraud state or federal health care plan by deceptive marketing.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [executed] [conspired to execute[2]][1] a plan or action to defraud a state or federally funded or mandated managed health care plan in connection with the delivery of or payment for health care benefits.

2. [The defendant's plan included engaging in any intentionally deceptive marketing practice in connection with [proposing] [offering] [selling] [soliciting] [providing][1] any health care service in a state or federally funded or mandated managed health care plan].[3]

3. This happened in New Mexico on or about the _____ day of _____, _____.[4]

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. UJI 14-2810 NMRA should be given if conspiracy is alleged.

3. Include this element if the defendant's plan to defraud included engaging in any intentionally deceptive marking practice.

4. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(4)(a) (2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4415. Medicaid fraud; executing plan or conspiracy to execute plan for delivery or payment of benefits by fraud or fraudulent representation.

For you to find the defendant guilty of Medicaid fraud as charged in Count ____, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [executed] [conspired to execute[2]][1] a plan or action to obtain by false or fraudulent representation[4] or promise, _____[3], which is anything of value, in connection with the delivery of or payment for health care benefits.

2. The health care benefits were in whole or in part, [paid for] [reimbursed] [subsidized][1] by a state or federally funded or mandated managed health care plan.

3. This happened in New Mexico on or about the _____ day of _____, _____.[5]

USE NOTES

1. Use only the applicable bracketed elements established by the evidence.

2. UJI 14-2810 NMRA should be given if conspiracy is alleged.

3. Name item.

4. *See* NMSA 1978, § 30-44-7(A)(4)(b) for a list of fraudulent representations or statements anticipated by the statute.

5. The applicable definition or definitions from UJI 14-4401 NMRA must be given after this instruction.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. — *See* NMSA 1978, § 30-44-7(A)(4)(b)(2003).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014.]

14-4420. Personal responsibility of corporate agent.

A person is responsible for conduct that person performs or causes to be performed on behalf of a corporation just as though the conduct were performed on the person's own behalf. However, a person is not responsible for the conduct of others performed on behalf of a corporation merely because that person is an officer, employee, or other agent of a corporation.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — The fact that actions are taken with the intent to further corporate business does not relieve the agent or employee of criminal responsibility for those actions. *See United States v. Wise*, 370 U.S. 405 (1962). However, a corporate employee or agent's criminal responsibility is not enlarged merely because of the employee or agent's corporate office. Corporate agents and employees are responsible for their own conduct and are responsible for the conduct of others according to the ordinary rules of accountability. This instructions does not exclude the possibility that a criminal statute may impose a special duty on corporate officers. *See United States v. Park*, 421 U.S. 659, 667-76 (1975). However, in that scenario, criminal liability attaches not because of a corporate officer's position, but because the officer acts or fails to act in conformity with the duty imposed by statute. *Id.* at 674. There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4421. Entity responsibility; scope of employment.

_____ (*name of entity*) is a [corporation] [partnership] [voluntary association][1]. A [corporation] [partnership] [voluntary association][1] may be found guilty of an offense.

A [corporation] [partnership] [voluntary association][1] acts only through its agents and employees, that is, those directors, officers, agents, employees, or other persons authorized or employed to act for it.

To sustain the charge of _____[2] against _____ (*name of entity*), the state must prove the following propositions:

First, the offense charged was committed by [an] agent[s] or employee[s] of _____ (*name of entity*);

Second, in committing the offense, the agent[s] or employee[s] intended, at least in part, to benefit _____ (*name of entity*);

Third, the acts by the agent[s] or employee[s] were committed within the authority or scope of employment.

For an act to be within the authority of an agent or the scope of employment of an employee, it must deal with a matter whose performance is generally entrusted to the agent or employee by _____ (*name of entity*).

It is not necessary that the particular act was itself authorized or directed by _____ (*name of entity*) as long as the entity has a right to control the

manner in which the details of the work were to be performed at the time of the occurrence, even though the right of control may not have been exercised.

If an agent or an employee was acting within the authority or scope of employment, _____ (*name of entity*) is not relieved of its responsibility because the act was illegal, contrary to _____'s (*name of entity*) instructions, or against its general policies. You may, however, consider the existence of _____'s (*name of entity*) policies and instructions and the diligence of its efforts to enforce them in determining whether the agent[s] or employee[s] [was][were] acting with intent to benefit _____ (*name of entity*) or within the scope of employment.

USE NOTES

1. Use only applicable alternative.

2. Insert name of charge.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This instruction adopts the position of the majority of courts which have considered the question of the responsibility of a corporation for the criminal conduct of its agents. There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175. The majority view is that unless the criminal statute explicitly provides otherwise, a corporation is vicariously criminally liable for the crimes committed by its agents acting within the scope of their employment–that is, within their actual or apparent authority and on behalf of the corporation for the benefit of the corporation. *See Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962). Under this view, which simply constitutes an application of respondeat superior principles to criminal statutes, it may be irrelevant that the agent is not a high managerial official, that the corporation may have specifically instructed the agent not to engage in the proscribed conduct, or that the statute is one that requires willful or knowing violations, rather than one that imposes strict liability. The stated rationale is that the criminal statutes impose a duty upon the corporation to prevent its employees from committing the statutory violations. *See Echols v. N.C. Ribble Co.*, 1973-NMCA-038, 85 N.M. 240, 511 P.2d 566 (when an agent is acting within the scope of authority, the principal is liable for false representations made by the agent, even if the principal was without knowledge of its agent's fraud and otherwise innocent of wrongdoing).

However, an agent acts outside the scope of employment when not acting at least in part for the benefit of the corporation. *See United States v. One Parcel of Land Located at 7326 Highway 45 N., Three Lakes*, 965 F.2d 311, 316 (7th Cir. 1992). When an employee acts to the detriment of the employer and in violation of the law, the employee's actions normally will be deemed to fall outside the scope of employment

and thus will not be imputed to the employer. *See United States v. Barrett*, 51 F.3d 86, 89 (7th Cir. 1995).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4422. Entity responsibility; outside the scope of employment.

If you find that an act of an agent was not committed within the scope of the agent's employment, then you must consider whether the corporation later approved the act. An act is approved if, after it is performed, another agent of the corporation, with the authority to perform or authorize the act, and with the intent to benefit the corporation, either expressly approves or engages in conduct that is consistent with approving the act.

A corporation is legally responsible for any act or omission approved by its agents.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This instruction provides for corporate criminal liability when the corporation ratifies the conduct of an agent who acts outside the scope of the agent's employment. *See generally Steere Tank Lines, Inc. v. United States*, 330 F.2d 719 (5th Cir. 1963). There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4423. Entity responsibility; independent contractor.

A corporation may be criminally liable for the acts and omissions of an apparent employee, even though there has been no actual employment and no right to control the manner of the work performed if:

1. _____ (*name of corporate defendant*), by its statements, acts or conduct led a person or entity to reasonably believe _____ (*name of apparent employee*) was the corporate defendant's employee;

2. The person or entity dealt with _____ (*name of apparent employee*) in justifiable reliance upon representations of _____ (*name of corporate defendant*);

3. At the time of the injury, _____ (*name of apparent employee*) was acting in the scope of the apparent employment of _____ (*name of corporate defendant*);

4. In committing the offense, _____ (*name of apparent employee*) intended, at least in part, to benefit _____ (*name of corporate defendant*).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — This instruction provides for corporate liability when an apparent employee or an independent contractor acts criminally or fails to do some act which results in a violation of the law. There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175. Ordinarily, a corporation is not liable for the acts or omissions of an independent contractor when the corporation does not have the right to control the manner in which the details of the work are to be performed. *See Valdez v. Yates Petroleum Corp.*, 2007-NMCA-038, 141 N.M. 381, 155 P.3d 786. However, New Mexico law provides that a corporation can be liable for the acts or omissions of an independent contractor when a third party justifiably relies on the apparent relationship. *See Chevron Oil Co., v. Sutton*, 1973-NMSC-111, 85 N.M. 679, 515 P.2d 1283.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

14-4424. Party other than an individual.

_____ (*name of corporate defendant*) must be given the same fair consideration as you would give an individual.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — There are no New Mexico cases on point. *See State v. Wilson*, 1994-NMSC-009, ¶¶ 4-6, 116 N.M. 793, 867 P.2d 1175; *see also De La O v. Bimbo's Restaurant, Inc.*, 1976-NMCA-115, 89 N.M. 800, 558 P.2d 69 (failing to give instruction, when requested, was held to be reversible error).

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014.]

CHAPTER 45
Motor Vehicle Offenses

14-4501. Driving while under the influence of intoxicating liquor; essential elements.

For you to find the defendant guilty of driving while under the influence of intoxicating liquor [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2];

2. At the time, the defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;

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

USE NOTES

1. Insert count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

[Adopted, October 1, 1985; UJI Criminal Rule 35.01 NMSA 1978; UJI 14-4501 SCRA 1986; as amended, effective May 1, 1997.]

Committee commentary. — This instruction does not contain a definition of "under the influence of intoxicating liquor". UJI Crim. 14-243, which defines "under the influence of intoxicating liquor", should be given if requested. *See* committee commentary for UJI Crim. 14-243 for the sources of this definition.

The phrase "to drive" does not require motion of the vehicle. The offense is committed when a person under the influence is in actual physical control of a motor vehicle. Motion of the vehicle is not a necessary element of the offense. *See State v. Harrison,* 115 N.M. 73, 846 P.2d 1082 (Ct.App. 1992) and *Boone v. State,* 105 N.M. 223, 731 P.2d 366 (1986). *See also* Subsection K of Section 66-1-4.4 NMSA 1978 defining "driver" for purposes of the Motor Vehicle Code.

A person may be charged, under Section 66-8-102A NMSA 1978, with driving any motor vehicle while under the influence of intoxicating liquor, or in the alternative, under Section 66-8-102C NMSA 1978, with driving any motor vehicle with eight one-hundredths or more alcohol in the person's blood or breath. The jury may render a guilty verdict for a violation of Subsection A or for a violation of Subsection C. If the defendant is charged in the alternative, the jury may not render a guilty verdict for both offenses. *See State v. Cavanaugh,* 116 N.M. 826, 867 P.2d 1208 (Ct. App. 1993).

ANNOTATIONS

The 1997 amendment, effective May 1, 1997, substituted "operated" for "drove" in Paragraph 1, and substituted "the defendant" for "he" and added the language beginning "that is" in Paragraph 2.

Compiler's notes. — Notwithstanding Use Note number 2, the definition of motor vehicle is contained in 66-1-4.11 NMSA 1978.

14-4502. Driving while under the influence of drugs; essential elements.

For you to find the defendant guilty of driving while under the influence of drugs [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle;[2]

2. At that time, the defendant was under the influence of drugs to such a degree that the defendant was incapable of safely driving a vehicle;

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

USE NOTES

1. Insert count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of "motor vehicle".

[Adopted, October 1, 1985; UJI Criminal Rule 35.02 NMSA 1978; UJI 14-4502 SCRA 1986; as amended, effective May 1, 1997.]

Committee commentary. — Section 66-8-102B NMSA 1978 states that it is unlawful for any person who is under the influence "of any drug" to a degree which renders the person incapable of safely driving a vehicle to drive any vehicle in New Mexico. Section 66-8-102 NMSA 1978 does not define the term "drug". Drug is defined in the Controlled Substances Act. *See* Subsection K of Section 30-31-2 NMSA 1978.

For a discussion of the meaning of the phrase "to drive," *see* committee commentary to UJI Crim. 14-4501.

ANNOTATIONS

The 1997 amendment, effective May 1, 1997, substituted "operated" for "drove" in Paragraph 1 and made gender neutral changes in Paragraph 2, and rewrote Use Note 2 and deleted former Use Note 3 prohibiting giving UJI 14-243.

14-4503. Driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more; essential elements.

For you to find the defendant guilty of driving with a blood or breath alcohol concentration of eight one-hundredths (.08) or more [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2];

2. Within three (3) hours of driving, the defendant had an alcohol concentration of eight one-hundredths (.08) grams or more in [one hundred milliliters of blood][3] [or] [two hundred ten liters of breath] and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle.

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

USE NOTES

1. Insert count number if more than one count is charged.

2. For the definition of "motor vehicle," *see* § 66-1-4.11 (H) NMSA 1978 (2007).

3. Use only the applicable alternative or alternatives.

[Adopted, October 1, 1985; UJI Criminal Rule 35.02 NMSA 1978; UJI 14-4502 SCRA 1986; as amended, effective August 1, 1989; May 1, 1997; as amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008; as amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This instruction pertains to NMSA 1978, Section 66-8-102, which makes it a criminal offense for a person to drive any vehicle within New Mexico while having eight one-hundredths or more alcohol in the person's blood or breath. It is commonly known as the "*per se*" violation.

NMSA 1978, Section 66-8-110(C), provides that "when the blood or breath of the person tested contains an alcohol concentration of eight one-hundredths or more, the arresting officer shall charge him with a violation of Section 66-8-102 NMSA 1978". The determination of blood or breath concentration is based on the grams of alcohol in one hundred milliliters of blood or grams of alcohol in two hundred ten liters of breath. *See* NMSA 1978, § 66-8-111(C). Therefore, Section 66-8-102(C) and Section 66-8-110 create a *per se* standard. It is not necessary for the state to prove that the defendant was driving impaired in order for the jury to render a guilty verdict under Section 66-8-102(C) NMSA 1978.

For a discussion of alternative charges under NMSA 1978, Sections 66-8-102(A) and 66-8-102(C), *see* committee commentary for UJI 14-4501 NMRA.

For a discussion of the meaning of the phrase "to drive," *see* committee commentary for UJI 14-4501.

This instruction pertains to NMSA 1978, Section 66-8-102(C)(1) (2007), which makes it a criminal offense for "a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle." It is commonly known as the "*per se*" violation. This instruction should be used for all driving under the influence of intoxicating liquor cases in which a *per se* violation is alleged to have been committed after April 1, 2007, to reflect amendments to Section 66-8-102. The committee amended this instruction in 2016 to remove the brackets around the phrase, "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle." The committee determined that Section 66-8-102(C)(1) makes this an essential element in all cases and it should not be omitted from the instruction.

Section 66-8-110(C)(1) provides, "The arresting officer shall charge the person tested with a violation of § 66-8-102 NMSA 1978 when the blood or breath of the person contains an alcohol concentration of . . . eight one hundredths or more."

"The determination of alcohol concentration shall be based on the grams of alcohol in one hundred milliliters of blood or the grams of alcohol in two hundred ten liters of breath." NMSA 1978, § 66-8-110(F) (2007).

Therefore, Sections 66-8-102(C) and 66-8-110 create a *per se* standard. It is not necessary for the state to prove that the defendant was driving "while under the influence" in order for the jury to render a guilty verdict under Section 66-8-102(C).

For a discussion of alternative charges under Sections 66-8-102(A) and 66-8-102(C), *see* committee commentary for UJI 14-4501.

For a discussion of the meaning of the phrase "to drive," *see* committee commentary for UJI 14-4501.

[As amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-010, effective December 31, 2016, in Paragraph (2), removed the brackets around "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle", and removed the use note designation "3" at the end of Paragraph (2); and in the committee

commentary, made technical changes and added the last two sentences of the fifth undesignated paragraph.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, in Paragraph 2, substituted "Within three (3) hours of driving" for "At that time" and added "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle"; and rewrote the committee commentary to explain the impact of the 2007 amendments to 66-8-102 NMSA 1978 on this instruction.

The 1997 amendment, effective May 1, 1997, substituted "a blood or breath alcohol concentration of eight one-hundredths (.08) or more" for "a blood alcohol content of .10 or more" in the instruction heading, substituted "a blood or breath alcohol concentration of eight one-hundredths (.08) or more" for "one tenth of one percent or more by weight of alcohol in his blood" in the introductory paragraph, substituted "operated" for "drove" in Paragraph 1, substituted the language beginning "the defendant" for "he had one tenth of one percent or more by weight of alcohol in his blood" in Paragraph 2, and rewrote Use Note 2 and added Use Note 3.

The 1989 amendment, effective for cases filed in the district courts on or after August 1, 1989, near the beginning of the instruction, substituted "driving with one-tenth of one percent or more by weight of alcohol in his blood" for "driving while under the influence of intoxicating liquor".

Minimum concentration relates to time of operation. — The Uniform Jury Instructions for both per se DWI and per se aggravated DWI require that the minimum alcohol concentration relate to the time the defendant operated a motor vehicle. *State v. Notah-Hunter*, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006.

Where delay between driving and testing is significant, the state must prove a nexus between the defendant's blood alcohol content score and the time of driving through evidence corroborating the inference that the defendant's blood alcohol content at the time of driving was at the statutory level of 0.08 or above. *State v. Hughey*, 2005-NMCA-114, 138 N.M. 308, 119 P.3d 188, cert. granted, 2005-NMCERT-008.

Extrapolation to blood alcohol content at time of driving. — If an expert can testify as to a method that reliably extrapolates from a defendant's blood alcohol content test result to a likely blood alcohol content at the time of driving, the blood alcohol content result is helpful to the fact finder and may be admissible. *State v. Hughey*, 2005-NMCA-114, 138 N.M. 308, 119 P.3d 188, cert. granted, 2005-NMCERT-008.

Critical inquiry. — In any case where the state attempts to prove a violation of the per se driving while intoxicated statute, which requires a minimum blood alcohol concentration at the time "the defendant operated a motor vehicle", the critical inquiry is how to determine the defendant's blood alcohol concentration at the time of driving if there is a significant delay between the time of driving and the time the blood alcohol

concentration is measured. *State v. Silago*, 2005-NMCA-100, 138 N.M. 301, 119 P.3d 181.

14-4504. Reckless driving; essential elements.[1]

For you to find the defendant guilty of reckless driving [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. The defendant drove carelessly and heedlessly in willful or wanton disregard of the rights or safety of others and without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property;

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

USE NOTES

1. If UJI Crim. 14-240 and 14-241 are given, this instruction should not be given.

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

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

[As amended, effective May 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective May 1, 1997, substituted "operated" for "drove" in Paragraph 1 and rewrote Use Note 3.

Cross references. — *See* Section 66-8-113 NMSA 1978.

Substantial evidence of reckless driving while willfully disregarding the rights and safety of others. — Where a motorist, who was attempting to merge into the right lane of the highway, reported that defendant passed the motorist on the right side at a high speed; the police stopped defendant; defendant admitted that defendant had been driving eighty miles per hour; the officers gave defendant a verbal warning, told defendant to slow down before defendant hurt someone, and told defendant to follow the forty-five mile per hour speed limit which would decrease to thirty-five miles per hour; approximately two minutes after the traffic stop and one to one and one-half miles from the traffic stop, defendant collided with a vehicle that was crossing the highway, killing the passenger; defendant was driving in the left lane and could have avoided the

collision by steering left into the oncoming traffic lane; instead, defendant veered to the right toward the other vehicle; the driver of the other vehicle testified that defendant appeared to be laughing as defendant veered into the other vehicle; and defendant was driving between fifty-four and fifty-nine miles per hour in a thirty-five mile per hour speed zone, there was substantial evidence that defendant was driving recklessly when defendant willfully disregarded the rights and safety of others. *State v. Munoz*, 2014-NMCA-101.

Sufficient evidence to prove reckless driving. — In delinquency proceedings where the child was charged with unlawful taking of a motor vehicle and reckless driving, there was sufficient evidence to support the jurors' reasonable determination that the child committed the delinquent act of reckless driving where the state, in addition to presenting Facebook messages in which the child apologized to the victim and claimed that she was intoxicated when she took the victim's vehicle, presented testimony from the victim that after getting out of his vehicle to hug the child goodbye, the child pushed him aside and took off in his vehicle without his permission, that she failed to stop even though he ran after her, banged on the driver side window, and yelled for her to stop, and that the victim saw the child drive over a curb, knock down and drive over a fence, and heard the sound of the vehicle strike a dumpster before he lost sight of the vehicle. *State v. Jesenya O.*, 2021-NMCA-030, 493 P.3d 418, *rev'd on other grounds by* 2022-NMSC-014.

14-4505. Careless driving; essential elements.

For you to find the defendant guilty of careless driving [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[2] on a highway[3];

2. The defendant operated the motor vehicle in a careless, inattentive or imprudent manner without due regard for the width, grade, curves, corners, traffic, weather, road conditions and all other attendant circumstances;

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

USE NOTES

1. Insert count number if more than one count is charged.

2. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

3. *See* Section 66-1-4.8 NMSA 1978 for the definition of a highway.

[Adopted, October 1, 1985; UJI Criminal Rule 35.05 NMSA 1978; UJI 14-4505 SCRA 1986; as amended, effective May 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective May 1, 1997, rewrote Use Notes 2 and 3.

Cross references. — *See* Section 66-8-114 NMSA 1978.

Duress does not negate an essential element of the charged offense. — Where defendant was charged with aggravated DWI and careless driving, and where defendant claimed that circumstances required her to drive in violation of the law, the metropolitan court did not err in refusing defendant's tendered instruction that imbedded the absence of duress as an essential element of careless driving, because a defendant pleading duress is not attempting to disprove a requisite mental state, but defendants in that context are instead attempting to show that they ought to be excused from criminal liability because of the circumstances surrounding their intentional act. *State v. Percival*, 2017-NMCA-042.

14-4506. Aggravated driving with alcohol concentration of (.16) or more; essential elements.[1]

For you to find the defendant guilty of aggravated driving while under the influence of intoxicating liquor [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. Within three hours of driving, the defendant had an alcohol concentration of sixteen one-hundredths (.16) grams or more in [one hundred milliliters of blood;][4] [or] [two hundred ten liters of breath;] and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle.

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

USE NOTES

1. If the evidence supports more than one theory of aggravated driving while intoxicated the applicable alternatives set forth in UJI 14-4509 NMRA are to be given. This instruction is to be used if the only theory of aggravated driving in issue is aggravated driving with an alcohol concentration of (.16) or more.

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

3. For a definition of "motor vehicle," *see* § 66-1-4.11 NMSA 1978 (2007).

4. Use applicable alternative or alternatives.

[Adopted, effective May 1, 1997; amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008; as amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This instruction should be used for all aggravated driving under the influence of intoxicating liquor cases in which a per se violation is alleged to have been committed after April 1, 2007, to reflect amendments to § 66-8-102 NMSA 1978.

This instruction was amended in 2016 to remove the brackets around the phrase, “and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle,” because it was determined that Section 66-8-102(D)(1) makes this an essential element in all cases and it should not be omitted from the instruction.

[As amended by Supreme Court Order No. 16-8300-010, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-010, effective December 31, 2016, in Paragraph (2), removed the brackets around “and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle”, and removed the use note designation “4” at the end of Paragraph (2); and in the committee commentary, added the last paragraph.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, in Paragraph 2, substituted "Within three hours of driving" for "At that time", and added "and the alcohol concentration resulted from alcohol consumed before or while driving the vehicle"; and added a new committee commentary.

Minimum concentration relates to time of operation. — The Uniform Jury Instructions for both per se DWI and per se aggravated DWI require that the minimum alcohol concentration relate to the time the defendant operated a motor vehicle. *State v. Notah-Hunter*, 2005-NMCA-074, 137 N.M. 597, 113 P.3d 867, cert. denied, 2005-NMCERT-006.

Measurement ratio not for jury. — The measurement ratio of grams per 210 liters of breath is a foundational requirement for admission of breath test results, rather than an element of the offense for the jury to decide. *State v. Onsurez*, 2002-NMCA-082, 132 N.M. 485, 51 P.3d 528, cert. denied, 132 N.M. 551, 52 P.3d 411.

Duress does not negate an essential element of the charged offense. — Where defendant was charged with aggravated DWI and careless driving, and where defendant claimed that circumstances required her to drive in violation of the law, the

metropolitan court did not err in refusing defendant's tendered instruction that imbedded the absence of duress as an essential element of aggravated DWI, because a defendant pleading duress is not attempting to disprove a requisite mental state, but defendants in that context are instead attempting to show that they ought to be excused from criminal liability because of the circumstances surrounding their intentional act. *State v. Percival*, 2017-NMCA-042.

14-4507. Aggravated driving while under influence of alcohol or drugs and causing bodily injury; essential elements.[1]

For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. At that time the defendant was under the influence of

> [intoxicating liquor; that is, as a result of drinking such liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;][4]
>
> [or]
>
> [drugs to such a degree that the defendant was incapable of safely driving a vehicle;]

3. The defendant caused painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of _____ *(set forth name of victim)*;

4. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTES

1. If the evidence supports more than one theory of aggravated driving while intoxicated, the applicable alternatives set forth in Instruction 14-4509 are to be given. This instruction is to be used if the only theory of aggravated driving in issue is causing bodily injury while under the influence.

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

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

4. Use applicable alternative or alternatives.

[Adopted, effective May 1, 1997.]

ANNOTATIONS

Cross references. — *See* Section 66-8-102 NMSA 1978.

14-4508. Aggravated driving while under influence of alcohol or drugs and refusing to submit to chemical testing; essential elements.[1]

For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. At that time the defendant was under the influence of

> [intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;][4]
>
> [or]
>
> [drugs to such a degree that the defendant was incapable of safely driving a vehicle;]

3. The defendant refused to submit to chemical testing[5];

4. This happened in New Mexico, on or about the _____ day of _____, _____.

USE NOTES

1. If the evidence supports more than one theory of aggravated driving while intoxicated, the applicable alternatives set forth in Instruction 14-4509 are to be given. This instruction is to be used if the only theory of aggravated driving in issue is refusing to submit to chemical testing while driving under the influence.

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

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

4. Use applicable alternative or alternatives.

5. Instruction 14-4510, the definition of refusal to submit to chemical testing, must be given immediately after this instruction.

[Adopted, effective May 1, 1997.]

ANNOTATIONS

Cross references. — *See* Section 66-8-102 NMSA 1978.

DWI based on an inference of past driving. — Where police officers were called to investigate a report of domestic violence occurring in a van parked on a roadside; when the officers arrived, defendant was in the driver's seat of the van; the van was not running; the keys were not in the ignition; defendant exhibited signs of intoxication, failed a standard field sobriety test, and refused to submit to chemical testing; defendant admitted to drinking twenty-four ounces of beer about one hour earlier; and the state prosecuted defendant exclusively on the past impaired driving theory, the evidence was insufficient to prove that defendant operated a motor vehicle while impaired to the slightest degree. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Substantial evidence. — Defendant's conviction of DWI was supported by substantial evidence where police officers observed that the defendant had red, blood shot and watery eyes, slurred speech and a very strong odor of alcohol on his breath; one officer testified that the defendant had admitted to the officer that he had been drinking at this mother's apartment; the officers observed several open cans of beer at the apartment of the defendant's mother; and defendant did not dispute that he refused to consent to take a breath test. *State v. Soto*, 2007-NMCA-077, 142 N.M. 32, 162 P.3d 187, cert. denied, 2007-NMCERT-006.

14-4509. Aggravated driving while under influence of alcohol or drugs; essential elements.[1]

For you to find the defendant guilty of aggravated driving while under the influence of [intoxicating liquor] [or] [drugs] [as charged in Count _____][2], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant operated a motor vehicle[3];

2. At that time, the defendant

> [had an alcohol concentration of sixteen one-hundredths (.16) grams or more in [one hundred milliliters of blood;][4] [or] [two hundred ten liters of breath;]][4]

[OR]

[was under the influence of

[intoxicating liquor; that is, as a result of drinking liquor the defendant was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public;][4]

[or]

[drugs to such a degree that the defendant was incapable of safely driving a vehicle]

and

[caused painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of _____ *(set forth name of victim)*;]

[or]

[refused to submit to chemical testing[5].]]

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

USE NOTES

1. This instruction sets forth the elements of all three types of "aggravated driving while under the influence" in Subsection D of Section 66-8-102 NMSA 1978: (1) driving with an alcohol concentration of .16 or more; (2) causing bodily injury while driving intoxicated; and (3) refusing to submit to chemical testing when driving while intoxicated. If the evidence supports two or more of these theories of "aggravated driving while under the influence of intoxicating liquor or drugs", this instruction must be used. If the evidence supports only one theory of aggravated driving while under the influence, use instruction 14-4506, 14-4507 or 14-4508, whichever is applicable.

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

3. *See* Section 66-1-4.11 NMSA 1978 for the definition of a motor vehicle.

4. Use applicable alternative or alternatives.

5. Instruction 14-4510, the definition of refusal to submit to chemical testing, must be given if this element is given.

[Adopted, effective May 1, 1997.]

ANNOTATIONS

Cross references. — *See* Section 66-8-102 NMSA 1978.

14-4510. Refusal to submit to chemical testing; defined.[1]

The defendant refused to submit to chemical testing if:

1. the defendant was arrested on reasonable grounds to believe that the defendant was driving while under the influence of intoxicating liquor or drugs;

2. the defendant was advised by a law enforcement officer that failure to submit to the test could result in the revocation of the defendant's privilege to drive;

3. a law enforcement officer requested the defendant to submit to a chemical [breath][2] [blood] test;

4. the defendant was conscious and otherwise capable of submitting to a chemical test; and

5. the defendant willfully refused to submit to a [breath][2] [blood] test.

USE NOTES

1. This instruction must be given immediately after UJI Criminal 14-4508 or 14-4509 if the defendant is charged with aggravated driving while under the influence of intoxicating liquor or drugs by refusing to submit to a chemical test.

2. Use only applicable bracketed alternative.

[Adopted, effective May 1, 1997; as amended effective April 1, 1998.]

ANNOTATIONS

The 1998 amendment, effective April 1, 1998, deleted former paragraph 2 and Use Note 2, both relating to the right to independent chemical testing, and redesignated the subsequent paragraphs and Use Note accordingly.

Cross references. — *See* Sections 66-8-103 and 66-8-105 to 66-8-112 NMSA 1978.

14-4511. "Operating" or driving a motor vehicle; defined.[1]

A person is "operating" a motor vehicle[2] if the person is:

[driving the motor vehicle;][3]

[or]

[in actual physical control with the intent to drive the vehicle, whether or not the vehicle is moving;]

[or]

[exercising control over or steering a vehicle being towed by a motor vehicle;]

[or]

[operating an off-highway motor vehicle;]

[or]

[in actual physical control with the intent to drive the vehicle, of an off-highway motor vehicle whether or not the vehicle is moving].

USE NOTES

1. Use this instruction if "operating" or "driving" is in issue.

2. If there is an issue as to whether the vehicle is a motor vehicle, the definition of "motor vehicle", Section 66-1-4.11 NMSA 1978 should be given.

3. Use only applicable alternative or alternatives.

[Approved, effective April 1, 1997; as amended, effective August 1, 2001; as amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

Committee commentary. — *See State v. Sims*, 2010-NMSC-027, 148 N.M. 330, 236 P.3d 642 (holding that when a DWI charge is based on the allegation that the defendant was in actual physical control of the vehicle, the state must prove that the defendant had an intent to drive and limiting the holdings of *Boone v. State*, 105 N.M. 223, 731 P.2d 366 (1986); *State v. Johnson*, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233).

[As amended by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-004, effective March 21, 2011, required the jury to find that the defendant had the intent to drive a vehicle that was in the actual physical control of the defendant.

The 2001 amendment, effective August 1, 2001, deleted the phrase "if the vehicle is on a highway" after "whether or not the vehicle is moving"; added "[or] [operating an off-highway motor vehicle;]," added the phrase "whether or not the vehicle is moving]" at the end of the last clause, and deleted Use Note 4 which read "If there is an issue as to whether or not the motor vehicle was on a 'highway', the definition of 'highway' set forth in Section 66-1-4.8 NMSA 1978 should be given".

Cross references. — *See* Section 66-7-2 NMSA 1978; Section 66-1-4.4 NMSA 1978; Section 66-1-4.4K NMSA 1978.

"Operating" vs. "driving" motor vehicle. – The term "operating" a motor vehicle as used in this instruction is synonymous with the term "driving" a motor vehicle under the driving while intoxicated statute, 66-8-102 NMSA 1978. *State v. Laney,* 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

In a prosecution for vehicular homicide under 66-8-101 NMSA 1978 and reckless driving under 66-8-113 NMSA 1978 where the issue was whether the defendant was in fact the driver, the defendant was not prejudiced by this instruction, because the instructions defining the offenses required that the defendant be "driving" the vehicle in the ordinary sense. *State v. Laney,* 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

Vehicle on private property. — The state may charge a person with DWI pursuant to 66-8-102 NMSA 1978, despite the fact that the defendant is found on private property in actual physical control of a non-moving vehicle. *State v. Johnson,* 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233.

Sufficient evidence of aggravated DWI based on past driving. — In a prosecution for aggravated DWI, where there were no witnesses who personally observed defendant driving, there was sufficient evidence to support an inference that defendant had actually driven the vehicle based on the evidence presented at trial establishing that the arresting officer reached defendant’s vehicle about five minutes after receiving a dispatch call alerting him that there was a pickup truck stuck in the median that was trying to back into traffic, that the officer observed defendant in the driver’s seat of the truck, which was stuck in the median on the interstate with the hazard lights on, that the key to the vehicle was in the ignition and in the “on” position, and that defendant stated that he was coming from Albuquerque and was going to El Paso; the state presented sufficient evidence to support a conviction for DWI based on past driving. *State v. Alvarez*, 2018-NMCA-006, cert. denied.

14-4512. Actual physical control; defined.

In determining whether the state has proved beyond a reasonable doubt that the defendant was in actual physical control of the vehicle and that the defendant intended to drive the vehicle, thereby posing a real danger to [himself] [herself] or the public, you

should consider the totality of the circumstances shown by the evidence. You may consider the following factors and any other relevant factors supported by the evidence:

1. whether the vehicle was running;
2. whether the ignition was in the "on" position;
3. where the ignition key was located;
4. where and in what position the driver was found in the vehicle;
5. whether the person was awake or asleep;
6. whether the vehicle's headlights were on;
7. where the vehicle was stopped;
8. whether the driver had voluntarily pulled off the road;
9. the time of day;
10. the weather conditions;
11. whether the heater or air conditioner was on;
12. whether the windows were up or down;
13. whether the vehicle was operable;
14. any explanation of the circumstances shown by the evidence.

It is up to you to examine all the available evidence in its totality and weigh its credibility in determining whether the defendant was simply using the vehicle as stationary shelter or actually posed a threat to the public by the exercise of actual control over it while impaired.

[Adopted by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

Committee commentary. — *See State v. Sims*, 2010-NMSC-027, ¶ 26, 148 N.M. 330, 236 P.3d 642 (holding that when a DWI charge is based on the allegation that the defendant was in actual physical control of the vehicle, the state must prove that the defendant had an intent to drive and limiting the holdings of *Boone v. State*, 105 N.M. 223, 731 P.2d 366 (1986); *State v. Johnson*, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233). *See also State v. Mailman*, 2010-NMSC-036 , ¶ 20, 148 N.M. 702, 242 P.3d 269 (holding that the operability of a vehicle is an additional factor for the jury to consider in determining whether a defendant has the general intent to drive).

[Adopted by Supreme Court Order No. 11-8300-004, effective March 21, 2011.]

ANNOTATIONS

Sufficient evidence of DWI based on actual physical control. — In a prosecution for aggravated DWI, where there were no witnesses who personally observed defendant driving, there was sufficient evidence to support the conviction under the theory of actual physical control based on the evidence presented at trial establishing that the arresting officer reached defendant's vehicle about five minutes after receiving a dispatch call alerting him that there was a pickup truck stuck in the median that was trying to back into traffic, that the officer observed defendant in the driver's seat of the truck, which was stuck in the median on the interstate with the hazard lights on, that the key to the vehicle was in the ignition and in the "on" position, and that defendant expressed an intent to drive, stating that he was going to El Paso. *State v. Alvarez*, 2018-NMCA-006, cert. denied.

CHAPTER 46 to 49
(Reserved)

CHAPTER 50
Evidence and Guides for Its Consideration

Part A
General Rules

14-5001. Direct and circumstantial evidence.

There are two types of evidence. One is direct evidence, such as the testimony of an eyewitness, which directly proves a fact. The other is circumstantial evidence. Circumstantial evidence means evidence that proves a fact from which you may infer the existence of another fact.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The committee believed that defining the types of evidence has little practical value for the jury. Consequently, no instruction should be given on this subject. The use of circumstantial evidence and the requirement that the

state must prove the guilt of the defendant beyond a reasonable doubt are certainly proper subjects for discussion by counsel during final argument.

The language of this instruction is derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 11.02 (1970), and California Jury Instructions Criminal, 2.00 (1970). *Compare* with UJI Civ. 17.6 (1966).

ANNOTATIONS

Traditional distinction between direct and circumstantial evidence has been disapproved by this instruction and UJI 14-5002 [withdrawn]. *State v. Bell,* 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

Circumstantial evidence rule is special application of rule concerning reasonable doubt; it is not independent of the question of whether there is substantial evidence to support the verdict. *State v. Jacobs,* 1978-NMCA-013, 91 N.M. 445, 575 P.2d 954, cert. denied, 91 N.M. 491, 576 P.2d 297.

Circumstantial evidence may be used to establish element of crime. *State v. Sanchez,* 1982-NMCA-105, 98 N.M. 428, 649 P.2d 496.

Substantial support by circumstantial evidence sustains verdict. — Even if the evidence is circumstantial, if the circumstantial evidence substantially supports the verdict, the verdict will not be set aside. *State v. Jacobs,* 1978-NMCA-013, 91 N.M. 445, 575 P.2d 954, cert. denied, 91 N.M. 491, 576 P.2d 297.

Where circumstances alone are relied upon by the prosecution for a conviction, the circumstances must be such as to apply exclusively to the defendant, and such as are reconcilable with no other hypothesis than the defendant's guilt, and they must satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt. *State v. Seal,* 1965-NMSC-154, 75 N.M. 608, 409 P.2d 128 (decided prior to adoption of instructions).

Where circumstantial evidence alone is relied upon for a conviction, such evidence must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. *State v. Zarafonetis,* 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Circumstantial evidence alone can be sufficient to prove guilt beyond a reasonable doubt. *State v. Duncan,* 1990-NMCA-063, 113 N.M. 637, 830 P.2d 554, *aff'd*, 111 N.M. 354, 805 P.2d 621.

Circumstantial evidence must exclude every reasonable hypothesis other than the guilt of the defendant. *State v. Seal,* 1965-NMSC-154, 75 N.M. 608, 409 P.2d 128.

Where circumstances alone are relied upon, they must point unerringly to the defendant and be incompatible with and exclude every reasonable hypothesis other than guilt. *State v. Page,* 1972-NMCA-008, 83 N.M. 487, 493 P.2d 972, cert. denied, 83 N.M. 473, 493 P.2d 958.

Guilty knowledge is rarely susceptible to direct and positive proof and generally can be established only through circumstantial evidence. *State v. Zarafonetis,* 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Circumstantial evidence as basis for inference of fact. — Where the evidence connecting the defendant with the crime is circumstantial, it may properly serve as a basis for an inference of fact essential to the establishment of the offense. *State v. Paul,* 1971-NMCA-040, 82 N.M. 619, 485 P.2d 375, cert. denied, 82 N.M. 601, 485 P.2d 357.

Location of crime, as element of offense, may be proved by circumstantial evidence, and the defendant's confession, together with circumstantial evidence, may supply substantial evidence for the jury's verdict that the crime was committed in New Mexico, since if a choice exists between two conflicting chains of inference, that choice is for the trier of fact. *State v. Ramirez,* 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds*, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Circumstantial evidence instruction found proper. — Instruction informing the jury that it could consider both direct and circumstantial evidence in deciding the case, was a proper instruction, and where another instruction defined circumstantial evidence, it would not have been error to have given it in addition. *State v. Archuleta,* 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241.

Instruction on uncollected evidence. — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim; defendant was tried for first degree murder with the predicate felony of shooting at a dwelling; during their investigation of the crime scene, police officers observed spent and unspent bullet casings in the house, which were not photographed or collected, and spent bullet casings outside the house, which were photographed, but not collected; defendant’s theory of the case was that defendant shot toward the house at people who were shooting at him ; defendant requested a jury instruction that would have allowed the jury to assume that the uncollected evidence was unfavorable to the prosecution if the jury found that the evidence was lost, destroyed or altered without a reasonable explanation; and defendant did not contend that the officers acted in bad faith or that their failure to collect evidence was grossly negligent, the district court did not err in rejecting defendant’s tendered jury instruction. *State v. Torrez*, 2013-NMSC-034.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29A Am. Jur. 2d Evidence § 1434 et seq.

Duty of court in criminal case, in absence of request, to charge with respect to circumstantial evidence, 15 A.L.R. 1049.

Instruction on circumstantial evidence in criminal case, 89 A.L.R. 1379.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial - state cases, 36 A.L.R.4th 1046.

22A C.J.S. Criminal Law § 530(1).

14-5002. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 19-8300-016, UJI 14-5002 NMRA, relating to circumstantial evidence, sufficiency, was withdrawn effective December 31, 2019. For provisions of former instruction, *see* the 2019 NMRA on *NMOneSource.com*.

14-5003. Consciousness of guilt; falsehood.

If you find that before this trial the defendant made a false or deliberately misleading statement concerning the charge upon which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt, but it is not sufficient of itself to prove guilt. The weight to be given to such a circumstance and its significance, if any, are matters for your determination.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.03. The committee believed that no instruction should be given on this subject because it singles out one item of evidence. The subject is more properly left to the final argument of counsel. *See also* commentary to UJI 14-5002 [withdrawn].

ANNOTATIONS

Instructions implicitly adopt policy against using instructions which comment on evidence. *State v. Padilla*, 1977-NMCA-055, 90 N.M. 481, 565 P.2d 352, cert. denied, 91 N.M. 3, 569 P.2d 413.

As comment on evidence is matter that should be left for argument. *State v. Padilla*, 1977-NMCA-055, 90 N.M. 481, 565 P.2d 352, cert. denied, 91 N.M. 3, 569 P.2d 413.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A C.J.S. Criminal Law § 623.

14-5004. Efforts by defendant to fabricate evidence.

Evidence that the defendant attempted [to persuade a witness to testify falsely] [to manufacture evidence to be produced at the trial] may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your determination.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.04. The committee believed that an instruction on this subject would constitute a comment on the evidence. *See* Rule 11-107 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1225.

14-5005. Efforts by others than defendant to fabricate evidence.

If there is evidence that efforts to procure false or fabricated evidence were made by another person on behalf of the defendant, you may not consider this as tending to show the defendant's guilt, unless you find that the defendant authorized those efforts.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.05. *See* the commentaries to UJI 14-5003 and 14-5004.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility in criminal case, on issue of defendant's guilt, of evidence that third person has attempted to influence a witness not to testify or to testify falsely, 79 A.L.R.3d 1156.

23A C.J.S. Criminal Law § 1225.

14-5006. Efforts to suppress evidence.

Evidence that the defendant attempted to suppress evidence against himself, in any manner [such as] [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.06. *See* the commentary to UJI 14-5003.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1225.

14-5007. Evidence limited to one defendant.[1]

You are [again][2] instructed that you must not consider evidence about _____ (*describe evidence*) against _____ (*name of defendant*).

You may consider this evidence only against _____ (*name of defendant*).

Your verdict as to each defendant must be reached as if each defendant were being tried separately.

USE NOTES

1. Upon request, the court must instruct the jury of the limited scope of evidence admitted only as to one co-defendant but not the other co-defendant when the co-defendants are tried jointly.

2. Use only if jury was admonished at the time the evidence was admitted.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Rule 11-105 NMRA says that "[w]hen evidence which is admissible as to one party . . . but not admissible as to another party . . . is admitted, the judge, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

In general, evidence that is properly "admissible for one purpose is not to be excluded because it is inadmissible for another purpose." *State v. Wyman*, 1981-NMCA-087, 96 N.M. 558, 632 P.2d 1196; *see also DeMatteo v. Simon*, 1991-NMCA-027, ¶ 3, 112 N.M. 112, 812 P.2d 361. "Evidence inadmissible for one purpose may be admissible for other purposes under a different rule of evidence." *State v. Litteral*, 1990-NMSC-059, ¶ 10, 110 N.M. 138, 793 P.2d 268. "Evidence can be admitted for a limited purpose and, once so limited, it cannot be relied on for another purpose." *Attorney Gen. of State of N.M. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 9, 101 N.M. 549, 685 P.2d 957.

Even when it is shown that evidence of other acts has a legitimate alternative use that does not depend upon an inference of propensity, the proponent must establish that under Rule 11-403 NMRA, the probative value of the evidence used for a legitimate, non-propensity purpose outweighs any unfair prejudice to the defendant. *See State v. Ruiz*, 1995-NMCA-007, ¶ 9, 119 N.M. 515, 892 P.2d 962; *see also State v. Kerby*, 2005-NMCA-106, ¶ 25, 138 N.M. 232, 118 P.3d 740, *aff'd*, 2007-NMSC-014, ¶ 25, 141 N.M. 413, 156 P.3d 704.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, rewrote the instruction to clarify that when evidence is limited to one defendant, the evidence may not be considered against any other defendants, revised the Use Notes, and revised the committee commentary; deleted the first sentence of the instruction, which related to evidence limited to one defendant, and added the first two sentences; in the third sentence, after "reached as if", deleted "he" and added "each defendant"; and in Use Note 1, after "only as to one", deleted "party" and added "co-defendant but not the other co-defendant when the co-defendants are tried jointly".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1283.

23 C.J.S. Criminal Law § 1032(4).

14-5008. Statement limited to one defendant.

Evidence has been admitted of a statement made by _____ *(name of defendant)* after his arrest.

At the time the evidence of this statement was admitted, you were told that it could not be considered by you as against _____ *(name of other defendant or defendants).*

You are again instructed that you must not consider the evidence as against _____ *(name of other defendant or defendants).*

Your verdict as to each defendant must be rendered as if he were being tried separately.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.08. The committee determined that the instruction should no longer be given. The adoption of a "no instruction" instruction may help alert the bench and bar to the problems of allowing statements by a joint defendant into evidence.

If the prosecution "probably" was to present evidence against a joint defendant which would not be admissible in a separate trial of the defendant, the defendant will usually request a separate trial. *State v. Benavidez,* 87 N.M. 223, 531 P.2d 957 (Ct. App. 1975). A defendant may know of, or, if he has pursued his discovery remedies under Rule 5-501 NMRA, will have discovered the codefendant's statement. Under such circumstances he may move for and may be granted a separate trial under Rule 5-203 NMRA. In that event, this instruction would, of course, be unnecessary.

In the event that the defendant overlooks his remedy under Rule 5-203 NMRA and the joint trial proceeds to the point at which the prosecution tenders the codefendant's out-of-court statement, there are at least two possible consequences: (1) if the "declarant" codefendant does not take the stand and subject himself to cross-examination, then this cautionary instruction does not overcome the violation of the right of the "injured" codefendant to confront the witnesses against him, *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); (2) if the declarant does take the stand and is subject to cross-examination, there is no denial of the right of confrontation, *Nelson v. O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). In the latter situation, the testimony and the cross-examination of the declarant and his out-of-court statement are admissible for all purposes. The limiting instruction is simply not necessary. This rule applies, according to *Nelson,* even if the declarant codefendant denies the statement in court and testifies favorably for the codefendant.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1283.

23A C.J.S. Criminal Law § 1032(4).

14-5009. Evidence admitted for a limited purpose.[1]

You are [again][2] instructed that you must not consider evidence about _____ (*describe evidence*) for any purpose other than _____ (*proof*).

USE NOTES

1. Upon request, the court must instruct the jury that evidence is admitted for a limited purpose. This is a general instruction. For special instructions, *see* UJIs 14-5010, 14-5022, 14-5028, 14-5034, and 14-5035 NMRA.

2. Use only if jury was admonished at the time the evidence was admitted.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This instruction is required by Rule 11-105 NMRA. *See also* the commentary to UJI 14-5007 NMRA.

As indicated in the use note, there are special instructions for the following circumstances, and this instruction should not be given: a confession given to a psychiatrist under certain circumstances, UJI 14-5010; impeachment of the defendant by other crimes or wrongs, UJI 14-5022; impeachment of the defendant by use of otherwise inadmissible confessions, UJI 14-5034; impeachment of the defendant by use of inadmissible real evidence, UJI 14-5035. For a case where this instruction would have been appropriate, *see State v. Foster*, 1974-NMCA-150, ¶ 21, 87 N.M. 155, 530 P.2d 949 (testimony inadmissible to establish the truth of a blackmail defense did not render it inadmissible for the purpose of rebutting the implied charge of recent fabrication).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, removed certain language to clarify the instruction, and revised the committee commentary; deleted “Evidence concerning _____ (*facts*) was admitted for the limited purpose of _____ (*proof*). [At the time this evidence was admitted, you were admonished that it could not be considered for any other purpose.]”; and after “you must not consider evidence”, added “about _____ (*describe evidence*)”.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1283.

23A C.J.S. Criminal Law § 1163.

14-5010. Statements made by defendant during psychiatric examination or treatment.

Statements made by the defendant in the course of a mental examination or treatment may be considered only for the limited purpose of showing the information upon which an expert based the expert's opinion about the defendant's mental capacity.

USE NOTES

Upon request, this instruction may be given upon completion of the witness' testimony, as well as at the time the balance of the instructions are given to the jury.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Under Rule 11-504 NMRA, a statement made in the course of a court-ordered mental examination is not privileged. Under Rule 5-602 NMRA, a "statement made by a person during a psychiatric examination or treatment subsequent to the commission of the alleged crime shall not be admissible in evidence against him in any criminal proceeding on any issue other than that of his sanity."

Assuming that the statement is not a privileged communication under Rule 11-504, *see, e.g., State v. Milton*, 1974-NMCA-094, 86 N.M. 639, 526 P.2d 436, the statement will be admitted under the restrictions of Rule 5-602. In construing a similar federal statute, 18 U.S.C. § 4244, the Tenth Circuit has noted that "such statements could be prejudicial. The district judge must therefore . . . be careful in instructing the jury as to the significance of the testimony." *United States v. Julian*, 469 F.2d 371, 376 (10th Cir. 1972); *see also United States v. Bennett*, 460 F.2d 872, 879 (D.C. Cir. 1972).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, deleted "Evidence has been admitted concerning" and after "examination or treatment", deleted "These statements".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1190.

22A C.J.S. Criminal Law § 651.

14-5011. Production of all witnesses or all available evidence not required.

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence. You may not speculate on whether the testimony or evidence not produced would have been favorable or unfavorable to the party who apparently failed to present the witness or evidence.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.11. Following the precedent of UJI 13-2104, the committee believed that no instruction on the matter should be given. The subject may be covered in final argument. A "no instruction" instruction on this subject resolves the conflict of opinion on whether this or a similar instruction should be given in a criminal case. *See State v. Debarry,* 86 N.M. 742, 527 P.2d 505 (Ct. App. 1974); *State v. Archuleta,* 82 N.M. 378, 482 P.2d 242 (Ct. App. 1970), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971); *State v. Soliz,* 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

ANNOTATIONS

Comment on failure to call witness permitted. — Although no instruction is to be given concerning the production of witnesses, New Mexico law permits comment, in closing argument, concerning the failure to call a witness. *State v. Vallejos,* 1982-NMCA-146, 98 N.M. 798, 653 P.2d 174.

New Mexico law permits comment, in closing argument, concerning the failure to call a witness, so long as the argument has a basis in the evidence and the statement made cannot be construed as a comment on the failure of the defendant to testify. *State v. Ennis,* 1982-NMCA-157, 99 N.M. 117, 654 P.2d 570.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial - modern criminal cases, 76 A.L.R.4th 812.

14-5012. Transcript testimony; weight.[1]

Testimony given by a witness at a [preliminary hearing][2] [deposition] [previous trial] [has been read to you from the reporter's transcript of that proceeding][3] [has been presented by tape recording]. You are to give such testimony the same consideration as the testimony of witnesses who have testified here in court.

USE NOTES

1. This instruction shall be used only when the prior testimony has been admitted as substantive evidence, not when it is admitted solely for impeachment or as a prior consistent statement.

2. Use applicable description of source of prior testimony.

3. Use applicable type of presentation.

Committee commentary. — This instruction was derived from California Jury Instructions Criminal, 2.12, and UJI 13-203. The Civil UJI instruction is limited to deposition testimony, whereas the California instruction covers testimony at any prior proceeding. The committee has limited the transcribed testimony to testimony from either a preliminary hearing, a deposition or a previous trial. *See also* Subparagraph (1), Paragraph D of Rule 11-801 NMRA.

ANNOTATIONS

No basis for giving instruction where defendant does not offer testimony into evidence. — Where the defendant used a witness' preliminary hearing testimony for purposes of impeachment but did not offer the question and answer into evidence, no preliminary hearing testimony was admitted as substantive evidence, and, thus, there was no basis for giving this instruction. *State v. Traxler,* 1977-NMCA-135, 91 N.M. 266, 572 P.2d 1274.

14-5013. Facts established by judicial notice.[1]

Without requiring testimony or other evidence, the court has taken notice that _____.[2] You may, but are not required to, accept this as a fact.

USE NOTES

1. This instruction must be given each time an adjudicative fact is established by judicial notice. This instruction does not go to the jury room.

2. Here state fact judicially noticed.

Committee commentary. — Paragraph G of Rule 11-201 NMRA requires the judge to instruct the jury to accept, as established, any adjudicative facts judicially noticed. *See generally* 56 F.R.D. 183, 201-07 (1973). Compare the federal version of Rule 201, 88 Stat. 1926, 1930.

The commentary to [federal] Rule 201 describes adjudicative facts as those facts of the case concerning the parties; that is, the questions of what, where, when and how, which are determined by the trier of fact. 56 F.R.D. 183, 201-04 (1973). The rule does not cover the taking of judicial notice of legislative facts, i.e., facts which have relevance to legal reasoning and the law-making process. 56 F.R.D. 183, 202 (1973). In addition,

Rule 11-201 does not cover the taking of judicial notice of law, a matter of procedure. *See, e.g.*, Fed. R. Crim. P. 26.1. The New Mexico Rules of Criminal Procedure do not have a similar provision for the taking of judicial notice of law. The absence of such a procedure has no bearing on the jury instruction, however, since the jury is not instructed on the taking of judicial notice of law.

14-5014. Failure of the state to call a witness.

If a witness whose testimony would have been material on an issue in the case was peculiarly available to the state and was not introduced by the state and the absence of that witness has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony by that witness would have been unfavorable to the state and favorable to the accused.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — This instruction sets out the rule that an inference may be drawn from the failure of a party to call a witness. UJI 13-2104 provides that no such instruction is to be given in civil cases.

The instruction may have been appropriate in criminal cases. *State v. Soliz,* 80 N.M. 297, 298, 454 P.2d 779 (Ct. App. 1969). However, it is not appropriate in cases where a witness is equally available to both sides. *State v. Smith,* 51 N.M. 328, 332, 184 P.2d 301 (1947).

Discovery procedures and the subpoena power make it most likely that all potential witnesses would be equally available to both sides. Therefore this instruction should not be used.

No instruction on this subject is necessary to guide the jury, and such an instruction may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Adverse presumption or inference based on failure to produce or examine codefendant or accomplice who is not on trial - modern criminal cases, 76 A.L.R.4th 812.

22A C.J.S. Criminal Law § 594.

14-5015. Testimony of an accomplice.

There has been testimony in this case by an alleged accomplice of the accused. You as members of the jury must view the testimony of the accomplice with suspicion and

receive it with caution. The testimony of an accomplice must be weighed with great care. However, you are instructed that an accused may be convicted upon the testimony of an accomplice, even though it is uncorroborated.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was approved in *State v. Baca,* 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973). *See also* California Jury Instructions Criminal, 3.18, p. 84 (3rd ed. 1970). No instruction on this subject is necessary to guide the jury; the subject matter is adequately covered by UJI 14-5020; it is better to leave the subject to the argument of counsel; and the instruction may constitute a comment on the evidence. *See* Rule 11-107 NMRA.

ANNOTATIONS

Constitutionality. — Trial court's refusal to use jury instruction tendered by defendant admonishing the jury to weigh accomplice testimony with greater care than other testimony was proper under New Mexico law and practice and did not violate defendant's constitutional right to due process. *State v. Sarracino,* 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1225; 75B Am. Jur. 2d Trial § 1363.

Detective or other person participating in crime to obtain evidence as accomplice within rule requiring corroboration of, or cautionary instruction as to, testimony of accomplice, 119 A.L.R. 689.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring cautionary instruction, 53 A.L.R.2d 817.

Receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

23 C.J.S. Criminal Law § 808.

Part B
Evaluation of Evidence

14-5020. Credibility of witnesses.

You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any

witness, you should take into account the witness's truthfulness or untruthfulness, ability and opportunity to observe, memory, manner while testifying, any interest, bias or prejudice the witness may have and the reasonableness of the witness's testimony, considered in the light of all the evidence in the case.

USE NOTES

This is a basic instruction and may be given in all cases.

[As amended, effective August 1, 2001.]

Committee commentary. — This instruction was derived from UJI 13-2003. The precedent and authority for the civil instruction was a criminal case, *State v. Massey*, 32 N.M. 500, 258 P. 1009 (1927).

This instruction, a positive statement of the jury duty to determine the credibility of the witnesses, is particularly appropriate when the witness has been "impeached" in accordance with Rules 11-608, 11-609 and 11-613 NMRA. Compare New Mexico UJI 13-2004.

This instruction, together with the reasonable doubt instruction, UJI 14-5060, makes an instruction on the dangers of eyewitness testimony unnecessary. *See State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

ANNOTATIONS

The 2001 amendment, effective August 1, 2001, substituted "the witness" for "he," and "the witness's" for "his" throughout.

Giving of this general instruction is sufficient; it is not error to refuse to instruct on the credibility of the defendant as a witness. *State v. Wise,* 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

Where the trial court gave this instruction, instructions requested by defendant which went to the credibility of certain witnesses were not required. *State v. Hogervorst,* 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

The uniform jury instructions on witness credibility and reasonable doubt cover a defendant's theory of misidentification by an eyewitness. Therefore, the rejection of a specific instruction on the infirmities of eyewitness testimony was not reversible error. *State v. Gallegos,* 1993-NMCA-046, 115 N.M. 458, 853 P.2d 160.

Defendant not entitled to additional instruction on witness credibility. — Where defendant was charged with two counts of murder in the first degree, and where at trial, the state presented testimony from a witness who was incarcerated with defendant and who testified that defendant told him that he shot the two kids because they owed him

money, and where defendant proffered a jury instruction on informant testimony based on a tenth circuit criminal jury instruction, the district court did not err in refusing defendant's proffered instruction, because a court's refusal to give instructions tendered by the defendant concerning the credibility of certain witnesses is not error where the court gave the jury the general uniform jury instruction on witness credibility. *State v. Martinez*, 2021-NMSC-002, *overruling Patterson v. LeMaster*, 2001-NMSC-013, 130 N.M. 179, 21 P.3d 1032, *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, and *State v. Baca*, 1983-NMSC-049, 99 N.M. 754, 664 P.2d 360.

No requirement exists that instruction be given concerning weighing testimony of particular categories of witnesses; the validity of special instructions concerning the evaluation of certain witnesses is doubtful; and the basic instruction on credibility of witnesses sufficiently instructs on witness evaluation. *State v. Smith,* 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

And instruction regarding scrutiny of certain witnesses refused. — The trial court did not err in refusing the defendant's requested instructions, regarding a closer scrutiny of the testimony of witnesses who acted under a promise of immunity or reward, as well as that of accomplices, since the jury is the sole judge of the credibility of witnesses and it determines the weight to be given their testimony. *State v. Smith,* 1975-NMCA-139, 88 N.M. 541, 543 P.2d 834.

Court not to comment on credibility. — In a jury trial, the court must not in any manner comment upon the weight to be given certain evidence or indicate an opinion as to the credibility of a witness, but it is not error to advise a witness outside the presence of the jury of the consequences of perjury or to caution him about testifying truthfully, when the need arises because of some statement or action of the witness. *State v. Martinez*, 1982-NMCA-137, 99 N.M. 48, 653 P.2d 879.

Jury determines credibility of coconspirator. — The coconspirator rule does not apply to the in-court testimony of a conspirator who testifies about his own activities. The credibility of that testimony is for the jury to determine. *State v. Carr,* 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds*, *State v. Olguin,* 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92.

Jury instructions as to accomplice testimony. — Trial court's refusal to use jury instruction tendered by defendant admonishing the jury to weigh accomplice testimony with greater care than other testimony was proper under New Mexico law and practice and did not violate defendant's constitutional right to due process. *State v. Sarracino,* 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72; *State v. Smith,* 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

Instruction not objected to not heard on appeal. — Where the instruction complained of was an instruction upon credibility, even though it might have contained erroneous statements of law, it still satisfied the requirements of this rule; therefore, as

the defendant made no objection to this instruction, he will not be heard on appeal. *State v. Cardona,* 1974-NMCA-052, 86 N.M. 373, 524 P.2d 989, cert. denied, 86 N.M. 372, 524 P.2d 988.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1405 et seq.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony - state cases, 23 A.L.R.4th 1089.

Propriety, in federal criminal trial, of including in jury instruction statement disparaging defendants' credibility, 59 A.L.R. Fed. 514.

23A C.J.S. Criminal Law §§ 1254 to 1259.

14-5021. Credibility of witness; prior inconsistent statement.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including a statement made by him that is inconsistent with any part of his testimony.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.20. Under Rule 11-801D(1) NMRA, a prior inconsistent statement may be admitted as substantive evidence. *See California v. Green,* 399 U.S. 149 (1970) and 56 F.R.D. 183, 296 (1973). The committee believed that UJI 14-5020 generally covers this subject matter and no separate instruction should be given.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1411 et seq.

Testimony tending to show that party or witness has made contradictory statements as ground for evidence as to his truth and veracity, 6 A.L.R. 862.

23A C.J.S. Criminal Law § 1259.

14-5022. Impeachment of defendant; wrongs, acts or conviction of a crime.[1]

You may consider whether the defendant [was convicted of the crime[s] of _____[2]] [committed the act of _____[3]] for the purpose

of determining whether the defendant told the truth when the defendant testified in this case and for that purpose only.

USE NOTES

1. Upon request of the defendant, this instruction must be given when the state has used evidence of specific instances of bad conduct or the conviction of a crime to impeach the defendant.

2. Insert common name of crime or crimes.

3. Identify the specific acts of misconduct admitted for impeachment. An act admitted as substantive evidence under UJI 14-5028 NMRA may not be included in this instruction.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Evidence of some specific acts of misconduct and of some prior convictions are admissible for impeachment purposes under the provisions of Rules 11-608 and 11-609 NMRA. Under Rule 11-105 NMRA, the court, if requested, must instruct the jury on the limited purpose of the evidence.

Although Rules 11-608 and 11-609 NMRA cover impeachment of all witnesses, it is obviously not necessary to give the jury a limiting instruction for witnesses other than the defendant. UJI 14-5020 covers the right of the jury to determine the credibility of the witnesses as a general rule.

The use note cautions the court not to include matters which have been admitted as substantive evidence under Rule 11-404B NMRA. *See* commentary to UJI 14-5028.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes; deleted “Evidence has been admitted that” and added “You may consider whether”, and after Use Note reference “3”, deleted “You may consider such evidence”.

Testimony from defendant as to his prior convictions relates only to his credibility. *State v. Archunde,* 1978-NMCA-050, 91 N.M. 682, 579 P.2d 808.

Omission of impeachment instruction found harmless. — Where the court acted immediately to supply the impeachment instruction as soon as its omission became known and the appellant availed himself fully of the opportunity to argue the point prior to the state's closing its argument, the appellant has not met the burden imposed upon

him and the error was harmless. *State v. Lindwood*, 1968-NMCA-063, 79 N.M. 439, 444 P.2d 766.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1417 et seq.

Propriety of jury instruction regarding credibility of witness who has been convicted of a crime, 9 A.L.R.4th 897.

23A C.J.S. Criminal Law § 1262.

14-5023. Witness willfully false may be disregarded.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 12.05. *See also* UJI 13-2123. As stated by the committee drafting UJI Civil, an instruction on this subject matter invades the province of the jury and the subject matter is better left to the argument of counsel.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1405 et seq.

23A C.J.S. Criminal Law § 1259.

14-5024. Weighing conflicting testimony.

You are not bound to decide in favor of the party who produced the most witnesses. The final test is not the relative number of witnesses, but in the relative convincing force of the evidence.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.22. The committee believed that this was another subject which should be left to the argument of counsel.

14-5025. Refusal of witness to testify; exercise of privilege.[1]

The witness, _____ *(name)* has refused to testify as to a certain matter, basing his refusal on the exercise of a [privilege against self-incrimination][2] [lawful privilege]. You are not to draw any conclusions from his refusal to testify.

USE NOTES

1. To be given if requested by any party against whom the jury might draw an adverse inference from a claim of privilege.

2. Use the applicable bracketed phrase.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.26. Under Rule 11-513C NMRA, "[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Instructions as to inferences arising from refusal of witness other than accused to answer questions on the ground that answer would tend to incriminate him, 24 A.L.R.2d 895.

23A C.J.S. Criminal Law § 1266.

14-5026. Traits of character of defendant.

Evidence has been introduced in this case to prove that the defendant, prior to the time of the alleged commission of the crime, was a person of good character. The law presumes that a person of good character is less likely to commit a crime and therefore you shall consider such evidence in connection with all the other evidence in the case. If after considering all the evidence in the case, including that touching upon the good character of the defendant, you find and believe beyond a reasonable doubt that he is guilty of the crime charged, you should not acquit him solely upon the ground of such good character.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — Under Rule 11-404A(1) NMRA, the defendant may introduce pertinent evidence of good character and the prosecution may rebut with evidence of bad character. The defendant may introduce such evidence by: testimony as to reputation; opinion testimony; specific instances of his conduct in cases where character or trait of character is an essential element of the charge, claim or defense. *See also* Rule 11-405 NMRA.

It has apparently been a common practice to instruct the jury on the defendant's good character. *See, e.g.*, *State v. Burkett,* 30 N.M. 382, 234 P. 681 (1925). *See generally* Annot., 68 A.L.R. 1068 (1930). The committee, however, believed that this instruction invaded the province of the jury and was a prohibited comment on the evidence. *See* Rule 11-107 NMRA and *State v. Myers,* 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

ANNOTATIONS

Defendant is not entitled to jury instructions on alibi and character witnesses, even where he presents evidence to support them and tenders such instructions; UJI 14-5060 is adequate. *State v. Robinson*, 1980-NMSC-049, 94 N.M. 693, 616 P.2d 406.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1417 et seq.

Right to and propriety of instruction as to credibility of defendant in criminal case as a witness, 85 A.L.R. 523.

23A C.J.S. Criminal Law § 1208.

14-5027. Cross-examination of a character witness.

_____ *(name of witness)* has testified to the good character of the defendant and on cross-examination he was asked if he knew or had heard of certain conduct of the defendant inconsistent with such good character. You may consider those questions and the witness' answers only for the purpose of determining the weight to be given the testimony of the witness concerning the good character of the defendant. Such questions and answers are not evidence that the defendant did engage in such conduct or that the reports are true.

USE NOTES

Upon request, this instruction shall be given upon completion of the testimony of the witness, as well as at the time the final instructions are given to the jury.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.42. *See also People v. Grimes*, 148 Cal. App. 2d 747, 307 P.2d 932 (1957), overruled in part, *People v. White,* 50 Cal. 2d 428, 325 P.2d 985 (1958); *People v. Bentley,* 138 Cal. App. 2d 687, 281 P.2d 1 (1955). Cross-examination of a character witness by inquiry into relevant specific instances of conduct

is authorized by Rule 11-405A NMRA. *See, e.g.*, *State v. Hawkins,* 25 N.M. 514, 184 P. 977 (1919). *See generally* Annot., 47 A.L.R.2d 1258 (1956). *See also McCormick,* Evidence 457-59 (2d ed. 1972).

The necessity of a jury instruction explaining the limited purpose of the questions is assumed by the courts. *See, e.g.*, *Michelson v. United States,* 335 U.S. 469, 472, 69 S. Ct. 213, 93 L. Ed. 168 (1948). *See generally* Annot., 47 A.L.R.2d 1258, 1274 (1956). The instruction is specifically authorized by Rule 11-105 of the Rules of Evidence.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1406.

14-5028. Evidence of other wrongs or offenses.[1]

You may consider whether the defendant committed[2] [_____[3]] [_____[4]] other than the crime charged in this case for the purpose of determining[2]

[the identity of the person who committed the crime charged in this case];

[a motive for the commission of the crime charged];

[the existence of the intent which is a necessary element of the crime charged];

[the existence of opportunity to commit the crime charged];

[the existence of the defendant's knowledge of _____[5]];

[the preparation or plan to _____[5]];

[the absence of mistake or accident in _____[5]] and for that purpose only.

USE NOTES

1. Upon request, this instruction shall be given at the time the evidence of the other crime is admitted as well as at the time the final instructions are given to the jury.

2. Use only applicable bracketed paragraphs. If more than one alternative is applicable, insert appropriate punctuation and conjunction.

3. Identify the crimes.

4. Identify the "wrong" or "acts."

5. Identify the facts relied on for the use of this provision.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — The form of this instruction was derived from California Jury Instructions Criminal, 2.50. Its use, upon request, is required by Rule 11-105 NMRA. *See also* 1 Wharton, Criminal Evidence § 264 (13th ed. 1972).

Under the general rule, evidence of collateral offenses committed by defendant, even if similar in character to the crime charged, is not admissible to prove that he committed the crime charged. *See*, e.g., *State v. Velarde,* 67 N.M. 224, 354 P.2d 522 (1960). *See generally* 1 Wharton, Criminal Evidence § 240 (13th ed. 1972). The general rule is subject to exceptions. *See* Rule 11-404B NMRA. *See generally* 1 Wharton, Criminal Evidence §§ 241-259 (13th ed. 1972). As stated by the New Mexico Supreme Court, "[t]he courts are not divided upon these abstract rules, but are in hopeless confusion in their application to particular facts." *State v. Lord,* 42 N.M. 638, 652, 84 P.2d 80 (1938).

Some significant cases involving the collateral offenses rule include: proof of knowledge - *State v. Lindsey,* 81 N.M. 173, 178, 464 P.2d 903, 908 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559, cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970), and *State v. Sero,* 82 N.M. 17, 474 P.2d 503 (Ct. App. 1970); proof of scheme, plan or design - *State v. Mason,* 79 N.M. 663, 448 P.2d 175 (Ct. App.), *cert. denied,* 79 N.M. 688, 448 P.2d 489 (1968); proof of intent - *State v. Roy*, 40 N.M. 397, 406, 60 P.2d 646, 110 A.L.R. 1 (1936), and *State v. Marquez,* 87 N.M. 57, 529 P.2d 283 (Ct. App.), cert. denied, 87 N.M. 47, 529 P.2d 273 (1974).

The *Marquez* case, specifically interpreting Rule 11-404B NMRA, should be analyzed with caution. The relevant part of the decision did not receive a majority vote of the panel. Furthermore, the decision does not discuss the limitations on the use of collateral offenses to prove intent. *See generally* 1 Wharton, Criminal Evidence § 245 (13th ed. 1972). *See also State v. Mason*, supra.

Rule 11-404B NMRA also allows evidence of other "wrongs" or "acts" of the defendant to be admitted. This probably does not expand the common-law decisions admitting evidence of collateral offenses, although the commentaries to the Rules of Evidence do not fully explain the use of "wrongs" and "acts." *See* 56 F.R.D. 183, 221 (1973). Rule 11-404B NMRA, unlike Rule 11-609 NMRA, (impeachment by proof of other crimes), does not require conviction of the collateral offense. Evidence of wrongs and acts may include an offense not even punishable as a serious crime. Cf. commentary to UJI 14-230 (involuntary manslaughter by an act not amounting to a felony).

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes; deleted “Evidence has

been admitted concerning” and added “You may consider”, after “the crime charged in this case”, deleted “The evidence was received and you may consider it only”, and after “accident in _____”, added “and for that purpose only”.

Evidence of other "offenses" is properly admitted where they tend to show the defendant's knowledge of a crime and an absence of mistake or accident. *State v. Turner,* 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178.

Limitation of testimony of prior child abuse. — Where evidence as to the defendant's responsibility for a child's injury was severely disputed and the defendant's credibility is crucial, there is a sufficient showing of prejudice so that the failure to give an instruction limiting a jury's consideration of prior incidents of child abuse is reversible error. *State v. Sanders,* 1979-NMCA-115, 93 N.M. 450, 601 P.2d 83.

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," *see* 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 C.J.S. Criminal Law § 1032(3); 23A C.J.S. Criminal Law § 1242; 24B C.J.S. Criminal Law § 1915(17).

14-5029. Motive.

The state does not have to prove a motive. However, motive or lack of motive may be considered by you as a fact or circumstance in this case. You may give the presence or lack of motive such weight as you find it to be entitled.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — Motive is not an element of the crime nor its absence a defense. Its presence or absence may have some practical effect on the jury finding guilt beyond a reasonable doubt, especially in a case based upon circumstantial evidence. The majority of jurisdictions tend to the view that it is not necessary to instruct on motive. *See generally* Annot., 71 A.L.R.2d 1025 (1960). The New Mexico Supreme Court had taken the opposite view. In *State v. Vigil,* 87 N.M. 345, 533 P.2d 578 (1975), the court reversed the defendant's conviction because, *inter alia,* the district court had refused the defendant's tendered instruction on motive. *See also State v. Romero,* 34 N.M. 494, 285 P. 497 (1930), and *State v. Orfanakis*, 22 N.M. 107, 159 P. 674 (1916). The committee believed that an instruction on motive amounted to a comment on the circumstantial evidence. Such an instruction would be inconsistent with the elimination of other instructions on circumstantial evidence and would constitute a comment on the evidence. *See* the commentary to UJI 14-5002 [withdrawn] and Rule 11-107 NMRA. The adoption of this instruction consequently supersedes the holding in *State v. Vigil*, supra.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1253, 1283.

23A C.J.S. Criminal Law § 1198.

14-5030. Flight.

The flight of a person immediately after the commission of a crime, or after he has been accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. Whether or not defendant's conduct amounted to flight, and if it did, whether or not it shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively for you to decide.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction is derived from California Jury Instructions Criminal, 2.52. In California, the instruction must be given when evidence of flight is relied upon as tending to show guilt. No New Mexico cases indicate that an instruction is required. However, in *State v. Hardison*, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970), the court held that the jury may draw an inference of guilt from an unexplained flight. *See also State v. Duran,* 86 N.M. 594, 526 P.2d 188 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974); *State v. Gonzales,* 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971). The committee believed that the instruction would constitute a comment on the evidence and that the matter was better left to argument of counsel.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1333 to 1335.

Flight as evidence of guilt, 25 A.L.R. 886.

23A C.J.S. Criminal Law § 1185.

14-5031. Defendant not testifying; no inference of guilt.

You must not draw any inference of guilt from the fact that the defendant did not testify in this case, nor should this fact be discussed by you or enter into your deliberations in any way.

USE NOTES

This instruction must be given on request of a defendant who does not testify and must not be given if the defendant objects.

Committee commentary. — In *Griffin v. California,* 380 U.S. 609 (1965), it was held that an instruction that a defendant's failure to testify supports an unfavorable inference against him violated the United States constitutional guarantee against compelling a person in a criminal case to be a witness against himself. However, it is only adverse comments that are prohibited under *Griffin.* In *Lakeside v. Oregon,* 435 U.S. 333, 98 S. Ct. 1091, 55 L. Ed. 2d 319 (1978), the United States Supreme Court held that an instruction given over the defendant's objection that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify does not violate the privilege against self-incrimination.

The New Mexico courts have consistently held that this instruction may be given by the court over the defendant's objection. *See, e.g.*, *State v. Garcia*, 84 N.M. 519, 505 P.2d 862 (Ct. App.), cert. denied, 84 N.M. 512, 505 P.2d 855 (1972); *Patterson v. State*, 81 N.M. 210, 465 P.2d 93 (Ct. App. 1970). The rationale of the cases is that the instruction is for the benefit of the defendant and, therefore, it is proper to give it sua sponte. However, the better view is that the instruction should be given upon request of the defendant and not given over the objection of the defendant. Under an adversary system, the use of this instruction should be the choice of the defendant.

Under prior law, if the defendant requested the instruction, it was error for the court to refuse to give this instruction. *State v. Spearman,* 84 N.M. 366, 503 P.2d 649 (Ct. App. 1972). The court in *Spearman* relied upon former Section 41-12-19 NMSA 1953 Comp. as authority for its holding. However, with the adoption of the Rules of Criminal Procedure in 1972, the supreme court abrogated the trial court rule codified as former Section 41-12-19. The adoption of this instruction reinstates the requirement that the jury, on the defendant's request, be instructed not to indulge any presumptions against him.

ANNOTATIONS

Compiler's notes. — Section 41-12-19 NMSA 1953 Comp., referred to in the first and second sentences in the third paragraph of the committee commentary, was repealed effective July 1, 1972.

Prosecutor's comment on self-incrimination. — Prosecutor's comment to grand jury explaining privilege against self-incrimination was consistent with this instruction. *State v. Martinez*, 1982-NMCA-002, 97 N.M. 585, 642 P.2d 188.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 356; 75B Am. Jur. 2d Trial §§ 1297, 1300.

Propriety under Griffin v. California and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify, 18 A.L.R.3d 1335.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error, 24 A.L.R.3d 1093, 32 A.L.R.4th 774.

23A C.J.S. Criminal Law § 1266.

14-5032. Proof of knowledge.

You have been instructed that knowledge is an essential element of the crime of _____. Knowledge need not be established by direct evidence but may be inferred from all the surrounding circumstances, such as the manner in which the act was done, the means used, [and] the conduct of the defendant [and any statements made by the defendant].

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction states the legal test for the sufficiency of the circumstantial evidence needed to prove the mental element of knowledge. The committee believed that the subject matter was best left to the argument of counsel.

Knowledge of certain facts is an element of some property crimes and crimes under the Controlled Substance Law. For example: issuing or transferring a forged writing with knowledge that the writing is false, etc. - *see* UJI 14-1644 and commentary; receiving stolen property with knowledge that the property had been stolen - *see* UJI 14-1650 and commentary; knowledge of the presence of the controlled substance and its narcotic character as an element of possession of a controlled substance - *see State v. Giddings,* 67 N.M. 87, 352 P.2d 1003 (1960).

Knowledge may, and for the most part must, be proved by circumstantial evidence. *See, e.g.*, *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559, cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970); *State v. Nation,* 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973); *State v. Garcia,* 76 N.M. 171, 413 P.2d 210 (1966).

The courts recognize that the mental element of knowledge is a separate concept from the mental element of intent. *State v. Gonzales,* 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974). Conceding the general rule, the court in *Gonzales* proceeded to find that a separate reference to knowledge in the jury instructions was not necessary, since a reference to intent to sell embodied the idea that the defendant knew what he was

selling. Under UJI Criminal, where knowledge and intent are elements of the crime, they are separately identified in the elements instruction.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1252, 1486.

23 C.J.S. Criminal Law § 918.

14-5033. Proof of intent to do a further act or achieve a further consequence.

The intent to _____ need not be established by direct evidence but may be inferred from all the surrounding circumstances, such as the manner in which certain acts were committed, the means used, [and] the conduct of the defendant [and any statements made by the defendant].

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction states the legal test for the sufficiency of the circumstantial evidence needed to prove the mental element of intent to do a further act or achieve a further consequence. The committee believed that the subject matter was best left to the argument of counsel.

Establishing a "specific intent" by inference from facts and circumstances is well established in the criminal law. *See, e.g.*, *State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968). Under these instructions, a "specific intent" is no longer treated as a special criminal intent. However, an intent to do a further act or achieve a further consequence is an essential element of some crimes. *See, e.g.*, UJI 14-1630. In addition, some special defenses still apply only to this element. *See* UJI 14-5111 and commentary.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1209; 75B Am. Jur. 2d Trial §§ 1251, 1256, 1325, 1416.

23 C.J.S. Criminal Law § 919.

14-5034. Admission or confession used for impeachment.[1]

You may consider statements the defendant made to the authorities during the investigation of the case for the purpose of determining whether the defendant told the truth when the defendant testified in this case and for that purpose only.

USE NOTES

1. Upon request, this instruction must be given when the state uses an otherwise inadmissible statement for impeachment.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Under the general rule, a prior inconsistent statement would be admissible as substantive evidence and there would be no need to instruct the jury on use of the statement for impeachment. *See* commentary to UJI 14-5021. A voluntary confession or admission obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), is not admissible as substantive evidence. However, its use to impeach the credibility of the defendant is permitted under federal constitutional law. *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971); *Oregon v. Haas*, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975).

In *Harris* and *Haas,* voluntariness of the confession was not in issue. The committee assumed that an involuntary confession cannot be used for impeachment. *See Jackson v. Denno*, 378 U.S. 368, 385-86, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964). Furthermore, the committee determined that the jury need not pass upon voluntariness when the confession is used for impeachment only. *See also* commentary to UJI 14-5040.

In *Harris* the prosecutor read parts of the statement during cross-examination. If the defendant denies making any statement, proof of its contents by extrinsic evidence would presumably be allowed. *See* commentary to UJI 14-5035.

A requirement that the jury be instructed on the limited nature of the use of the statement is implied in *Harris* and is supported by Rule 11-105 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, and revised the Use Notes; deleted "[During cross-examination, the defendant was asked about] [Evidence has been admitted concerning][2] [certain statements [he] [the defendant][2]]" and added "You may consider statements the defendant", and after "investigation of the case", deleted "You may consider the statement[s]"; and deleted Use Note 2, which related to bracketed alternative provisions.

Instruction is approved for use when statement has been used for impeachment purposes; the instruction does not state when it is proper to use a statement for impeachment purposes. *State v. Trujillo*, 1979-NMCA-055, 93 N.M. 728, 605 P.2d 236, *aff'd*, 1980-NMSC-004, 93 N.M. 724, 605 P.2d 232.

Violation of due process where voluntariness not shown. — The admission of evidence of a prior confession to impeach a defendant represents a denial of due process where the voluntariness of such a confession has not been shown and the defendant denies or claims inability to recall the statement. *State v. Turnbow*, 1960-NMSC-081, 67 N.M. 241, 354 P.2d 533.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 1214, 1215; 75B Am. Jur. 2d Trial §§ 1353, 1355, 1361.

23A C.J.S. Criminal Law §§ 1230, 1233.

14-5035. Impeachment of defendant by inadmissible evidence.[1]

You may consider evidence that _____ (*describe circumstances*)] for the purpose of determining whether the defendant told the truth when the defendant testified in this case and for that purpose only.

USE NOTES

1. Upon request, this instruction must be given when the state uses illegally seized evidence to impeach the defendant.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — If the defendant on direct examination specifically makes assertions which the state can contradict by use of unconstitutionally seized evidence, the state is not prohibited by federal constitutional law from using such evidence for impeachment. *Walder v. United States,* 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954); *Harris v. New York,* 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

A denial on cross-examination of any knowledge, etc., allows the state to impeach the defendant by extrinsic evidence. *Walder v. United States,* supra. Obviously, the state may not contrive a scenario on cross-examination in order to introduce illegally seized evidence which it could not otherwise introduce. *See Agnello v. United States,* 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925). This may be a situation where the court should carefully limit cross-examination to matters testified to on direct examination. *See* Rule 11-611B NMRA.

A requirement that the jury be instructed on the limited nature of the use of the evidence is implied in *Walder* and is supported by Rule 11-105 NMRA.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, and revised the Use

Notes; deleted “[Evidence has been admitted concerning _____ (*describe circumstances*)][2] [On cross-examination, the defendant was asked about]” and added “You may consider evidence that”, after “(*describe circumstances*)]”, deleted “You may consider such evidence”; and deleted Use Note 2, which related to bracketed alternative provisions.

14-5036. Criminal sexual conduct; cautionary instruction.

A charge such as that made against the defendant in this case is one which is easily made, and, once made, difficult to defend against, even if the person accused is innocent. Therefore the law requires that you examine the testimony of the victim with caution.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — This instruction should never be used as it constitutes an impermissible comment on the evidence. By its terms, such a cautionary instruction imposes a stricter test of credibility on rape victims than on the victims of other crimes and results in the implication that the credibility of rape victims as a class is suspect. *See* Rule 11-107 NMRA. *See also State v. Feddersen,* 230 N.W.2d 510 (Iowa 1975).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1227.

23A C.J.S. Criminal Law §§ 1186, 1325(5).

Part C
Substantive Use of Admissions and Confessions

14-5040. Use of voluntary confession or admission.

Before you consider a statement made by the defendant for any purpose, you must determine that the statement was given voluntarily. In determining whether a statement was voluntarily given, you should consider if it was freely made and not induced by promise or threat. [In determining whether the statement was induced by a promise or threat, you may consider the defendant’s mental state.][2]

USE NOTES

1. This instruction must be used when the court has made a determination that a statement by the defendant is voluntary and then submits it to the jury for consideration.

2. Instruct with bracketed language only if at issue.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Under the federal constitution and New Mexico law, the court must determine the voluntariness of a confession or inculpatory admission out of the hearing of the jury. *Jackson v. Denno*, 378 U.S. 368 (1964); *State v. Martinez*, 1924-NMSC-075, ¶¶ 18-21, 30 N.M. 178, 230 P. 379; *see also* Rule 11-104(C) NMRA (requiring, as a "preliminary question," a hearing outside presence of jury to determine admissibility of a confession). If the court finds that the statement is voluntary (and also was given after compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966)), the statement is admitted and the jury is instructed to determine that the statement is voluntary before considering it as substantive evidence. *See, e.g., State v. Burk*, 1971-NMCA-018, ¶¶ 16-21, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955 (1971).

Although required under New Mexico precedents, submission of the question of voluntariness to the jury is not required under federal constitutional law. *Lego v. Twomey*, 404 U.S. 477 (1972). Under New Mexico law, failure to submit the voluntariness question is harmless error if the defendant substantially admits the facts that are contained in the confession. *State v. Barnett*, 1973-NMSC-056, ¶¶ 16-17, 85 N.M. 301, 512 P.2d 61, *rev'g* 1972-NMCA-159, 84 N.M. 455, 504 P.2d 1088.

The ultimate question is whether the defendant's "will has been overborne" and the defendant's "capacity for self-determination critically impaired." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). While involuntariness requires police coercion, this instruction was updated to include the jury's consideration of the defendant's mental capacity in its assessment of voluntariness. The bracketed language is applicable in cases in which otherwise common and non-coercive police interrogation tactics may have unduly coercive effects due to a particular defendant's vulnerabilities. *See State v. LaCouture*, 2009-NMCA-071, ¶ 11, 146 N.M. 649, 213 P.3d 799 (the totality of the circumstances for voluntariness includes "the physical and mental state of the Defendant as a context affecting what might be coercive and overreaching"); *State v. Martinez*, 1999-NMSC-018, ¶ 18, 127 N.M. 207, 979 P.2d 718 (adopting totality of circumstances factors from NMSA 1978, Section 32A-2-14(E) (2009), for analyzing adult confessions, which includes the mental and physical condition of the defendant). *Accord State v. Aguilar*, 1988-NMSC-004, ¶¶ 10-13, 106 N.M. 798, 751 P.2d 178 (finding a confession involuntary due to evidence of subnormal intelligence and mental illness, causing defendant's inability to understand the implications of interrogation techniques).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, revised the instruction to permit the jury to consider the defendant's mental state when determining whether defendant's statement was induced by a promise or threat, revised the Use Notes, and revised the committee commentary; deleted "Evidence has been admitted concerning a statement allegedly made by the defendant", after "Before you consider a statement", added "made by the defendant", and added the last sentence in brackets; and in the Use Notes, added Use Note 2 and redesignated the former undesignated use note as Use Note 1.

Purpose of instruction. — This instruction was adopted by the supreme court as a protection for defendant against statements made after his arrest. It is broad and expansive in its language. It must be given when evidence has been admitted concerning a statement allegedly made by a defendant, even though the statement be admitted in evidence without objection. *State v. Zamora,* 1978-NMCA-017, 91 N.M. 470, 575 P.2d 1355, cert. denied, 91 N.M. 491, 576 P.2d 297.

Instruction does not cover question of defendant's competency to give statement; the question of competency is not being covered by a uniform instruction. *State v. Ruiz,* 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

Instruction is mandatory, not permissive, it must be used when the trial court submits to a jury voluntary statements of a defendant given to police officers. *State v. Zamora,* 1978-NMCA-017, 91 N.M. 470, 575 P.2d 1355, cert. denied, 91 N.M. 491, 576 P.2d 297.

Statement of defendant can be induced by promise or threat of third persons. *State v. Zamora,* 1978-NMCA-017, 91 N.M. 470, 575 P.2d 1355, cert. denied, 91 N.M. 491, 576 P.2d 297.

Rule requires determination of voluntariness of confession by court before being submitted to the jury under proper instructions requiring it to consider any questions concerning whether or not it was voluntary, as well as the truth or weight to accord it. *Pece v. Cox*, 1964-NMSC-237, 74 N.M. 591, 396 P.2d 422.

And judge's finding to be clear. — Before permitting a defendant's statement to be submitted to a jury, the trial court is required to fully and independently resolve the question of voluntariness, and not only must the judge's conclusion be clearly evident, but his findings on disputed factual issues must either be expressly stated or ascertainable from the record. *State v. Stout,* 1971-NMCA-028, 82 N.M. 455, 483 P.2d 510.

Rule as to exculpatory matters in an extra-judicial confession is not the same where the defendant's testimony at the trial is substantially the same as that in the confession. *State v. Casaus,* 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

The trial court was not in error when it refused to give a requested instruction on exculpatory statements contained in the defendant's confession, where the court adequately instructed as to self-defense and the defendant voluntarily took the stand, and his own testimony corresponded to the exculpatory matter contained in the confession introduced by the state. *State v. Casaus,* 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

Jury to consider claim of inducements. — Where the judge, on record, passed on the voluntariness and admissibility of the defendant's statements at a suppression hearing, and submitted the statements to the jury with a charge which complied with this instruction, the defendant's argument that his statements were the product of promises and inducements was to be considered with all the conflicting evidence, and it was not for the appellate court to substitute its own judgment for that of the trier of fact and the trial judge. *State v. Ramirez,* 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds*, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Where it was apparent that the trial court fully performed its preliminary duty of inquiring into the voluntariness of the defendant's confession prior to submitting it to the jury, then submitted the confession to the jury under proper instructions, which imposed upon the jury the duty to determine the credibility of the testimony respecting the voluntariness and the mental capacity of the defendant to make a confession, the trial court did not err. *State v. Armstrong,* 1971-NMSC-031, 82 N.M. 358, 482 P.2d 61.

Word "threat" in instruction in criminal case should be defined; members of a jury may easily disagree on what constitutes a threat. *State v. Zamora,* 1978-NMCA-017, 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Jury was properly instructed on the voluntariness of defendant's confession where it was instructed regarding the admission of a confession according to this instruction and, at defendant's request, the jury also received an instruction that defined both "promise" and "threat." *State v. Sanders,* 2000-NMSC-032, 129 N.M. 728, 13 P.3d 460.

Where foundation for instruction not laid. — Where no request was made at the trial for a hearing on the voluntariness of a confession, and the explanation of rights form and the confession were admitted in evidence without objection, no foundation was laid by the defense which required the trial court to give this instruction. *State v. McCarter,* 1980-NMSC-003, 93 N.M. 708, 604 P.2d 1242.

Waiver of error where no instruction requested. — Where the defendant never requested an instruction on the voluntariness of certain statements made by him, any error committed by the court in failing to give one was waived. *State v. Romero,* 1975-NMCA-017, 87 N.M. 279, 532 P.2d 208.

Where a typewritten signed statement of one defendant was admitted in evidence at the trial without objection and the other defendant did not request the trial court to instruct on the issue, the error claimed is waived. *State v. Riley,* 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

The defendant's contention that the jury could not have adequately performed their required function of determining the voluntariness of his statement because they were never informed as to what "Miranda rights" were, the attorneys, witnesses and the court referred to all through the trial, was waived because the defendant never requested an instruction defining "Miranda rights." *State v. Torres,* 1975-NMCA-148, 88 N.M. 574, 544 P.2d 289.

Acknowledgement of guilt requires confession instruction. — Statements freely and voluntarily admitting a forced entry into another's house and the taking of another's property are so sufficiently close to an express acknowledgement of guilt that the trial court does not err in giving a confession instruction. *State v. Kijowski,* 1973-NMCA-129, 85 N.M. 549, 514 P.2d 306.

Use of warnings on statement form negates prejudice. — Where the petitioner had no attorney when the statement was given and claims that he had not been advised (contrary to what is clearly set forth in the form on which the confession was typed), that he did not have to make any statement at all and that if he did make a statement it could be used against him in a trial, no prejudice is shown where it was typed on the form that he did not have to make any statement and a codefendant who was at the time represented by counsel also gave a statement which was admitted in evidence by the trial court after a foundation as to its voluntary character had been ruled on by the judge. *Pece v. Cox,* 1964-NMSC-237, 74 N.M. 591, 396 P.2d 422.

Where statement of one defendant includes inculpatory facts concerning codefendant, the proper procedure is to admit the statement but to exclude from the jury's consideration all parts thereof damaging to the other defendant. *State v. Alaniz,* 1951-NMSC-049, 55 N.M. 312, 232 P.2d 982.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1353 to 1360.

Presumption and burden of proof as to voluntariness of nonjudicial confession, 38 A.L.R. 116, 102 A.L.R. 641.

Voluntariness of confession admitted by court as question for jury, 85 A.L.R. 870, 170 A.L.R. 567.

23 C.J.S. Criminal Law § 838.

14-5041. Corpus delicti must be proved independent of admission or confession.

No person may be convicted of a criminal offense unless there is some proof that the crime was committed, independent of any [confession] [admission] made by him outside of this trial.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from California Jury Instructions Criminal, 2.72. In California, the instruction must be given sua sponte. The committee believed that, as a matter of law, a case could not go to the jury based entirely upon the extrajudicial confession or admission of the defendant. There must be facts and circumstances which would allow the jury to find the elements of the crime. *State v. Paris*, 76 N.M. 291, 294, 414 P.2d 512 (1966). Consequently, the committee believed that no instruction on this subject was necessary or proper.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23A C.J.S. Criminal Law § 1197.

14-5042. Withdrawal of evidence from consideration of jury.[1]

Evidence has been admitted concerning _____[2]. At the time that the evidence was admitted, it was admitted subject to a further ruling by the court. The court now rules that:

[You should not consider this evidence against the defendant _____.][3]

[You should disregard this evidence entirely and not consider it for any purpose.]

USE NOTES

1. When evidence is to be withdrawn from the jury, this instruction is appropriate to be given in writing with the other instructions, if requested, unless the court has given an oral instruction to this effect before the close of the evidence.

2. Describe the evidence with enough particularity to enable the jury to know to which evidence this instruction refers.

3. Use applicable alternative.

Committee commentary. — This instruction withdraws from the jury evidence which was erroneously admitted or evidence which was admitted subject to condition when such condition is not fulfilled. *See* Rule 11-104B NMRA. The instruction is appropriate for use in withdrawing co-conspirator acts or declarations when a prima facie case for

existence of the conspiracy is not established by substantial, independent evidence. *See* Rules 11-801D(2)(e) and 11-104B NMRA. This instruction is also appropriate to withdraw from the jury evidence against one defendant in joint trials. *See* Evidence Rule 11-105.

A determination of the admissibility of evidence may be made by the judge at any time during the course of a trial. This instruction need not be given at the close of the evidence if an oral instruction has already been given.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1185.

24B C.J.S. Criminal Law § 1915(11).

Part D
Opinion Testimony

14-5050. Opinion testimony.

You should consider each opinion received in evidence in this case and give it such weight as you think it deserves. If you should conclude that the reasons given in support of the opinion are not sound or that for any other reason an opinion is not correct, you may disregard the opinion entirely.

USE NOTES

Upon request, this instruction may be given whenever an expert has testified or when a layman has been allowed to state an opinion.

Committee commentary. — The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 11.27.

Under Rules 11-701 and 11-702 NMRA, both lay witnesses and experts may give opinions under certain conditions. In addition, Rule 11-405A NMRA permits testimony in the form of an opinion on the question of character or a trait of character. Furthermore, under Rule 11-704 NMRA, testimony in the form of an opinion is not objectionable merely because it embraces an ultimate issue to be decided by the jury. Compare UJI 13-213 and 13-715. Because opinion evidence is admissible, this instruction is used to caution the jury that an opinion need not be accepted as conclusive. *See, e.g., State v. Holden,* 85 N.M. 397, 512 P.2d 970 (Ct. App.), *cert. denied,* 85 N.M. 380, 512 P.2d 953 (1973).

ANNOTATIONS

Qualifications of DNA expert. — DNA expert witness, who held a bachelor of science degree in biology and was the DNA analyst for the New Mexico department of public safety, and whose training included specialized courses in molecular biology and a course in DNA analysis with the FBI, was not unqualified to testify; the jury was free to consider his qualifications when deciding what weight to give his testimony. *State v. McDonald,* 1998-NMSC-034, 126 N.M. 44, 966 P.2d 752.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers § 214; 75A Am. Jur. 2d Trial §§ 1190, 1226; 75B Am. Jur. 2d Trial § 1408.

23 C.J.S. Criminal Law § 891.

14-5051. Hypothetical questions.

In examining an expert witness, the lawyer may ask him to assume a state of facts and to give an opinion based on that assumption.

In permitting such a question, the court does not rule, and does not necessarily find that all the assumed facts have been proved.

You must find from all the evidence whether or not the assumed facts have been proved. If you should find that any assumption has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert opinion based on the assumption.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — Under Rule 11-705 NMRA, it is no longer necessary for the expert to be asked a hypothetical question, i.e., to assume certain facts and to give an opinion based on that assumption. *See* 56 F.R.D. 183, 285 (1973). Consequently, the committee believed that it was not necessary for the jury to be instructed on this subject. Compare UJI 13-209.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 1135 to 1137, 1202.

Hypothetical questions in case of expert witness who has personal knowledge or observation of facts, 82 A.L.R. 1338.

23 C.J.S. Criminal Law § 883.

Part E
Presumptions or Inferences

14-5060. Presumption of innocence; reasonable doubt; burden of proof.

The law presumes the defendant to be innocent unless and until you are satisfied beyond a reasonable doubt of his guilt.

The burden is always on the state to prove guilt beyond a reasonable doubt. It is not required that the state prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

USE NOTES

This instruction must be given in all cases.

Committee commentary. — The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 11.01 (1970), and *State v. Ellison,* 19 N.M. 428, 144 P. 10 (1914). *See also State v. Rodriguez,* 23 N.M. 156, 167 P. 426, 1918A L.R.A. 1016 (1917).

Because of the importance of the presumption of innocence and the need to find guilt beyond a reasonable doubt, this instruction is required in all cases. It repeats some of the explanation given the jury at the outset of the trial in UJI 14-101.

It is generally accepted that the reasonable doubt instruction will cover a multitude of problems. For example, an instruction on the danger of eyewitness testimony is not necessary where the jury is given this instruction and UJI 14-5020, Credibility of witnesses. *See State v. Mazurek,* 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

ANNOTATIONS

Question for reviewing sufficiency of the evidence is whether, viewing all of the evidence in a light most favorable to upholding the jury's verdict, there is substantial evidence in the record to support any rational trier of fact being so convinced. *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

This instruction is to be used in all jury trials, unadorned by any added, illustrative language from any opinion. *State v. Garcia*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72.

No due process violation where no burden of proof instruction on firearm use. — Where the burden of proof instruction, by its wording, was applied to a determination of

guilt, but no reference was made to use of a firearm, and after the guilty verdicts were returned instructions were given submitting the use-of-a-firearm issue to the jury without a burden of proof instruction, but the defendant did not complain of the absence of an instruction and the evidence was almost uncontradicted that a firearm was used as to each count, there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

There can be proof beyond a reasonable doubt though proof depends on a presumed fact, that is, a permissible inference from a basic fact or facts; the reasonable doubt standard is met if the evidence necessary to invoke the inference (the evidence as a whole, including the basic fact or facts) is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. *State v. Matamoros,* 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

No requirement to instruct prior to introduction of evidence. — Where the presumption of innocence was adequately covered in the instruction given, and since there is no requirement upon the trial court to instruct the jury in criminal cases prior to the introduction of evidence, the trial court did not err in refusing the premature request. *State v. Wesson,* 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965.

Defendant not entitled to jury instructions on alibi and character witnesses, even where he presents evidence to support them and tenders such instructions; this instruction is adequate. *State v. Robinson,* 1980-NMSC-049, 94 N.M. 693, 616 P.2d 406.

Requirement of evidence showing insanity lesser burden than creating reasonable doubt. — The requirement that the defendant must offer evidence tending to show his insanity at the time of the offense in order to create a jury question upon this issue is a lesser burden than creating a reasonable doubt, as "reasonable doubt" is defined in this instruction. *State v. Day,* 1977-NMCA-009, 90 N.M. 154, 560 P.2d 945, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Instruction on reasonable doubt found adequate. — Since there was a direct charge that the jury must find beyond a reasonable doubt that the defendant was in the store when the offense occurred and that either he or his companion inflicted upon the deceased the injuries of which he later died, then the jury was adequately instructed on that issue. *State v. Ramirez,* 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986.

Prohibition on deviating from the definition of reasonable doubt. — In defendant's murder trial, where defense counsel began to explain the meaning of reasonable doubt by using an example of going to the doctor, the district court did not abuse its discretion in prohibiting defense counsel from deviating from the definition of "reasonable doubt" contained in UJI 14-5060 NMRA, because the jury was properly instructed pursuant to

this instruction and attorneys are not permitted to pose different definitions of "reasonable doubt." *State v. Montoya*, 2016-NMCA-098, cert. denied.

Instruction need not be repeated with each element. — When a correct general instruction as to reasonable doubt is given, it need not be repeated in dealing with each element of the case, and the trial court did not err in refusing the defendant's request to instruct on reasonable doubt in connection with the defendant's theory of self-defense. *State v. Harrison,* 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 29 Am. Jur. 2d Evidence § 168 et seq.; 75B Am. Jur. 2d Trial §§ 1291, 1292, 1297 to 1301, 1370, 1371, 1374 to 1380.

Presumption of innocence as evidence, 34 A.L.R. 938, 94 A.L.R. 1042, 152 A.L.R. 626.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony - state cases, 23 A.L.R.4th 1089.

23A C.J.S. Criminal Law § 1221.

14-5061. Presumptions or inferences.[1]

Proof of _____ *(set forth presumed fact)* is an essential element of _____ *(set forth crime)* as defined elsewhere in these instructions. The burden is on the state to prove _____ *(set forth presumed fact)* beyond a reasonable doubt.

In this case if you find that _____ *(here state basic fact or facts on which presumption rests)* [has] [have] been proved, you may but are not required to find that _____ *(presumed fact)* has been proved. You must consider all of the evidence in making your determination. In order to find the defendant guilty of _____ *(set forth offense charged)*, [as charged in Count _____][2], you must be convinced beyond a reasonable doubt that the defendant _____ *(set forth presumed fact)*.

USE NOTES

1. This instruction shall be given when the state relies upon a statutory "presumption" to prove an element of the crime or when an element is inferred ("implied") from certain facts. It may not be used if there is a specific UJI Criminal presumption instruction provided for the crime. *See* for example UJI 14-242, 14-1651, 14-1671 and 14-1672.

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

[As amended, effective September 1, 1988.]

Committee commentary. — Some New Mexico statutes allow the jury to "presume" certain facts from other facts. For example, the intention of converting merchandise may be presumed from the fact that the person concealed the merchandise. § 30-16-22 NMSA 1978. In addition, the courts often state that certain facts may be "implied" from other facts. For example, the intent to kill or do great bodily harm (malice aforethought) required for second degree murder may be implied from the use of a deadly weapon by defendant. It is believed that the courts mean "inferred," rather than "implied." *See generally* Perkins, "A Re-examination of Malice Aforethought," 43 Yale L.J. 537, 549 (1934).

Under Rule 11-303 NMRA, the court may not direct the jury to find a presumed fact against the accused. *See State v. Jones,* 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), and *United States v. Gainey,* 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965). Furthermore, the jury must be told that it must find the ultimate facts beyond a reasonable doubt. For special instructions on the presumption of intoxication or presumption of knowledge by a dealer receiving stolen property, *see* UJI 14-242 and 14-1651.

ANNOTATIONS

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in the second paragraph, substituted the present language in the second and third sentences for "However, you may do so only if upon consideration of all of the evidence you find that . . . . . (set forth presumed fact) has been proved beyond a reasonable doubt"; in Item 1 of the Use Note, deleted "On request" at the beginning of the first sentence, substituted the present second sentence for "It may not be used for the presumption of intoxication by use of an alcohol blood test or a dealer's presumption for knowledge that property is stolen", and, in the last sentence, inserted "for example" and "14-1671 and 14-1672"; added Item 2; and made minor stylistic changes.

Inference is merely a logical deduction from the facts and evidence. *State v. Romero*, 1968-NMCA-078, 79 N.M. 522, 445 P.2d 587.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1293 to 1332.

23A C.J.S. Criminal Law §§ 1183 to 1185.

14-5062. Lost, destroyed, or uncollected evidence; adverse inference permitted.[1]

If the State fails to produce evidence [under its control][2] because the State [lost][3] [or] [destroyed] [or] [inadequately preserved] [or] [failed to gather or collect] that evidence,

then you may, but are not required to, infer that the evidence would be unfavorable to the State.

USE NOTES

1. For use upon a court's finding that the State breached a duty to preserve material evidence and the deprivation of evidence was prejudicial to the defendant, or upon a court's finding that the State acted with gross negligence in failing to collect material evidence.

2. Use when the State failed to preserve evidence.

3. Use applicable alternative or alternatives.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — This instruction may be given as a sanction against the State in two types of cases: first, when the trial court determines that the State collected but improperly failed to preserve evidence under *State v. Chouinard*, 1981-NMSC-096, ¶ 16, 96 N.M. 658, 634 P.2d 680; or second, when the trial court determines that the State improperly failed to collect evidence under *State v. Ware*, 1994-NMSC-091, ¶¶ 25-26, 118 N.M. 319, 881 P.2d 679.

In the first category of cases, involving failure to preserve evidence, the three-part test in *Chouinard*, 1981-NMSC-096, ¶ 16, applies. In such cases, deprivation of evidence is reversible error when: "1) The State either breached some duty or intentionally deprived the defendant of evidence; 2) The improperly 'suppressed' evidence [was] . . . material; and 3) The suppression of this evidence prejudiced the defendant." *Id.* (quoting *State v. Lovato*, 1980-NMCA-126, ¶ 6, 94 N.M. 780, 617 P.2d 169). If the trial court finds that those three factors are satisfied and the loss of evidence is known prior to trial, then "there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import." *Chouinard*, 1981-NMSC-096, ¶ 23. If the trial court chooses the latter alternative, then this instruction may be given.

If the trial court chooses an adverse inference instruction, this instruction may be given—alone, modified to ensure "full disclosure of the loss and its relevance and import," or as a non-exclusive portion of a broader remedy to assure "justice is done, both to the defendant and to the public." *Id.* ¶ 23; *see Scoggins v. State*, 1990-NMSC-103, ¶ 9, 111 N.M. 122, 802 P.2d 631 (emphasizing that *Chouinard* grants the trial court broad discretion to choose remedy on a case-by-case basis); *State v. Hill*, 2008-NMCA-117, ¶ 15, 192 P.3d 770 (noting that *Chouinard* may be applied "in a flexible manner"); *State v. Sanchez*, 1999-NMCA-004, ¶ 14, 126 N.M. 559, 972 P.2d 1150 (concluding that the trial court "always has the discretion to limit the ability of the state to take unfair advantage of evidence destroyed"); *cf. Torres v. El Paso Electric Co.*, 1999-NMSC-029,

¶¶ 53-54, 127 N.M. 729, 987 P.2d 386 (holding that an adverse inference instruction is an appropriate lesser remedy for evidence spoliation in civil cases), *overruled in part on other grounds by Herrera v. Quality Pontiac*, 2003-NMSC-018, 134 N.M. 43, 73 P.3d 181; *Restaurant Management Co. v. Kidde-Fenwal, Inc.*, 1999-NMCA-101, ¶¶ 11, 18, 127 N.M. 708, 986 P.2d 504 (recognizing that the court has inherent power to give an adverse inference instruction as one possible sanction for evidence spoliation).

In the second category of cases, involving failure to collect evidence, the two-part test in *Ware*, 1994-NMSC-091, ¶¶ 25-26, applies. In such cases, the first question is whether the evidence is material to the defense. "Evidence is material only if there is a reasonable probability that, had the evidence been available to the defense, the result of the proceeding would have been different." *Id.* ¶ 25 (internal quotation marks, citation, and alteration omitted). If the trial court finds that the evidence is material, then it considers the conduct of the investigating officers. *Id.* ¶ 26. If the investigating officers acted in bad faith, then the trial court may order the evidence suppressed. *Id.* However, absent a finding of bad faith, suppression of the evidence is not appropriate. *Id.* Instead, if the investigating officers "were grossly negligent in failing to gather the evidence—for example, by acting directly contrary to standard police investigatory procedure—then the trial court may instruct the jury that it can infer that the material evidence not gathered from the crime scene would be unfavorable to the State." *Id.* Mere negligence may be addressed through cross-examination and argument, but does not warrant an adverse inference instruction. *Id.* Thus, in the context of failure to collect evidence, this instruction may only be given when the trial court determines that investigating officers acted with gross negligence.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

CHAPTER 51
Justification and Defense

Part A
Insanity and Incompetency

14-5101. Insanity; jury procedure.[1]

There is an issue in this case as to the defendant's mental condition at the time the act was committed. You will be given alternative verdict forms [for each crime charged][2] as follows:

"guilty";

"not guilty";

"not guilty by reason of insanity."

Only one of these forms is to be completed [for each crime charged][2].

You will first consider whether the defendant committed the act charged.

If you determine that the defendant committed the act charged, but you are not satisfied beyond a reasonable doubt that the defendant was sane at the time, you must find the defendant not guilty by reason of insanity.

The defendant was insane at the time of the commission of the crime if, because of a mental disease, as explained below, the defendant

[did not know what [he] [she] was doing or understand the consequences of [his] [her] act,]

[or][3]

[did not know that [his] [her] act was wrong,]

[or]

[could not prevent [himself] [herself] from committing the act].

A mental disease is a specific disorder of the mind that both substantially affects mental processes and substantially impairs behavior controls. This disorder normally must extend over a considerable period of time, as distinguished from a momentary condition arising under the pressure of circumstances.

The term mental disease does not include a personality disorder or an abnormality manifested only by repeated criminal conduct or by other anti-social conduct, and the term does not mean developmental disability.

The burden is on the state to prove beyond a reasonable doubt that the defendant was sane at the time the offense was committed. If you have a reasonable doubt as to whether the defendant was sane at the time the offense was committed, you must find the defendant not guilty by reason of insanity.

In determining the defendant's mental condition at the time the act was committed, you may consider all of the evidence, including [testimony of medical experts][3] [testimony of lay witnesses] [acts and conduct of the defendant].

USE NOTES

1. This instruction must be modified if more than one offense is charged. If there is more than one defendant, the name of the defendant raising an insanity defense should

be used. If this instruction is given, add the following essential element to the essential elements instruction for the offense charged: “The defendant was sane at the time the offense was committed.”

2. Use the bracketed language when there is more than one crime charged.

3. Use only applicable bracketed alternative.

[As amended, effective January 1, 1997; January 1, 1999; as amended by Supreme Court Order No. 11-8300-015, effective April 25, 2011; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Initially, there is a presumption that the defendant is sane. *See State v. Dorsey*, 1979-NMSC-097, ¶ 3, 93 N.M. 607, 603 P.2d 717 (relied on in *State v. Martinez*, 2021-NMSC-012, ¶ 37, 483 P.3d 590). Once the defendant introduces some competent evidence to support the defense of insanity, “the burden [of proof] then shifts to the [s]tate to prove beyond a reasonable doubt that [the] defendant was sane at the time the act was committed.” *Martinez*, 2021-NMSC-012, ¶ 37 (quoting *State v. Lopez*, 1978-NMSC-060, ¶ 4, 91 N.M. 779, 581 P.2d 872); *State v. Wilson*, 1973-NMSC-093, ¶¶ 17-19, 85 N.M. 552, 514 P.2d 603. However, the state is not required to present any evidence on the issue, and it may instead simply rely on the presumption. *Martinez*, 2021-NSMC-012, ¶ 37; *Wilson*, 1973-NMSC-093, ¶ 19; *see generally*, W.E. Shipley, Annotation, *Modern Status of Rules As To Burden and Sufficiency of Proof of Mental Irresponsibility In Criminal Case*, 17 A.L.R.3d 146 § 9 (1968).

The trial court must determine, as a matter of law, whether a reasonable doubt exists as to the accused’s sanity. *State v. Chavez*, 1975-NMCA-119, ¶ 18, 88 N.M. 451, 541 P.2d 631. If the trial court determines the evidence is sufficient to raise an issue as to the defendant’s sanity, it must instruct the jury on the issue of sanity. *See id.*

“[T]he jury should be instructed to consider first whether the defendant is guilty of the crime charged,” and if the defendant is found guilty, then the jury should “determine whether the defendant is not guilty by reason of insanity.” *State v. James*, 1971-NMCA-156, ¶ 18, 83 N.M. 263, 490 P.2d 1236. However, it may not be reversible error if a jury considers the defendant’s insanity before considering the elements of the offense. *State v. Victorian*, 1973-NMSC-008, ¶ 12, 84 N.M. 491, 505 P.2d 436. If the jury is not persuaded that the defendant committed the crime beyond a reasonable doubt, the defendant is entitled to a verdict of not guilty. UJI 14-5060 NMRA.

Although the instruction requires the jury to find that the defendant was insane at the time of the commission of the offense, evidence of the defendant’s mental condition before and after the commission of the offense may be considered by the jury in arriving at its determination. *See James*, 1971-NMCA-156, ¶¶ 10-11.

Evidence of the defendant's mental condition may be presented by expert and lay witnesses. Since the jury is the final decision-maker on the question of insanity, it is up to the jury to decide whether to afford greater weight to expert testimony. "The purpose of psychiatry is to diagnose and cure mental illnesses, but not to assess blame for acts resulting from these illnesses. The law seeks to find facts and assess accountability." *Dorsey*, 1979-NMSC-097, ¶ 9. Psychiatric testimony, however, is relevant evidence in determining accountability. *Id.*

Rule 5-602(A)(2) NMRA requires the jury to return a special verdict if it finds that the defendant is not guilty by reason of insanity. However, the jury has no right to know the consequences of a verdict of not guilty by reason of insanity because the consequences are not relevant to the jury's consideration. *State v. Neely*, 1991-NMSC-087, ¶ 29, 112 N.M. 702, 819 P.2d 249; *see also* UJI 14-6007 NMRA.

[As amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-031, effective December 31, 2022, provided clarification for identifying a "mental disease," clarified that the term "mental disease" does not mean developmental disability, and revised the committee commentary; in the fourth undesignated paragraph, after "impairs behavior controls", deleted "This specific disorder must also be a long-standing disorder. It" and added "This disorder normally"; and in the fifth undesignated paragraph, after "anti-social contact", added "and the term does not mean developmental disability."

The 2011 amendment, approved by Supreme Court Order No. 11-8300-015, effective April 25, 2011, in the jury instruction, deleted the verdict form for "guilty but mentally ill" from the list of alternative verdict forms, deleted the instruction directing the jury, when it finds the defendant guilty, to consider whether the defendant was mentally ill at the time of the commission of the crime, and deleted the instructions prescribing the verdicts the jury should return if it finds the defendant mentally ill or not mentally ill; and in the Use Note, deleted the directions to insert the greater offense in the bracketed verdict form in the list of alternative verdict forms and to use only the applicable bracketed alternative verdict form.

The 1998 amendment, effective January 1, 1999, added "by reason of insanity" at the end of sixth paragraph from the end.

The 1997 amendment, effective January 1, 1997, substituted "act charged" for "crime" in the third paragraph, substituted "the defendant" for "he" and "him" in the fourth paragraph, inserted the fifth through eighth paragraphs, inserted the tenth paragraph, substituted "and you further find the defendant was mentally ill at the time, you should find the defendant" for "but was mentally ill at the time, you should find him" in the eleventh paragraph, substituted "but do not find the defendant was mentally ill" for "and

was not insane or mentally ill" in the next-to-last paragraph; and in Use Note 1, deleted the former first sentence which read: "This instruction should be given prior to 14-5102 and 14-5103", and added the last sentence.

One accused of crime is presumed to be sane. However, if the defendant introduces competent evidence reasonably tending to support insanity at the time of the alleged offenses, then an issue is raised as to the mental condition of the accused, and it becomes the duty of the jury to determine the issue from the evidence independent of the presumption of sanity. However, if the jury disbelieves the evidence as to the defendant's claimed insanity, then the presumption stands. *State v. Armstrong,* 1971-NMSC-031, 82 N.M. 358, 482 P.2d 61.

There is a presumption of sanity which must be rebutted by the defendant, whereupon the jury shall make its determination. *State v. Torres,* 1971-NMSC-039, 82 N.M. 422, 483 P.2d 303.

And burden on defendant to overcome presumption. — The burden of proof is upon the state to prove that the defendant is sane beyond a reasonable doubt; however, in the first instance, this burden is met or satisfied by the presumption that the defendant is sane. It then becomes the duty of the defendant and upon him is the onus or burden of going forward with evidence to overcome this presumption. *State v. James,* 1971-NMCA-156, 83 N.M. 263, 490 P.2d 1236.

Insanity is question of fact which ordinarily is decided by trier of facts, and where the testimony of the experts was not the only competent evidence touching on the defendant's mental condition, their testimony was not conclusive on this issue. *State v. Victorian,* 1973-NMSC-008, 84 N.M. 491, 505 P.2d 436.

It was the fact-finder's prerogative to reject the testimony of conflicting experts and determine that defendant was neither legally insane nor mentally ill. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008.

Court determines whether evidence sufficient to take insanity question to jury. — When the defendant has put in evidence reasonably tending to show him insane, the problem is then to determine whether it is sufficient to take the case to the jury and this is a question for the court to determine; however, if there has been adduced competent evidence reasonably tending to support the fact of insanity, it is the duty of the court to instruct on the question of insanity. *State v. James,* 1971-NMCA-156, 83 N.M. 263, 490 P.2d 1236.

Jury should be instructed to consider first whether defendant is guilty of crime charged, without consideration of the question of insanity. Should the defendant be found not guilty, there would be no necessity for further consideration. Should the defendant be found guilty, then the jury would determine whether the defendant is not guilty by reason of insanity. *State v. James,* 1971-NMCA-156, 83 N.M. 263, 490 P.2d 1236.

Consideration of insanity before elements of offense not reversible error. — Where the jury may possibly have considered the issue of sanity before considering whether the defendant had in fact committed the essential elements of the crimes charged, it cannot be said to be reversible error. *State v. Victorian,* 1973-NMSC-008, 84 N.M. 491, 505 P.2d 436.

Evidence sufficient to warrant insanity instruction. — Evidence in a trial for aggravated battery that the defendant was a chronic alcoholic with organic brain damage was sufficient to warrant an instruction on the issue of sanity or mental illness as a defense. *State v. Crespin,* 1974-NMCA-104, 86 N.M. 689, 526 P.2d 1282.

Evidence not sufficient to require insanity instruction. — Where the evidence shows nothing more than the temporary effects of drug intoxication, on which the trial court instructed the jury, and where the defendant does not have a diseased mind, the evidence is not sufficient upon which to require an instruction on insanity. *State v. Nelson,* 1971-NMCA-152, 83 N.M. 269, 490 P.2d 1242, cert. denied, 83 N.M. 259, 490 P.2d 1232.

A psychiatrist's testimony that the defendant had no organic brain damage or psychological damage, that the defendant's history of paint sniffing included instances when he would become violent and feel that devils were chasing him, but that in connection with the killing, the psychiatrist was of the opinion that the defendant knew what he was doing when he did it and that it was an impulsive act, was insufficient to raise a factual issue concerning a true disease of the mind and insufficient to raise a factual issue as to substantial impairment of behavior controls, and the trial court did not err in refusing the requested insanity instruction. *State v. Gutierrez,* 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

Testimony by lay witnesses that the defendant was mentally disturbed and that, when committing the offense, he did not act, or look, normal, together with the defendant's testimony that he sniffed paint during periods of stress and when upset, and that when he sniffed he did not know what he was doing and went off on trips, was insufficient to raise a factual issue concerning a true disease of the mind and was insufficient to raise a factual issue concerning a substantial impairment of behavior controls, and the court did not err in refusing an insanity instruction. *State v. Gutierrez,* 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

Instruction found proper. — An instruction stating that: "In order to find the defendant not guilty by reason of insanity you must be satisfied that, at the time of committing the act, the accused, as a result of disease of the mind: (1) did not know the nature and quality of the act; (2) did not know that it was wrong; (3) was incapable of preventing himself from committing it," was correct. *State v. Chambers,* 1972-NMSC-069, 84 N.M. 309, 502 P.2d 999.

Law reviews. — For annual survey of New Mexico law relating to criminal law, *see* 12 N.M.L. Rev. 229 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," *see* 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 31 to 45.

Instructions in criminal case in which defendant pleads insanity as to his hospital confinement in the event of acquittal, 11 A.L.R.3d 737, 81 A.L.R.4th 659.

Modern status of rules as to burden and sufficiency of proof of mental irresponsibility in criminal case, 17 A.L.R.3d 146.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

Construction and application of 18 USCS § 17, providing for insanity defense in federal criminal prosecutions, 118 A.L.R. Fed. 265.

22 C.J.S. Criminal Law §§ 56, 58 to 60.

14-5102. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to an order dated October 30, 1996, this instruction, relating to insanity, was withdrawn effective January 1, 1997. For present comparable provisions, *see* UJI 14-5101.

14-5103. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to an order dated October 30, 1996, this instruction, relating to determination of mentally ill, was withdrawn effective January 1, 1997. For present comparable provisions, *see* UJI 14-5101.

14-5104. Determination of present competency.[1]

An issue in this case is the defendant's competency to stand trial. The defendant has the burden of proving by the greater weight of the evidence that the defendant is mentally incompetent to be tried.

[Before considering whether the defendant committed the crime charged, you must make a determination of the defendant's competency to stand trial.][2] A person is competent to stand trial if that person has:

1. a sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding;

2. a rational as well as factual understanding of the proceedings against the person;

3. the capacity to assist in the person's own defense; and

4. the capacity to comprehend the reasons for punishment.

As to this issue only, your verdict need not be unanimous. When as many as ten of you have agreed as to whether the defendant is competent to stand trial, your foreperson must sign the proper form. If your verdict is that the defendant is incompetent, you will immediately return to open court without proceeding further. If your verdict is that the defendant is competent, you should proceed to consider the defendant's guilt or innocence.

USE NOTES

1. This instruction is to be given upon request of the defendant only if the evidence raises a reasonable doubt as to the defendant's competency to stand trial and this issue is submitted to the jury.

2. Delete bracketed material if this determination of competency is to be made by a jury other than the jury deliberating the guilt or innocence of the defendant.

[As amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 31-9-1 (1993).

"A person is competent to stand trial when he or she has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding, a rational as well as factual understanding of the proceedings against him [or her], and the capacity to assist in his own defense and to comprehend the reasons for punishment." *State v. Linares*, 2017-NMSC-014, ¶ 34, 393 P.3d 691 (quoting *State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131 (brackets, internal quotation marks, and footnote omitted). This jury instruction was updated in 2022 to reflect the controlling standard for competency set forth in Linares.

"The law has long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *Rotherham*, 1996-NMSC-048, ¶ 13; *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."). All participants in a criminal proceeding—

including the court acting sua sponte—have a shared duty to inquire into the defendant's competency whenever circumstances suggest that the defendant, "though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Drope*, 420 U.S. at 171 (internal quotation marks and citation omitted); § 31-9-1.

Although the New Mexico appellate decisions on competency to stand trial have all involved incompetency because of some mental illness or disease, UJI 14-5104 NMRA is not limited to incompetency by reason of mental illness. *See Jackson v. Indiana*, 406 U.S. 715 (1972) (recognizing where a developmentally disabled, deaf, non-verbal person who can neither read nor write and who is unable to communicate with the person's attorney may be incompetent to stand trial even though not suffering from any mental disease).

The issue of a defendant's competency to stand trial may be raised at any time during a criminal proceeding. *See* § 31-9-1 ("Whenever it appears that there is a question as to the defendant's competency to proceed in a criminal case, any further proceeding in the cause shall be suspended until the issue is determined."). If a motion for competency evaluation is filed after the start of a trial by jury in district court, the court shall instruct the jury under UJI 14-5104 to determine the defendant's competency to stand trial. Rule 5-602.1(I)(2) NMRA ("If the motion for a competency evaluation was filed after the start of a trial by jury, the court shall submit the question to the jury at the close of evidence."). Rules 5-602.1, 6-507.1, 7-507.1, and 8-507.1 NMRA govern the procedure for resolving a question of competency.

The defendant has the burden of proving by a preponderance or greater weight of the evidence that the defendant is not competent to stand trial. *State v. Santillanes*, 1978-NMCA-051, ¶ 6, 91 N.M. 721, 580 P.2d 489; Rule 5-601.2(I)(2) NMRA ("The jury shall decide by a preponderance of the evidence if the defendant is not competent to stand trial before considering the defendant's guilt or innocence beyond a reasonable doubt.").

[As amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-031, effective December 31, 2022, completely rewrote the factors in determining whether a defendant is competent to stand trial, and revised the committee commentary; after "A person is competent to stand trial if that person has", deleted designated factors 1 through 3, which provided "1. understands the nature and significance of the criminal proceedings against him 2. has a factual understanding of the criminal charges; and 3. is able to assist his attorney in his defense", and added new factors 1 through 4.

Compiler's notes. — Section 4448, Code 1915, referred to in the next-to-last sentence in the first paragraph of the committee commentary, was compiled as 41-13-3, 1953 Comp., before being repealed by Laws 1967, ch. 231, § 1.

Laws 1967, ch. 231, § 1, referred to in the second paragraph of the committee commentary, was compiled as 41-13-3, 1953 Comp., prior to its repeal by Laws 1972, ch. 71, § 18. Section 2 of Laws 1967, ch. 231 enacted 41-13-3.1, 1953 Comp., relating to determination of present competency, which is presently compiled as 31-9-1 NMSA 1978.

Giving instruction to jury not warranted. — Where even if defendant had requested that this instruction be given or that the issue otherwise be submitted, but no offer of proof was made at trial and no evidence was presented for jury consideration concerning defendant's competency, that would not warrant giving the instruction to the jury. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011.

Presumption of sanity does not deny the defendant due process of law. — It merely gives the defendant the burden of going forward with evidence of insanity; if he meets this burden, his sanity must be proved by the state beyond a reasonable doubt; if he fails to meet this burden, by introducing no evidence of insanity, by offering evidence disbelieved by the jury or by offering evidence insufficient to rebut the presumption, the presumption of sanity decides the issue. *State v. Lujan,* 1975-NMSC-017, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Competency to plead same as to stand trial. — The trial court did not err in applying the same standard to a defendant's competency to enter into a plea agreement as would have been appropriate in determining his competency to stand trial. *State v. Lucas,* 1990-NMCA-056, 110 N.M. 272, 794 P.2d 1201.

Instruction cannot cover situation where there is existing ruling that defendant is incompetent and incompetency is to be redetermined by the jury, because in that situation the state has the burden of persuading the fact finder that the defendant is competent to stand trial. *State v. Santillanes,* 1978-NMCA-051, 91 N.M. 721, 580 P.2d 489.

Evidence not sufficient to raise reasonable doubt as to competency. State v. Coates, 1985-NMSC-091, 103 N.M. 353, 707 P.2d 1163.

Issue not preserved where no objection made nor instruction offered. — Where the defendant did not offer an instruction on competence to stand trial, nor did he object to the instructions given the jury, this issue was not properly preserved for appeal. *State v. Lujan,* 1975-NMSC-017, 87 N.M. 400, 534 P.2d 1112, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 400 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 62, 63.

22 C.J.S. Criminal Law § 940(2).

Part B
Intoxication

14-5105. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 19-8300-016, UJI 14-5105 NMRA, relating to voluntary intoxication, was withdrawn effective December 31, 2019. For provisions of former instruction, *see* the 2019 NMRA on *NMOneSource.com.*

14-5106. Involuntary intoxication; defined.[1]

An issue you must consider in this case is whether the defendant was intoxicated and if so, whether the intoxication was involuntary.

Intoxication is involuntary if:[2]

[a person is forced to become intoxicated against the person's will]

[a person becomes intoxicated by using (alcohol)[3] (drugs) without knowing the intoxicating character of the (alcohol)[3] (drugs) and without willingly assuming the risk of possible intoxication].

USE NOTES

1. If this instruction is given, add to the essential elements instruction for the offense charged:

[The defendant was not involuntarily intoxicated at the time the offense was committed or, if the defendant was involuntarily intoxicated, then the defendant nonetheless [knew what (he) (she) was doing or understood the consequences of (his) (her) act][3]

[or]

[knew that (his) (her) act was wrong]

[or]

[could have prevented (himself) (herself) from committing the act].

2. Use only the applicable source of the intoxication.

3. Use only the applicable alternative or alternatives.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Involuntary intoxication may result from the mistaken use of a liquor or narcotic substance. *See generally* Perkins, *Criminal Law* 894 (2d ed. 1969). "[I]nvoluntary intoxication is a defense only when it negates the intent element of a crime." *State v. Gurule*, 2011-NMCA-042, ¶ 17, 149 N.M. 599, 252 P.3d 823. Involuntary intoxication is not available as a defense to strict liability crimes, which, by definition, do not require criminal intent. *Id*. ¶ 18. Involuntary intoxication may serve as a defense "only . . . to the extent that it impairs the ability to form intent." *Id*. (internal quotation marks and citation omitted). In *State v. Brown*, 1996-NMSC-073, ¶ 27, 122 N.M. 724, 931 P.2d 69, the Supreme Court extended the partial defense of voluntary intoxication to depraved mind murder. Our appellate courts have not yet considered whether involuntary intoxication would also be a partial defense to depraved mind murder. *See* UJIs 14-5110, 14-5111 NMRA.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added clarifying language, revised the Use Notes, and revised the committee commentary; deleted "Evidence has been presented that" and added "An issue you must consider in this case is whether", and after "intoxicated", deleted "but that" and added "and if so, whether"; and in Use Note 1, deleted "The defendant was not involuntarily intoxicated at the time the offense was committed or if defendant was involuntarily intoxicated, then defendant nonetheless: knew what [he] [she] was doing or understood the consequences of [his] [her] act, knew that [his] [her] act was wrong and could have prevented [himself] [herself] from committing the act.", and in Use Note 3, after "alternative", added "or alternatives".

The 1997 amendment, effective January 1, 1997, added "defined" in the rule heading, substituted "the person's" for "his" in the second paragraph, deleted the former third and fourth paragraphs relating to the effect of the involuntary intoxication on the defendant's mens rea and the burden of the state to prove that the defense of involuntary intoxication does not apply, rewrote Use Note 1, and substituted "alternative" for "insanity alternatives" in Use Note 3.

Law reviews. — For article, "Death in the Desert: A New Look at the Involuntary Intoxication Defense in New Mexico," *see* 32 N.M.L. Rev. 243 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 108.

When intoxication deemed involuntary so as to constitute defense to criminal charge, 73 A.L.R.3d 195.

22 C.J.S. Criminal Law §§ 69, 72.

Part C
Inability to Form Intent

14-5110. Inability to form a deliberate intention to take away the life of another or to know conduct was greatly dangerous to life.[1]

An issue you must consider in this case is whether the defendant was [intoxicated from use of (alcohol) (drugs)][2] [or] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was _____[3] and if so, what effect this had on the defendant's [ability to form the deliberate intent to take away the life of another][2] [or] [subjective knowledge that the defendant's conduct was greatly dangerous to the lives of others].

The burden is on the state to prove beyond a reasonable doubt that the defendant was capable of [forming a deliberate intention to take the life of another][2] [or] [knowing that the defendant's conduct was greatly dangerous to the lives of others]. If you have a reasonable doubt as to whether the defendant was capable of [forming a deliberate intent to take away the life of another][2] [or] [knowing the dangerousness of the defendant's conduct], you must find the defendant not guilty of a first-degree murder by [deliberate killing][2] [or] [an act greatly dangerous to life].

USE NOTES

1. This instruction may be given only for a willful and deliberate murder or a depraved mind murder and should immediately follow UJI 14-201 NMRA when the defendant has relied on the defense of "diminished responsibility" or "inability to form specific intent." If, in a "mental disease or disorder" case, the defendant has also relied on the complete defense of insanity, this instruction should follow UJI 14-5101 NMRA. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant was not [intoxicated from use of (alcohol) (drugs)][2] [or] [suffering from a mental disease or disorder] at the time the offense was committed to the extent of being incapable of [forming an intent to take away the life of another][2] [or] [knowing the dangerousness of the defendant's conduct]."

2. Use only the applicable bracketed phrase. If intoxication is in issue, use only the applicable source of intoxication.

3. Repeat bracketed and parenthetical words used in the first sentence.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Willful and deliberate first-degree murder requires "a *deliberate* intent, which by definition involves careful thought and the weighing of the consideration for and against a proposed course of action, and does not describe every intentional killing." *State v. Balderama*, 2004-NMSC-008, ¶ 29, 135 N.M. 329, 88 P.3d 845. Voluntary alcoholic and drug intoxication, *see State v. Nelson*, 1971-NMCA-152, 83 N.M. 269, 490 P.2d 1242, and mental disorders, *see State v. Padilla*, 1959-NMSC-100, 66 N.M. 289, 347 P.2d 312, may negate this intent. The defense of inability to form a "specific intent" is analogous to the defense of insanity. *State v. Holden*, 1973-NMCA-092, ¶ 8, 85 N.M. 397, 512 P.2d 970.

In *State v. Brown*, the Supreme Court recognized that depraved mind murder's "specific *mens rea* element of 'subjective knowledge'" may be negated by voluntary intoxication. 1996-NMSC-073, ¶ 27, 122 N.M. 724, 931 P.2d 69. Ultimately, the Supreme Court held that "evidence of intoxication [is] relevant to the formation of the heightened mens rea element of depraved mind murder." *Id*. More recent case law has affirmed that the defense of voluntary intoxication applies to specific-intent crimes such as first-degree murder. *State v. Arrendondo*, 2012-NMSC-013, ¶ 42, 278 P.3d 517.

The defense of voluntary intoxication is not available for felony murder, second-degree murder, or general intent crimes. *See State v. Campos*, 1996-NMSC-043, ¶¶ 39, 46, 122 N.M. 148, 921 P.2d 1266. For clarity, UJI 14-5105 NMRA (voluntary intoxication) [withdrawn], which previously limited the applicability of the voluntary intoxication defense, was withdrawn in 2019. UJI 14-5110 NMRA is used for a willful and deliberate first-degree murder where intoxication can negate the deliberate intention to take away the life of another person or for depraved mind murder where intoxication can negate the subjective knowledge that the defendant's conduct was greatly dangerous to the lives of others. For non-homicide crimes, UJI 14-5111 is used where intoxication can negate the element of intent to do a further act or achieve a further consequence.

[As amended by Supreme Court Order No.19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added language directing the jury to consider whether the defendant had the knowledge that his conduct was greatly dangerous to the lives of others, revised the Use Notes, and revised the committee commentary; in the heading, added "or to know conduct was greatly dangerous to life"; in the first paragraph, deleted "Evidence has been presented that" and added "An issue you must consider in this case is whether", after "to take away the life of another", added "[or] [subjective knowledge that the defendant's conduct was greatly dangerous to the lives of others]"; in the second paragraph, after "to take the life

of another", added "[or] [knowing that the defendant's conduct was greatly dangerous to the lives of others]", after "defendant was capable of [forming", deleted "such an intention]" and added "a deliberate intent to take away the life of another] [or] [knowing the dangerousness of the defendant's conduct]", and after "[deliberate killing]", added "[or] [an act greatly dangerous to life]"; and in Use Note 1, after "deliberate murder", added "or a depraved mind murder", after "(alcohol) (drugs)", added "[or]", and after "intent to take away the life of another]", added "[or] [knowing the dangerousness of the defendant's conduct]".

The 1997 amendment, effective January 1, 1997, rewrote the last paragraph, added the last sentence in Use Note 1, and deleted former Use Note 4 relating to giving bracketed sentences pertaining to alternative unlawful killing in the former last paragraph of the instruction.

This instruction must be given as an element of the offense for which intent could be negated, not as a separate instruction. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

Expert testimony. — When an understanding of the purported cause of a defendant's inability to form specific intent goes beyond common knowledge and experience and requires scientific knowledge, lay witnesses are not qualified to testify and expert testimony is required. *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 355.

Where the defendant claimed that organic brain damage he suffered years earlier caused him some mental disease or disorder that made him incapable of forming the requisite intent for first degree murder, expert testimony was necessary to link the defendant's injury to his inability to form the requisite intent. *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 355.

Instruction as to burden of proof. — Instruction to jury, based on a former version of this law in effect at the time of defendant's trial, that if it had a reasonable doubt as to the capacity of defendant, who claimed intoxication, to form specific intent, it must find him not guilty of first-degree murder, adequately conveyed the current law in New Mexico, which is that the state has the burden of proving defendant's capacity to form specific intent beyond a reasonable doubt. *State v. Begay,* 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

Inability to form an intention is distinct from the inability to control emotions and the inability to stop oneself from committing a crime, and unless there is evidence that the defendant could not have formed the requisite intent, this instruction is improper. *State v. Lujan,* 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114.

Diminished-capacity instruction is proper only when there is evidence that reasonably tends to show that the defendant's claimed mental disease or disorder rendered the defendant incapable of forming specific intent at the time of the offense. *State v. Balderama,* 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

Evidence warranting instruction. — Testimony from accomplices that murder defendant had consumed alcohol and methamphetamine on the evening of the murder, and expert testimony about the effect of those substances on the ability to form intent, was sufficient to warrant an instruction on intoxication. *State v. Begay,* 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

Evidence required to instruct on intoxication. — To authorize an instruction on intoxication, the record must contain some evidence showing or tending to show that defendant consumed an intoxicant and the intoxicant affected his mental state at or near the time of the homicide. The instruction does not, however, require expert evidence regarding the effect of intoxication upon defendant's ability to form a deliberate intent to kill. *State v. Privett,* 1986-NMSC-025, 104 N.M. 79, 717 P.2d 55.

Law reviews. — For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," *see* 13 N.M.L. Rev. 99 (1983).

For article, "Death in the Desert: A New Look at the Involuntary Intoxication Defense in New Mexico," see 32 N.M.L. Rev. 243 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 106 to 109.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effort of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 29 to 32, 56, 58 to 60.

14-5111. Inability to form intent to do a further act or achieve a further consequence.[1]

An issue you must consider in this case is whether the defendant was [intoxicated from the use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder]. You must determine whether or not the defendant was _____[3] and, if so, what effect this had on the defendant's ability to form the intent to [_____[4]].

[Intent to _____[4] is not an element of the crime of _____[5]. If you find the defendant not guilty of _____[6], you must proceed to determine whether or not the defendant is guilty of the crime of _____[5].]

The burden is on the state to prove beyond a reasonable doubt that the defendant was capable of forming an intention to _____[4]. If you have a reasonable

doubt as to whether the defendant was capable of forming such an intention, you must find the defendant not guilty of _____[5].

USE NOTES

1. This instruction is used for the intoxication or mental disease defense for a crime that includes an element of intent to do a further act or achieve a further consequence. It may not be used for a homicide crime. *See* UJI 14-5110 NMRA. When the defense is based on a "mental disease or disorder" and the defendant has also relied on the complete defense of insanity, this instruction should follow UJI 14-5101 NMRA. Otherwise, the instruction should follow the elements instruction for the crime or crimes with the intent element. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant was not [intoxicated from use of (alcohol) (drugs)][2] [suffering from a mental disease or disorder] at the time the offense was committed to the extent of being incapable of forming an intention to _____[4]."

2. Use only the applicable bracketed phrase. If intoxication is in issue, use only the applicable source of intoxication.

3. Repeat the bracketed and parenthetical words used in the first sentence.

4. Repeat the applicable specific intent to do a further act or achieve a further consequence from the essential elements instruction of the crime.

5. Name any other offenses or lesser included offense which does not have an intent to do a further act or achieve a further consequence and for which an instruction is being given to the jury.

6. Name the crime charged which requires specific intent.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This instruction embodies the defense of intoxication (involuntary or voluntary) or mental disease short of "complete insanity," which will negate a specific intent in a nonhomicide crime. *See, e.g., State v. Ortega*, 1968-NMCA-092, ¶ 9, 79 N.M. 707, 448 P.2d 813 ("[S]pecific intent to commit a felony or theft is an essential element of the state's case to be proved beyond a reasonable doubt."). This instruction may be used only for nonhomicide crimes containing an element of intent to do a further act or achieve a further consequence.

For clarity, UJI 14-5105 NMRA (voluntary intoxication) [withdrawn] has been withdrawn. *See* committee commentary to UJI 14-5110 NMRA. "Voluntary intoxication provides a defense to specific-intent crimes 'where the intoxication is to such a degree as would negate the possibility of the necessary intent.'" *State v. Hernandez*, 2003-NMCA-131, ¶

20, 134 N.M. 510, 79 P.3d 1118 (internal quotation marks and citation omitted) (holding that the defendant was not entitled to a voluntary intoxication instruction for robbery where no evidence was presented that the defendant was intoxicated, much less to the point that he would be unable to form the mental state necessary to commit a specific-intent crime).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, made certain stylistic changes, and revised the committee commentary; after the heading, deleted “Evidence has been presented that” and added “An issue you must consider in this case is whether”; and in Use Note 1, changed "UJI 14-5110" to "UJI 14-5101".

The 1997 amendment, effective January 1, 1997, deleted the former second paragraph relating to finding the defendant not capable of forming intent, added the last paragraph, added the last sentence in Use Note 1, added Use Note 5, redesignated former Use Note 5 as Use Note 6 and substituted "which requires specific intent" for "or lesser included offense which contains an intent to do a further act or achieve a further consequence" in that use note, and deleted former Use Note 6 relating any other offense which does not have an intent to do a further act or achieve a further consequence for which an instruction is given.

This instruction must be given as an element of the offense for which intent could be negated, not as a separate instruction. *State v. Leyba*, 2012-NMSC-037, 289 P.3d 1215.

Instruction inapplicable to general intent. — Voluntary intoxication from the use of alcohol or drugs is not a defense to the question of whether a defendant had a general criminal intent. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Voluntary intoxication instruction was not appropriate for second degree murder. — Where defendant, who had consumed a large quantify of alcohol and who was walking along a ditch with friends, encountered the victim; the friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; and at trial, defendant requested an instruction on voluntary intoxication; and defendant was acquitted of conspiring to commit first degree murder and convicted of being an accessory to second degree murder, the voluntary intoxication instruction was not appropriate in the context of accessory liability for second degree murder because second degree murder is a general intent crime. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Inconsistent defenses of intoxication and noninvolvement. — Where defendant was charged with multiple specific intent crimes that arose out of an altercation; defendant testified and denied having committed the acts underlying the charges; at the close of defendant's trial, defendant requested a jury instruction on intoxication as a defense to the specific intent crimes charged; and there was sufficient evidence that defendant was significantly intoxicated at the time of the altercation, defendant was entitled to the jury instruction on intoxication and the trial court erred in denying the instruction on the ground that defendant's trial theory of noninvolvement was inconsistent with the defense of intoxication. *State v. Dickert*, 2012-NMCA-004, 268 P.3d 515, cert. denied, 2011-NMCERT-012.

But intoxication may be shown in all cases of crimes requiring specific intent, to negate the existence of such an intent. *State v. Rayos,* 1967-NMSC-008, 77 N.M. 204, 420 P.2d 314.

Question of intent matter for jury. — Where a defendant claims that he was so intoxicated as to be unable to form the necessary intent, then the question of intent is a matter for the jury. *State v. Rayos,* 1967-NMSC-008, 77 N.M. 204, 420 P.2d 314.

Evidence supported jury instruction of intoxication. — Where defendant was charged with multiple specific intent crimes that arose out of an altercation; defendant claimed that defendant was intoxicated during the altercation; defendant testified that defendant casually consumed alcohol between 5:00 p.m. and 10:00 p.m. on the day of the altercation; defendant then went to a house party where defendant consumed between six and ten beers, when defendant left the house party, a friend drove defendant to the location of the altercation, because defendant was too drunk to drive, and during the drive, defendant drank a "good portion" of a bottle of alcohol; defendant arrived at the location of the altercation around midnight; defendant was arrested at 2:00 a.m.; and the arresting officer testified that defendant smelled of alcohol, acted belligerent and violent, and appeared to be drunk, the evidence of intoxication was substantial both in terms of degree and proximity to the time of the alleged crimes and was sufficient to justify defendant's requested instruction on intoxication. *State v. Dickert*, 2012-NMCA-004, 268 P.3d 515, cert. denied, 2011-NMCERT-012.

Diminished capacity instruction refused upon lack of evidence. — Where the record does not contain any evidence which reasonably tends to show that the defendant's claimed intoxication rendered him incapable of acting in a purposeful way, a tendered instruction on diminished capacity was properly refused. *State v. Luna,* 1980-NMSC-009, 93 N.M. 773, 606 P.2d 183.

Where a defendant was charged with aggravated battery, and there was evidence that the defendant was drinking heavily from 3:00 p.m. to 6:00 p.m. on the day of the crime and that he was "pretty drunk" at that time, but there was no evidence that the defendant was still intoxicated approximately four hours later when the crime was committed, the trial court properly denied the defendant's requested instruction on intoxication. *State v. Lovato,* 1990-NMCA-047, 110 N.M. 146, 793 P.2d 276.

Procedure tending to simplify instruction not error. — Where the jury was instructed as to each count of a particular crime and these instructions were followed by one instruction as to the specific intent required for that particular crime, after which the trial court instructed, on the basis of this instruction concerning alcohol, drugs and mental disease or disorder, applying this instruction to the specific intent crimes by naming them in the instruction, the procedure followed by the trial court tended to simplify the instructions and avoid confusion, and was not in error. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

The application of a specific intent instruction to several counts involving the same specific intent crime was not a substantial modification of this instruction. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Evidence sufficient to show intent to hold girl against will. — Evidence that the defendant bound and gagged a girl and her mother, raped the mother and stated that the girl and her mother were to take the defendant out of state was sufficient to show an intent to hold the girl for service against her will. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd in part on other grounds*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 106 to 109.

Modern status of rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Effect of voluntary drug intoxication upon criminal responsibility, 73 A.L.R.3d 98.

22 C.J.S. Criminal Law §§ 29 to 32, 56, 58 to 60.

Part D
Mistake

14-5120. Ignorance or mistake of fact.[1]

An issue in this case is whether the defendant believed that _____[2]. The burden is on the state to prove beyond a reasonable doubt that the defendant did

not have an honest and reasonable belief in the existence of those facts at the time of the alleged conduct. If you have a reasonable doubt as to whether the defendant's alleged conduct resulted from a reasonable belief in those facts, you must find the defendant not guilty.

USE NOTES

1. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not [act] [fail to act] under a mistake of fact."

2. Describe what the defendant claims he or she believed.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. —

When to give

A jury should be instructed on mistake of fact as a defense "when it negates the existence of the mental state essential to the crime charged." *State v. Contreras*, 2007-NMCA-119, ¶ 15, 142 N.M. 518, 167 P.3d 966. The jury instructions should be considered in their entirety to determine whether they adequately instruct on the requisite mental state. *Id*.

"Ordinarily, a defendant is not entitled to a specific instruction where the jury has already been adequately instructed upon the matter by other instructions." *State v. Venegas*, 1981-NMSC-047, ¶ 9, 96 N.M. 61, 628 P.2d 306 (upholding the district court's refusal to give the defendant's requested mistake of fact jury instruction because it was duplicative). *See also State v. Nozie*, 2009-NMSC-018, ¶ 36, 146 N.M. 142, 207 P.3d 1119, distinguishing *Venegas*, 1981-NMSC-047, ¶ 9 (explaining that it was unnecessary to decide whether a mistake of fact instruction, when given along with a proper instruction on the essential elements of the offense of aggravated battery upon a peace officer, would have been cumulative or superfluous because the jury had not been instructed that knowledge of the victim's status as a peace officer was an essential element of the offense). *See also* UJI 14-2211 NMRA.

Essential Element – Examples

Where the defendant was charged with aggravated battery upon a peace officer, an offense requiring knowledge of the victim's identity as a peace officer, the defendant was entitled to a mistake of fact instruction where a reasonable jury could have found that the defendant was in an intoxicated and disoriented state, and in such a state, he believed that the individual he attacked was the private security guard who had followed him from the supermarket parking lot. *Nozie*, 2009-NMSC-018, ¶¶ 34-35. (Note: UJI 14-2213 and UJI 14-2214 were amended in 2010 to be consistent with *Nozie* and add

knowledge as an essential element to the offense of aggravated battery upon a peace officer.)

In a conviction for breaking and entering, where lack of permission is an essential element, the defendant was entitled to a mistake of fact instruction because sufficient evidence was presented that the defendant believed he had permission to enter the room: the defendant was very intoxicated, he paid for a room, and it could be reasonably inferred that he used the room as one that he paid for. *Contreras*, 2007-NMCA-119, ¶¶ 9, 11-12, 18.

Fundamental Error

In *State v. Bunce*, the Supreme Court held that if the defendant had offered a correct mistake of fact instruction as a defense to embezzlement, the district court's refusal to instruct the jury would have been in error. 1993-NMSC-057, ¶ 13, 116 N.M. 284, 861 P.2d 965. The Supreme Court further concluded that the defendant's offered mistake of fact instruction was inadequate because the jury could have convicted the defendant based on solely innocent conduct and reversed the defendant's conviction on the basis of fundamental error. *Id*. ¶¶ 14-15 (explaining the defendant's offered instruction would have required the jury to find the defendant not guilty if the defendant believed only that he was owed money, but that the pertinent question was not whether the defendant believed that he was owed money, "but [instead] whether the payments [received by the defendant] were intended to apply to the balance due or whether those payments were intended for some other purpose, such as the purchase and installation of materials").

[As amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-008, effective December 31, 2016, updated the instruction to more accurately reflect the elements of ignorance or mistake of fact, revised the Use Notes, and rewrote the committee commentary; deleted "Evidence has been presented that" and added "An issue in this case is whether", after "the defendant did not", deleted "[act] [fail to act] under" and added "have", after "those facts", added "at the time of the alleged conduct", after "whether the defendant's", deleted "[action] [or] [failure to act]" and added "alleged conduct", after "resulted from a", deleted "mistaken" and added "reasonable", and after "belief", deleted "of" and added "in"; in Use Note 2, after "Describe", deleted "the facts constituting a mistake of fact" and added "what the defendant claims he or she believed".

The 2009 amendment, approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, in the committee commentary, deleted the former first sentence of

the last paragraph and added the current first sentence of the last paragraph, but did not amend the jury instruction.

The 1997 amendment, effective January 1, 1997, substituted the language beginning "The burden" for language relating to the defendant acting or failing to act under an honest and reasonable belief in the existence of the facts, added Use Note 1, redesignated former Use Note 1 as Use Note 2, and deleted former Use Note 2 relating to giving bracketed alternatives.

Sufficient evidence for mistake-of-fact instruction. — Where defendant, who was very intoxicated, checked into a motel, paid for a room, was issued a key card without a room number on it, was assigned Room 125, entered Room 121 by breaking a window, and was found by the police using Room 121 as one for which had paid, the evidence was sufficient to support an instruction on mistake of fact. *State v. Contreras*, 2007-NMCA-119, 142 N.M. 518, 167 P.3d 966.

Mistake of fact common-law defense. — At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act was a good defense. *State v. Gonzales,* 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Mistake of fact concept included in intent instruction involving mental state. — Whenever an intent instruction involving the defendant's mental state is given, the mistake of fact concept is automatically included and does not merit a separate instruction. *State v. Griscom,* 1984-NMCA-059, 101 N.M. 377, 683 P.2d 59.

Instruction given where evidence defendant believed fact that, if true, made conduct lawful. — To entitle himself to an instruction on mistake of fact, there must be some evidence that at the time in question, the defendant entertained a belief of fact that, if true, would make his conduct lawful. *State v. Gonzales,* 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Defendant was entitled to a mistake of fact instruction on criminal sexual penetration charges. — Where defendant was charged with two counts of criminal sexual penetration (CSP), and where the state presented two theories to the jury, that defendant used physical force or physical violence without the victim's consent, or in the alternative, defendant knew or had reason to know that the victim did not have the capacity to consent to the alleged acts, and where defendant proffered a jury instruction on mistake of fact which was denied by the district court judge who concluded that the unlawfulness and elements instructions were sufficient, the district court erred in denying defendant's instruction, because, based on the jury given jury instructions, the jury was required to first consider the victim's state of mind and decide whether she consented to the alleged acts, and if she did not consent, the jury was required to view the evidence from defendant's perspective to determine whether the manner in which

the victim expressed her lack of consent was so equivocal as to cause the accused to assume that the victim consented where, in fact, she did not, and when only the unlawfulness instruction is given, the jury could convict defendant of CSP even if it found that defendant honestly and reasonably but mistakenly believed that the victim consented to the use of physical force or physical violence. Defendant was entitled to an instruction on his mistake of fact defense because his mistaken belief would negate the intent necessary to convict him for using physical force or physical violence to penetrate a person who did not have the capacity to consent. *State v. Apodaca*, 2021-NMCA-001, cert. granted.

Defendant was entitled to a mistake of fact instruction on tampering with evidence charge. — Where defendant was charged with two counts of criminal sexual penetration (CSP) and tampering with evidence, and where the jury was instructed that defendant was guilty of tampering with evidence if the jury found beyond a reasonable doubt that defendant destroyed, changed, or hid blood evidence by cleaning the vehicle where the alleged CSP occurred, and where the district court, claiming that the unlawfulness and elements instructions were sufficient, denied defendant's proffered instruction on mistake of fact, the district court erred in denying defendant's instruction, because if the jury were to conclude that defendant, at the time that he cleaned the vehicle, had an honest and reasonable belief that the victim had the capacity to consent to the alleged sexual acts and did consent to defendant's actions, the jury could also reasonably conclude defendant necessarily lacked the intent necessary to convict him for tampering with evidence. *State v. Apodaca*, 2021-NMCA-001, cert. granted.

Instruction improper where evidence showed active "aiding and abetting." — In a prosecution for attempted murder, the defendant's tendered mistake-of-fact instruction, based on his "omission to act" did not correctly state the law applicable to the case, where the evidence showed that the defendant actively "aided and abetted" the crime. *State v. Johnson,* 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174.

Requested instruction on mistake of fact in bank robbery properly refused. — Where the defendant knew that another was going to rob the bank, went to the bank, not to stop the robbery, but with the purpose of preventing any shooting, a requested instruction on mistake of fact was properly refused. *State v. Roque,* 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

As in embezzlement prosecution, defendant believed he was authorized to expend public funds. — The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales,* 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Refusal of mistake-of-fact instruction in child abuse case is proper because criminal intent is not required to commit child abuse, and since the accused's mental state is not essential to the crime, mistake of fact would not be a defense thereto. *State v. Fuentes,* 1978-NMCA-028, 91 N.M. 554, 577 P.2d 452, cert. denied, 91 N.M. 610, 577 P.2d 1256.

Deficient instructions on mistake of fact. — Although the defendant offered an inadequate instruction on mistake of fact, the doctrine of fundamental error required reversal of the defendant's embezzlement conviction, since under the given instructions, the defendant could have been convicted for innocent conduct involving the application of certain payments towards the balance allegedly due him by the alleged victim. *State v. Bunce,* 1993-NMSC-057, 116 N.M. 284, 861 P.2d 965.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 93.

Mistaken belief in existence, validity or effect of divorce or separation as defense to prosecution for bigamy, 56 A.L.R.2d 915.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

Criminal offense of selling liquor to minor or permitting him to stay on licensed premises as affected by ignorance or mistake regarding his age, 12 A.L.R.3d 991.

Mistake or lack of information as to victim's age as defense to statutory rape, 46 A.L.R.5th 499.

22 C.J.S. Criminal Law § 47.

14-5121. Ignorance or mistake of law.[1]

Evidence has been presented that the defendant was [ignorant of] [mistaken about] the law which he is accused of violating. When a person voluntarily does that which the law forbids and declares to be a crime, it is no defense that he did not know that his act was unlawful or that he believed it to be lawful.

USE NOTES

1. No instruction on this subject shall be given.

Committee commentary. — The committee found no reported New Mexico decisions on the problem of the defendant who is ignorant of the law. As a general proposition, the problem of ignorance of the law arises primarily in the context of criminal intent. *See generally* Perkins, Criminal Law 923 (2d ed. 1969). Consequently, a provision is included in the general criminal intent UJI 14-141. For the exceptions to the general rule that ignorance of the law is no defense, *see generally* Perkins, supra, at 925.

ANNOTATIONS

Mistake of law was not an appropriate issue for a jury instruction. — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor and of contributing to the delinquency of a minor based on unclothed experiences with two teenage children; defendant claimed that because defendant believed that touching the children was a religious act, defendant was not guilty of committing a crime; and defendant requested an instruction that the State had the burden to provide that defendant did not act under a belief that touching the children was a religious act, the fact that defendant believed that defendant's behavior was excepted, because it was motivated by a sincere religious belief, from what would otherwise be considered criminal, was not an appropriate matter for the jury, because it was a legal, not a factual issue, and the instruction was properly rejected by the district court. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 94.

22 C.J.S. Criminal Law § 48.

Part E
Duress

14-5130. Duress; nonhomicide crimes.[1]

An issue in this case is whether the defendant was forced to _____[2] [under threats] [or] [out of necessity][3]. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under reasonable fear. A defendant acted under a reasonable fear when:

1. The defendant feared immediate great bodily harm to himself or another person if he did not commit the crime;

[2. The defendant did not find himself in a position that compelled him to violate the law due to his own recklessness;

3. The defendant's illegal conduct was directly caused by the threat of harm][4]; and

4. A reasonable person would have acted in the same way under the circumstances.

USE NOTES

1. For use when duress is a defense to any crime except homicide or a crime requiring an intent to kill. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act under duress."

2. Describe acts of defendant constituting the offense.

3. Choose applicable alternative or alternatives. *See* committee commentary.

4. Bracketed elements apply only when duress is raised as a defense to a strict liability crime.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — UJI 14-5130 has been amended to expand the conditions which must exist to accept the defense of duress in the commission of a crime. Although the New Mexico Court of Appeals stated that former UJI 14-5130 was not complete in that it failed to include the requirement that the defendant must not have had a full opportunity to avoid the danger of great bodily harm, the supreme court, on certiorari, stated that "the full opportunity to avoid the act without danger" requirement set forth in *State v. LeMarr*, 1971-NMSC-082, 83 N.M. 18, 487 P.2d 1088 was covered by the requirement that the duress must be present, imminent and impending "and of such nature as to induce a well-grounded apprehension of death or serious bodily injury." *See Esquibel v. State*, 1978-NMSC-024, ¶ 2, 91 N.M. 498, 576 P.2d 1129 *overruled on other grounds by State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

"To warrant submission to the jury of the defense of duress, a defendant must make a prima facie showing that he was in fear of immediate and great bodily harm to himself or another and that a reasonable person in his position would have acted the same way under the circumstances." *State v. Castrillo*, 1991-NMSC-096, ¶ 4, 112 N.M. 766, 819 P.2d 1324 (citing *Esquibel*, 1978-NMSC-024, ¶ 9).

UJI 14-5130 applies to all crimes, other than homicide or a crime requiring an intent to kill. *Esquibel*, 1978-NMSC-024, ¶ 8. *Esquibel* further clarified that duress is a defense to escape from a penitentiary, so that if the circumstances of the case present a prima facie case of duress, the jury should be instructed accordingly. *Id.* ¶¶ 2, 12. *See generally*, Perkins, Criminal Law 951 (2d ed. 1969), and 69 A.L.R.3d 688 (1974); 40 A.L.R.2d 908 (1955) and *United States v. Boomer*, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911, 98 S. Ct. 2250, 56 L. Ed. 2d 411 (1978).

In addition to affirmative threats by a third party, New Mexico recognizes a duress defense in circumstances of "necessity" even absent threatening conduct by another. *See State v. Rios*, 1999-NMCA-069, ¶¶ 14-15, 127 N.M. 334, 980 P.2d 1068 (collecting, with approval, authorities noting the modern rejection of common law distinctions between necessity and duress). "Duress and necessity are two forms of compulsion that may be raised as valid defenses in criminal law." *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, 124 N.M. 129, 148, 947 P.2d 86, 105, cert. granted, *judgment rev'd sub nom. New Mexico, ex rel. Ortiz v. Reed*, 524 U.S. 151 (1998). The New Mexico Supreme Court recognizes that "the distinction between duress and necessity has been blurred by modern case law and is no longer deemed decisive." *Id.* (citing *United States v. Bailey*, 444 U.S. 394, 410 (1980)). In *Bailey*, the United States Supreme Court stated that both "defenses were designed to spare a person from punishment if he acted 'under threats or conditions that a person of ordinary firmness would have been unable to resist,' or if he reasonably believed that criminal action 'was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense.'" *Bailey*, 444 U.S. at 410 (quoting and *reversing on other grounds, United States v. Bailey*, 585 F.2d 1087, 1097-98 (D.C. Cir. 1978)). The Committee Commentary uses the term "duress" to refer to this overarching concept.

A duress defense is available for strict liability crimes, but in such cases requires additional instruction on the bracketed elements outlined in UJI 14-5130 as indicated in Use Note 4. *See Castrillo*, 1991-NMSC-096, ¶¶ 11-19; *see* ¶ 13 ("Application of the concept of duress to a charge of felon in possession does not require us to develop special rules or alter the law of duress. We merely evaluate the different elements in the context of the strict liability crime. … A reasonable felon, knowing that possession of a firearm is a felony, is expected to pursue other possible avenues of relief before arming himself."). *See also Rios*, 1999-NMCA-069, ¶ 25 (recognizing duress as a defense to driving while intoxicated); *State v. Baca*, 1992-NMSC-055, ¶ 13, 114 N.M. 668, 845 P.2d 762 (recognizing duress as a defense to possession of a deadly weapon by a prisoner). Therefore, to balance the duress defense with the protective purposes of strict liability crimes, "New Mexico law establishes four elements to duress in the strict liability context: (1) the defendant acted under unlawful and imminent threat of death or serious bodily injury, (2) he did not find himself in a position that compelled him to violate the law due to his own recklessness, (3) he had no reasonable legal alternative, and (4) his illegal conduct was directly caused by the threat of harm." *Id.* (citing *Baca*, 1992-NMSC-055, ¶ 19).

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-012, effective December 31, 2017, in the instruction heading, added the Use Note "1" designation; in the introductory paragraph, in the first sentence, deleted "Evidence has been presented that", added "An issue in this case is whether", added brackets around "under threats",

and added "[or] [out of necessity][3]", and added the second and third sentences; added the Element designation "1"; added Elements 2 and 3; added the Element designation "4", and after "circumstances", deleted "[you must find the defendant not guilty]. The burden is on the state to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear."; in Use Note 1, after "except homicide", added "or", and deleted "and escape from a penitentiary", and added the last sentence; added Use Notes 3 and 4; and revised the committee commentary.

Duress not shown. — Where the evidence showed that after the defendant and the defendant's accomplice had shot the driver of a car who had been in an accident with the car driven by the defendant, the accomplice, who had the gun, hit the defendant with the gun because the accomplice believed that the defendant had ruined the accomplice's life by shooting the other driver; the accomplice forced the defendant to follow the accomplice because the defendant was confused and was going back to the scene of the shooting; the accomplice and the defendant kidnapped another person who was driving a van to escape the scene of the shooting; there was no evidence that the accomplice threatened the defendant if the defendant did not get into the van; the defendant gave directions to the driver of the van; and the defendant remained in the van after the accomplice had left the van, the evidence did not support the defense of duress and the trial court did not err in refusing the defendant's requested instruction on duress. *State v. Perry*, 2009-NMCA-052, 146 N.M. 208, 207 P.3d 1185.

Duress is a defense available in New Mexico except when the crime charged is a homicide or a crime requiring the intent to kill. *Esquibel v. State,* 1978-NMSC-024, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds*, *State v. Wilson,* 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

Act committed under compulsion not criminal. — An act committed under compulsion, such as apprehension of serious and immediate bodily harm, is involuntary and, therefore, not criminal. *State v. Lee,* 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265; *Esquibel v. State,* 1978-NMSC-024, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds*, *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

Elements of defense of duress. — From the wording of this rule, it appears that the elements of the duress defense are: (1) that the defendant committed the crime under threats; (2) that the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime; and (3) that a reasonable person would have acted in the same way under the circumstances. *State v. Duncan,* 1991-NMSC-010, 111 N.M. 354, 805 P.2d 621.

To support the defense of duress, there must be some reasonable nexus between the harm feared and the crime that was committed in response to that fear. *State v. Castrillo,* 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

To warrant submission to the jury of the defense of duress, a defendant must make a prima facie showing that he was in fear of immediate and great bodily harm to himself or

another and that a reasonable person in his position would have acted the same way under the circumstances. *State v. Castrillo,* 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

The standard of duress consists of both subjective and objective components: (1) did defendant in fact fear immediate great bodily harm?; if he did, (2) would a reasonable person have acted in the same way under the circumstances? *State v. Duncan,* 1990-NMCA-063, 113 N.M. 637, 830 P.2d 554, *aff'd*, 1991-NMSC-010, 111 N.M. 354, 805 P.2d 621.

Reasonable alternatives unavailable. — The defense of duress is available against the charge of felon in possession of a firearm only when no reasonable alternatives are available - a reasonable person would resort to possession of a firearm only when committing the offense is the only reasonable alternative. *State v. Castrillo,* 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

Duress must be present, imminent and impending. — In order to constitute a defense to a criminal charge, other than taking the life of an innocent person, the coercion or duress must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. *State v. Lee,* 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265; *Esquibel v. State,* 1978-NMSC-024, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds*, *State v. Wilson,* 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

And no duress where threatened at some prior time. — The defense of duress is not established by proof that the defendant had been threatened with violence at some prior time, if he was not under any personal constraint at the time of the actual commission of the crime charged. *State v. Lee,* 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265.

Duress need not be immediate and continuous during all of time act committed. — The force which is claimed to have compelled criminal conduct against the will of the actor need not be immediate and continuous and threaten grave danger to his person or that of another during all of the time the act is being committed. A prolonged history of beatings and threats, the last of which occurred several days before a crime of fraud, is sufficient to create a jury question on duress. *State v. Torres,* 1983-NMCA-009, 99 N.M. 345, 657 P.2d 1194.

What constitutes present, imminent and impending compulsion depends on circumstances of each case. *Esquibel v. State*, 1978-NMSC-024, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds*, *State v. Wilson,* 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175; *State v. Norush,* 1982-NMCA-034, 97 N.M. 660, 642 P.2d 1119.

Where there is substantial evidence of a prolonged history of beatings and serious threats toward a defendant by certain guards and prison personnel, a jury might conclude that the defendant, in escaping, had acted under a genuine fear of great bodily harm to himself, and the passage of two to three days between the threat and escape

did not suffice to remove the defense of duress from the consideration of the jury. *Esquibel v. State*, 1978-NMSC-024, 91 N.M. 498, 576 P.2d 1129, *overruled on other grounds*, *State v. Wilson,* 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

The character of the coercer is not an element of the defense of duress. *State v. Duncan*, 1991-NMSC-010, 111 N.M. 354, 805 P.2d 621.

District court properly refused to submit the defense of duress to the jury, where defendant, a convicted felon, could have contacted the police or simply avoided his estranged wife after she smashed his car windshield but instead he chose to arm himself by purchasing a handgun. *State v. Castrillo,* 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

Duress does not negate an essential element of the charged offense. — Where defendant was charged with aggravated DWI and careless driving, and where defendant claimed that circumstances required her to drive in violation of the law, the metropolitan court did not err in refusing defendant's tendered instruction that imbedded the absence of duress as an essential element of aggravated DWI and careless driving, because a defendant pleading duress is not attempting to disprove a requisite mental state, but defendants in that context are instead attempting to show that they ought to be excused from criminal liability because of the circumstances surrounding their intentional act. *State v. Percival*, 2017-NMCA-042.

Availability of defense to deadly weapon possession. — While the duress defense is available to the charge of possession of a deadly weapon by a prisoner, it is extremely limited. The defendant must produce sufficient evidence that he could not have reasonably avoided the criminal conduct in which he engaged, and prove that a direct causal relationship existed between the criminal action and the avoidance of the threatened harm. *State v. Baca,* 1993-NMCA-051, 115 N.M. 536, 854 P.2d 363.

Prima facie showing of duress. — A defendant seeking a duress instruction must make a prima facie showing that he was in fear of immediate and great bodily harm to himself or another and that a reasonable person in his position would have acted the same way under the circumstances. By asserting duress, the accused admits performing the crime but seeks excusal from punishment on grounds that the action was compelled by an imminent threat of serious harm to the accused or another. *State v. Ortiz*, 2020-NMSC-008, *rev'g* 2018-NMCA-018, 412 P.3d 1132.

Where defendant was charged with great bodily harm by vehicle and aggravated battery, and where, at trial, defendant alerted the district court that she intended to present the affirmative defense of duress as she was forced to flee from the victim fearing great bodily harm, the district court erred in denying defendant's instruction on duress, because defendant made a prima facie showing of duress by presenting evidence to establish that defendant was previously raped by the victim years earlier, that defendant fled the victim's home in reasonable fear of immediate bodily harm as the victim attempted to assault defendant, that the victim's continued conduct, when he

immediately followed defendant to her car and jumped into the vehicle, reasonably continued defendant's fear of immediate bodily harm, and that defendant's continued fear of immediate bodily harm remained even after the victim jumped out of defendant's vehicle and began running around to the front of the vehicle, because the victim was still in a position to re-engage in his assaultive behavior, and that an objectively reasonable person would have continued to try to get away from the victim's assaultive behavior and would have attempted to drive away from the scene to escape further assaults by the victim once he exited defendant's car. *State v. Ortiz*, 2018-NMCA-018, cert. granted.

Duress instruction requires an admission to committing the criminal act. — Where defendant was charged with four crimes, causing great bodily injury by vehicle, aggravated battery with a deadly weapon (a vehicle), leaving the scene of an accident where great bodily injury had occurred, and aggravated driving while under the influence of intoxicating liquor, two of which were related to her driving her vehicle into her ex-boyfriend, and where defendant testified at trial that she accidentally struck her ex-boyfriend with her vehicle, the district court did not err in denying defendant's request for a duress instruction because a duress instruction requires an admission to committing the criminal act, and defendant's contention that she had no intention to commit the criminal acts at issue preclude her from asserting duress as a defense to the crimes. *State v. Ortiz*, 2020-NMSC-008, *rev'g* 2018-NMCA-018, 412 P.3d 1132.

Modified duress instruction when charged with the strict liability crime of DWI. — When a defendant is charged with the strict liability crime of DWI, the elements of a duress instruction must be modified to include that the defendant did not find him or herself in a position that compelled him or her to violate the law due to his or her own recklessness, and that the defendant had no reasonable legal alternative. *State v. Ortiz*, 2018-NMCA-018, cert. granted.

Defendant failed to show that she exhausted all legal alternatives to warrant a duress instruction in her DWI trial.- Where defendant was charged with the strict liability crime of aggravated DWI, and where, at trial, defendant alerted the district court that she intended to present the affirmative defense of duress as she was forced to flee from her attacker fearing great bodily harm, and where defendant presented evidence establishing that defendant fled her attacker's home in reasonable fear of immediate bodily harm as the attacker attempted to sexually assault her, that when defendant fled the attacker's home, the attacker immediately followed defendant to her car and jumped into the vehicle, and that defendant's first thought was to get away from the assaultive behavior by driving away from the scene to escape further assaults by the attacker once he exited defendant's car, the district court did not err in refusing to give the modified duress instruction for the strict liability charge of aggravated DWI where the State presented numerous legal alternatives to driving and where the other legal alternatives were not even considered at the time of the incident or factually overcome after being raised by the State at trial. *State v. Ortiz*, 2018-NMCA-018, cert. granted.

Availability of duress defense in DWI cases. — Duress is a valid defense that is available to defendants in DWI cases, but when applying the duress defense to the

strict liability crime of DWI, New Mexico courts have adopted a narrowed articulation of the defense so as not to weaken the protectionary purpose of the strict liability crime of DWI. *State v. Wyatt B*., 2015-NMCA-110, cert. denied, 2015-NMCERT-010.

In delinquency proceedings, where child was charged with the delinquent act of DWI, and where the passenger in the child's vehicle testified that he "forced" child to drive to the store to buy more alcohol, that he raised his voice and told child to "hurry", that he "pressured" child, but never made physical contact or threatened child with physical force or a weapon, the evidence did not support child's claim that he acted under unlawful and imminent threat of death or serious bodily injury or that child feared immediate great bodily harm. The district court properly denied child's request for a jury instruction on duress. *State v. Wyatt B*., 2015-NMCA-110, cert. denied, 2015-NMCERT-010.

Not available as defense to intentional murder. — Defendant is not entitled to an instruction that would promote the misstatement of the law by suggesting that duress was available as a defense to the charge of intentional murder. *State v. Nieto,* 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 100.

Duress, necessity or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Coercion, compulsion, or duress as defense to charge of kidnapping, 69 A.L.R.4th 1005.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

22 C.J.S. Criminal Law § 44.

14-5131. Duress; no defense to homicide.[1]

The fact that the defendant may have acted under a threat of death or great bodily harm from another is no defense to an [intentional killing of][2] [attempted killing of] [assault with intent to kill] a human being.

USE NOTES

1. This instruction may also be used for an attempted homicide or assault with intent to kill.

2. Use only the applicable bracketed provisions.

[As amended by Supreme Court Order No. 12-8300-032, effective for all cases filed or pending on or after January 7, 2013.]

Committee commentary. — Duress is not a defense to an intentional homicide. *See Esquibel v. State*, 91 N.M. 498, 501, 576 P.2d 1129, 1132 (1978) ("We hold that duress is a defense available in New Mexico except when the crime charged is a homicide or a crime requiring intent to kill."); *State v. Finnell*, 101 N.M. 732, 737, 688 P.2d 769 (1984) ("We unhesitatingly adopt the rule duress is not a defense to an intentional homicide.").

[As amended by Supreme Court Order No. 12-8300-032, effective for all cases filed or pending on or after January 7, 2013.]

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-032, effective January 7, 2013, eliminated the element of homicide of an innocent person; deleted the former first sentence of the instruction which stated that evidence had been presented that defendant killed or intended to kill the victim under a threat of death or great bodily harm from a third person; after "acted under threat", added "of death or great bodily harm"; and after "assault with intent to kill", deleted "an innocent person" and added "a human being".

Duress defense traditionally refused for homicide. *State v. Finnell,* 1984-NMSC-064, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 100.

22 C.J.S. Criminal Law § 44.

14-5132. Escape from jail or penitentiary; duress defined.[1]

An issue you must consider is whether the defendant escaped from [jail][2] [the penitentiary] as a result of duress. An escape is a result of duress to avoid great bodily harm if:

1. The defendant feared [great bodily harm to (himself) (herself) (_____) (*name of other person*)][2] [(he) (she) would be sexually assaulted] if [he] [she] did not escape;

2. [The defendant did not have time to complain to the authorities;][2]

[OR]

[Under the circumstances it would have been futile for the defendant to complain to the authorities;]

3. The defendant did not use force or violence toward prison personnel or any other person during the escape;

4. The defendant [intended to report][2] [reported] immediately to the proper authorities when [he] [she] attained a position of safety from the immediate threat; and

5. A reasonable person would have acted in the same way under the circumstances.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act as a result of duress. If you have a reasonable doubt as to whether the defendant acted as a result of duress, you must find the defendant not guilty.

USE NOTES

1. For use when necessity is defense to crimes of escape or attempted escape from jail (UJI 14-2221 NMRA) or escape or attempted escape from the penitentiary (UJI 14-2222 NMRA). If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not escape as a result of duress."

2. Use only applicable alternative or alternatives.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — Generally, escape from confinement is unlawful and constitutes a crime which is punishable, unless the confinement was illegal. In recent years, the courts have begun to recognize the defense of coercion or duress when the defendant is charged with escape from confinement. In *People v. Lovercamp,* 42 Cal. App. 3d 823, 118 Cal. Rptr. 110, 69 A.L.R.3d 668 (1974), the court established the following requirements which must be proved in order to establish the defense of duress in an escape case:

specific threats of death, forcible sexual attack or substantial bodily injury in the immediate future;

no time for complaint to the authorities or complaint is futile based upon a history of futility of prior complaints;

no time to resort to the courts;

no force or violence used toward prison personnel or other innocent persons; and

the prisoner immediately reports to the proper authorities when he has attained a position of safety.

Although some cases refuse to consider sexual threats or attack as a sufficient reason for permitting the defense, the *Lovercamp* case involved female prisoners who complained of threats by lesbians that the escapees engage in sex acts with them, and the case holds that sexual attacks are equal to death or bodily harm.

In *United States v. Bailey,* 444 U.S. 394, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980), the United States Supreme Court held that in the federal courts duress or necessity is not a defense unless it is established that escape was the only reasonable alternative and there must be evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress has lost its coercive force.

In *Esquibel v. State,* 91 N.M. 498, 576 P.2d 1129 (1978), the supreme court held that UJI 14-5130 was to be given in escape cases where the claim was fear of great bodily harm.

UJI 14-5132 was adopted effective July 1, 1980, to set forth specific elements of the defense of duress when claimed in an escape case.

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, and revised the Use Notes; deleted “Evidence has been presented that” and added “An issue you must consider is whether”, after “[jail]”, added Use Note reference “2”, and after “[penitentiary]”, deleted Use Note reference “2”; in Element 1, after “(*name of other person*)]”, added Use Note reference “2”, and after “assaulted]”, deleted Use Note reference “2”; in Element 2, after the first occurrence of “authorities;]”, added Use Note reference “2”, and after the second occurrence of “authorities;]”, deleted Use Note reference “2”; in Element 4, after “[intended to report]”, added Use Note reference “2”, and after “[reported]”, deleted Use Note reference “2”; and in Use Note 2, after “applicable”, added “alternative or”.

The 1997 amendment, effective January 1, 1997, deleted "Duress" from the beginning of the rule heading and added "duress defined" in the rule heading, rewrote the introductory language, made gender neutral changes in Paragraph 1 and Paragraph 4, added the last paragraph, and added the last sentence in Use Note 1.

Instruction not applied ex post facto. — Supreme court orders as to the use of criminal jury instructions are not to be used, and are not intended to be used, to deprive defendants of a duress defense ex post facto; accordingly, the use of this instruction as the applicable instruction at a trial after 1980 for a prison escape prior to 1980 is prohibited. *State v. Norush,* 1982-NMCA-034, 97 N.M. 660, 642 P.2d 1119.

Part F
Accident and Misfortune

14-5140. Excusable homicide.

Evidence has been presented that the killing of _____ *(name of victim)* by defendant occurred by accident or misfortune

[while defendant was _____ *(describe facts),* with usual and ordinary caution and without any unlawful intent]

[upon any sudden and sufficient provocation against defendant]

[upon a sudden combat, with no undue advantage taken by defendant, nor any dangerous weapon used and the killing was not done in a cruel or unusual manner].

If you determine that the defendant killed _____ *(victim),* by accident or misfortune you must find him not guilty.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction is derived from the statute on excusable homicide, Section 30-2-5 NMSA 1978. In *State v. Bailey*, 27 N.M. 145, 198 P. 529 (1921), a prosecution for first degree murder, the court held that the district court had properly refused an instruction which simply listed all of the various elements in the statute. The court said that the instruction tendered in the language of the statute was inapplicable as an abstract statement of the law. The court goes on to say that the statute contains at least three identifiable defenses. *See also State v. Welch,* 37 N.M. 549, 555, 25 P.2d 211 (1933).

A comparison of the elements of the statute with the elements of involuntary manslaughter indicates that the excusable homicide statute merely provides that in the absence of the elements of involuntary manslaughter, the defendant cannot be found guilty of involuntary manslaughter.

The instruction on involuntary manslaughter requires the jury to find the elements of the crime before it can find the defendant guilty. In argument and through the presentation of defense witnesses or cross-examination of prosecution witnesses, the defendant will undoubtedly, where the defense is misfortune or accident, bring out the absence of the elements of involuntary manslaughter or will attempt to create a reasonable doubt. Consequently, the committee believed that no separate instruction on the defense was either necessary or proper.

ANNOTATIONS

Distinction between self-defense and accident. — The fundamental distinction between self-defense and accident is the defendant's mental state. A killing in self-defense is intentional in nature, but justified by the imminent threat to the defendant's life or limb, whereas an accidental killing is unintentional and non-negligent in nature. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, *rev'g* 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

No instruction. — Juries are not given an instruction on the defense of accident because, in the absence of criminal negligence, the defendant cannot be found guilty of involuntary manslaughter. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, *rev'g* 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 514, 519, 520.

Unintentional killing of or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 A.L.R.3d 239.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 A.L.R.4th 983.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

40 C.J.S. Homicide §§ 101 to 138.

Part G
Alibi

14-5150. Alibi.

Evidence has been presented concerning whether or not the defendant was present at the time and place of the commission of the offense charged. If, after a consideration of all the evidence, you have reasonable doubt that the defendant was present at the time the crime was committed, you must find him not guilty.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction is derived from California Jury Instructions Criminal, 4.50. The New Mexico Supreme Court has held that the

defendant's alibi is a question for the jury. *State v. Garcia,* 80 N.M. 21, 450 P.2d 621 (1969). The court has also held that it is improper to instruct that the burden is on the defendant to prove his alibi. *State v. Smith,* 21 N.M. 173, 153 P. 256 (1915). There are no New Mexico decisions holding that the jury must be instructed on the question of alibi. Analytically, an alibi is not a technical or "legal" defense but it is used to cast doubt on the proof of elements of the crime. *See, e.g.*, *People v. Williamson,* 168 Cal. App. 2d 735, 336 P.2d 214 (1959). Consequently, the committee believed that no instruction on alibi should be given since it merely comments on the evidence.

ANNOTATIONS

Instruction unnecessary. — An alibi instruction is unnecessary because an alibi is not a technical or "legal" defense, but an attempt to cast doubt on the proof of the elements of the crime, and an instruction therefor would merely comment on the evidence. *State v. McGuire,* 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Trial court did not err in denying alibi instruction. — Where defendant was charged with larceny and burglary in connection with money stolen from a home improvement store in Farmington, New Mexico, and where, at trial, defendant requested that the district court give the uniform alibi jury instruction because there was testimony that defendant was in another state when the crimes occurred, the district court did not err in denying the alibi instruction, because the district court was bound by the uniform jury instruction's Use Note which states that "[n]o instruction on this subject shall be given." Use notes are binding on district courts. The New Mexico Supreme Court has adopted and approved a categorical directive not to give UJI 14-5150 NMRA, and thus the district court had no discretion to give the instruction. *State v. Stalter*, 2023-NMCA-054, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 136.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 A.L.R.3d 547.

Propriety and prejudicial effect of "on or about" instruction where alibi evidence in federal criminal case purports to cover specific date shown by prosecution evidence, 92 A.L.R. Fed. 313.

22 C.J.S. Criminal Law §§ 40, 1202 to 1206.

Part H
Entrapment

14-5160. Entrapment; unfair inducement; not predisposed.[1]

An issue in the case is whether _____ (*name of defendant*) was the subject of unfair inducement. Unfair inducement occurs when government agents unfairly cause the commission of a crime. "Government agents" include law enforcement officers or persons acting under their direction, influence, or control.

Where a defendant was not ready and willing to commit the crime of _____[2] before first being contacted or approached by a government agent, but is induced or persuaded to commit the crime by a government agent, the defendant is a victim of unfair inducement. However, where a defendant is ready and willing to commit the crime at the time of the first contact with the government agent, the mere fact that the government agent provides what appears to be an opportunity to commit the crime is not unfair inducement.

The burden is on the state to prove to your satisfaction beyond a reasonable doubt that the defendant was not unfairly induced. If you have a reasonable doubt as to whether the defendant was unfairly induced, you must find the defendant not guilty.

USE NOTES

1. When entrapment is in issue this instruction or 14-5161 NMRA, or both instructions, may be appropriate. When evidence exists that the defendant was not predisposed to commit the crime before being contacted or approached by "government agents" and was unfairly induced to commit the crime by government agents, this instruction must be given at the defendant's request. When there is evidence that government agents exceeded the bounds of proper investigation, UJI 14-5161 also must be given at the defendant's request. UJI 14-5161 also must be given upon request when there is evidence that government agents both transferred an item to the defendant and subsequently reacquired the item from the defendant, or when there is evidence that the conduct of government agents created a substantial risk that an ordinary person would have been caused to commit the crime charged.

2. Insert the type of offense charged in the indictment, such as, "burglary," "trafficking," or "robbery."

[As amended, effective September 1, 1994; July 1, 1998; January 1, 2000; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — This instruction follows the subjective test for unfair inducement (*i.e*., entrapment). To determine whether or not a defendant has been unfairly induced under the subjective standard, the key issue for the trier of fact is the defendant's intent—the defendant's predisposition—to commit the crime charged. *See State v. Vallejos*, 1997-NMSC-040, ¶ 5, 123 N.M. 739, 945 P.2d 957; *Baca v. State*, 1987-NMSC-092, ¶ 7, 106 N.M. 338, 742 P.2d 1043. Subjective entrapment—unfair inducement where the defendant is not predisposed—occurs '"when the criminal design originates with the officials of the government, and they implant in the mind of an

innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'" *Vallejos*, 1997-NMSC-040, ¶ 5 (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)). Where the defendant is predisposed to commit the crime, the subjective entrapment defense necessarily fails.

Unlike in subjective entrapment, under the "objective entrapment" standard, the actual intent of the defendant is not directly at issue. *See* UJI 14-5161 NMRA. Further, the Supreme Court made clear in *Vallejos* that defendants may assert either subjective or objective entrapment, or both, in defense of a charge. *Vallejos*, 1997-NMSC-040, ¶ 34.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, and revised the committee commentary; deleted “Evidence has been presented that” and added “An issue in the case is whether”.

The 1999 amendment, effective for cases filed on and after January 1, 2000, rewrote this instruction substituting unfair inducement for entrapment and adding the second paragraph, relating to the defendant's predisposition to commit a crime.

Entrapment is a valid defense to a criminal prosecution. *State v. Romero,* 1968-NMCA-078, 79 N.M. 522, 445 P.2d 587.

But entrapment is not a defense of constitutional dimension, and New Mexico is not therefore bound to apply the law as announced by the United States Supreme Court. *State v. Fiechter,* 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

Focal issue is the intent or the predisposition of the defendant to commit the crime, and if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue. *State v. Fiechter,* 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

Entrapment rarely matter of law. — Under the subjective standards approved by the supreme court, it is rare indeed when entrapment may correctly be held to exist as a matter of law, and if entrapment in law is not present, then the jury must decide whether the defendant was predisposed to commit the crime. *State v. Fiechter,* 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

Entrapment as a matter of law. — Entrapment as a matter of law exists when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act or when the district court determines

that as a matter of law the police conduct exceeded the standards of proper investigation. *State v. Mendoza*, 2016-NMCA-002.

Where defendant was convicted of child solicitation by electronic device, evidence that law enforcement posted an ad in an adults-only section of a website and used an age-regressed photo of an adult to accompany the false persona of a fifteen-year-old child, who purportedly placed the ad, was insufficient to support defendant's claim that he was entrapped as a matter of law, when the evidence showed that defendant was made aware at the outset that he was conversing with a fifteen-year-old child, that defendant first introduced the subject of sex in his conversations with the fifteen-year-old child, and where the record was void of any evidence that the police practices exceeded the standards of proper investigation or were unconscionable. *State v. Mendoza*, 2016-NMCA-002.

"Subjective entrapment". — Subjective entrapment focuses on the intent or predisposition of a defendant to commit the crime. Government officials engage in subjective entrapment when they originate the criminal design and implant the disposition to commit the crime in the mind of an innocent person in order to enable prosecution. *In re Alberto L.*, 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428.

When the defendant presents evidence of unfair inducement and the defense of subjective entrapment is presented to the trier of fact, the state has the burden to persuade the trier of fact beyond a reasonable doubt that the defendant was not unfairly induced to commit the crime. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428.

Where defendant presented evidence that a government agent gave the defendant the opportunity to make a cocaine sale, but did not present any evidence concerning a lack of disposition to sell cocaine, the defendant did not meet his burden of presenting evidence on the issue of subjective entrapment on a motion to suppress all evidence as the product of an unreasonable search and seizure. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428.

Subjective approach to the defense of entrapment. — Under the subjective approach to the defense of entrapment, the focus is on the defendant's intent or predisposition to commit the crime, with the prosecution bearing the burden of proving to the fact-finder that the defendant was predisposed to commit the crime; where the prosecution proves that the defendant was predisposed to commit the crime and the police merely provided an opportunity to commit a crime that is free of police inducement and overreach, and the defendant avails himself of the opportunity, the subjective entrapment defense must fail. *State v. Schaublin*, 2015-NMCA-024, cert. denied, 2015-NMCERT-002.

Where defendant was convicted of child solicitation by electronic communication device contrary to Section 30-37-3.2 NMSA 1978, and where the state presented evidence that

the police presented an opportunity, via a “women seeking men” Craigslist posting in which the online profile immediately represented herself as a fifteen-year-old girl, and where defendant availed himself of the opportunity presented by the police when he continued to communicate with the “fifteen-year-old,” even after having learned her age, and where defendant introduced sexuality into the communications and arranged to meet the fifteen-year-old, defendant’s willingness to engage in sexually explicit conversations with the online profile, which was not the product of police overreach or improper inducement, was sufficient evidence of defendant’s predisposition to commit the crime of child solicitation by electronic device to support the jury’s rejection of his subjective entrapment defense. *State v. Schaublin*, 2015-NMCA-024, cert. denied, 2015-NMCERT-002.

"Objective entrapment". — The factual inquiry of objective entrapment is whether the actions of government officials create a substantial risk that an ordinary person who was not so predisposed would commit a crime. Because the analysis is objective, not subjective, the defendant's predisposition is not relevant. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428.

The normative inquiry of objective entrapment focuses on the standards of proper investigative conduct. Certain conduct may be sufficiently fundamentally unfair or outrageous as to violate due process principles, even though it does not create a substantial risk that an ordinary person not predisposed to commit a crime would do so. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428.

Given the purposes of the investigation to enforce the school's drug policy and to prohibit the exchange of drugs on campus, as well as the limited time in which to conduct the investigation because school was closing for winter break within the hour, the school officials did not exercise their discretion, in performing the investigation, in a manner so extreme that it violated constitutional due process principles of fundamental fairness, where the assistant principal provided one student money to buy cocaine from a second student and school officials observed the drug transaction. *In re Alberto L.,* 2002-NMCA-107, 133 N.M. 1, 57 P.3d 555, cert. denied, 132 N.M. 732, 55 P.3d 428.

Entrapment is not available to a defendant who denies committing the offense, because to invoke entrapment necessarily assumes the commission of at least some of the elements of the offense. *State v. Garcia*, 1968-NMSC-119, 79 N.M. 367, 443 P.2d 860.

No entrapment exists when the accused himself initiates the unlawful act. *State v. Romero,* 1968-NMCA-078, 79 N.M. 522, 445 P.2d 587.

And he is not entitled to defense when he was merely given opportunity to commit offense he was already willing to commit. *State v. Mordecai,* 1971-NMCA-139, 83 N.M. 208, 490 P.2d 466.

Nor when he pooled thoughts to plan criminal enterprise. — Where an addict, who was abruptly cut off from a methadone maintenance program which closed and forced to suffer a two-week waiting period before entering another, agreed with his former supplier who was acting as a police informer under a promise of immunity to engage in a marijuana transaction in order to obtain money for heroin, for which transaction he was convicted, entrapment did not exist as a matter of law, and the jury could reasonably have believed that the defendant and the informer pooled their thoughts to plan a criminal enterprise for which the defendant was predisposed. *State v. Fiechter,* 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

Officer may not initiate a criminal act, or use undue persuasion or enticement to induce another to commit a crime, when without such conduct by the officer the other would not have committed the crime. *State v. Romero,* 1968-NMCA-078, 79 N.M. 522, 445 P.2d 587.

But may act in good faith to secure evidence. — If an officer acts in good faith in the honest belief that the defendant is engaged in an unlawful business, of which the offense charged in the information is a part, and the purpose of the officer is not to induce an innocent person to commit a crime but to secure evidence upon which a guilty person can be brought to justice, the defense of entrapment is without merit. *State v. Roybal,* 1959-NMSC-032, 65 N.M. 342, 337 P.2d 406.

Defendant recruited as mere conduit. — A criminal defendant may successfully assert the defense of entrapment, either by showing lack of predisposition to commit the crime for which he is charged, or showing that the police exceeded the standards of proper investigation, as where the government is both the supplier and the purchaser of contraband and the defendant is recruited as a mere conduit. *Baca v. State,* 1987-NMSC-092, 106 N.M. 338, 742 P.2d 1043.

Procedure to be followed in submitting issue to jury. — When defendant alleges that the police exceeded the standards of proper investigation, the trial court should view the facts in the light most favorable to defendant, and if the facts do not raise an issue of misconduct of state agents, then the entrapment issue is to be submitted to the jury under this instruction. If the facts are undisputed or if the trial court, after resolving the facts, believes that they establish misconduct of state agents, the court shall dismiss the charges. If the trial court, after resolving the factual issues, does not find they establish such misconduct on the part of state agents but is of the opinion that another fact finder could so find, it shall submit the matter to the jury under instructions that place the burden of proof on the state, consistent with other defense jury instructions. *State v. Sheetz,* 1991-NMCA-149, 113 N.M. 324, 825 P.2d 614.

No instruction where insufficient evidence. — The court's refusal to instruct on entrapment, stating that it would inject a false issue into the case, was proper, where the evidence was insufficient to justify such an instruction. *State v. Garcia*, 1968-NMSC-119, 79 N.M. 367, 443 P.2d 860.

Defendant was not entitled to an entrapment instruction where there was not sufficient evidence to submit the issue of entrapment to the jury. *State v. Ontiveros,* 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672.

Ordinarily question of entrapment is one for jury to decide under proper instruction. *State v. Sainz*, 1972-NMCA-133, 84 N.M. 259, 501 P.2d 1247, *overruled on other grounds*, *State v. Fiechter,* 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

For note, "Criminal Law - New Mexico Expands the Entrapment Defense: Baca v. State," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d §§ 143 to 145.

Availability in state court of defense of entrapment where accused denies committing acts which constitute offense charged, 5 A.L.R.4th 1128.

Burden of proof as to entrapment defense - state cases, 52 A.L.R.4th 775.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 A.L.R.5th 464.

Right of criminal defendant to raise entrapment defense based on having dealt with other party who was entrapped, 15 A.L.R.5th 39.

Propriety and prejudicial effect in federal criminal case of instruction distinguishing "lawful" and "unlawful" entrapment, 39 A.L.R. Fed. 751.

22 C.J.S. Criminal Law § 45.

14-5161. Entrapment; law enforcement unconscionable methods and illegitimate purposes.[1]

An issue in this case is whether government agents exceeded the bounds of permissible law enforcement conduct. Permissible law enforcement conduct is exceeded if government agents

[supplied the _____[2] to the defendant and then obtained the same _____[2] from the defendant];

[or]

[_____ (*describe unconscionable method or illegitimate purpose*)][3];

or

[engaged in conduct which creates a substantial risk that an ordinary person would commit the crime of _____.][4]

"Government agents" include law enforcement officers or persons acting under their direction, influence, or control.

The burden is on the state to prove to your satisfaction beyond a reasonable doubt that government agents did not exceed the bounds of permissible law enforcement conduct. If you have a reasonable doubt as to whether the government agents exceeded the bounds of permissible law enforcement conduct, you must find the defendant not guilty.

USE NOTES

1. When entrapment is in issue this instruction or UJI 14-5160 NMRA, or both instructions, may be appropriate. This instruction must be given upon request in three different situations. First, it must be given when there is evidence of a circular transaction, in which government agents both transferred items to the defendant and subsequently reacquired some or all of the items from the defendant. Second, this instruction must be given when there is evidence that government agents created “a substantial risk” through their actions that an ordinary person would have been caused to commit the crime charged. Third, this instruction must be given when there is evidence that the conduct of government agents exceeded the bounds of proper investigation. If the court has decided as a matter of law the alleged conduct would be impermissible if it occurred, the jury must be instructed as provided in this instruction. If there is evidence that the defendant was not predisposed to commit the offense but was unfairly induced to do so, UJI-14-5160 NMRA also must be given upon request.

2. Describe the contraband or property transferred or sold which resulted in the charges against the defendant.

3. In *State v. Vallejos*, 1997-NMSC-040, ¶¶ 18-19, 123 N.M. 739, 945 P.2d 957, the Supreme Court gave extensive specific—but non-dispositive or exclusive— examples of unconscionable methods or illegitimate purposes and delineated the roles of the court and the jury in resolving such claims.

4. Insert the name of the felony or the felonies in the disjunctive.

[Adopted, effective September 1, 1994; as amended, effective July 1, 1998; January 1, 2000; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — In addition to subjective entrapment—where unfair inducement overbears a person not predisposed to commit the crime (UJI 14-5160 NMRA)—the Supreme Court recognizes three overlapping, but not identical, defenses of "objective entrapment," "outrageous government conduct," and "due process" violations. *State v. Vallejos*, 1997-NMSC-040, ¶ 17, n.8, 123 N.M. 739, 945 P.2d 957. However the non-subjective defense is denominated, this instruction is to be used if evidence is adduced that there was impermissible conduct by law enforcement which exceeded the standards of proper investigation or such that an ordinary person could have been ensnared.

If a defendant instead solely raises the defense of subjective entrapment, "the focal issue is 'the intent or predisposition of the defendant to commit the crime.'" *Id*. ¶ 5 (quoting *State v. Fiechter*, 1976-NMSC-006, ¶ 9, 89 N.M. 74, 547 P.2d 557. The defense of subjective entrapment is the focus of UJI 14-5160. However, a defendant may raise both the defense of subjective entrapment and objective entrapment, in which case both UJI 14-5160 NMRA and this instruction may be appropriate. *Vallejos*, 1997-NMSC-040, ¶ 34.

Whether the conduct of government agents exceeded the standards of proper investigation focuses on cultural, "shared" definitions of desirable behavior, noting that, "[t]he entrapment and outrageous government conduct doctrines involve the normative issue of whether the government *should* have used inducements in the manner that it did." *Id*. ¶ 2 n.1 (quoting affirmatively John David Buretta, *Reconfiguring the Entrapment and Outrageous Government Conduct Doctrines*, 84 Geo. L.J. 1945, 1949 (1996)).

In *Baca v. State*, 1987-NMSC-092, 106 N.M. 338, 742 P.2d 1043, the Supreme Court recognized the defense of objective entrapment—unfair inducement where the focus is on the conduct of government agents—as a means of compensating for critical shortcomings of the subjective entrapment standard. *Vallejos*, 1997-NMSC-040, ¶ 6.

In addition, the Court expressly recognized in *Vallejos* that under certain circumstances, the conduct of government agents might exceed the standards of proper investigation without creating a substantial risk that an ordinary person not ready and willing to commit a crime would be caused to commit one. *Id*. Both the methods and the purposes of law enforcement conduct must be carefully scrutinized to determine whether the tactics used "offend our notions of fundamental fairness, or are so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id*. ¶ 16 (internal quotation marks and citations omitted).

Two broad categories of impropriety vis a vis the conduct of government agents were recognized in *Vallejos*: unconscionable methods and illegitimate purposes. *Vallejos*, 1997-NMSC-040, ¶¶ 17-19 (giving “possible indicia”).

Ordinarily, the judge decides the issue of whether the alleged government conduct, if it occurred, was acceptable as a matter of law, leaving for the jury the issue of whether

this misconduct did occur. The "jury may resolve factual disputes where credibility is an issue or where there is conflicting evidence as to the events which transpired." *Vallejos*, 1997-NMSC-040, ¶ 20.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, revised the Use Notes, and revised the committee commentary; deleted “Evidence has been presented that” and added “An issue in this case is whether”; in Use Note 3, after “1997-NMSC-040,”, deleted “PP 18 to 20” and added “¶¶ 18-19”, after “Supreme Court gave”, added “extensive”, after “specific”, added “but non-dispositive or exclusive”, after “illegitimate purposes”, added “and delineated the roles of the court and the jury in resolving such claims”, and deleted the remainder of the use note, which related to specific examples of unconscionable methods and illegitimate purposes; and added Use Note 4.

The 1999 amendment, effective for cases filed on and after January 1, 2000, rewrote this instruction, delineating the elements of impermissible conduct of government agents.

Entrapment as a matter of law. — Entrapment as a matter of law exists when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act or when the district court determines that as a matter of law the police conduct exceeded the standards of proper investigation. *State v. Mendoza*, 2016-NMCA-002.

Where defendant was convicted of child solicitation by electronic device, evidence that law enforcement posted an ad in an adults-only section of a website and used an age-regressed photo of an adult to accompany the false persona of a fifteen-year-old child, who purportedly placed the ad, was insufficient to support defendant’s claim that he was entrapped as a matter of law, when the evidence showed that defendant was made aware at the outset that he was conversing with a fifteen-year-old child, that defendant first introduced the subject of sex in his conversations with the fifteen-year-old child, and where the record was void of any evidence that the police practices exceeded the standards of proper investigation or were unconscionable. *State v. Mendoza*, 2016-NMCA-002.

Part I
Justifiable Homicide

14-5170. Justifiable homicide; defense of habitation.[1]

An issue you must consider in this case is whether the defendant killed _____ (*name of victim*) while attempting to prevent a _____[2] in the defendant's _____.[3]

A killing in defense of _____[3] is justified if:

1. The _____[3] was being used as the defendant's dwelling; and

2. It appeared to the defendant that the commission of _____[2] was immediately at hand and that it was necessary to kill the intruder to prevent the commission of _____;[2] and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not kill in defense of _____.[3] If you have a reasonable doubt as to whether the defendant killed in defense of _____,[3] you must find the defendant not guilty.

USE NOTES

1. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not kill in defense of _____."[3]

2. Describe the violent felony being committed or attempted. The essential elements of the violent felony being committed or attempted must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.

3. Identify the place where the killing occurred.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) (1963) provides that a homicide is justifiable when committed in the necessary defense of property. Although this statute has been a part of New Mexico law since 1907, the New Mexico appellate courts have never interpreted the statute broadly. *See also* commentary to UJI 14-5171 NMRA. The New Mexico courts have consistently held, not always referring to the statute, that one cannot defend his property, other than his habitation, from a mere trespass to the extent of killing the aggressor. *State v. Couch*, 1946-NMSC-047, ¶ 30, 52 N.M. 127, 193 P.2d 405 ("The . . . rule limiting the amount of force which may be

lawfully used in defense of other property does not apply in defense of habitation."); *State v. Martinez*, 1929-NMSC-040, ¶ 9, 34 N.M. 112, 278 P. 210 (explaining that "[e]ven if deceased was a trespasser [on the defendant's land], taking his life for that reason was not justifiable"); *State v. McCracken*, 1917-NMSC-029, ¶ 8, 22 N.M. 588, 166 P. 1174 (addressing trespass on open lands and holding that the defendant did not have the right to use deadly force "to enable him to enter upon the land and construct his fence," even if he did legally possess the land). *See generally*, Annot., 25 A.L.R. 508, 525 (1923).

The "pure" defense of property, i.e., not including a defense against force and violence, is always limited to reasonable force under the circumstances. *See, e.g., State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122; *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152. In *Brown*, the Court held that resort to the use of a firearm to prevent a mere trespass or an unlawful act not amounting to a felony was unreasonable as a matter of law.

In defense of habitation, although the defendant is limited by the elements of imminent threat, apparent necessity and reasonableness, he does not have to fear for the life of himself or others or necessarily believe that great bodily harm will come to himself or others. An apparent necessity to kill to prevent a violent felony is required. *Couch*, 1946-NMSC-014; *see also State v. Boyett*, 2008-NMSC-030, ¶ 21, 144 N.M. 184, 185 P.3d 355 (requiring felony, in defense of habitation context, to be a violent felony); *State v. Cardenas*, 2016-NMCA-042, ¶ 6, 380 P.3d 866 (same); *State v. Baxendale*, 2016-NMCA-048, ¶ 15, 370 P.3d 813 (same); Perkins, Criminal Law 1024 (2d ed. 1969).

This instruction requires a determination of what constitutes a habitation, if the structure is not obviously a home or apartment, under the particular facts of the case. *See generally*, Annot., 25 A.L.R. 508, 521 (1923). *See also* commentary to UJI 14-1631.

If the property being defended is not the defendant's habitation, he may kill the intruder only if the interference with the property is accompanied by a threat of death or great bodily harm. *See* LaFave & Scott, Criminal Law 399 (1972). In such a case, UJI 14-5171 (Justifiable homicide; self-defense) must be given.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020, in Use Note 2, after "Describe the violent felony being committed or attempted.", added the remainder of the Use Note.

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, made certain stylistic

changes, revised the Use Notes, and revised the committee commentary; after the heading, deleted “Evidence has been presented that” and added “An issue you must consider in this case is whether”; in the Use Notes, in Use Note 2, after “Describe the”, added “violent”.

The 1997 amendment, effective January 1, 1997, rewrote the last paragraph, added Use Note 1, and redesignated former Use Notes 1 and 2 as Use Notes 2 and 3.

Criteria for asserting the defense. — A person has a right to defend his or her residence not only when an intruder is already inside the home, but also when an intruder is outside the home, and attempting to enter to commit a felony involving violence against the occupants of the home. *State v. Boyett*, 2008-NMSC-030, 144 N.M. 184, 185 P.3d 355.

Evidence supported giving an instruction on the defense of habitation. — An instruction on defense of habitation is warranted if some evidence reasonably tended to show that the defendant killed the victim to prevent the victim from forcing entry into the defendant’s home and committing a violent felony once inside, and therefore defendant, charged with voluntary manslaughter, was entitled to an instruction on the defense of habitation when the evidence showed that the decedent was trying to break through the defendant’s front door at the time of the shooting which supported an assertion by defendant that he reasonably believed that a violent felony was about to occur in his home. *State v. Cardenas*, 2016-NMCA-042, cert. denied.

Instruction not supported by evidence. — The defendant's request for "defense of habitation" instruction was properly denied since the evidence showed that the confrontation between the defendant and the victims took place in a parking lot in front of the defendant's apartment, and the victims were running across the street away from the defendant when he fired at them. *State v. Niewiadowski*, 1995-NMCA-083, 120 N.M. 361, 901 P.2d 779.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 174 to 179.

41 C.J.S. Homicide § 109.

14-5171. Justifiable homicide; self defense.[1]

An issue you must consider in this case is whether the defendant killed _____ (*name of victim*) in self defense.

The killing is in self defense if:

1. There was an appearance of immediate danger of death or great bodily harm[2] to the defendant as a result of _____[3];[4] and

2. The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed _____ (*name of victim*) because of that fear; and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense you must find the defendant not guilty.

USE NOTES

1. For use when the self defense theory is based on necessary defense of self against any unlawful action; reasonable grounds to believe a design exists to commit a felony; or reasonable grounds to believe a design exists to do some great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

3. Describe unlawful act, felony, or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. UJI 14-5190 NMRA (assailed person need not retreat), must be given if at issue. If at issue, UJI 14-5191 NMRA (self defense; limitations; aggressor) and UJI 14-5191A NMRA (first aggressor; exceptions to the limitation on self defense) should also be given.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — New Mexico cases recognize deadly force may be justified to defend against an actual or apparent and imminent threat of harm in three basic circumstances: self defense, defense of another, and defense of habitation. *See generally State v. Rudolfo*, 2008-NMSC-036, ¶ 27, 144 N.M. 305, 187 P.3d 170 (self defense); *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537 (defense of another); *State v. Cardenas*, 2016-NMCA-042, 380 P.3d 866 (defense of habitation); UJI 14-5170 NMRA (defense of habitation), UJI 14-5171 NMRA (self defense); UJI 14-

5172 NMRA (defense of another); *see also* NMSA 1978, § 30-2-7 (1963) (recognizing defenses).

The threat of harm required for self-defense or defense of another is that of death or great bodily harm. *See, e.g., Rudolfo*, 2008-NMSC-036, ¶ 17. For defense of habitation, the justification for use of deadly force arises from a threat of a violent felony by an intruder into the home. *Cardenas*, 2016-NMCA-042, ¶ 18. These defenses provide "a complete justification to homicide" based on "the reasonable belief in the necessity of using deadly force." *State v. Coffin*, 1999-NMSC-038, ¶ 12, 128 N.M. 192, 991 P.2d 477; *see also* NMSA 1978, § 30-2-8 (1963) (requiring that the defendant be acquitted when the killing is justified or excused). "It is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for . . . defense, should be able to take reasonable steps to defend [against] harm." Wayne R. LaFave, *Substantive Criminal Law*, § 10.4(a) (3rd ed.; Oct. 2017 Update). Deadly force may not be used solely to defend one's personal property. *See State v. Baxendale*, 2016-NMCA-048, ¶ 12, 370 P.3d 813 (quoting *Brown v. Martinez*, 1961-NMSC-040, ¶ 22, 68 N.M. 271, 361 P.2d 152).

Under New Mexico law, the danger involved may be either real or apparent based on the circumstances known to or perceived by the accused. *Rudolfo*, 2008-NMSC-036, ¶ 17; *State v. Chesher*, 1916-NMSC-083, 22 N.M. 319, 161 P. 1108. The apparent danger must be imminent. *Jernigan*, 2006-NMSC-003, ¶ 5; *Territory v. Baker*, 1887-NMSC-021, ¶ 11, 4 N.M. 236, 13 P. 30. The defendant must also believe in the existence of the apparent danger. *State v. Parks*, 1919-NMSC-041, ¶ 6, 25 N.M. 395, 183 P. 433. New Mexico uses a hybrid test, judging the appearance of actual danger and actual apprehension subjectively while judging whether the use of deadly force was reasonable objectively. *Coffin*, 1999-NMSC-038, ¶ 15.

The instruction does not require a separate instruction in the event the victim is an innocent bystander, i.e., a person who did not instigate the action which required the defense. Under New Mexico law, if the circumstances would justify the use of deadly force in self-defense, the defendant is not guilty of homicide if he unintentionally kills a third person. *State v. Sherwood*, 1935-NMSC-082, 39 N.M. 518, 50 P.2d 968. *See generally*, LaFave, *supra*, § 10.4(g); Annot., 55 A.L.R.3d 620 (1974).

The third element of "a reasonable man under the same circumstances as the defendant," includes the principle that the defendant's right to use force may end when the danger ceases or the adversary is disabled. *See, e.g., State v. Benally*, 2001-NMSC-033, ¶ 43, 131 N.M. 258, 34 P.3d 1134 (Baca, J., dissenting).

Self-defense is not available to an aggressor unless the aggressor first tries to stop the fight or unless it is necessary to defend against an unreasonable force. *See State v. Chavez*, 1983-NMSC-037, ¶ 6, 99 N.M. 609, 661 P.2d 887; UJI 14-5191 NMRA; UJI 5191A NMRA.

Homicide requires as an element that the killing was unlawful. *Benally*¸ 2001-NMSC-033, ¶ 10. Because self defense, defense of another, or defense of habitation justifies the defendant's actions, when established they negate the element of unlawfulness. *State v. Armijo*, 1999-NMCA-087, ¶ 14, 127 N.M. 594, 985 P.2d 764. Once sufficient evidence has been presented to create a jury issue on the elements of one of these defenses, unlawfulness becomes an element the state must prove, and therefore it bears the burden to disprove these defenses beyond a reasonable doubt. *State v. Parish*, 1994-NMSC-073, ¶¶ 11, 13, 118 N.M. 39, 878 P.2d 988.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, made certain stylistic changes, revised the Use Notes, and revised the committee commentary; deleted "Evidence has been presented that" and added "An issue you must consider in this case is whether"; and added Use Note 4.

The 1997 amendment, effective January 1, 1997, substituted "in self defense" for "while defending himself" in the first paragraph, rewrote the last paragraph, and added the last sentence in Use Note 1.

Cross references. — For justifiable homicide by citizen, *see* Sections 30-2-7 and 30-2-8 NMSA 1978.

Compiler's notes. — The reference to Laws 1907, ch. 36, § 1, in the next-to-last sentence in the first paragraph of the committee commentary, seems incorrect, as that section was compiled as 40-24-4, 1953 Comp., which defined "first degree murder." Laws 1907, ch. 36, § 11, which was compiled as 40-24-11, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1, dealt with justifiable homicide.

Laws 1853-54, p. 86, referred to in the next-to-last sentence in the first paragraph of the committee commentary, was compiled as 40-24-13, 1953 Comp., before being repealed by Laws 1963, ch. 303, § 30-1.

Imperfect self-defense. — Imperfect self-defense, which occurs when a person uses excessive force while otherwise lawfully engaging in self-defense, is not a true affirmative defense for which a defendant is entitled to an instruction. Any issues raised by a claim of imperfect self-defense are properly addressed if the jury is instructed on voluntary manslaughter. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Distinction between self-defense and accident. — The fundamental distinction between self-defense and accident is the defendant's mental state. A killing in self-

defense is intentional in nature, but justified by the imminent threat to the defendant's life or limb, whereas an accidental killing is unintentional and non-negligent in nature. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, *rev'g* 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

Instruction on justifiable homicide improper. — Where a car pulled up into defendant's driveway blaring loud music, revving its engine, and "peeling out"; defendant did not recognize the car; defendant went outside the house and loudly questioned the car's occupants, but received no response; defendant returned to the house, retrieved a pistol, and put the pistol in defendant's front pocket; defendant went back outside the house and walked toward the car with defendant's hand resting on the handle of the pistol; the car began to drive away and then stopped at the end of the driveway; the victim exited the car, walked toward defendant, and hit defendant in the face; defendant pulled the pistol out of the pocket and shot the victim; and defendant testified that defendant did not intend to shoot the victim and that the pistol discharged accidentally and reflexively as a result of being hit by the victim, defendant was not entitled to an instruction on justifiable homicide because the evidence established that the shooting was accidental, rather than intentional, and that the force used by defendant was excessive and unjustified under the circumstances. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, *rev'g* 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

Test to determine when instruction is appropriate. — For a defendant to be entitled to a self-defense instruction, there need be only enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense. *State v. Rudolfo*, 2008-NMSC-036, 144 N.M. 305, 187 P.3d 170.

When a defendant is entitled to a self-defense instruction. — For a defendant to be entitled to a self-defense instruction, there need be only enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense. If any reasonable minds could differ, the instruction should be given. *State v. Lucero*, 2015-NMCA-040.

Where defendant killed victim with a machete and was convicted of voluntary manslaughter and aggravated battery, the district court erred in denying defendant's requested self-defense instruction where evidence was presented at trial that victim first attacked defendant with the machete and struck defendant in the head, that a significant gash on defendant's forehead was consistent with defendant's testimony that he had been struck with the machete, that when victim pointed a gun at defendant, defendant was afraid for his life and was defending himself when he injured victim; the evidence presented at trial did not conclusively establish the sequence of events that resulted in victim's injuries, nor could it be determined to what extent defendant and victim may have struggled against one another, what type of struggle took place, or how long the struggle may have lasted; the evidence was sufficient to raise a reasonable doubt in the mind of a juror that defendant lawfully acted in self-defense. *State v. Lucero*, 2015-NMCA-040.

Self-defense instruction is required whenever defendant presents evidence sufficient to allow reasonable minds to differ as to all elements of the defense. *State v. Branchal,* 1984-NMCA-063, 101 N.M. 498, 684 P.2d 1163; *State v. Gallegos,* 1986-NMCA-004, 104 N.M. 247, 719 P.2d 1268; *State v. Lopez,* 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727.

Self-defense and "unlawfulness" of manslaughter. — It is the element of unlawfulness that is negated by self-defense. When self-defense or the defense of others is at issue, the absence of such justification is an element of the offense. The instruction, derived from UJI 14-220, was simply erroneous in neglecting to instruct on the element of unlawfulness after the self-defense evidence had been introduced. *State v. Parish,* 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

Instruction given where evidence defendant, acting reasonably, killed out of fear. — In order to warrant an instruction on self-defense, the evidence must support a finding by the jury that the defendant was put in fear by an apparent danger of immediate death or great bodily harm, that the killing resulted from that fear, and that the defendant acted as a reasonable person would act in those circumstances. *State v. Chavez,* 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

Self-defense and provocation of manslaughter. — The instructions on provocation and self-defense are each accurate and unambiguous; however, as applied to the facts of this case they are confusing. The defendant suggests that it is impossible to determine whether the jury understood that the claim of self-defense supersedes the element of provocation. Any confusion could have been eliminated if the jury had been told that it was required to find the defendant not guilty if his conduct met the definition of self-defense, regardless of if same conduct could be found to be provocation. In the future, when a case presents similar circumstances, juries should be so instructed. *State v. Parish,* 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

But not where defendant provoked encounter leading to use of deadly force. — A defendant who provokes an encounter, as a result of which he finds it necessary to use deadly force to defend himself, is guilty of an unlawful homicide and cannot avail himself of the claim that he was acting in self-defense. *State v. Chavez,* 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

Such as where defendant entered store with weapon, prepared to commit armed robbery. — Where the defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez,* 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

No instruction where no evidence of killing out of fear. — Where defendant was convicted of second-degree murder for stabbing and bludgeoning the victim; defendant maintained that the victim stabbed defendant before defendant stabbed the victim;

police officers testified that defendant's knife wound could have been defensive in nature; defendant's relative testified that defendant stated that the victim stabbed defendant; the autopsy of the victim showed that the victim suffered multiple stab wounds and multiple blunt force injuries caused by a rock that defendant used to bludgeon the victim; and there was no evidence in the record that fear motivated defendant to kill the victim, the trial court did not err in refusing to instruct the jury on self-defense. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, ***aff'g*** 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

An instruction on self-defense should not be given when there is no evidence that the defendant killed out of fear. *State v. Montano,* 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887.

Where the evidence showed that defendant had a wound on one hand and that the victim had seven stab wounds to the chest, one stab wound to the right cheek, and one stab wound to the back and numerous, severe blunt-force injuries to the face and cranium, the instruction was properly refused because the evidence supplied no basis for inferring that defendant's attack on the victim was objectively reasonable. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

An instruction was properly refused because of insufficient evidence, where the victim fired his gun first, but there was neither evidence, nor an inference, that the defendant was put in fear by the apparent danger. *State v. Najar,* 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169.

The trial court properly refused a self-defense instruction where defendant's violent actions (inflicting 54 stab wounds upon the victim and crushing his skull) suggested conduct fueled by hatred or by rage or other strong emotion, but not by fear. *State v. Lopez,* 2000-NMSC-003, 128 N.M. 410, 993 P.2d 727.

Error in rejecting instruction. — Trial court erred in rejecting defendant's tendered self-defense instruction, where defendant introduced sufficient evidence of her ex-husband's past brutality and imminent danger upon which reasonable minds could disagree as to whether she, in fact, feared for her safety and killed him as a result of that fear. *State v. Gallegos,* 1986-NMCA-004, 104 N.M. 247, 719 P.2d 1268.

Jury instruction proper. *State v. Gibbins,* 1990-NMCA-013, 110 N.M. 408, 796 P.2d 1104; *State v. Coffin,* 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Evidence sufficient to raise reasonable doubt as to self-defense. *State v. Montano,* 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887.

Jury free to reject defendant's self-defense theory. — Where defendant was convicted of depraved mind murder based on evidence that he fired a gun at a vehicle occupied by four people, striking and killing an eight-year-old child sitting in the

backseat of the vehicle, the jury was free to reject defendant's self-defense theory where the evidence established that no one in the vehicle had a weapon of any kind, that detectives testified that apart from defendant's gun and casings, no other weapons or casings were found, and no gun residue was found in the vehicle. Furthermore, even if the jury believed defendant was put in fear by the apparent danger presented by the opposing group, the jury could have found that defendant's act of firing his handgun into a vehicle occupied by unarmed people was excessive and unreasonable under the circumstances. *State v. Candelaria*, 2019-NMSC-004.

No conflict with instruction limiting self-defense. — The instruction limiting self-defense when the defendant is the aggressor (UJI 14-5191) does not conflict with this instruction or the instruction on absence of need of an assailed person to retreat (UJI 14-5190). *State v. Velasquez,* 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

Evidence insufficient to raise issue of self-defense. — To support an instruction on ordinary self-defense, there must be evidence that defendant was put in fear by an apparent danger of immediate death or great bodily harm, that the killing resulted from that fear, and that defendant acted as a reasonable person would act under those circumstances. *State v. Mantelli,* 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Evidence that the defendant had been instructed by his employer to recover a stolen truck containing contraband from those who had it (the decedents) or to kill them if they refused under a threat of death from the employer did not raise an issue of self-defense, which requires the preservation of oneself from attack; no sudden quarrel, heat of passion or sufficient provocation was shown, and thus the trial court did not err in refusing to give instructions on manslaughter. *State v. Ramirez,* 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds*, *City of Albuquerque v. Haywood,* 1998-NMCA-029, 124 N.M. 661, 954 P.2d 93, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Jury instruction on self-defense adequate. *State v. Vigil*, 1990-NMSC-066, 110 N.M. 254, 794 P.2d 728.

Burden of proof on state. — It is settled law in New Mexico that the defendant does not have the burden of proving the killing was an exercise of self-defense. *State v. Parish,* 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

Law reviews. — For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 139, 140, 519.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of evidence of battered child syndrome on issue of self-defense, 22 A.L.R.5th 787.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

41 C.J.S. Homicide §§ 113 to 138.

14-5172. Justifiable homicide; defense of another.[1]

An issue you must consider in this case is whether the defendant killed _____ (*name of victim*) while defending another.

The killing was in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm[2] to _____[3] as a result of _____[4]; and

2. The defendant believed that _____[3] was in immediate danger of death or great bodily harm from _____ (*name of victim*) and killed _____ (*name of victim*) to prevent the death or great bodily harm; and

3. The apparent danger to _____[3] would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of another. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE NOTES

1. For use when the defense theory is based on a reasonable ground to believe a design exists to commit a felony; a reasonable ground to believe a design exists to do great bodily harm; or a defense of spouse or other member of the family, a necessary defense against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, “The defendant did not act in defense of another.”

2. The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

3. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

4. Describe the unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

[As amended, effective October 1, 1985; January 1, 1997; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — This instruction is a combination of the defense of spouse or family against any unlawful action, NMSA 1978, Section 30-2-7(A) (1963), and the defense of another against a felony or act that would result in some great personal injury to the other person, Section 30-2-7(B). *See e.g., State v. Beal*, 1951-NMSC-055, 55 N.M. 382, 234 P.2d 331. For a discussion of the general rules that apply to defense of another, *see* the commentary to UJI 14-5171.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, made certain stylistic changes, revised the Use Notes, and revised the committee commentary; deleted "Evidence has been presented that" and added "An issue you must consider in this case is whether"; in the Use Notes, added a new Use Note 2 and redesignated former Use Notes 2 and 3 as Use Notes 3 and 4, respectively, and deleted former Use Note 4, which stated "The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.".

The 1997 amendment, effective January 1, 1997, rewrote the last paragraph, and added the last sentence in Use Note 1.

Cross references. — For justifiable homicide by citizen, *see* Sections 30-2-7 and 30-2-8 NMSA 1978.

A multiple assailant jury instruction must include all assailants in the description of the imminent threat of death or great bodily harm. *State v. Sandoval*, 2011-NMSC-022, 150 N.M. 224, 258 P.3d 1016, *rev'g* 2010-NMCA-025, 147 N.M. 465, 225 P.3d 795.

Multiple assailant instruction failed to include all assailants. — Where defendant had an altercation with the victim and two friends of the victim at a convenience store; when defendant and defendant's friend drove away in an Acura, the victim and the

victim's friends chased defendant in an Explorer and forced the Acura off the road; the driver and the front seat passenger of the Explorer, who had a gun, approached the Acura; the victim opened the rear door and partially exited the Explorer while reaching for something inside the Explorer; the victim was shot and killed when defendant and the passenger of the Explorer began shooting; the trial court issued a self-defense instruction as to the killing of the victim which stated that the killing was in self-defense if there was an appearance of immediate danger of death or great bodily harm to defendant as a result of the confrontation with the driver and the front seat passenger; and the instruction did not state or require the jury to find that the victim was an aggressor, the instruction was a misstatement of the law regarding multiple assailants because it allowed the jury to find that defendant acted in self-defense against an innocent bystander as a result of defendant's confrontation with the named assailants, but because there was sufficient evidence for the jury to find that defendant acted in self-defense without considering the victim as an assailant, the instruction did not constitute fundamental error. *State v. Sandoval*, 2011-NMSC-022, 150 N.M. 224, 258 P.3d 1016, *rev'g* 2010-NMCA-025, 147 N.M. 465, 225 P.3d 795.

Self defense involving multiple assailants. — Where defendant had an altercation with the victim and two friends of the victim at a convenience store; when defendant and defendant's girlfriend drove away from the store in an Acura, the victim and the victim's friends chased the Acura in an Explorer; the Explorer pulled up to and forced the Acura off the road; the front seat passenger, who had a gun, jumped out of the Explorer and approached the Acura; the driver of the Explorer ran to the front of the Acura while grabbing at the driver's side; the victim opened the rear door and partially exited the Explorer while reaching for something inside the Explorer; defendant, who had a gun, exited the Acura and approached the Explorer; the driver and the passenger of the Explorer got into an angry altercation with defendant; the passenger of the Explorer pointed a gun at defendant; the passenger and defendant began shooting; the driver was wounded and the passenger and the victim were killed; defendant's girlfriend, who was driving the Acura, testified that the girlfriend was afraid for defendant's life and the girlfriend's own life based on an apparent threat from all three of the occupants of the Explorer; the trial court instructed the jury that the killing of the victim was in self defense if there was an appearance of immediate danger of death or great bodily harm as a result of defendant's confrontation with the driver and the front seat passenger of the Explorer; and the instruction did not include the participation and complicity of the victim as part of the confrontation and immediate threat to defendant and defendant's girlfriend, the instruction did not direct the jury to consider defendant's theory of defense regarding the victim, relieved the state's burden of disproving self-defense beyond a reasonable doubt, misstated the law regarding an attack by multiple defendants, and constituted fundamental error. *State v. Sandoval*, 2010-NMCA-025, 147 N.M. 465, 225 P.3d 795, *rev'd*, 2011-NMSC-022, 150 N.M. 224, 258 P.3d 1016.

Instruction on mistake of fact need not be given. — Since an honest and reasonable mistaken belief fits within the justifiable homicide instruction, an instruction on mistake of fact would duplicate the justifiable homicide instruction and need not be given. *State v. Venegas,* 1981-NMSC-047, 96 N.M. 61, 628 P.2d 306.

Substantial evidence that actions based upon reasonable belief essential to justifiable homicide defense. — It is essential to the justifiable homicide defense that there be substantial evidence that the defendant's actions were based upon a reasonable belief that such action was necessary to save the life or prevent great bodily harm to another. *State v. Venegas,* 1981-NMSC-047, 96 N.M. 61, 628 P.2d 306.

The trial court's refusal to give the requested deadly force defense-of-others instruction was proper since there was no evidence tending to satisfy the reasonableness prong of the deadly force test. *State v. Duarte,* 1996-NMCA-038, 121 N.M. 553, 915 P.2d 309.

And such a belief may rest upon apparent danger and need not be supported by actual danger. *State v. Venegas,* 1981-NMSC-047, 96 N.M. 61, 628 P.2d 306.

Defense to involuntary manslaughter. — Defendant charged with involuntary homicide could raise the theory of self-defense and was entitled to a jury instruction on her theory of defense of another. *State v. Gallegos,* 2001-NMCA-021, 130 N.M. 221, 22 P.3d 689, cert. denied, 130 N.M. 459, 26 P.3d 103.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 170 to 173, 519.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

41 C.J.S. Homicide § 108.

14-5173. Justifiable homicide; public officer or employee.[1]

An issue you must consider in this case is whether the killing of _____ (*name of victim*) was justifiable homicide by a public officer or employee.

The killing was justifiable homicide by a public officer or public employee if

1. At the time of the killing, the defendant was a public officer or employee;

2. The killing was committed while the defendant was performing the defendant's duties as a public officer or employee;

3. The killing was committed while[2]

[overcoming the actual resistance of _____ (*name of victim*) to the execution of _____][3]; or

[overcoming the actual resistance of _____ (*name of victim*) to the discharge of _____][4]; or

[retaking [_____ (*name of victim*)] [a person], who had committed _____[5] (*name of felony*) and who had [been rescued][6] [escaped]]; or

[arresting [_____ (*name of victim*)] [a person], who had committed _____[5] (*name of felony*) and was fleeing from justice]; or

[attempting to prevent the escape from _____[7] by [_____ (*name of victim*)] [a person] who had committed _____[5] (*name of felony*)];

4. The defendant believed that _____ (*name of victim*) posed a threat of death or great bodily harm to the defendant or another person; and

5. Under the totality of the circumstances, a reasonable officer would have acted as the defendant did. The following factors may be considered in evaluating the totality of the circumstances:

[the officer's training]

[the officer's experience]

[the officer's expertise]

[the feasibility of giving a warning prior to using deadly force]

[the feasibility of taking lesser measures than using deadly force]

[(other factor(s))][8]

The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE NOTES

1. For use when the defense is based on NMSA 1978, Section 30-2-6 (1989). If this instruction is given, add to the essential elements instruction for the offense charged, "The killing was not justifiable homicide by a public officer or employee."

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Unless the parties stipulate or the court deems naming the felony unfairly prejudicial, insert the name of the felony. If named, the essential elements of the felony

must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.

6. Use only the applicable parenthetical alternative.

7. Describe circumstances and place of lawful custody or confinement.

8. Element 5 is not an exhaustive list. Use any applicable bracketed phrase or insert description of factor(s).

[As amended, effective October 1, 1985; January 1, 1997; April 25, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-036, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* NMSA 1978, § 30-2-6 (1989).

Since before statehood, New Mexico case law has interpreted this justifiable homicide defense to apply to only law enforcement officers with arrest authority. *See Territory v. Gutierrez*, 1905-NMSC-018, 13 N.M. 138, 79 P. 716; *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62; *State v. Gabaldon*, 1939-NMSC-060, 43 N.M. 525, 96 P.2d 293; *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033; *Cordova v. City of Albuquerque*, 1974-NMCA-101, 86 N.M. 697, 526 P.2d 1290; and *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272. However, the committee did not find it necessary to limit the application to law enforcement officers with arrest authority.

In considering the reasonableness of the officer's actions, the jury should consider whether it was feasible for the officer to give a warning prior to using deadly force and whether the officer should have done so. NMSA 1978, § 30-2-6(B).

This instruction has been modified to meet the requirements of NMSA 1978, Section 30-2-6(B) as amended in 1989 and recommended in *Mantelli*, 2002-NMCA-033, ¶ 48. The parenthetical options to name either the victim or another person reflect the possibility that the person justifiably killed in retaking, arresting, or preventing the escape of a felon may not be the felon.

Additionally, *Mantelli* goes beyond simply referring to the statutory requirement for "probable cause" by the defendant and incorporates an objectively reasonable standard which takes into account "the expertise and experience of the officer." *Id. Mantelli* calls for a jury to consider the totality of the circumstances to decide if a defendant's use of deadly force was reasonable and constituted a justifiable homicide. *Id.* ¶ 31. In considering the totality of the circumstances, *Mantelli* suggests consideration of the

officer's training and experience, but this is not a complete list of circumstances that may be considered in assessing objective reasonableness. *See id*. ¶¶ 31, 36-37, 48.

The totality of the circumstances has been defined by other jurisdictions as "the whole picture." *See State v. Williams*, 99-1006, p. 10 (La. App. 5 Cir. 3/30/99); 735 So. 2d 62; *State v. Hebert*, 95-1645, p. 7 (La. App. 3 Cir. 6/5/96); 676 So. 2d 692; *State v. Duhe*, 2012-2677, p. 8 (La. 12/10/13); 130 So. 3d 880; *State v. Perez-Jungo*, 329 P.3d 391, 397 (Idaho 2014). Furthermore, the totality of the circumstances includes "both the quantity and quality of the information known by the police" at the time of the event. *Reed v. Pompeo*, 810 S.E.2d 66, 73 (W. Va. 2018) (internal quotation marks and citation omitted).

Element 5 provides a nonexclusive, open-ended list of specific factors frequently relevant to determining reasonableness under a totality of the circumstances. Based on the evidence adduced by either party, the trial court can approve including a wide variety of other relevant factors as long as they are not unfairly prejudicial to either party. The committee believes the trial court is in the best position to decide whether to avoid the jury's giving undue weight to additional factors by leaving them to the argument of counsel.

This instruction also omits the statutory grounds of justifiable homicide when acting in obedience to a judgment of the court. The committee believed that the provision applied exclusively to death penalty judgments and would never be prosecuted. A special bracketed sentence would have to be drafted to follow Use Note 3 if the defense of acting in obedience to a judgment is raised.

[As amended by Supreme Court Order No. 22-8300-036, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-036, effective December 31, 2022, revised the defendant's state of mind element of the instruction, added an inexhaustive list of factors for the jury to consider when determining the totality of the circumstances under which a reasonable officer would have acted, made certain technical changes, revised the Use Notes, and completely rewrote the committee commentary; deleted former Element 4 and added new Elements 4 and 5; in the Use Note 5, deleted "Insert" and added "Unless the parties stipulate or the court deems naming the felony unfairly prejudicial, insert", and after "name of the felony", deleted "The" and added "If named, the"; and added Use Note 8.

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective after December 31, 2020, in Use Note 5, after "Insert the name of the felony.", added the remainder of the Use Note.

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, made certain stylistic changes; deleted “Evidence has been presented that” and added “An issue you must consider in this case is whether”; and in Element 2, after “was performing”, deleted “[his] [her]” and added “the defendant’s”.

The 2003 amendment, effective April 15, 2003, added "by a public officer or employee" to the end of the first sentence; rewrote the second sentence which read, "a homicide is justifiable if it is committed while"; inserted the first two numbered sentences and the fourth numbered sentence; inserted "the killing was committed while" to the present third numbered sentence, and rearranged the use notes.

The 1997 amendment, effective January 1, 1997, rewrote the introductory language, rewrote the last paragraph, and deleted "Part One" following "30-2-6" and added the last sentence in Use Note 1.

In prosecution under Section 30-2-6 NMSA 1978 the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry. *State v. Mantelli,* 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 134 to 136.

40 C.J.S. Homicide §§ 104 to 107.

14-5174. Justifiable homicide; aiding public official.[1]

An issue you must consider in this case is whether the killing of _____ (*name of victim*) was justifiable homicide by a person aiding a public officer or public employee if:

1. At the time of the killing, _____ (*name of defendant*) was acting at the command and in the aid or assistance of a public officer or employee;

2. The killing was committed while[2]

[overcoming the actual resistance of _____ (*victim*) to the execution of _____][3]

[overcoming the actual resistance of _____ (*victim*) to the discharge of _____][4]

[retaking [_____ (*name of victim*)] [a person], who committed _____[6] and who had [been rescued][5] [escaped]]

[arresting [_____ (*name of victim*)] [a person] who committed _____[6] and was fleeing from justice]

[attempting to prevent the escape from _____[7] of [_____ (*name of victim*)] [a person], who committed _____];[6] and

3. A reasonable person in the same circumstances as _____ (*name of defendant*) would have reasonably believed that _____ (*name of victim*) posed a threat of death or great bodily harm to _____ (*name of public officer or public employee*) or another person.

The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE NOTES

1. For use when the defense is based on Section 30-2-6 NMSA 1978. If this instruction is given, add to the essential elements instruction for the offense charged, "The killing was not justifiable homicide by a person aiding a public officer or employee."

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Use only applicable parenthetical alternative.

6. Insert name of felony. The essential elements of the felony must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words "the defendant" in UJI 14-140 NMRA.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — The elements of this instruction are similar to the instruction for a killing by the public officer. *See* commentary to UJI 14-5173. As a matter of law, the person who aids a public officer stands in the same position as the officer and has no more rights than the officer. *State v. Gabaldon,* 43 N.M. 525, 533, 96

P.2d 293 (1939). For example, the person fleeing must actually be a felon. The defendant is not entitled to kill a misdemeanant even if under the circumstances the latter appears to be a felon. *State v. Gabaldon*, *supra*. In this respect, this defense is unlike the defense of another, where the defendant may act on an appearance of danger to another. *See* commentary to UJI 14-5172. For the reasons for omitting the defense of "acting in obedience to a judgment of the court," *see* commentary to UJI 14-5173.

Section 30-2-7C NMSA 1978 contains a justifiable homicide provision for one who, on his own initiative, kills a fleeing felon or kills to suppress a riot or to keep and preserve the peace. The committee was of the opinion that, not only was the defense rarely available, it had an uncertain common-law basis. *See generally* Perkins, Criminal Law 989 (2d ed. 1969). The committee further believed that the public policy behind the statute should be the subject of legislative review. For these reasons, no instruction interpreting the statute was included. A special instruction must be drafted under the guidelines of the General Use Note in the event that the evidence justifies giving an instruction based on the statute.

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, in Use Note 1, after “homicide by a”, added “person aiding a”; and in Use Note 6, after “Insert name of felony.”, added the remainder of the Use Note.

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, deleted “Evidence has been presented that” and added “An issue you must consider in this case is whether”.

The 2003 amendment, effective April 15, 2003, added element 3 and restructured the instruction.

Instruction on mistake of fact need not be given. — Since an honest and reasonable mistaken belief fits within the justifiable homicide instruction, an instruction on mistake of fact would duplicate the justifiable homicide instruction and need not be given. *State v. Venegas*, 1981-NMSC-047, 96 N.M. 61, 628 P.2d 306.

In prosecution under Section 30-2-6 NMSA 1978 the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry. *State v. Mantelli,* 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 C.J.S. Homicide § 104.

Part J
Nonhomicidal Defense of Self, Others or Property

14-5180. Defense of property.[1]

An issue in this case is whether the defendant acted while defending property.

The defendant acted in defense of property if

1. The _____[2] was property [of the defendant][3] [in the defendant's lawful possession[4]];

2. It appeared to the defendant that _____ (*name of victim*) was about to _____ (*describe act*) and that it was necessary to _____ (*describe defendant's action*) in order to stop _____ (*name of victim*);

3. The defendant used an amount of force that the defendant believed was reasonable and necessary to defend the property;

4. A reasonable person in the same circumstances as the defendant would have acted as the defendant did;

[5. The force used by the defendant would not ordinarily create a substantial risk of death or great bodily harm.][5]

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of _____[2]. If you have a reasonable doubt as to whether the defendant acted in defense of property, you must find the defendant not guilty.

USE NOTES

1. For use when defense is based on defense of property against either felony act or nonfelony act. UJI 14-5170 NMRA is used for justifiable homicide; defense of habitation. UJI 14-5171 NMRA (Justifiable homicide; self-defense) is used if unlawful interference with property is accompanied by threat of death or great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of property."

2. Describe the property.

3. Use only the applicable bracketed language.

4. If there is a question of fact as to whether the defendant was in lawful possession of the property, an appropriate instruction must be prepared.

5. Use bracketed material only if the defendant's action resulted in death or great bodily harm. If the bracketed material is used, the definition of "great bodily harm," UJI 14-131 NMRA, must also be given if not already given.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — In *State v. Couch*, 1946-NMSC-047, ¶ 31, 52 N.M. 127, 193 P.2d 405, the New Mexico Supreme Court recognized that "one cannot defend property, other than his habitation, to the extent of killing an aggressor for the mere purpose of preventing a trespass." (Internal quotation marks and citation omitted.) *See also Brown v. Martinez*, 1961-NMSC-040, ¶¶ 21-28, 68 N.M. 271, 361 P.2d 152. A person may use reasonable force to protect the person's property from unlawful interference by another, however, no force is reasonable if a request to cease the unlawful interference would have been sufficient. *See* Wayne LaFave, 2 Subst. Crim. L. § 10.6(a), *Defense of property: Generally*, (2d ed., Oct. 2017 update).

A deadly force may be used in protection of a person's real or personal property if the interference with the property is accompanied by a deadly force. In such a case, a self-defense instruction must be given.

This instruction adopts the Model Penal Code position which permits the use of force to protect property in the defendant's lawful possession. *See* LaFave, *supra*.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, and revised the committee commentary; deleted "Evidence has been presented that" and added "An issue in this case is whether"; and in Element 2, after "*defendant's action*", deleted "*and name victim*".

The 1997 amendment, effective January 1, 1997, made gender neutral changes in Paragraphs 1, 2, and 3, rewrote the last paragraph, and added the last sentence in Use Note 1.

Defendant as aggressor. — The defendant was not entitled to a defense of property instruction where the defendant chased down and confronted repo men at gun point for the purpose of recovering his truck, not to prevent a theft. *State v. Emmons*, 2007-NMCA-082, 141 N.M. 875, 161 P.3d 920, cert. denied, 2007-NMCERT-006.

Exercise of legal right, no matter how offensive, is not adequate provocation to reduce homicide from murder to manslaughter. *State v. Marquez,* 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

Instruction properly not given. — An individual may not use force to defend real or personal property where the attempt to dispossess is lawful. *State v. Trammel,* 1983-NMSC-095, 100 N.M. 479, 672 P.2d 652.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Homicide or assault in defense of habitation or property, 25 A.L.R. 508, 32 A.L.R. 1541, 34 A.L.R. 1488.

14-5181. Self defense; nondeadly force by defendant.[1]

An issue in this case is whether the defendant acted in self defense.

The defendant acted in self defense if

1. There was an appearance of immediate danger of bodily harm to the defendant as a result of _____[2]; and

2. The defendant was in fact put in fear of immediate bodily harm and _____[3] because of that fear; and

3. The defendant used an amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and

[4. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; and][4]

5. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTES

1. For use in cases when the self-defense theory is based on necessary defense of self against any unlawful action; reasonable grounds to believe a design exists to commit an unlawful act; or reasonable grounds to believe a design exists to do some bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. Describe unlawful act which would result in some bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

3. Describe the act of defendant, *e.g.*, "struck Richard Roe," "choked Richard Roe."

4. Use bracketed material only if the defendant's action resulted in death or great bodily harm. If bracketed material is used, the definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) and (B) (1963) provide that a person may act in self-defense if necessarily or reasonably defending himself or herself against any unlawful action, felony, or great personal injury. "A defendant is not entitled to a self-defense instruction unless it is justified by sufficient evidence on every element of self-defense." *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170. Sufficient evidence means "enough evidence to raise a reasonable doubt in the mind of a juror about whether the defendant lawfully acted in self-defense." *Id*. ¶ 27. "If any reasonable minds could differ, the instruction should be given." *Id*. It is never reasonable to use deadly force against a nondeadly attack. A person may use a deadly force in self-defense only if defending himself or herself against an attack which creates a substantial risk of death or great bodily harm. *See* commentary to UJI 14-5171 NMRA; 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4 (3d ed. Oct. 2017 update).

Element 4 is bracketed and is to be used only if there is evidence that the defendant used a force which ordinarily would not cause death or great bodily harm but which resulted in death or great bodily harm. A person is not guilty of homicide if he or she unintentionally kills a third person in self-defense. *State v. Sherwood*, 1935-NMSC-082, 39 N.M. 518, 50 P.2d 968. *See generally*, Annot., 55 A.L.R.3d 620 (1974).

NMSA 1978, Sections 30-3-2 (Aggravated assault) and 30-3-4 (Battery) (1963) provide that an aggravated assault or a battery must be unlawful. The term "unlawfully" means simply that the action is not authorized by law. *State v. Mascarenas*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d 1285. The words "without excuse or justification" have been held to be "clearly equivalent to the word unlawful." *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250. *Cf. State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988 (once the defense raised a self-defense theory, unlawfulness became a necessary element of voluntary manslaughter). The phrase "without excuse or justification" identifies a defense theory, *i.e.*, even if all of the acts constituting the crime were committed, the act is otherwise excusable or justifiable. *Cf*. NMSA 1978, § 30-2-8 (1963); *State v. Woods*, 1971-NMCA-026, ¶ 4, 82 N.M. 449, 483 P.2d 504 (noting that unlawfulness includes "without legal excuse or justification").

Unlawfulness is generally present in an assault or a battery if the other elements are proved. *Cf. Parish*, 1994-NMSC-073, ¶ 5 ("It seems tautological to stress that unlawfulness is an essential aspect of any crime. Indeed, it is not an element which must be proven unless a defense which justifies the homicide is raised."). It is, of

course, possible for the state to proceed with a prosecution when the defense is based on some theory of lawfulness other than self-defense. *See, e.g., Perkins, Criminal Law* 987 (2d ed. 1969). In the event that the case does go to the jury and there is evidence to establish the defense of a lawful assault, an instruction must be drafted for that purpose. The burden on the defendant is only to produce evidence which raises a reasonable doubt in the minds of the jurors. *See State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193. The burden is then on the state to prove beyond a reasonable doubt that the assault or battery was not justifiable. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The committee revised this instruction in 1981 to resolve the problem presented in *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, where the defendant is charged with a nondeadly assault. Previously, the instruction failed to adequately address the use of nondeadly force against the threat of nondeadly force.

In 2018, the committee removed the use note language limiting nondeadly force instructions to “nonhomicide” cases, recognizing that the instruction is intended to be used in some cases where death does result. *See State v. Romero*, 2005-NMCA-060, ¶ 13, 137 N.M. 456, 112 P.3d 1113 (recognizing the non-deadly force instruction is appropriate in some homicide cases where "[t]he force used by defendant ordinarily would not create a substantial risk of death or great bodily harm," but where death nevertheless results); *State v. Gallegos*, 2001-NMCA-021, ¶ 12, 130 N.M. 221, 22 P.3d 689 ("It is entirely plausible that a person could act intentionally in self-defense and at the same time achieve an unintended result.").

See UJI 14-5185 NMRA and UJI 14-5186 NMRA if the victim is a law enforcement officer.

[As amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, revised the Use Notes, and revised the committee commentary; deleted “Evidence has been presented that” and added “An issue in this case is whether”; and in Use Note 1, after “For use in”, deleted “nonhomicide”.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, in Paragraph 4 of the Use Notes, added "NMRA"; in the committee commentary, changed the style of the statutory references, deleted the former last paragraph, and added the current last paragraph, but did not amend the jury instruction.

The 1997 amendment, effective January 1, 1997, substituted "in self defense" for "while defending himself" in the first paragraph, deleted "by the apparent danger" following "fear" in Paragraph 2, substituted "that the defendant" for "which he" in Paragraph 3, rewrote the last paragraph, and added the last sentence in Use Note 1.

Instruction on nondeadly force self defense improper. — Where a car pulled up into defendant's driveway blaring loud music, revving its engine, and "peeling out"; defendant did not recognize the car; defendant went outside the house and loudly questioned the car's occupants, but received no response; defendant returned to the house, retrieved a pistol, and put the pistol in defendant's front pocket; defendant went back outside the house and walked toward the car with defendant's hand resting on the handle of the pistol; the car began to drive away and then stopped at the end of the driveway; the victim exited the car, walked toward defendant, and hit defendant in the face; defendant pulled the pistol out of the pocket and shot the victim; and defendant testified that defendant did not intend to shoot the victim and that the pistol discharged accidentally and reflexively as a result of being hit by the victim, defendant was not entitled to an instruction regarding nondeadly force self-defense because the evidence established that the shooting was accidental, rather that intentional, and that the force used by defendant was excessive and unjustified under the circumstances. *State v. Lucero*, 2010-NMSC-011, 147 N.M. 747, 228 P.3d 1167, *rev'g* 2008-NMCA-158, 145 N.M. 273, 196 P.3d 974.

Claim of self defense by a child. — When a child asserts self-defense as a justification for a battery against his parent, the jury must first determine whether the parent's use of physical discipline was reasonable under the circumstances. *State v. Denzel B.*, 2008-NMCA-118, 144 N.M. 746, 192 P.3d 260.

Where a child asserts self-defense as a justification for battery against his parent, the self-defense instruction must be limited to account for the parental privilege to discipline the child. *State v. Denzel B.*, 2008-NMCA-118, 144 N.M. 746, 192 P.3d 260.

The appropriate standard of analysis for determining whether an officer's use of force was excessive, sufficient to justify a limited claim of self-defense, is an objective view based on a reasonable officer's opinion about the use of force, and not on the officer's subjective view. *State v. Ellis*, 2008-NMSC-032, 144 N.M. 253, 186 P.3d 245, *rev'g* 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775.

Defendant did not have a right of self-defense against a police officer. — Where a police officer stopped the defendant for a seat belt violation; the defendant got out of his truck, refused to sign the citation, grabbed his license from the officer, threatened the officer, and refused to obey the officer's instructions; the officer pulled his weapon and pointed it at the defendant; the defendant returned to his truck and left the scene; the officer pursued the defendant; the defendant stopped his truck, got out of the truck, grabbed a tire iron and approached the officer's vehicle, the evidence showed that the officer used only reasonable and necessary force to protect himself in the first encounter and the defendant was not entitled to a self-defense instruction. *State v. Ellis*,

2008-NMSC-032, 144 N.M. 253, 186 P.3d 245, *rev'g* 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775.

Defendant as aggressor. — The defendant was not entitled to a self-defense instruction where the defendant chased down and confronted repo men at gun point who had reposed the defendant's truck from his yard. *State v. Emmons*, 2007-NMCA-082, 141 N.M. 875, 161 P.3d 920, cert. denied, 2007-NMCERT-006.

Reference to self-defense is required in elements instructions. — If a self-defense instruction is given, a reference to self-defense must also be included in the elements instruction for the charged crime. *State v. Ellis*, 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775, cert. granted, 2007-NMCERT-003.

Self-defense against a police officer. — In the context of self-defense against a police officer, the general self-defense instruction must be modified to reflect the understanding that an individual may use self-defense against a police officer only in the limited circumstances when excessive force is used by the police officer to affect an arrest. *State v. Ellis*, 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775, cert. granted, 2007-NMCERT-003.

Evidence supported claim of self-defense against a police officer. — Where defendant was stopped by a police officer in an isolated area for a seat-belt violation; the officer gave defendant out-of-control and contradictory instructions and allegedly pointed his gun at defendant who was not under arrest and who had not threatened the officer; defendant became frightened and believed that he was going to be shot and told the officer that he was going to a place where there were witnesses; defendant left the scene of the initial stop and the officer pursued him; the officer allegedly pointed his gun at defendant and sprayed him twice with pepper spray at the second stop; defendant, who was not attempting to escape, then took a tire tool to protect himself which he subsequently discarded, the evidence supported defendant's claim of self-defense and the district court's failure to properly instruct the jury with respect to self-defense was not harmless error. *State v. Ellis*, 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775, cert. granted, 2007-NMCERT-003.

Where cause of death did not exclude accidental death caused by the exercise of nondeadly force, the nondeadly force self defense instruction should be given. *State v. Romero*, 2005-NMCA-060, 137 N.M. 456, 112 P.3d 1113, cert. granted, 2005-NMCERT-005.

Construed with UJI 14-131. — A defendant's requested instruction that "the force used by the defendant would not ordinarily create a substantial risk of death or great bodily harm," was inappropriate where there was no evidence that the victim suffered great bodily harm. *State v. Lara,* 1990-NMCA-075, 110 N.M. 507, 797 P.2d 296.

Burden of proof. — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-

defense and defense of another, the instructions thereon were erroneous because they did not clearly place the burden of proof on the state. *State v. Acosta,* 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Failure to include self-defense in elements instruction. — It is not fundamental error for judges not to follow the use note for the self-defense instruction when no one alerts them to the need to insert the sentence about the defendant not acting in self defense in the elements instruction when an otherwise correct self-defense instruction is given. *State v. Armijo,* 1999-NMCA-087, 127 N.M. 594, 985 P.2d 764.

Unlawfulness required. — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another. *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Defendant had a limited right of self-defense against a police officer, and was entitled to an instruction on that limited right. The instruction concerning a resistance to an unlawful arrest did not cover the defendant's right to self-defense since it went only to the arrest and did not cover the right to defend against excessive force, whether or not the arrest was unlawful. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

One has a right to defend oneself from a police officer, whether the attempted arrest is lawful or unlawful; this right, however, is limited, so that one may defend oneself against excessive use of force by the officer, but one may not resort to self-defense when the officer is using necessary force to effect an arrest. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Self-defense against a peace officer is sharply limited because officers are permitted to use necessary force to effect an arrest. *State v. Hernandez*, 2004-NMCA-045, 135 N.M. 416, 89 P.3d 88, cert. denied, 2004-NMCERT-004.

Where instruction crosses line into suggesting that officer's perception of emergency can eliminate a person's right to defend his bodily integrity, the jury instruction is erroneous. *State v. Hernandez*, 2004-NMCA-045, 135 N.M. 416, 89 P.3d 88, cert. denied, 2004-NMCERT-004.

Defense to child abuse. — In a prosecution for child abuse when a defendant is charged with having intentionally or negligently endangered the life or health of a child, if the evidence otherwise supports a claim that a defendant's acts were carried out in self-defense, the defendant is entitled to have the jury consider his claim of self-defense as justification for his acts. *State v. Ungarten*, 1993-NMCA-073, 115 N.M. 607, 856 P.2d 569.

Fear of police may be element of self-defense. — The defendant's fear of the police was relevant to whether he believed he was in immediate danger of bodily harm - an element of self-defense. *State v. Brown*, 1977-NMCA-125, 91 N.M. 320, 573 P.2d 675, cert. quashed, 91 N.M. 349, 573 P.2d 1204, cert. denied, 436 U.S. 928, 98 S. Ct. 2826, 56 L. Ed. 2d 772 (1978).

But a refusal of the requested instruction was not error because the requested instruction did not limit the defendant's right of self-defense to situations where the officer used excessive force, but would have given the defendant an unlimited right of self-defense, and, thus, it was an incorrect statement of the law. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Self defense by trespasser. — First, the jury must decide whether the victim was entitled to use potentially deadly force against defendant; if not justified, then the defendant had right to stand his ground and the state must prove the defendant did not act in self-defense. *State v. Southworth*, 2002-NMCA-091, 132 N.M. 615, 52 P.3d 987, cert. denied, 132 N.M. 551, 52 P.3d 411.

Defendant must prove error in refusal to give instruction. — It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Exercise of legal right, no matter how offensive, is not adequate provocation to reduce homicide from murder to manslaughter. *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

Instruction to inform jury of elements of self-defense claim. — Use of this instruction does not instruct the jury as a matter of law that the victim suffered great bodily harm; it informs the jury of the elements of the self-defense claim that it must decide. *State v. Mills*, 1980-NMCA-005, 94 N.M. 17, 606 P.2d 1111, cert. denied, 94 N.M. 628, 614 P.2d 545.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 69, 71, 80; 75B Am. Jur. 2d Trial § 1259.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

6A C.J.S. Assault and Battery § 128.

14-5182. Defense of another; nondeadly force by defendant.[1]

An issue in this case is whether the defendant acted while defending another person.

The defendant acted in defense of another if

1. There was an appearance of immediate danger of bodily harm to _____[2] as a result of _____[3]; and

2. The defendant believed that _____[2] was in immediate danger of bodily harm from _____ (*name of victim*) and _____[4] to prevent the bodily harm; and

3. The defendant used an amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and

[4. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; and][5]

5. The apparent danger to _____[2] would have caused a reasonable person in the same circumstances to act as defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of _____[2]. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE NOTES

1. For use in cases when the defense theory is based on (1) a reasonable ground to believe a design exists to commit an unlawful act or do bodily harm against another; or (2) a defense of spouse or other family member against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of _____."[2]

2. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

3. Describe unlawful act which would result in some bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. Describe the act of defendant, *e.g.*, "struck Richard Roe," "choked Richard Roe."

5. Use bracketed material only if the defendant's action resulted in death or great bodily harm. The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) (1963) provides that a person may necessarily defend a member of the person's family against any unlawful action. Section 30-2-7(B) provides that a person may reasonably defend another when there is reasonable ground to believe a design exists to commit a felony or to do some great personal injury against another. Since it is never reasonable or necessary to use a deadly force to repel a nondeadly attack, these subsections are redundant. A person may use a deadly force in defending another only if the person reasonably believes the other person to be in danger of death or great bodily harm. *See* committee commentary to UJI 14-5172 NMRA.

Element 4 is bracketed and is to be used only if there is evidence that the defendant used a force which ordinarily would not cause death or great bodily harm, but which resulted in death or great bodily harm.

The 1981 amendments to UJI 14-5172 NMRA were made to clarify this instruction and to make this instruction consistent with other instructions on self-defense.

See also committee commentary to UJI 14-5181 NMRA.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes, revised the Use Notes, and revised the committee commentary; deleted “Evidence has been presented that” and added “An issue in this case is whether”; and in Use Note 1, after “For use in”, deleted “nonhomicide”, after “based upon”, added “on (1)”, after “unlawful act”, deleted “a reasonable ground to believe a design exists to” and added “or”, after “bodily harm”, added “against another”, after the next occurrence of “or”, added “(2)”, after “spouse or other”, added “family”, and after “member”, deleted “of the family, a necessary defense”.

The 1997 amendment, effective January 1, 1997, substituted "that the defendant" for "which he" in Paragraph 3, rewrote the last paragraph, and added the last sentence in Use Note 1.

Burden of proof. — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instructions thereon were erroneous because they did not clearly place the burden of proof on the state. *State v. Acosta,* 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Unlawfulness required. — In a prosecution for aggravated battery with a deadly weapon, where there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another. *State v. Acosta,* 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery § 63; 75B Am. Jur. 2d Trial § 1259.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

6A C.J.S. Assault and Battery § 128.

14-5183. Self defense; deadly force by defendant.[1]

An issue in this case is whether the defendant acted in self defense.

The defendant acted in self defense if

1. There was an appearance of immediate danger of death or great bodily harm[2] to the defendant as a result of _____[3]; and

2. The defendant was in fact put in fear of immediate death or great bodily harm and _____[4] because of that fear; and

3. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTES

1. For use in nonhomicide cases when the self-defense theory is based on necessary defense of self against any unlawful action; reasonable grounds to believe a design exists to commit a felony; or reasonable grounds to believe a design exists to do some great bodily harm. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. The definition of "great bodily harm," UJI 14-131 NMRA, must be given if not already given.

3. Describe unlawful act, felony, or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in context of the evidence.

4. Describe act of defendant, *e.g.*, "struck Richard Roe," "choked Richard Roe."

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes; deleted “Evidence has been presented that” and added “An issue in this case is whether”.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-028, effective September 16, 2009, made non-substantive changes.

The 1997 amendment, effective January 1, 1997, substituted "in self defense" for "while defending himself" in the first paragraph, deleted "by the apparent danger" following "fear" in Paragraph 2, rewrote the last paragraph, and added the last sentence in Use Note 1.

Self-defense. — Where defendant was charged with aggravated battery with a deadly weapon, and the trial court denied her requested elements instruction, the failure to include the negation of self-defense in the essential elements instruction was reversible error. *State v. Griffin,* 2002-NMCA-051, 132 N.M. 195, 46 P.3d 102, cert. denied, 132 N.M. 193, 46 P.3d 100.

Self-defense instruction not warranted. — Where defendant’s child and the victim were going through a divorce; the defendant’s child told defendant that the defendant’s child and the victim had agreed to reconcile; defendant replied that defendant would "fix it" for the defendant’s child; defendant went to a motel and accosted the victim; a fight broke out between defendant and the victim; the victim pleaded for an opportunity to talk; defendant was armed with a large knife; defendant, covered in blood and holding a knife, opened the door of the motel room and told defendant’s child to "take your kids, you’re free"; witnesses testified that they saw defendant in the room, with blood on defendant’s hands, the victim was lying on the floor, and defendant was shouting obscenities and kicking the victim’s body; defendant told the police that defendant killed the victim and that defendant had told defendant’s child that defendant intended to kill the victim; the police found two knives covered with blood that came from a knife block in the home where defendant lived; the victim’s body had thirty-one stab wounds; defendant wrote letters while in custody in which defendant admitted attacking and killing the victim without remorse; the victim was unarmed; and there was no evidence

that the victim had previously threatened defendant, defendant was not entitled to a self-defense instruction. *State v. Guerra,* 2012-NMSC-014, 278 P.3d 1031.

14-5184. Defense of another; deadly force by defendant.[1]

An issue in this case is whether the defendant acted while defending another person.

The defendant acted in defense of another if

1. There was an appearance of immediate danger of death or great bodily harm[2] to _____[3] as a result of _____[4]; and

2. The defendant believed that _____[3] was in immediate danger of death or great bodily harm from _____ (*name of victim*) and _____[5] to prevent the death or great bodily harm; and

3. The apparent danger to _____[3] would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in defense of _____[3]. If you have a reasonable doubt as to whether the defendant acted in defense of another, you must find the defendant not guilty.

USE NOTES

1. For use in nonhomicide cases when the defense theory is based on a reasonable ground to believe a design exists to commit a felony; a reasonable ground to believe a design exists to do great bodily harm; or a defense of spouse or other member of the family, a necessary defense against any unlawful action. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in defense of _____"[3].

2. The definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

3. Give the name of the person in apparent danger, if known, and the relationship to defendant, if any. More than one person may be included.

4. Describe the unlawful act, felony, or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

5. Describe the act of defendant, *e.g*. "struck Richard Roe," "choked Richard Roe."

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes; deleted “Evidence has been presented that” and added “An issue in this case is whether”.

The 1997 amendment, effective January 1, 1997, rewrote the last paragraph, and added the last sentence in Use Note 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

14-5185. Self defense against excessive force by a peace officer; nondeadly force by defendant.[1]

An issue in this case is whether the defendant acted in self defense. A defendant has the right to defend himself or herself against an officer only if the officer used excessive force.

Excessive force means greater force than reasonably necessary.

The defendant acted in self defense if

1. The officer used greater force than reasonable and necessary by _____[2]; and

2. There was an appearance of immediate danger of bodily harm to the defendant as a result of _____[3]; and

3. The defendant was in fact put in fear of immediate bodily harm and _____[4] because of that fear; and

4. The defendant used an amount of force that the defendant believed was reasonable and necessary to prevent the bodily harm; and

[5. The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm; and][5]

6. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTES

1. For use in nonhomicide cases when the self defense theory is based on the limited right of self defense against excessive force by a peace officer. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. Describe the act of the officer.

3. Describe unlawful act which would result in some bodily harm as established by the evidence. Give at least enough detail to put the act in the context of the evidence.

4. Describe the act of defendant, *e.g*. "struck Officer Richard Roe," "choked Officer Richard Roe."

5. Use bracketed material only if the defendant's action resulted in death or great bodily harm. If bracketed material is used, the definition of great bodily harm, UJI 14-131 NMRA, must be given if not already given.

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — When asserting self-defense against a private citizen, a defendant has an "unqualified right to a self-defense instruction in a criminal case when there is evidence which supports the instruction." *State v. Ellis*, 2008-NMSC-032, ¶ 15, 144 N.M. 253, 186 P.3d 245 (quoting *State v. Kraul*, 90 N.M. 314, 318, 563 P.2d 108, 112 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977)). "By comparison, a person has only a qualified right to assert self-defense against a police officer, because police officers have a duty to make arrests and a right to use reasonable force when necessary." *Ellis*, 2008-NMSC-032, ¶ 15 (citing *Kraul*, 90 N.M. at 319, 563 P.2d at 113). The burden is on the defendant to persuade the court that reasonable minds could differ on whether the officer's use of force was excessive, in order for this issue to be submitted to the jury. *Ellis*, 2008-NMSC-032, ¶ 34.

Element 5 is bracketed and is to be used only if there is evidence that the defendant used a force which ordinarily would not cause death or great bodily harm but which resulted in death or great bodily harm. A person is not guilty of homicide if he or she unintentionally kills a third person in self-defense. *State v. Sherwood*, 39 N.M. 518, 50 P.2d 968 (1953). *See generally*, Annot., 55 A.L.R.3d 620 (1974).

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes; deleted “Evidence has been presented that” and added “An issue in this case is whether”.

14-5186. Self defense against excessive force by a peace officer; deadly force by defendant.[1]

An issue in this case is whether the defendant acted in self defense. A defendant has the right to defend himself or herself against an officer only if the officer used excessive force. Excessive force means greater force than reasonably necessary.

The defendant acted in self defense if

1. The officer used greater force than reasonable and necessary by _____[2]; and

2. There was an appearance of immediate danger of death or great bodily harm[3] to the defendant as a result of _____[4]; and

3. The defendant was in fact put in fear of immediate death or great bodily harm and _____[5] because of that fear; and

4. The apparent danger would have caused a reasonable person in the same circumstances to act as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense, you must find the defendant not guilty.

USE NOTES

1. For use in nonhomicide cases when the self defense theory is based on the limited right of self defense against excessive force by a peace officer. If this instruction is given, add to the essential elements instruction for the offense charged, "The defendant did not act in self defense."

2. Describe the act of the officer.

3. The definition of "great bodily harm," UJI 14-131 NMRA, must be given if not already given.

4. Describe unlawful act, felony or act which would result in death or some great bodily harm as established by the evidence. Give at least enough detail to put the act in context of the evidence.

5. Describe act of defendant, *e.g.*, "struck Officer Richard Roe," "choked Officer Richard Roe."

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary.— When asserting self-defense against a private citizen, a defendant has an "unqualified right to a self-defense instruction in a criminal case when there is evidence which supports the instruction." *State v. Ellis*, 2008-NMSC-032, ¶ 15, 144 N.M. 253, 186 P.3d 245 (quoting *State v. Kraul*, 90 N.M. 314, 318, 563 P.2d 108, 112 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977)). "By comparison, a person has only a qualified right to assert self-defense against a police officer, because police officers have a duty to make arrests and a right to use reasonable force when necessary." *Ellis*, 2008-NMSC-032, ¶ 15 (citing *Kraul*, 90 N.M. at 319, 563 P.2d at 113). The burden is on the defendant to persuade the court that reasonable minds could differ on whether the officer's use of force was excessive, in order for this issue to be submitted to the jury. *Ellis*, 2008-NMSC-032, ¶ 34.

[Adopted by Supreme Court Order No. 09-8300-028, effective September 16, 2009.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, made certain technical language changes; deleted "Evidence has been presented that" and added "An issue in this case is whether".

Self-defense instruction requires a showing of excessive force. — Where defendant was charged with first-degree murder in the shooting death of an Albuquerque police officer, and where defendant claimed that he acted in self-defense, the trial court did not err in denying defendant's proffered self-defense instruction, because to support a self-defense instruction, a defendant must present evidence of fear by an apparent danger of immediate death or great bodily harm, that the killing resulted from that fear, that the defendant acted as a reasonable person would act under those circumstances, and that the police officer used excessive force, and in this case, defendant failed to present any evidence that the officer used excessive force. *State v. Lymon*, 2021-NMSC-021.

Part K
Self Defense

14-5190. Self defense; assailed person need not retreat.[1]

A person who is [defending against an attack][2] [defending another from an attack] [or] [defending property] need not retreat. In the exercise of the right of [self defense][2]

[defense of another] [or] [defense of property], a person may stand the person's ground and defend [herself][2] [himself] [another] [the person's habitation] [or] [property].

USE NOTES

1. This instruction must be given when a duty to retreat is at issue in a self defense, defense of another, or defense of property case.

2. Choose applicable alternative or alternatives.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — When acting in self-defense, defense of another, or defense of property, a person may use no more force than is reasonably necessary to avoid the threatened harm. *See* UJIs 14-5171, 14-5181 NMRA. A person need not, however, retreat even though the person could do so safely. *See State v. Horton*, 1953-NMSC-044, 57 N.M. 257, 258 P.2d 371 (holding that it was erroneous to instruct the jury that the defendant could not kill his assailant if he could yield without being killed); *see also* LaFave & Scott, Criminal Law 395 (1972).

In *State v. Anderson*, the Court of Appeals declined to conclude that UJI 14-5190 NMRA was a mere definitional instruction. 2016-NMCA-007, ¶ 13, 364 P.3d 30. The Court explained that "[w]here the evidentiary basis for the instruction has been laid, UJI 14-5190 informs jurors of what is reasonable under the third prong of UJI 14-5190, and it is therefore critical to understanding the third element of a general self-defense instruction." *Id*. ¶ 14; *see also* UJI 14-5171. The Court therefore held that omission of UJI 14-5190, after the district court determined that giving the instruction was appropriate, amounted to fundamental error because it was "akin to a missing elements instruction." *Id*. ¶¶ 15, 19.

[As amended by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-012, effective December 31, 2018, modified the essential elements of self defense when a duty to retreat is at issue; added Use Notes, and revised the committee commentary; after "retreat", added Use Note reference "1"; after "A person who is", deleted "threatened with" and added "defending against", after "an attack]", added Use Note reference "2" and "defending another from an attack] [or] [defending property]", after "the right of self defense]", added Use Note reference "2" and "[defense of another] [or] [defense of property]", and after "[himself]", added "[another] [the person's habitation] [or] [property]"; and added new Use Notes 1 and 2.

Voluntary confrontation of victim. – The second element of the foundational predicate for a self-defense instruction was not established where there was evidence that the defendant voluntarily left his trailer and confronted the victim, engaging in an altercation that left the victim dead; no evidence suggested that the defendant was put in fear of the victim, that the defendant killed the victim because of that fear, or that a reasonable person would have killed the victim under these circumstances. *State v. Gurule,* 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

Evidence must raise reasonable doubt on self-defense. — To call for instruction on self-defense, the evidence may not be so slight as to be incapable of raising a reasonable doubt in the jury's mind on whether a defendant accused of a homicide did act in self-defense. *State v. Heisler,* 1954-NMSC-032, 58 N.M. 446, 272 P.2d 660.

Evidence sufficient to raise doubt warrants self-defense instruction. — If there is evidence sufficient to raise a reasonable doubt in the jury's mind as to whether the defendant acted in self-defense, an instruction on self-defense must be given. *State v. Montano,* 1980-NMCA-163, 95 N.M. 233, 620 P.2d 887; *State v. Martinez,* 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

And instruction proper even where supported only by defendant's own testimony. — Where self-defense is involved in a criminal case and there is any evidence, although slight, to establish the same, it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on that issue that are warranted by the evidence, even though such a defense is supported only by the defendant's own testimony. *State v. Heisler,* 1954-NMSC-032, 58 N.M. 446, 272 P.2d 660.

Essential elements necessary before self-defense instruction can be given are: (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez,* 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

No conflict with instruction limiting self-defense. — The instruction limiting self-defense when the defendant is the aggressor (UJI 14-5191) does not conflict with the instruction on justifiable homicide (UJI 14-5171) or this instruction. *State v. Velasquez,* 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

Use of "must" in instruction not error. — Instructions dealing with the elements of self-defense have consistently referred to elements which "must" exist if self-defense is to be submitted to the jury, and as the instruction did no more than inform the jury of the necessary elements and made no reference to a burden of proof in regard to self-defense, the use of "must" in the instruction was not error. *State v. Harrison,* 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Defendant must show error in refusal to give instruction. — It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. *State v. Gonzales,* 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Failure to give instruction did not amount to fundamental error. — Where defendant was charged with depraved mind murder and three counts of aggravated assault based on evidence that he fired a gun at a vehicle occupied by four people, striking and killing an eight-year-old child sitting in the backseat of the vehicle, the failure of the trial court to give the no-retreat instruction did not amount to fundamental error, because the evidentiary basis for the no-retreat instruction was not laid and therefore a reasonable juror would not have been confused or misdirected by the omission of the no-retreat instruction. *State v. Candelaria*, 2019-NMSC-004.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Duty of trial court to instruct on self-defense in absence of request by accused, 56 A.L.R.2d 1170.

Duty to retreat where assailant is social guest on premises, 100 A.L.R.3d 532.

14-5191. Self defense; limitations; aggressor.[1]

Before you consider whether the defendant acted in self defense, you must first decide whether the defendant was the first aggressor. The defendant was the first aggressor if the defendant

[started the fight with _____ (*name of victim*)][2]

[or]

[agreed to fight with _____ (*name of victim*)]

[or]

[intentionally provoked a fight in order to harm _____ (*name of victim*)]

[or]

[committed the act of _____ (*describe defendant's conduct that constituted the alleged crime*), in response to _____'s (*name of victim*) act of _____ (*describe conduct of victim giving rise to an appearance of immediate danger of harm to defendant*), where _____'s (*name of victim*) act was the [lawful and][3] foreseeable result of _____ (*describe defendant's alleged unlawful act that resulted in victim's conduct*)][4].

The burden is on the state to prove beyond a reasonable doubt that the defendant was the first aggressor. [If the defendant was the first aggressor, the defendant cannot

claim self defense. If the defendant was not the first aggressor, you should proceed to decide whether the defendant acted in self defense.][5] [If you find that the defendant was the first aggressor, you must then decide whether _____ (*name of victim*) became the aggressor. If _____ (*name of victim*) became the aggressor, the defendant may claim self defense even though the defendant was the first aggressor.][6]

USE NOTES

1. This instruction must be given in all self defense cases in which first aggressor is an issue.

2. Use only applicable bracketed element or elements established by the evidence.

3. If the lawfulness of the victim's conduct is at issue, e.g., may have been privileged or justified, give appropriate definition.

4. This alternative should be used when the defendant provoked the victim through an unlawful act and the victim responded in a lawful manner. *See State v. Denzel B.*, 2008-NMCA-118, 144 N.M. 746, 192 P.3d 260; *see also* committee commentary, *infra*.

5. Use this bracketed alternative in cases where UJI 14-5191A NMRA will not be given.

6. Use this bracketed alternative in cases where UJI 14-5191A will be given. If UJI 14-5191A will be given, it should immediately follow this instruction.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — A defendant's "claim of self defense may fail if the defendant was the aggressor or instigator of the conflict." *State v. Lucero*, 1998-NMSC-044, ¶ 7, 126 N.M. 552, 972 P.2d 1143 (internal quotation marks and citation omitted). In *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887, the defendant was a first aggressor when he entered a convenience store with a knife intending to rob the store and subsequently stabbed and killed a patron who tried to stop the robbery. *Id*. ¶ 6. The Supreme Court held that it is "well established in this jurisdiction that a defendant who provokes an encounter, as a result of which he finds it necessary to use deadly force to defend himself, is guilty of an unlawful homicide and cannot avail himself of the claim that he was acting in self-defense." *Id*. *Lucero* then clarified that if the defendant was an aggressor or instigator of the conflict, self-defense is still available if the "defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and [the] . . . victim responded with force which would ordinarily create a substantial risk of death or great bodily harm[.]" 1998-NMSC-044, ¶ 7 (internal quotation marks and citation omitted). Thus, the right of self-defense can be reinstated if the victim responds by escalating the conflict or pursues the conflict after the defendant attempts to disengage. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.4(e)

(3d ed. Oct. 2017 update); *see also Territory v. Clarke*, 1909-NMSC-005, ¶ 8, 15 N.M. 35, 99 P. 697 (upholding conviction where jury was instructed that defendant could claim self defense if "defendant in reality and in good faith endeavored to decline any further struggle before the fatal shot was fired").

The state bears the burden of proving that the defendant was the first aggressor beyond a reasonable doubt. *See State v. Pruett*, 1918-NMSC-062, ¶ 9, 24 N.M. 68, 172 P. 1044.

The bracketed "lawful" term in this instruction should be used and defined if there is an issue about whether the victim's use of force may have been a lawful response to the defendant's conduct. *See* Use Note 3. For example, *State v. Southworth* held that the self-defense instruction was improper because it did not require the jury to determine whether the victim acted reasonably in defense of her home when she used potentially deadly force against the trespassing defendant. *See* 2002-NMCA-091, ¶¶ 18-19, 132 N.M. 615, 52 P.3d 987 ("The trial court should instruct the jury that [the defendant] had the right to stand his ground and did not need to retreat unless he was threatened with lawful force. In order to determine whether the force used by [the victim] was lawful, the jury must conclude that [she] acted reasonably in defending her home against the perceived threat of the commission of a felony (similar to the elements of defense of habitation set for in UJI 14-5170).").

Similarly, *State v. Denzel B*. held that the self-defense instruction was improper because it failed to instruct the jury that the victim's conduct, grabbing the defendant by the shirt after the defendant pushed him, may have been protected by the parental privilege. *See* 2008-NMCA-118, ¶¶ 3-4, 17, 144 N.M. 746, 192 P.3d 260 ("We therefore hold that when a child asserts self-defense as justification for battery against his parent, the jury must first determine whether the parent's use of physical discipline was reasonable under the circumstances."). In both *Southworth* and *Denzel B*., the court held that the jury must be instructed that the state must prove that the defendant did not act in self-defense, taking into account whether the victim's response to the defendant's conduct was lawful under the particular circumstances of the case. *Accord State v. Lara*, 1989-NMCA-098, ¶¶ 7-9, 109 N.M. 294, 784 P.2d 1037 (explaining defendant had no right to defend against store employees who had a lawful right to seize defendant for shoplifting).

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, completely rewrote the instruction, revised the Use Notes, and revised the committee commentary; and added a new Use Note 1 and redesignated former Use Note 1 as Use Note 2, and added Use Notes 3 through 6.

To warrant self-defense instruction, evidence must be sufficient to raise reasonable doubt in the minds of the jury as to whether or not a defendant accused of homicide did act in self-defense. *State v. Martinez,* 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

Essential elements necessary before self-defense instruction can be given are: (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez,* 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

No conflict with other instructions — This instruction does not conflict with the instructions on justifiable homicide (UJI 14-5171) or on absence of need of an assailed person to retreat (UJI 14-5190). *State v. Velasquez,* 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

Defendant must prove error in refusal to give instructions. — It is the defendant's burden to provide a record sufficient to demonstrate reversible error in refusing self-defense instructions. *State v. Gonzales,* 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Fight need not be lengthy. — The defendant and the victim need not be engaged in a drawn-out battle for there to be a "fight," and where there is evidence that a bottle was thrown and defendant responded with a knife, the giving of his instruction is proper. *State v. Velasquez,* 1982-NMCA-154, 99 N.M. 109, 654 P.2d 562, cert. denied, 99 N.M. 148, 655 P.2d 160.

Instruction on negligent self-defense improperly denied. — Where the defendant could be viewed as in a position where his safety or the safety of his friend was threatened and, if, in an attempt to protect himself or ward off the attackers, the defendant inadvertently shot the victim, then his actions could be viewed as being the commission of a lawful act of self-defense, committed in a unlawful manner or without due caution and circumspection, such that an instruction on involuntary manslaughter based on negligent self-defense should have been given. *State v. Arias,* 1993-NMCA-007, 115 N.M. 93, 847 P.2d 327, *overruled on other grounds*, *State v. Abeyta,* 1995-NMSC-051, 120 N.M. 233, 901 P.2d 164.

Defendant's creation of substantial risk of death. — Trial court did not err in refusing to give defendant's self-defense instruction where defendant ad brandished and fired a gun into the air creating a substantial risk of death or great bodily harm. *State v. Lucero,* 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143.

Law reviews. — For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense, 15 A.L.R.4th 983.

14-5191A. First aggressor; exceptions to the limitation on self defense.[1]

If you find beyond a reasonable doubt that the defendant was the first aggressor, you must then decide whether [the following exception applies][2] [any of the following exceptions apply]. If [the exception applies][2] [one of these exceptions apply], _____ (*name of victim*) became the aggressor, and the defendant is no longer the first aggressor.

[1. The defendant was using force which would not ordinarily create a substantial risk of death or great bodily harm; and

2. _____ (*name of victim*) responded with force which would ordinarily create a substantial risk of death or great bodily harm][2];

[OR]

[1. The defendant tried to stop the fight;

2. The defendant let _____ (*name of victim*) know he no longer wanted to fight; and

3. _____ (*name of victim*) continued to fight the defendant.]

If the state proves beyond a reasonable doubt that _____ (*name of victim*) did not become the aggressor, the defendant is still the aggressor and cannot claim self defense. If after deliberation you find that _____ (*name of victim*) became the aggressor, you should proceed to decide whether the defendant acted in self defense.

USE NOTES

1. This instruction must be given in conjunction with UJI 14-5191 NMRA in all self-defense cases in which there is an issue regarding whether a first aggressor regained the right to claim self defense because the victim became the aggressor.

2. Use applicable bracketed alternative or alternatives.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* committee commentary to UJI 14-5191 NMRA.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

CHAPTER 52 to 59
(Reserved)

CHAPTER 60
Concluding Instructions

Part A
General Explanation

14-6001. Duty to follow instructions.

The law governing this case is contained in instructions that I am about to give you. It is your duty to follow the law as contained in these instructions. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction and disregard others. A copy of these instructions will be given to you when you begin your deliberations.

USE NOTES

This is a proper instruction to be given in all cases.

[UJI Crim. 50.0; approved, effective September 1, 1975; as amended, effective November 1, 2003.]

Committee commentary. — This instruction was derived from and is identical with UJI 13-2002 NMRA.

ANNOTATIONS

The 2003 amendment, effective November 1, 2003, divided the former first sentence into the present first and second sentences, substituted "instructions that I am about to give you" for "these instructions" in the first sentence and "the law as contained in these instructions" for "that law" in the second sentence, and added the last sentence.

Judge alone instructs the jury as to the law in a given case; where counsel instructs on the law, counsel invades the province of the court. *State v. Payne,* 1981-NMCA-067, 96 N.M. 347, 630 P.2d 299, *overruled on other grounds, Buzbee v. Donnelly,* 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

No duty to read instructions by jury. — The defendant's contention that a jury should at least take sufficient time to read the instructions prior to rendering the verdict and that 10 minutes is not sufficient time to read the court's instructions is invalid, as it is based on the false premise that the only way for the jury to appraise itself of the instructions is to read them, which is not the case, as the instructions are read to the jury by the court and the written instructions need not go to the deliberation room unless there is a request. *State v. Mosier,* 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1456, 1486, 1487, 1490, 1491.

Propriety of instruction in criminal case as to the importance of enforcement of law, or duty of jury in that regard, 124 A.L.R. 1133.

Propriety of reference, in instruction in criminal case, to juror's duty to God, 39 A.L.R.3d 1445.

88 C.J.S. Trial §§ 297, 300, 349, 374.

14-6002. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 20-8300-004, UJI 14-6002 NMRA, relating to necessarily included offense, was withdrawn effective December 31, 2020. For provisions of former instruction, *see* the 2019 NMRA on *NMOneSource.com*.

14-6002A. Necessarily included offense; deliberations.[1]

You have been instructed on the crimes of _____ (*greater/greatest offense*), [_____ (*next lower offense(s)*],[2] and _____ (*lowest offense*), as charged [in Count _____].[3] It is up to you, the jury, to choose the manner and order in which you deliberate on the crimes charged [in that count].[3] However, to return a verdict, you must follow the procedure described in the next instruction.[4]

USE NOTES

1. This instruction should be given immediately after the instructions containing the elements of the offenses charged in the count.

2. The instruction is drafted to accommodate three levels of the offense: “greatest,” “next lower,” and “lowest,” but can be modified to account for any number of lesser-included offenses following the same procedure. The offenses should be identified by the names used in the elements instruction for that offense.

3. If there is more than one count, identify the count charged.

4. UJI 14-6002B NMRA should be given immediately after this instruction.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* Commentary for UJI 14-6002B NMRA.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

14-6002B. Necessarily included offense; verdict(s).[1]

To aid you in your deliberations and in returning your verdict, you will be provided both guilty and not guilty verdict forms for each of the crimes charged [in Count _____].[2] Unless you unanimously agree on a verdict, you should not sign a verdict form for that crime. Although you may deliberate on the crimes charged [in Count _____][2] in any manner and order which you choose, you must return your verdicts for each offense [in Count _____][2] in the order they are instructed.[3]

Under this procedure, if you unanimously find the defendant guilty of _____ (*greatest offense*),[3] you should sign the guilty verdict for that offense and should not proceed to reach a verdict on the remaining offense[s].[4] If, after reasonable deliberation, you do not reach a unanimous verdict on _____ (*greatest offense*), you should not sign a verdict form for that offense and should not proceed to reach a verdict on the remaining offense[s].[4]

You should only return a verdict on _____ (*next lower offense*) if you unanimously find the defendant not guilty of _____ (*greatest offense*). If you unanimously find the defendant not guilty of _____ (*greatest offense*), you must sign the not guilty verdict form for _____ (*greatest offense*) before returning a verdict on any other crime charged [in Count _____].[2]

If you unanimously find the defendant guilty of _____ (*next lower offense*), you should sign the guilty verdict for that offense [and should not proceed to reach verdicts on the remaining offenses].[4] If you do not reach a unanimous verdict on _____ (*next lower offense*), you should not sign a verdict form for that offense [and should not proceed to reach a verdict on the remaining offense[s]].[4]

[If you unanimously find the defendant not guilty of _____ (*next lower offense*), you must sign the not guilty verdict form for _____ (*next lower offense*) before returning a verdict on _____ (*lowest offense*)].[4]

[If you unanimously find the defendant not guilty of _____ (*greatest offense*) and _____ (*next lower offense*), you may then return a verdict on

_____ (*lowest offense*). If you do reach a unanimous verdict on _____ (*lowest offense*), you should sign the corresponding verdict form for that offense. If you are not unanimous on a verdict, do not sign a verdict form for that offense].[4]

USE NOTES

1. This instruction should be given immediately after UJI 14-6002A NMRA.

2. If there is more than one count, identify the count charged.

3. Both guilty and not guilty forms should be submitted for each level of offense. This instruction is drafted to accommodate three levels of the offense: "greatest," "next lower," and "lowest," but can be modified to account for any number of lesser-included offenses following the same procedure. The elements instructions for the offenses should be instructed in descending order and identified in this instruction by the names used in the elements instruction for that offense.

4. Use plural only if there are three or more crimes charged in the count.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Under New Mexico decisions, there is no automatic right for a party to have the jury instructed on a lesser-included offense. The determination depends on both the statutory elements and the facts of the case. A party is entitled to a lesser-included offense instruction "when the statutory elements of the lesser crime are a subset of the statutory elements of the charged crime." *State v. Meadors*, 1995-NMSC-073, ¶ 12, 121 N.M. 38, 908 P.2d 731. A party is also entitled to a lesser-included offense instruction

> if (1) the defendant could not have committed the greater offense in the manner described in the charging document without also committing the lesser offense . . .; (2) the evidence adduced at trial is sufficient to sustain a conviction of the lesser offense; and (3) the elements distinguishing the lesser and greater offenses are sufficiently in dispute such that a jury rationally could acquit on the greater offense and convict on the lesser.

Id. (applying test to a prosecution request); *see also State v. Darkis*, 2000-NMCA-085, ¶¶ 14-18, 129 N.M. 547, 10 P.3d 871 (applying same test to a defense request and concluding that *Meadors* provides defendants with an "effectively greater" right to lesser-included offense instructions than the prosecution).

This instruction was amended in 2019 to clarify the process for the jury to deliberate and return verdicts on lesser-included offenses. *State v. Lewis*, 2019-NMSC-001, ¶¶ 22-25,

433 P.3d 276. UJIs 14-6002A and 14-6002B NMRA now serve as a single adaptable instruction set to replace UJIs 14-6002, 14-250, and 14-625 NMRA.

In *Lewis* the Supreme Court adopted a rule of deliberation permitting the jury to deliberate on levels of an offense in any order, but requiring a full acquittal (and not just inability to agree) of the greater offense before a verdict can actually be returned on the lesser. 2019-NMSC-001, ¶ 37.

To ensure a clear record after this deliberative process, *Lewis* held that polling the jury on each level of a count upon return of the verdict is the best way to determine unambiguously upon which offenses the jury acquitted, hung, or convicted. *Id.* ¶ 17. The Court recommended providing the jury with "partial verdict forms, allowing the jury to indicate that it unanimously finds the defendant not guilty on a greater offense even if deadlocked on a lesser offense." *Id.* ¶ 38. This includes submitting not-guilty verdict forms for each level of the offense to indicate when a unanimous acquittal has occurred. *See* Use Note 3. Clarity regarding the jury's intent with respect to which level of charge the jury has hung is paramount to avoid a double jeopardy bar on retrial. *See State v. Phillips*, 2017-NMSC-019, ¶¶ 1, 17, 396 P.3d 153 (when a judge fails to properly clarify a verdict that even ambiguously reflects an acquittal, then double jeopardy principles require courts treat the ambiguous verdict as an acquittal barring future prosecution); *Lewis*, 2019-NMSC-001, ¶¶ 10-11.

The adoption of UJIs 14-6002A and 14-6002B NMRA coincides with the withdrawal of UJIs 14-250 NMRA (homicide cases) and 14-625 NMRA (child abuse cases resulting in death).

In homicide cases, the district court must instruct the jury on every degree of homicide for which there is evidence in the case tending to sustain such degree. *State v. Ulibarri*, 1960-NMSC-102, ¶¶ 8-9, 67 N.M. 336, 355 P.2d 275. This could involve instructing the jury on various types of first-degree murder, second-degree murder, voluntary manslaughter and involuntary manslaughter. *See, e.g., State v. Omar-Muhammad*, 1987-NMSC-043, ¶ 23, 105 N.M. 788, 737 P.2d 1165 (stating that the New Mexico Supreme Court has "analyzed felonious homicide, the unlawful taking of human life, as a 'generic offense' encompassing several degrees or forms"); *State v. La Boon*, 1960-NMSC-118, ¶ 10, 67 N.M. 466, 357 P.2d 54 ("Manslaughter is included in the charge of murder."); *cf. State v. McFall*, 1960-NMSC-084, ¶ 12, 67 N.M. 260, 354 P.2d 547 (stating that "manslaughter is one of the four kinds of homicide, and . . . it is included within a charge of murder"). Because the distinctions between the various degrees are not clear-cut, the jury will typically be given the option of multiple degrees of homicide. *See State v. Reed*, 2005-NMSC-031, ¶ 22, 138 N.M. 365, 120 P.3d 447 (acknowledging a "lack of clear-cut distinctions between varying degrees of homicide").

In cases involving various degrees of child abuse resulting in death of a child under twelve years of age, the jury may be instructed on the crimes of intentional child abuse resulting in the death of a child under twelve years of age, and child abuse with reckless disregard resulting in the death of a child under twelve years of age. *See State v.*

Montoya, 2015-NMSC-010, ¶¶ 41-42, 345 P.3d 1056 (holding that reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve and that the use of a step-down instruction therefore is appropriate). UJIs 14-6002A and 14-6002B NMRA should be adaptable for this scenario.

[Adopted by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

Stepdown instruction complied with law and did not confuse or misdirect the jury. — Where defendant was charged with numerous crimes in connection with a dispute over missing drugs during which the victim was shot and killed, and where, at the conclusion of the trial, the jury entered verdict forms convicting defendant of willful and deliberate first-degree murder, felony murder in the first-degree, kidnapping, conspiracy, and tampering with evidence, and also entered verdict forms acquitting defendant of second-degree murder and voluntary manslaughter, and where defendant argued that the district court committed reversible error in issuing its stepdown instruction to the jury, contending that it did not comply with supreme court precedent which requires the jury to be informed that it may consider both the greater and lesser offenses under a count in any order it deems appropriate provided it return a verdict of not guilty on the greater offense before the court may accept a verdict on the lesser offense, and that the instructions confused the jury because they were internally inconsistent and contained undefined terms, the district court did not commit reversible error in instructing the jury, because the instructions given to the jury in this case provided the language necessary to comply with the law, and examining the instructions as a whole, as the jury was instructed to do and as caselaw requires, any permissive suggestion regarding the order of consideration was clarified by the express instruction informing the jury that it had the discretion to consider the offenses in any order it wished, and the jury did not express any confusion regarding the instructions as given. *State v. Veleta*, 2023-NMSC-024.

14-6003. Multiple defendants; consider each separately.

In this case, you must consider separately whether each of the [two] [several] defendants is guilty or not guilty. You should analyze what the evidence in the case shows with respect to each individual defendant separately. Even if you cannot agree upon a verdict as to one [or more] of the defendants [or charges], you must return the verdict upon which you agree.

USE NOTES

This instruction is not appropriate for a conspiracy trial.

Committee commentary. — This instruction was derived from California Jury Instructions Criminal, 17.00, and Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.04.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1331, 1353.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

14-6004. Multiple counts; single defendant.

Each crime charged in the [indictment] [information] should be considered separately.

USE NOTES

If charge of felony murder and the underlying felony are submitted, this instruction is not to be given. If there are charges other than the felony murder and underlying felony, this instruction may be modified or not submitted.

Committee commentary. — This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.02.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

14-6005. Multiple counts; multiple defendants.

Each crime charged in the [indictment] [information] should be considered separately as to each defendant charged with that crime.

USE NOTES

If charge of felony murder and the underlying felony are submitted, this instruction is not to be given. If there are charges other than the felony murder and underlying felony, this instruction may be modified or not submitted.

Committee commentary. — This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.03.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1331, 1438, 1439.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

14-6006. Jury sole judge of facts; sympathy or prejudice not to influence verdict.

You are the sole judges of the facts in this case. It is your duty to determine the facts from the evidence produced here in court. Your verdict should not be based on speculation, guess or conjecture. Neither sympathy nor prejudice should influence your verdict. You are to apply the law as stated in these instructions to the facts as you find them, and in this way decide the case.

USE NOTES

This is a proper instruction to be given in all cases.

Committee commentary. — This instruction was derived from and is identical to UJI 13-2005.

ANNOTATIONS

Prediction of effects of conviction inconsistent with instruction. — Defense counsel's prediction of effects of conviction on defendant's family and career was a violation of this provision. *State ex rel. Schiff v. Madrid*, 1984-NMSC-047, 101 N.M. 153, 679 P.2d 821.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial §§ 1208 to 1212; 75B Am. Jur. 2d Trial §§ 1295, 1457.

Sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 547.

88 C.J.S. Trial §§ 280 to 282, 382.

14-6007. Jury must not consider penalty.

You must not concern yourself with the consequences of your verdict.

USE NOTES

This is a proper instruction to be given in every case. In light of the legislative repeal of the verdict of guilty but mentally ill, where evidence is presented of mental illness, or in cases presenting defenses related to the inability to form specific intent, this instruction may be of particular importance to the jury's deliberations. *See* 2010 N.M. Laws, ch. 97, § 1 (repealing NMSA 1978, § 31-9-3 relating to the plea, verdict, and sentence of "guilty but mentally ill"); *see also* UJI 14-5110; -5111 NMRA.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — The language of this instruction is derived from California Jury Instructions Criminal, 17.42. The disposition of the defendant, after a verdict of not guilty by reason of insanity, is not a matter for consideration by the jury. *State v. Chambers*, 1972-NMSC-069, 84 N.M. 309, 502 P.2d 999. *See also* Annot., 11 A.L.R.3d 737, 745 (1967).

Prior to 1972, it was common practice to instruct the jury that it could recommend clemency. *See, e.g., State v. Brigance*, 1926-NMSC-032, 31 N.M. 436, 246 P. 897. The basis for the instruction was a statute allowing the jury to recommend clemency to the court when it found the defendant guilty. N.M.Laws 1891, ch. 80, § 10, compiled as § 41-13-2 NMSA 1953 Comp. The statute was repealed in 1972. *See* N.M.Laws 1972, ch. 71, § 18.

[As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-004, effective December 31, 2015, revised the Use Note and committee commentary; in the Use Note, after the first sentence, deleted "In a capital case it is proper for the state or court in the voir dire or in the court's opening or closing remarks to tell the jury that the state will not seek the death penalty." and added the last sentence and related citations; and in the committee commentary, added vendor neutral citations to *State v. Chambers* and *State v. Brigance*.

Sentencing is not normally within the jury's province in noncapital crimes, and it has long been settled in New Mexico that the jury's function is to determine guilt or innocence, not to participate in the imposition of punishment; therefore, the instructions tendered by the trial court contained all the necessary elements of the offense including the requisite intent, and there was no error in refusing to give the defendant's requested instruction concerning possible sentences. *State v. Evans,* 1973-NMCA-053, 85 N.M. 47, 508 P.2d 1344.

And not error to refuse to instruct. — The refusal to give an instruction as to the disposition of defendant if found guilty is not reversible error, and certainly not fundamental error. *State v. Victorian,* 1973-NMSC-008, 84 N.M. 491, 505 P.2d 436.

Recommendation of clemency by the jury is advisory in nature and not binding on the trial court's final determination of sentence. *State v. Evans,* 1973-NMCA-053, 85 N.M. 47, 508 P.2d 1344.

Capital case jurors may be told state will not seek death penalty. — In a capital case it is proper, as the use note states, for the state or court in the voir dire or in the court's opening or closing remarks to tell the jury that the state will not seek the death penalty. *State v. Martin*, 1984-NMSC-077, 101 N.M. 595, 686 P.2d 937.

The prosecutor did not err in noting during voir dire that the state was not seeking the death penalty. *State v. Baca,* 1997-NMSC-059, 124 N.M. 333, 950 P.2d 776.

Life sentence request. — Although it is proper to inform the jury panel that the state was not seeking the death penalty, "fairness" does not require the court to inform the jury that the state was seeking a sentence of life imprisonment. *State v. Fero,* 1987-NMSC-008, 105 N.M. 339, 732 P.2d 866, *aff'd*, 1988-NMSC-053, 107 N.M. 369, 758 P.2d 783.

Modification describing consequences impermissible. — A judge-crafted modification to this instruction describing the consequences of a conviction for assault is improper and impermissible. *State ex rel. Schiff v. Madrid,* 1984-NMSC-047, 101 N.M. 153, 679 P.2d 821.

Attempted breaking and entering jury instruction did not invite the jury to consider the consequences of its verdict. — Where defendant was charged with breaking and entering, attempt to commit breaking and entering, criminal trespass, and resisting, evading, or obstructing an officer, and where, at trial, the jury was instructed, based on UJI 14-1410 NMRA, that to find defendant guilty of attempted breaking and entering, the state was required to prove beyond a reasonable doubt that defendant intended to commit the crime of breaking and entering and defendant began to do an act which constituted a substantial part of the breaking and entering but failed to commit the breaking and entering, and where defendant claimed that the jury instruction informed the jury of the seriousness of the offense and invited the jury to consider the consequences of its verdict, there was no error, because the instruction does not, in any

manner, encourage the jury to consider the consequences of its verdict, and it may be assumed that the jury followed the court's instruction that they must not concern themselves with the consequences of their verdict. *State v. Ancira*, 2022-NMCA-053, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial § 1442.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed, 35 A.L.R.2d 769.

Prejudicial effect of statement or instruction of court as to possibility of pardon or parole, 12 A.L.R.3d 832.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

14-6008. Duty to consult.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agrees. Your verdict must be unanimous.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a verdict.

You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

USE NOTES

This instruction must be given in every case. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given.

Committee commentary. — The language of this instruction was derived from a suggested jury instruction for federal criminal cases. *See* 27 F.R.D. 39, 97-98 (1961). The use of a mandatory, duty to consult, instruction in every case before the jury retires, takes the place of the so-called shotgun instruction. *See* commentary to UJI 14-6030. *See also* American Bar Association Standards Relating to Trial by Jury, § 5.4 (approved draft 1968).

ANNOTATIONS

Judge's action when jury unable to arrive at verdict. — When a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge not only can, but should, communicate with the jury, but should only do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it may consider further deliberations, but not that it must consider further deliberations. *State v. McCarter,* 1980-NMSC-003, 93 N.M. 708, 604 P.2d 1242.

The court's actions did not amount to an improper "shotgun" instruction to a deadlocked jury where jurors were given this instruction, there was no time limit imposed on deliberations, the court did not attempt to target holdout jurors or determine which way the votes fell, an unsolicited note from an undecided juror was not disclosed, and no further instructions were given; the lack of coercion was demonstrated by the fact that the jurors deliberated for two more hours and returned a "not guilty" verdict on one count. *State v. Laney,* 2003-NMCA-144, 134 N.M. 648, 81 P.3d 591, cert. denied, 2003-NMCERT-003.

Interference with deliberation. — Jurors are encouraged to consult with one another before reaching a conclusion, and the court is not permitted to interfere with the jury's discretion to deliberate. *State v. Chamberlain,* 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

Jury instruction proper. *State v. Vigil,* 1990-NMSC-066, 110 N.M. 254, 794 P.2d 728.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1382 to 1384, 1386, 1437, 1453, 1455, 1580 et seq.

Part B
Verdict Forms

14-6010. General verdict; no insanity or mental illness issue; no lesser included offenses.

In this case, there are two possible verdicts [as to each crime charged] [as to each defendant]:

(1) guilty; and

(2) not guilty.

Only one of the possible verdicts may be signed by you [as to each charge] [as to each defendant]. If you have agreed upon one verdict [as to a particular charge] [as to a

defendant], that form of verdict is the only form to be signed [as to that charge] [as to that defendant]. The other form [as to that charge] [as to that defendant] is to be left unsigned.

[As amended, effective August 1, 2001.]

Committee commentary. — These instructions explain the multiple verdict forms. The purpose is to aid the jury and possibly prevent a violation of the fundamental rights of the defendant. *See State v. Cisneros*, 77 N.M. 361, 423 P.2d 45 (1967). The use of these instructions may also alert the defendant to the need to preserve error by making a timely objection if the court omits a verdict form. *See State v. Duran*, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

ANNOTATIONS

The 2001 amendment, effective August 1, 2001, added the phrase "or mental illness" to the description.

The court has a duty to inform the jury regarding the option of ceasing deliberations. — If the jury reveals that it is having difficulty arriving at a unanimous verdict, and the jury is under the mistaken impression that it is required to continue its deliberations indefinitely until a unanimous verdict is achieved, the trial court has a mandatory duty to inform the jury that it may cease deliberations and not arrive at a unanimous verdict if it is indeed deadlocked. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Failure to answer jury's question regarding the option of a hung jury. — Where the trial court instructed the jury pursuant to UJI 14-6101 NMRA; after the jury had began deliberations, the jury asked the court whether a non-verdict or a hung jury was an option and indicated that a non-verdict or a hung jury was not an option under the general verdict instruction; the court never responded to the jury's question, even though the court had promptly responded to all other inquiries from the jury; the jury did not report that it was deadlocked or reveal the status of its deliberations in terms of numerical division; and the jury returned a guilty verdict, the court's failure to issue a supplementary instruction in answer to the jury's instruction coerced the jury into reaching a verdict, requiring a new trial. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1436, 1750, 1751, 1835, 1836, 1855, 1859.

Haste or shortness of time in which jury reached verdict in criminal case, 91 A.L.R.2d 1238.

14-6011. Use of multiple verdict forms; insanity.[1]

In this case, there are three (3) possible verdicts as to the defendant _____ (*name of defendant*) [for each crime charged][2]:

(1) not guilty;

(2) not guilty by reason of insanity; and

(3) guilty.

Only one of the possible verdicts may be signed by you [as to any particular charge][2]. If you have agreed upon one verdict [as to a particular charge][2], that form of verdict is the only form to be signed [as to that charge][2]. The other forms are to be left unsigned.

USE NOTES

1. For use with UJI 14-5101 NMRA.

2. Use this bracketed phrase if there is more than one offense charged.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* committee commentary under UJI 14-6010 NMRA.

[As amended for stylistic compliance by Supreme Court Order No. 22-8300-031, effective December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-031, effective December 31, 2022, reduced the number of possible verdicts in the jury instruction; after “there are”, deleted “four/f” and added “three (3)”, in the third alternative, after “guilty”, deleted “but mentally ill; and”, and deleted the fourth alternative, which provided “guilty”.

The 2001 amendment, effective August 1, 2001, substituted "four" for "three" and "defendant" for "defendant[s]"in the introductory sentence; added Subsection (3) concerning metal illness, and redesignated former Subsection (3) as (4); added Use Note 1, redesignated former Use Note 1 as 2, and substituted "is more than one offense charged" for "are multiple defendants, but the defense of not guilty by reason of insanity is not applicable to all defendants" in Use Note 2.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1788 to 1834.

Instructions in state criminal case in which defendant pleads insanity as to hospital confinement in event of acquittal, 81 A.L.R.4th 659.

14-6012. Multiple verdict forms; lesser included offenses.[1]

In this case, as to the charge of _____[2] [contained in Count _____], there are four possible verdicts [as to each defendant] [as to the defendant[s] _____ (*name*)]

(1) guilty of _____;[2]

(2) not guilty of _____;[2]

(3) guilty of _____;[3]

(4) not guilty of _____;[3]

You must consider each of these crimes. You should be sure that you fully understand the elements of each crime before you deliberate further. You have the discretion to choose the manner and order in which you deliberate on this Count, but you must return a unanimous verdict of not guilty on _____[2] before entering a verdict on _____.[3]

You will first decide whether [the] [a] defendant is guilty of the crime of _____.[2] If you unanimously find the defendant guilty of _____,[2] then that is the only form of verdict which is to be signed as to this Count. If you unanimously find the defendant not guilty of_____,[2] then you should sign only the not guilty form as to _____.[2]

If, after reasonable deliberation, you do not reach a unanimous verdict on _____,[2] you should not sign a verdict form for that crime and you should not proceed to reach a verdict on the remaining crime[s].[1]

If you unanimously find the defendant not guilty of_____,[2] you will then go on to a consideration of the crime of _____.[3] If you unanimously find the defendant guilty of _____,[3] then that is the only form of verdict which should be signed. But if you unanimously find the defendant not guilty of the crime of _____,[3] then you should sign only the not guilty form. If, after reasonable deliberation, you do not reach a unanimous verdict on _____,[3] you should not sign a verdict form for that crime.

You may not find [the] [a] defendant guilty of more than one of the foregoing crimes. If you have a reasonable doubt as to whether [the] [a] defendant has committed any one of the crimes, you must determine that the defendant is not guilty of that crime. If you find the defendant not guilty of all of these crimes, [in Count _____] you must return a verdict of not guilty [as to this Count].

USE NOTES

1. This instruction assumes only one lesser included offense. The instruction must be modified if there is more than one lesser included offense to the crime charged. For use when the defendant's mental condition at the time of the offense is not an issue.

2. Insert name of greater offense.

3. Insert name of lesser included offense.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — *See* committee commentary under UJI 14-6010 NMRA.

In addition to this instruction, to avoid a double jeopardy bar on retrying charges after a deadlock, the jury should be provided both guilty and not guilty verdict forms for each degree of offense charged in a single count, "allowing the jury to indicate that it unanimously finds the defendant not guilty on a greater offense even if deadlocked on a lesser offense," and to "create a clear record as to which offenses the jury has agreed and which it has deadlocked." *State v. Lewis*, 2019-NMSC-001, ¶ 38, 433 P.3d 276.

[As amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-004, effective December 31, 2020, clarified the language regarding possible verdicts to create a clear record as to which offenses the jury has agreed and to which offenses it is deadlocked, and provided additional guidance for the jury in making a determination on charges that have lesser included offenses, revised the Use Notes, and updated the committee commentary; in the first paragraph, after "there are", deleted "three" and added "four", in Item (3), deleted "not guilty" and added "guilty of", added new Item (4), after Item (4), deleted "Only one of the possible verdicts may be signed by you [as to each defendant] [as to the defendant[s] _____ (name).."; in the second paragraph, added the last sentence; in the third paragraph, after "You will", deleted "then consider" and added "first decide", after "If you", added "unanimously", after "to be signed", deleted "If you have a reasonable doubt as to his guilt of that crime, you will go on to a consideration of the crime of _____" and added "as to this Count", and added the last sentence of the paragraph; added the fourth paragraph; in the fifth paragraph, added "If you unanimously find the defendant not guilty of _____, you will then go on to a consideration of the crime of _____", after the next occurrence of "If you", added "unanimously", after "But if you", deleted "have a reasonable doubt as to his guilt" and added "unanimously find the defendant not guilty", after "then you should", deleted "find him not guilty and", and added "If, after reasonable deliberation, you do not reach a

unanimous verdict on _____, you should not sign a verdict form for that crime."; and in the Use Note 1, deleted "This instruction should not be given for homicide charges or if insanity is an issue. For such charges, UJI 14-250 or UJI 14-5101 is to be given."

Consistency in the verdict is not necessary. — An alleged inconsistency between a convicted offense and acquitted offenses does not require reversal because it is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. A criminal defendant is sufficiently protected against jury irrationality or error by the independent review of the sufficiency of the evidence as to those counts upon which a defendant is convicted. *State v. Veleta*, 2023-NMSC-024.

Alleged inconsistency in conviction of first-degree murder and acquittal of second-degree murder did not require reversal. — Where defendant was charged with numerous crimes in connection with a dispute over missing drugs during which the victim was shot and killed, and where, at the conclusion of the trial, the jury entered verdict forms convicting defendant of willful and deliberate first-degree murder, felony murder in the first-degree, kidnapping, conspiracy, and tampering with evidence, and also entered verdict forms acquitting defendant of second-degree murder and voluntary manslaughter, and where defendant argued that reversal was warranted because the guilty verdict for first-degree murder was legally inconsistent with his acquittals for second-degree murder and voluntary manslaughter, reversal was not warranted, because when the evidence is sufficient to support the verdict of conviction, an appellate court will not speculate as to why the jury acquitted a defendant of other charges, even if the conviction and acquittal are allegedly inconsistent, and in this case, it was undisputed, and the record reflects, that the state presented sufficient evidence to support the conviction of willful and deliberate first-degree murder. *State v. Veleta*, 2023-NMSC-024.

Stepdown instructions complied with law and did not confuse or misdirect the jury. — Where defendant was charged with numerous crimes in connection with a dispute over missing drugs during which the victim was shot and killed, and where, at the conclusion of the trial, the jury entered verdict forms convicting defendant of willful and deliberate first-degree murder, felony murder in the first-degree, kidnapping, conspiracy, and tampering with evidence, and also entered verdict forms acquitting defendant of second-degree murder and voluntary manslaughter, and where defendant argued that the district court committed reversible error in issuing its stepdown instruction to the jury, contending that it did not comply with supreme court precedent which requires the jury to be informed that it may consider both the greater and lesser offenses under a count in any order it deems appropriate provided it return a verdict of not guilty on the greater offense before the court may accept a verdict on the lesser offense, and that the instructions confused the jury because they were internally inconsistent and contained undefined terms, the district court did not commit reversible error in instructing the jury, because the instructions given to the jury in this case provided the language necessary to comply with the law, and examining the instructions

as a whole, as the jury was instructed to do and as caselaw requires, any permissive suggestion regarding the order of consideration was clarified by the express instruction informing the jury that it had the discretion to consider the offenses in any order it wished, and the jury did not express any confusion regarding the instructions as given. *State v. Veleta*, 2023-NMSC-024.

Modified acquit first approach adopted for counts with lesser included offenses.— A jury should be instructed that it may deliberate on the greater and lesser offenses under a count in any order it sees fit, but must return a unanimous verdict of not guilty on the greater offense before the court may accept any verdict on the lesser offense. *State v. Lewis*, 2019-NMSC-001, *aff'g* 2017-NMCA-056.

Either acquittal or conviction of lesser included offense bars further prosecution for the greater offense. *State v. Castrillo*, 1977-NMSC-059, 90 N.M. 608, 566 P.2d 1146.

Possible results by jury on included offenses. — Within the framework of these instructions, a jury may reach one of three different results as to each included offense: (1) it may unanimously find a defendant guilty of a greater offense; (2) it may unanimously vote to acquit on the greater offense; or (3) it may fail to reach agreement. If the vote is not unanimous or if the vote is unanimous for acquittal, it must then move to a consideration of the lesser offenses. *State v. Castrillo*, 1977-NMSC-059, 90 N.M. 608, 566 P.2d 1146.

Trial court's duty when jury is deadlocked. — When a jury is unable to reach unanimous agreement on an open count with lesser included offenses, the judge must poll the jury and clearly establish on the record on which offense in the count the jury was deadlocked. If the judge fails to clearly establish on the record the offenses on which the jury was deadlocked, all but the lowest offense must be dismissed and the dismissed offenses cannot be retried. *State v. Phillips*, 2017-NMSC-019.

Court failed to establish the offenses on which the jury was deadlocked. — Where defendant was charged with first-degree premeditated murder and the lesser included offenses of second-degree murder and voluntary manslaughter, where the jury announced that it was hung, and during the jury poll, seven jurors stated that the jury had unanimously agreed defendant was not guilty of first-degree murder, but five jurors indicated the jury was unable to reach a verdict on that crime, and where there was no written record of whether the jury had acquitted defendant of that crime or deadlocked during deliberations, the district court failed to clearly establish on the record whether the jury deadlocked on first-degree murder and therefore abused its discretion in concluding that the jury was hung and that there was manifest necessity justifying a mistrial on all of the crimes in the count; constitutional double jeopardy protections bar retrial on the first- and second degree murder charges, but defendant may be retried on the lowest offense of voluntary manslaughter. *State v. Phillips*, 2017-NMSC-019.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1436, 1760.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

14-6013. Special verdict; [use of a firearm][1]; [noncapital felony against a person sixty years of age or older].

If you find the defendant guilty of _____, then you must determine if the [crime was][1] [crimes were] committed [with the use of a firearm][1] [against a person sixty years of age or older, and that person was intentionally injured] and report your determination. You must complete the special form to indicate your finding. [With respect to any crime,][2] For you to make a finding of "yes," the state must prove to your satisfaction beyond a reasonable doubt that that crime was committed [with the use of a firearm][1] [against a person sixty years of age or older, and that person was intentionally injured].

USE NOTES

1. Use the applicable bracketed alternative.

2. Use the bracketed phrase if more than one crime committed.

Committee commentary. — This instruction, together with the special interrogatory, UJI 14-6014, is required by Section 31-18-16 NMSA 1978. Special sentencing provisions apply if the jury finds that a firearm was used in the commission of any felony, other than a capital felony. *State v. Wilkins,* 88 N.M. 116, 537 P.2d 1012 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975). *See also, State v. Ellis,* 88 N.M. 90, 537 P.2d 207 (Ct. App. 1975) and *State v. Gabaldon,* 92 N.M. 230, 585 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 230, 585 P.2d 1352 (1978). The use of this instruction and the interrogatory is based on the assumption that the defendant was put on notice that he must defend against a crime committed with a firearm. *State v. Barreras,* 88 N.M. 52, 536 P.2d 1108 (Ct. App. 1975).

The use of a firearm is not limited to situations where the defendant was the user of the firearm; it also applies where the defendant was only an accessory. Section 31-18-16 NMSA 1978 (former Section 31-18-4 NMSA 1978) requires only that the firearm be used in the commission of the crime. *State v. Roque,* 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4 (1977).

This instruction must also be given when, under Section 31-18-16.1, the evidence shows that a person sixty years of age or older was intentionally injured during the commission of a noncapital felony.

ANNOTATIONS

Determination of use of firearm beyond reasonable doubt essential. — Proof beyond a reasonable doubt is the traditional burden which our system of criminal justice

deems essential, and the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged; this standard applies not only to factual determinations of guilt, but also to the factual determination that a firearm was used, because that fact is a predicate for enhancing the defendant's sentence. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

But absence of instruction constitutional where evidence uncontradicted and no complaint. — Where the burden of proof instruction, by its wording, was applied to a determination of guilt, no reference was made to use of a firearm, and, after the guilty verdicts were returned, instructions were given submitting the use of a firearm issue to the jury without a burden of proof instruction, the jury was not instructed on the burden of proof concerning use of a firearm; however, the defendant did not complain of the absence of an instruction and the evidence was almost uncontradicted that a firearm was used as to each count; accordingly, there was no violation of federal due process because the jury was not instructed that the firearm use must be proved beyond a reasonable doubt. *State v. Kendall,* 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *aff'd in part, rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1236, 1750, 1751, 1835 to 1858.

Effect of failure of special verdict or special finding to include findings of all ultimate facts or issues, 76 A.L.R. 1137.

Failure of one or more jurors to join in answer to special interrogatory or special verdict as affecting verdict, 155 A.L.R. 586.

14-6014. Sample forms of verdict.[1]

(style of case)

We find the defendant [_____ (*name*)][2] GUILTY of _____[3] [as charged in Count _____[4]].

_____
FOREPERSON

(style of case)

We find the defendant [_____ (*name*)][2] NOT GUILTY of _____[3] [as charged in Count _____[4]].

_____

FOREPERSON

(style of case)

We find the defendant [_____ (*name*)][2] NOT GUILTY.[5]

_____
FOREPERSON

(style of case)

We find the defendant [_____ (*name*)][2] NOT GUILTY BY REASON OF INSANITY.

_____
FOREPERSON

(style of case)

Do you unanimously find beyond a reasonable doubt that a firearm was used in the commission of _____[3] [as charged in Count _____]?

_____ (Yes or No)

_____
FOREPERSON

(style of case)

Do you unanimously find beyond a reasonable doubt that _____[3] was committed against a person sixty years of age or older, and that person was intentionally injured [as charged in Count _____]?

_____ (Yes or No)

_____
FOREPERSON

(style of case)

Do you find that the defendant [_____ (*name*)][2] is competent to stand trial?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. A form of verdict must be submitted to the jury for each offense or lesser included offense, and each form must be typed on a separate page.

2. Use this provision and insert the name of each defendant when there are multiple defendants.

3. Insert the name of the offense; do not leave blank for the jury to complete.

4. Insert the count number, if any; do not leave blank for the jury to complete.

5. This form is appropriate for lesser included offenses. *See* UJI 14-6012 NMRA.

[As amended, effective August 1, 1997; as amended by Supreme Court Order No. 22-8300-031, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-031, effective December 31, 2022, removed one of the possible verdicts, and revised the Use Notes; after the fourth occurrence of “FOREPERSON”, deleted “We find the defendant [_____(name) GUILTY, BUT MENTALLY ILL.”, and deleted Use Note 6, which provided, “This form may be submitted when a defendant has presented sufficient evidence of insanity or lack of capacity to form a specific intent to the jury. Instruction 14-5102 or 14-5103 must also be given if this instruction is submitted.”

The 1997 amendment, effective August 1, 1997, substituted "foreperson" for "foreman" throughout the instruction, inserted "unanimously" and "beyond a reasonable doubt" in two places, and made stylistic changes in two places near the beginning of the instruction.

Multiple counts combined in one verdict form. — There was no fundamental error in submitting the forms of verdicts with multiple counts combined in one verdict form, but the court does not believe it to be the better practice. There could be a serious question arising in the event of an error in the record affecting one count, and in such a case, the judgment of conviction would have to be set aside in toto. *State v. Cisneros,* 1967-NMSC-015, 77 N.M. 361, 423 P.2d 45.

14-6015. Verdicts; single or multiple defendants; larceny and receiving by acquiring; insanity.[1]

In this case [in connection with the charges of larceny and receiving (by acquiring)[2] stolen goods][3], there are [three][4] [four] possible verdicts:

(1) guilty of larceny and not guilty of receiving (by acquiring)[2];

(2) guilty of receiving (by acquiring)[2] and not guilty of larceny;

(3) not guilty of larceny and not guilty of receiving (by acquiring)[2]; [and]

(4) not guilty by reason of insanity].[5]

Only one of the possible verdicts may be signed by you as to these charges [as to each defendant]. If you have agreed upon one verdict as to these charges [as to a defendant], that form of verdict is the only form to be signed as to these charges [as to that defendant]. The other forms as to these charges are to be left unsigned.

[Even if you determine from all the evidence that a defendant committed an offense, if you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity and sign only the not guilty by reason of insanity form.][5]

USE NOTES

1. This instruction should be given if charges of larceny and charges of receiving (by acquiring) stolen property, relate to the same property. This instruction supplants UJI 14-6011; but UJI 14-6011 may be used with this instruction if counts are submitted other than larceny and receiving by acquiring. UJI 14-6004 should not be used with this instruction because the two are in contradiction. If there are other charges, to which this instruction is not applicable, UJI 14-6004 may be tailored to refer solely to those counts and may be given with this instruction.

2. Use the parenthetical phrase if the charge of receiving by keeping or receiving by disposing is also submitted. If no charge of receiving by keeping or disposing is submitted, the parenthetical phrase should be omitted.

3. Use this bracketed phrase if charges other than larceny and receiving are submitted. In some cases it also may be necessary to identify the counts, such as cases in which there are other charges of larceny or receiving to which this instruction is not applicable. If the only charges that are submitted are larceny and receiving by acquiring, of the same property, then this bracketed phrase should be omitted.

4. Use appropriate bracketed alternative.

5. Use these bracketed provisions if the issue of not guilty by reason of insanity is submitted to the jury.

Committee commentary. — This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. *See State v. Mares*, 79 N.M. 327, 329, 442 P.2d 817 (Ct. App. 1968). For the substantive law of receiving, *see* the commentary to UJI 14-1650.

The general rule is that the thief cannot be guilty of receiving the stolen goods, because one cannot receive from oneself. *Territory v. Graves,* 17 N.M. 241, 125 P. 604 (1912). The statute has been changed since the *Graves* case, and under the present statute the thief cannot be guilty of receiving (by acquiring) stolen goods, but the thief can be guilty of receiving (by disposing of) the stolen goods. *State v. Tapia,* 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976). *See also State v. Rogers,* 90 N.M. 673, 568 P.2d 199 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 604, 566 P.2d 1142 (1977). The thief may also be convicted of receiving (by retaining). UJI 14-1650. Contra, dicta in the *Tapia* case.

The general rule bars a conviction of larceny and receiving (by acquiring) of the same goods. Moreover, it extends to bar a conviction of burglary and receiving (by acquiring) in cases in which the burglary charge is based on an intent to steal and in fact there is a theft by the accused of the same property which is the subject of the receiving charge. *State v. Gleason,* 80 N.M. 382, 456 P.2d 215 (Ct. App. 1969).

Even though a defendant cannot be convicted of larceny and receiving, or burglary and receiving, it is proper to charge both or all of such offenses. *State v. Mitchell,* 86 N.M. 343, 524 P.2d 206 (Ct. App. 1974). *Compare United States v. Gaddis,* 424 U.S. 544, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976). Therefore, a defendant may be charged with burglary, larceny and receiving (by acquiring). In such case, the jury may be instructed on all three offenses. If the jury convicts of burglary, they cannot convict of receiving (by acquiring). If the jury convicts of receiving (by acquiring) they cannot convict of burglary. The same rule holds for larceny and receiving (by acquiring). Since burglary, larceny and receiving all carry the same penalty (except where the goods are of a value of over $2500), there is no need to require the jury to consider any particular charge first, as is required when one of the offenses has a more severe penalty than the other. *See United States v. Gaddis*, supra.

If a charge of receiving the same or other property by keeping it or disposing of it is submitted to the jury, then the phrase "by acquiring" should be used in this instruction. It is necessary to distinguish between the different ways of committing the offense of receiving stolen property because the rule that the thief cannot be guilty of receiving applies only to receiving by acquiring.

If a charge of receiving by keeping or disposing is submitted, separate verdict forms are required for such charge. In that way, if there is a conviction of receiving it can be determined whether the defendant was convicted of receiving by acquiring or receiving by another means.

If insanity is in issue, there are four possible verdicts as to each defendant. In such cases, the bracketed clause, "not guilty by reason of insanity," should be given, and the final, bracketed paragraph should be given.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Larceny § 180 et seq.; 66 Am. Jur. 2d Receiving Stolen Property § 33; 75B Am. Jur. 2d Trial §§ 1436 to 1440, 1793 to 1797.

Failure of verdict on conviction of larceny or embezzlement to state value of property, 79 A.L.R. 1180.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

23A C.J.S. Criminal Law §§ 1393, 1402; 52A C.J.S. Larceny §§ 142, 155; 76 C.J.S. Receiving Stolen Goods § 1 et seq.; 88 C.J.S. Trial §§ 298, 322; 89 C.J.S. Trial §§ 492, 496, 510, 521.

14-6016. Verdicts; single or multiple defendants; burglary and receiving by acquiring; insanity.[1]

In this case [in connection with the charges of burglary and receiving (by acquiring)[2] stolen goods][3], there are [three][4] [four] possible verdicts:

(1) guilty of burglary and not guilty of receiving (by acquiring)[2];

(2) guilty of receiving (by acquiring)[2] and not guilty of burglary;

(3) not guilty of burglary and not guilty of receiving (by acquiring)[2]; [and]

[(4) not guilty by reason of insanity].[5]

Only one of the possible verdicts may be signed by you as to these charges [as to each defendant]. If you have agreed upon one verdict as to these charges [as to a defendant], that form of verdict is the only form to be signed as to these charges [as to that defendant]. The other forms as to these charges are to be left unsigned.

[Even if you determine from all the evidence that a defendant committed an offense, if you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity and sign only the not guilty by reason of insanity form.][5]

USE NOTES

1. This instruction should be given if charges of burglary and charges of receiving (by acquiring) stolen property, relate to the same property. This instruction supplants UJI 14-6011; but UJI 14-6011 may be used with this instruction if counts are submitted other than burglary and receiving by acquiring. UJI 14-6004 should not be used with this instruction because the two are in contradiction. If there are other charges, to which this instruction is not applicable, UJI 14-6004 may be tailored to refer solely to those counts and may be given with this instruction.

2. Use the parenthetical phrase if the charge of receiving by keeping or receiving by disposing is also submitted. If no charge of receiving by keeping or disposing is submitted, the parenthetical phrase should be omitted.

3. Use this bracketed phrase if charges other than burglary and receiving are submitted. In some cases it also may be necessary to identify the counts, such as cases in which there are other charges of burglary or receiving to which this instruction is not applicable. If the only charges that are submitted are burglary and receiving by acquiring, then this bracketed phrase should be omitted.

4. Use appropriate bracketed alternative.

5. Use these bracketed provisions if the issue of not guilty by reason of insanity is submitted to the jury.

Committee commentary. — This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. *See* committee commentary to UJI 14-6015.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary §§ 67 to 73; 66 Am. Jur. 2d Receiving Stolen Property § 33; 75B Am. Jur. 2d Trial §§ 1436 to 1440, 1793 to 1797.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

12A C.J.S. Burglary §§ 127 et seq.; 23A C.J.S. Criminal Law §§ 1393, 1402; 76 C.J.S. Receiving Stolen Goods § 1 et seq.; 88 C.J.S. Trial §§ 298, 322; 89 C.J.S. Trial §§ 492, 496, 510, 521.

14-6017. Verdicts; single or multiple defendants; burglary, larceny and receiving by acquiring; insanity.[1]

In this case [in connection with the charges of burglary, larceny and receiving (by acquiring)[2] stolen goods][3], there are [five][4] [six] possible verdicts:

(1) guilty of burglary, guilty of larceny and not guilty of receiving (by acquiring)[2];

(2) guilty of burglary, not guilty of larceny and not guilty of receiving (by acquiring)[2];

(3) guilty of larceny, not guilty of burglary and not guilty of receiving (by acquiring)[2];

(4) guilty of receiving (by acquiring)[2], not guilty of burglary and not guilty of larceny;

(5) not guilty of burglary, not guilty of larceny and not guilty of receiving (by acquiring)[2];

[(6) not guilty by reason of insanity.[5]

Only one of the possible verdicts may be signed by you as to these charges [as to each defendant]. If you have agreed upon one verdict as to these charges [as to a defendant], that form of verdict is the only form to be signed as to these charges [as to that defendant]. The other forms as to these charges are to be left unsigned.

[Even if you determine from all the evidence that a defendant committed an offense, if you are not satisfied beyond a reasonable doubt that he was sane at the time, you must find him not guilty by reason of insanity and sign only the not guilty by reason of insanity form.][5]

USE NOTES

1. This instruction should be given if charges of burglary, larceny and of receiving (by acquiring) stolen property, relate to the same property. This instruction supplants UJI 14-6011; but UJI 14-6011 may be used with this instruction if counts are submitted other than burglary, larceny and receiving by acquiring. UJI 14-6004 should not be used with this instruction because the two are in contradiction. If there are other charges to which this instruction is not applicable, UJI 14-6004 may be tailored to refer solely to those counts and may be given with this instruction.

2. Use the parenthetical phrase if the charge of receiving by keeping or receiving by disposing is also submitted. If no charge of receiving by keeping or disposing is submitted, the parenthetical phrase should be omitted.

3. Use this bracketed phrase if charges other than burglary, larceny and receiving are submitted. In some cases it also may be necessary to identify the counts, such as cases in which there are other charges of burglary, larceny or receiving to which this instruction is not applicable. If the only charges that are submitted are burglary, larceny and receiving by acquiring, then this bracketed phrase should be omitted.

4. Use appropriate bracketed alternative.

5. Use these bracketed provisions if the issue of not guilty by reason of insanity is submitted to the jury.

Committee commentary. — This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. *See* commentary to UJI 14-6015.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary §§ 67 to 73; 50 Am. Jur. 2d Larceny § 180 et seq.; 66 Am. Jur. 2d Receiving Stolen Property § 33; 75B Am. Jur. 2d Trial §§ 1436 to 1440, 1793 to 1797.

Failure of verdict on conviction of larceny or embezzlement to state value of property, 79 A.L.R. 1180.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

12A C.J.S. Burglary §§ 127 et seq.; 23A C.J.S. Criminal Law §§ 1393, 1402; 52A Larceny §§ 142, 155; 76 Receiving Stolen Goods §§ 21, 22; 88 C.J.S. Trial §§ 298, 322; 89 C.J.S. Trial §§ 492, 496, 510, 521.

14-6018. Withdrawn.

ANNOTATIONS

Withdrawals. – Pursuant to Supreme Court Order No. 15-8300-004, UJI 14-6018 NMRA, relating to special verdict, kidnapping, was withdrawn for all cases pending or filed on or after December 31, 2015.

Pursuant to the modification of UJI 14-403 NMRA (kidnapping; first-degree; essential elements) to incorporate the elements previously contained herein, this special verdict form, relating to first degree kidnapping, was withdrawn.

14-6019. Special verdict; tampering with evidence.[1]

Do you unanimously find beyond a reasonable doubt that _____ (*name of defendant*) committed tampering with evidence related to [_____ (*identify underlying crime(s)*)] [*or*] [_____ (*identify underlying crime(s) for which defendant was on probation or parole*)][2]?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. Give these instructions after UJI 14-2241 NMRA. Forms of verdict must be separately submitted to the jury for each category (penalty level) of crime for which tampering with evidence is alleged to have been committed for the sentencing court to determine the permissible range of punishment under NMSA 1978, Section 30-22-5(B).

2. Do not leave blank for the jury to complete. Insert the name of the offense (or multiple offenses within a penalty category under Section 30-22-5(B)). If a violation for probation or parole is at issue, the instruction must identify the underlying offense(s) for which the defendant was serving probation or parole. *See State v. Radosevich*, 2018-NMSC-028, ¶ 31, 419 P. 3d 176. *Accord* UJI 14-2241 NMRA, Use Note 4. This may include submitting a form of verdict to the jury that states "a crime or violation which cannot be determined." *See Radosevich*, 2018-NMSC-028, ¶ 29 ("[I]ndeterminate tampering" must be limited to the penalties "prescribed in the statute for the lowest level of tampering, which are currently the petty misdemeanor penalties of Section 30-22-5(B)(3).").

[Adopted by Supreme Court Order No. 13-8300-043, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, § 30-22-5(B) (2003). Because the permissible punishment range under Section 30-22-5 depends on the highest crime for which tampering with evidence is committed, the jury must clearly identify the crime for which tampering with evidence is alleged to have been committed. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond reasonable doubt). In *State v. Radosevich*, 2018-NMSC-028, ¶ 29, 419 P.3d 176, the Court limited the provisions of Section 30-22-5(B)(4), which permit a defendant to be convicted of a crime where the underlying crime is indeterminate, and held that the only constitutionally permissible punishment where the jury does not find the level of the underlying offense is limited to the petty misdemeanor penalties of Section 30-22-5(B)(3).

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added a provision directing the user of the instruction to insert the name of the underlying offense or the underlying crime for which the defendant was on probation or parole, revised the Use Notes, and revised the committee commentary; after "*identify*", deleted "*crime*" and added "*underlying crime(s)*", and after "[*or*]", added "(*identifying underlying crime(s) for which defendant was on probation or parole*)]"; in Use Note 1, deleted "Insert the name of the offense or offenses that fit within one category of crimes as defined in Section 30-22-

5(B) NMSA 1978. A form" and added "Give these instructions after UJI 14-2241 NMRA. Forms", after "verdict must be", added "separately", and after "category", added "(penalty level)", and completely rewrote Use Note 2.

14-6019A. Special verdict; sexual offense against a child.[1]

If you find the defendant guilty of _____ (*insert name of offense*) [as charged in Count _____][2], then you must determine whether, at the time of the offense, _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old. You must complete the special form to indicate your findings.

For you to make a finding of "yes," to the question, the state must prove to your satisfaction beyond a reasonable doubt that _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old. Do you unanimously find beyond a reasonable doubt that _____ (*name of victim*) was at least thirteen (13) but less than eighteen (18) years old?

_____ (yes or no)

_____
FOREPERSON

USE NOTES

1. For use in criminal sexual penetration cases when the age of the victim is not already an essential element of the offense.

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

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — NMSA 1978, Section 30-9-11(E) specifies six circumstances of criminal sexual penetration in the second degree. Only Section 30-9-11(E)(1) makes the victim's age an essential element of the offense. However, unless Section 30-9-11(E) (1) has been charged, under Sections 30-9-11(E)(2)-(6), whenever the victim is 13-18, the criminal sexual penetration in the second degree both triggers a statutory increase to a second-degree felony and also triggers a mandatory minimum three-year sentence not otherwise imposed for second-degree felonies. Where the State is seeking the second-degree felony statutory punishments and/or the mandatory minimum sentence prescribed by Section 30-9-11—notwithstanding the normal sentence for a second-degree felony under NMSA 1978, Section 31-18-15—because the victim is 13-18, the victim's age becomes an essential fact that must be submitted to the jury and determined beyond a reasonable doubt. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901.

[Adopted by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019, added a provision specifically requesting the jury to make a finding of whether the victim was at least thirteen but less than eighteen years old, and added the "Foreperson" signature line; and in the second paragraph, after the first occurrence of "eighteen (18) years old.", added the remainder of the instruction.

14-6019B. Conspiracy; multiple objectives; special verdict.[1]

If you find the defendant guilty of conspiracy [as charged in Count _____][2], then you must determine which crime[s] the defendant conspired to commit. You must complete the special [form] [forms] to indicate your findings. [With respect to each question,][3] For you to make a finding of "yes," the state must prove to your satisfaction beyond a reasonable doubt that the defendant conspired to commit the crime of _____ (*name of crime*).

(style of case)

QUESTION 1

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of _____(*name of crime*)?

_____ (Yes or No)

QUESTION [_____ (*insert question number*)][4]

Do you unanimously find beyond a reasonable doubt that the defendant conspired to commit the crime of _____(*name of crime*)?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. This verdict form is to be used in conjunction with UJI 14-2810B NMRA when the defendant is charged with conspiracy to commit multiple crimes. If the jury has been instructed on more than one count of conspiracy involving multiple objectives, use a separate special verdict form UJI 14-6019B for each count of conspiracy.

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

3. Use the bracketed phrase if more than one question is given to the jury.

4. For each crime the commission of which is alleged to be part of the conspiracy, provide a separate question.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

Committee commentary. — *See* the committee commentary to UJI 14-2810A NMRA, the unanimity instruction.

[Adopted by Supreme Court Order No. 18-8300-012, effective for all cases pending or filed on or after December 31, 2018.]

14-6019C. Sexual exploitation of children; under 13; special verdict.[1]

(*Style of Case*)

If you find the defendant guilty of sexual exploitation of children (possession) [as charged in Count ____][2], then you must determine if a child depicted in the visual or print medium was under the age of thirteen (13). You must complete this special form to indicate your finding. For you to make a finding of Ayes,@ the State must have proven it to your satisfaction beyond a reasonable doubt. Do you unanimously find beyond a reasonable doubt that a child depicted in the visual or print medium was under the age of thirteen (13)?

_____ (Yes or No)

_____
FOREPERSON

USE NOTES

1. This verdict form is to be used in conjunction with UJI 14-631 NMRA when the State seeks to enhance a defendant=s sentence under Section 30-6A-3(A) NMSA 1978.

2. Insert Count number if more than one (1) count is charged.

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — *See* NMSA 1978, ' 30-6A-3(A) (2016).

The Legislature amended Section 30-6A-3(A) in 2016, adding the one-year sentence enhancement for depictions of children under the age of 13. 2016 N.M. Laws, ch. 2, ' 1 (eff. Feb. 25, 2016). This enhancement is applicable to possession offenses only. *Id*.

Because the enhancement requires an additional fact not required for conviction, the age of a depicted child becomes an essential fact that must be submitted to the jury and proved beyond a reasonable doubt. *See generally Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond a reasonable doubt).

[Adopted by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

Part C
Final Instruction

14-6020. Final instruction.[1]

I will now ask you to retire to the jury room to begin your deliberations. You will be provided a copy of the jury instructions and the exhibits introduced as evidence [will be made available to you].[2]

Prior to beginning your deliberations you will need to select one of you to act foreperson. That person will preside over your deliberations and will speak for the jury here in court.

Forms of verdict have been prepared for your use.[3]

You will take these forms to the jury room; when you have reached unanimous agreement as to your verdict, the foreperson will sign the forms which express your verdict. You will then return all forms of verdict, these instructions and any exhibits to the courtroom.

_____ and _____ (*name of each alternate juror*) are alternate jurors in this case and therefore will need to remain in the courtroom.

USE NOTES

1. This instruction must be given in every case.

2. The bracketed language may be used if the exhibits will not be sent to the jury room.

3. Forms should be read at this time. The forms should be grouped according to defendants and counts. Lesser included offenses should be given in sequence after the greater offense.

[UJI Crim. 50.20; approved, effective September 1, 1975; as amended, effective November 1, 2003.]

Committee commentary. — This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.09.

ANNOTATIONS

The 2003 amendment, effective November 1, 2003, added the first and last paragraphs and substituted "prior to beginning your deliberations you will need to" for "you will now retire to the jury room and" and "foreperson" for "foreman" in the first sentence of the second paragraph, "use" for "convenience" in the third paragraph, and "foreperson" for "foreman" in the first sentence of the fourth paragraph. The amendment also inserted Use Note 2 and redesignated former Use Note 2 as present Use Note 3.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1437, 1448 to 1458, 1503, 1573 to 1579, 1647 et seq.

Verdict as affected by agreement in advance among jurors to abide by less than unanimous vote, 73 A.L.R. 93.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 A.L.R. 899.

Permitting dying declarations to be taken into jury room, 114 A.L.R. 1519.

Permitting or refusing to permit jury in criminal case to examine or take into jury room the indictment or information or other pleading or copy thereof, 120 A.L.R. 463.

Propriety of instruction in criminal case as to the importance of enforcement of law, or duty of jury in that regard, 124 A.L.R. 1133.

Propriety of permitting jury to take x-ray picture, introduced in evidence, with them into jury room, 10 A.L.R.2d 918.

Requirement of unanimity of verdict in proceedings to determine sanity of one accused of crime, 42 A.L.R.2d 1468.

Constitutionality and construction of statute or court rule relating to alternate or additional jurors or substitution of jurors during trial, 84 A.L.R.2d 1288, 15 A.L.R.4th 1127, 88 A.L.R.4th 711.

Haste or shortness of time in which jury reached verdict, 91 A.L.R.2d 1238.

Inconsistency of criminal verdict with verdict on another indictment or information tried at the same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Propriety of reference, in instruction in criminal case, to juror's duty to God, 39 A.L.R.3d 1445.

Validity and efficacy of accused's waiver of unanimous verdict, 97 A.L.R.3d 1253.

Taking and use of trial notes by jury, 36 A.L.R.5th 255.

23A C.J.S. Criminal Law § 1391; 88 C.J.S. Trial §§ 297, 324, 343; 89 C.J.S. Trial §§ 468, 494.

14-6021. Pre-deliberation oath to interpreter.

Do you solemnly swear or affirm that you will not interfere with the jury's deliberations in any way by expressing any ideas, opinions or observations that you may have during deliberations and that you will strictly limit your role during deliberations to interpreting?

USE NOTES

This instruction must be read before deliberations whenever a non-English speaking juror or hearing-impaired juror is serving on the jury.

[Approved by Supreme Court Order No. 07-8300-031, effective December 17, 2007.]

Committee commentary. — This instruction is modeled on Appendix A to *State v. Pacheco*, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

ANNOTATIONS

Cross references. — For the court interpreter code of professional responsibility, *see* 23-111 NMRA.

14-6022. Pre-deliberation instruction to jury.[1]

Ladies and gentlemen, we have at least one [non-English speaking] [hearing-impaired][2] juror who is participating in this case. New Mexico law permits all citizens to serve on a jury whether or not [English is their first language] [they are hearing-impaired].[2] You must include [this juror] [these jurors] in all deliberations and discussions on this case. To help you communicate, the [juror] [jurors] will be using the services of the official court interpreter. The following rules govern the conduct of the interpreter and the jury:

1. The interpreter's only function in the jury room is to interpret between [English and the non-English-speaking (juror) (jurors') native language] [speech and sign language].[2]

2. The interpreter is not permitted to answer questions, express opinions, have direct conversations with other jurors or participate in your deliberations.

3. The interpreter is only permitted to speak directly to a member of the jury to ensure that the interpreter's equipment is functioning properly and to advise the jury foreperson if a specific interpreting problem arises that is not related to the factual or legal issues in the case.

4. No gesture, expression, sound or movement made by the interpreter in the jury room should influence you opinion or indicate how you should vote.

5. If you can speak both English and [the language of the non-English speaker] [read sign language],[2] you must speak only English in the jury room so the rest of the jury is not excluded from any conversation.

6. Leave all interpretations to the official court interpreter. The interpreter is the only person permitted to interpret conversations inside the jury room and testimony in the courtroom.

7. You must immediately report any deviation from these rules by submitting a note identifying the problem to the judge or court personnel.

USE NOTES

1. This instruction must be read before deliberations whenever a non-English speaking juror or hearing-impaired juror is serving on the jury.

2. Use only the applicable alternative or alternatives.

[Approved by Supreme Court Order No. 07-8300-031, effective December 17, 2007.]

Committee commentary. — This instruction is modeled on Appendix B to *State v. Pacheco*, 2007-NMSC-009, 141 N.M. 340, 155 P.3d 745.

Part D
Shotgun Instruction

14-6030. Shotgun instruction.

It is your duty, as jurors, to consult with one another, and to deliberate with a view of reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinion of the other jurors.

I hope that after further deliberation you may be able to agree upon a verdict. That is why we try cases, to try to dispose of them and to reach a common conclusion, if you can do so, consistent with the conscience of the individual members of the jury. The court suggests that in deliberating you each recognize that you are not infallible, that you hear the opinion of the other jurors, and that you do it conscientiously with a view to reaching a common conclusion, if you can.

USE NOTES

No instruction on this subject shall be given.

Committee commentary. — The language of this instruction was derived from and is identical with UJI 13-1904. It was the approved shotgun instruction for criminal cases. *State v. Burk,* 82 N.M. 466, 483 P.2d 940 (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). The use of the instruction has continued to generate appellate issues. *See*, e.g., *State v. Padilla,* 86 N.M. 695, 526 P.2d 1288 (Ct. App. 1974); *State v. Romero,* 86 N.M. 674, 526 P.2d 816 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974); *State v. Cruz,* 86 N.M. 341, 524 P.2d 204 (Ct. App. 1974).

In other jurisdictions, the use of this type of instruction has been questioned as coercive and generative of appeals. *State v. Thomas,* 86 Ariz. 161, 342 P.2d 197 (1959); *State v. Randall,* 137 Mont. 534, 353 P.2d 1054, 100 A.L.R.2d 171 (1960). *See* Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge, 31 U. Chi. L. Rev. 386 (1963). *See* generally Annot., 100 A.L.R.2d 177 (1965). The committee believed that the use of the shotgun instruction was counterproductive and that the duty to consult instruction should be sufficient. *See* UJI 14-6008.

ANNOTATIONS

Shotgun jury instructions are prohibited. — The use of a shotgun jury instruction is prohibited due to the potentially coercive effect it has on holdout jurors to abandon their convictions to arrive at a verdict with the majority, and to determine whether communication between the district court and the jury related to the jury's deliberations is coercive, an appellate court looks at whether any additional instruction or instructions were given, whether the court failed to caution a jury not to surrender honest convictions, thus pressuring holdout jurors to conform, and whether the court established time limits on further deliberations with the threat of a mistrial. *State v. Salas*, 2017-NMCA-057, cert. denied.

District court's conduct did not pressure holdout jurors to conform or establish time limits on further deliberations. — In defendant's trial for battery on a peace officer, where the jury received the case on Friday at approximately 4:00 p.m., and where, at 5:10 p.m., the district court called the jury to the courtroom to discuss its progress toward a verdict and to relay logistical concerns with allowing deliberations to continue, the district court's instruction to the jury that it could deliberate for twenty more minutes and, if it did not reach a verdict, deliberations would resume on the following Monday was not improper, because the temporal limitation established by the district court applied only to that particular day and arose from logistical concerns, rather than deliberative ones; the district court's conduct in no way pressured holdout jurors to conform or established time limits on further deliberations with the threat of a mistrial. *State v. Salas*, 2017-NMCA-057, cert. denied.

Shotgun instruction. — Where the foreperson of the jury in the presence of the defendant and all counsel, but not in the presence of the jury, informed the court of the jury's numerical split with a minority favoring a not guilty verdict, and the court instructed the foreperson to "read the jury instructions and consider the matter after you have read the instructions together, and let me know at that point. I don't want to force you to do anything if it is not going to be fruitful, but I do want you to read the instructions to the jury together, and then discuss it again and see where you end up", the instruction was a prohibited shotgun instruction. *State v. Cortez*, 2007-NMCA-054, 141 N.M. 623, 159 P.3d 1108, cert. granted, 2007-NMCERT-005.

Grounds for relief on fundamental error not established by "shotgun" instruction. — "A shotgun" or supplementary instruction given by the court some time after the jury had received the case for its deliberations and had failed to reach a verdict does not establish grounds for relief on fundamental error. *State v. Travis,* 1968-NMCA-036, 79 N.M. 307, 442 P.2d 797.

Nor abuse of court discretion. — The trial court did not abuse its discretion in giving a shotgun instruction after the jury had been out three hours, and where the trial was short, the issues were relatively simple and the objection made by counsel did not raise the question of timeliness. *State v. Hatley,* 1963-NMSC-110, 72 N.M. 377, 384 P.2d 252.

But greatest caution should be exercised. — While the appropriateness of a "shotgun" instruction is largely within the discretion of the trial court, certainly the greatest caution should be exercised in avoiding an abuse of that discretion. *State v. White,* 1954-NMSC-050, 58 N.M. 324, 270 P.2d 727.

Coercive conduct requires reversal. — An inquiry as to numerical division followed by the shotgun instruction was found to be coercive conduct requiring reversal. *State v. Aragon,* 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284.

Actual deliberation time is one of various factors trial court must weigh in determining whether to give the shotgun instruction. *State v. Romero,* 1974-NMCA-090, 86 N.M. 674, 526 P.2d 816, cert. denied, 86 N.M. 656, 526 P.2d 798.

And instruction is appropriate after the jury has deliberated for some time without reaching a verdict, but it is improper to unduly hasten a jury in its consideration of the case or coerce the jury into an agreement. *State v. Lucero,* 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Judge's proper action when jury unable to arrive at verdict. — When a statement is submitted to the court by the jury during deliberations concerning the inability of the jury to arrive at a verdict, together with a disclosure of the numerical division, the judge not only can, but should, communicate with the jury, but should only do so if the communication leaves with the jury the discretion whether or not it should deliberate further. The court can inform the jury that it may consider further deliberations, but not that it must consider further deliberations. *State v. McCarter,* 1980-NMSC-003, 93 N.M. 708, 604 P.2d 1242.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75B Am. Jur. 2d Trial §§ 1437, 1448 to 1458, 1647 et seq., 1580 et seq.

Threat to dismiss jury in criminal case for term, unless they could agree on verdict as coercion, 10 A.L.R. 421.

Comments and conduct of judge calculated to coerce or influence jury to reach verdict in criminal case, 85 A.L.R. 1420.

Right of jurors to sustain their verdict by affidavits or testimony to effect that they were not influenced by improper matters which came before them, 93 A.L.R. 1449.

Haste or shortness of time in which jury reached verdict, 91 A.L.R.2d 1238.

Time jury may be kept together on disagreement in criminal case, 93 A.L.R.2d 627.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time, 16 A.L.R.3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information, 18 A.L.R.3d 259.

Inconsistency of criminal verdicts as between two or more defendants tried together, 22 A.L.R.3d 717.

Instructions urging dissenting jurors in state criminal case to give due consideration to opinion of majority (Allen charge) - modern cases, 97 A.L.R.3d 96.

23A C.J.S. Criminal Law § 1391; 88 C.J.S. Trial §§ 297, 320, 343, 389; 89 C.J.S. Trial §§ 468, 481, 494.

14-6040. Post-trial instruction.

You have now completed your service as jurors in this case. The court thanks you for your efforts in this matter.

People may want to talk to you about your service or the jury's deliberations. You are now free to discuss the case with others, but you do not have to. It is your choice. If anyone persists after you have told them that you do not wish to talk about the case, please inform my office.

USE NOTES

This instruction is to be given in every case before the jury is discharged.

[Approved, effective October 15, 2002.]

CHAPTER 61 to 69
(Reserved)

CHAPTER 70
Sentencing Proceedings

Part A
Habitual Criminal

14-7001 to 14-7007. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated May 2, 1989, these instructions, the General Use Note preceding the instructions, and the Use Note and committee

commentary following each instruction, were withdrawn effective for cases filed in the district courts on or after August 1, 1989.

Part B
Life Imprisonment

14-7010. Explanation of life imprisonment without possibility of release or parole proceeding; single aggravating circumstance.[1]

INTRODUCTION OF STAFF:

I am Judge _____ (name of Judge presiding over hearing). My bailiff, who will escort you and assist in communicating with the court, is_____. My administrative assistant is _____. If you need anything during this proceeding the bailiff or the administrative assistant would be happy to help. The court [reporter][monitor] is making a record of the proceeding. You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the proceeding because ordinarily transcripts of the witnesses testimony will not be provided to you.

INTRODUCTION TO PRELIMINARY INSTRUCTIONS:

As the proceeding begins, I have some instructions for you. These instructions, along with those previously given, are preliminary only and may be changed during or at the end of the proceeding. All of you must pay attention to the evidence. After you have heard all of the evidence I will read the final instructions of law to you. You will also receive a written copy of the instructions. You must follow the final instructions in reaching your verdict.

SCHEDULING DURING HEARING:

This proceeding is expected to last [until _____] [_____ days]. The usual hours of the proceeding will be from ___ (a.m.) to ___ (p.m.) with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by ___ (a.m.). Please do not come back into the courtroom until you are called by the bailiff.

NOTE TAKING PERMITTED

You are allowed, but not required, to take notes during this proceeding. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the proceeding. Listening and watching witnesses during their testimony will help you assess their appearance, behavior, memory and whatever else bears on their credibility. At each recess you must either leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your

notes and return them to you when the proceeding resumes. When deliberations commence you will take your notes with you to the jury room. Ordinarily at the end of the case the notes will be collected and destroyed.[3]

ORDER OF HEARING

The proceeding generally begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during the course of the proceeding can be of considerable assistance to you in understanding the evidence as it is presented at the proceeding. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at your verdict.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this proceeding, which you must do solely upon the evidence received in court.

It is the duty of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper, and you must not hold such objection against the objecting party. I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account, among other things, the witness's ability and opportunity to observe, memory, manner, or any bias or prejudice that the witness may have and the reasonableness of the testimony considered in light of all of the evidence of the case.

No ruling, gesture or comment I make during the course of the proceeding should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

QUESTIONS BY JURORS

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have an unanswered question after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write the question and your name it down on a piece of your note paper and give it to the bailiff before the witness leaves the stand. I will decide whether or

when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may prevent the question from being asked. If the question is not asked, please do not give it any further consideration, do not discuss it with the other jurors, and please do not hold it against either side that you did not get an answer.

CONDUCT OF JURORS

There are a number of important rules governing your conduct as jurors during the proceeding. You must reach your verdict based solely upon the evidence received in court. You must not consider anything you may have read or heard about the proceeding outside the courtroom. During the proceeding and your deliberations, you must avoid news accounts of the proceeding, whether they be on radio, television, the internet, or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the proceeding.

You, as jurors, must decide this proceeding based solely on the evidence presented here within the four walls of this courtroom. This means that during the proceeding you must not conduct any independent research about this proceeding, the matters in this proceeding and the individuals or corporations involved in the proceeding. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this proceeding or to help you reach your verdict. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this proceeding with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the verdict to be reached with your fellow jurors, but you cannot discuss the verdict with anyone else, including your family and friends, until the proceeding is at an end.

I know that many of you use cell phones, the internet, and other tools of technology. You are not to discuss or provide any information to anyone about this proceeding through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this proceeding until I have accepted your verdict and this proceeding is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing, or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the proceeding until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment impartially and without regard to sympathy, bias, or prejudice. Therefore, until you retire to deliberate, you must not discuss this proceeding or the evidence with anyone, even with each other, because you have not heard all the evidence, you have

not been instructed on the law, and you have not heard the final arguments of the lawyers. If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

To minimize the risk of accidentally overhearing something that is not evidence, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Although it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

HEARING PROCEDURE:

I will outline the procedure for you to follow in reaching your verdict.

The state has charged that the following aggravating circumstance was present:[2]

[at the time of the murder, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer];

[the murder of _____ (*name of victim*) was committed during [the commission of] [an attempt to commit][2] kidnapping];

[the murder of _____ (*name of victim*) was committed during [the commission of] [an attempt to commit][2] criminal sexual contact of a minor];

[the murder of _____ (*name of victim*) was committed during [the commission of] [an attempt to commit][2] criminal sexual penetration];

[the murder of _____ (*name of victim*) was committed while the defendant was attempting to escape from a penal institution];

[at the time of the murder, _____ (*name of victim*) was an inmate of a penal institution];

[at the time of the murder _____ (*name of victim*) was a person lawfully on the premises of a penal institution];

[at the time of the murder _____ (*name of victim*) was an employee of the corrections department];

[the murder of _____ (*name of victim*) was for hire];

[the murder was of a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was of a person likely to become a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will decide whether this aggravating circumstance was present beyond a reasonable doubt.

The prosecuting attorney will now make an opening statement if [he] [she] desires. The defendant's attorney may make an opening statement if [he] [she] desires or may wait until later in the proceeding to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [he] [she] expects the evidence to show.

USE NOTES

1. This instruction is to be used if the defendant is charged with a crime carrying a sentence of life imprisonment without possibility of release or parole and the court adopts a bifurcated proceeding to determine whether an aggravating circumstance exists. It is to be used when the defendant has been convicted of a single murder and a single aggravating circumstance has been charged. (For cases where the death penalty remains an option, *see* UJI 14-7010 NMRA (2020), *available at* https://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink)). It is to be given at the start of the proceeding on the aggravating factor and before opening statements. This instruction does not go to the jury room. If the defendant has been convicted of more than one capital offense, use UJI 14-7011 NMRA. If more than one aggravating circumstance is charged for the same murder, use UJI 14-7011 NMRA.

If the court does not adopt a bifurcated proceeding, do not use this instruction or the other instructions in Chapter 70; instead give special verdict and special interrogatory instructions patterned on UJIs 14-6013 and 14-6014 NMRA for each alleged murder and aggravating circumstance.

2. Use only the applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — This instruction may only be used in a proceeding involving a potential sentence of life imprisonment without possibility of release or parole when the court adopts a bifurcated proceeding and the state has charged a single aggravating circumstance. Rule 5-705 NMRA allows for the bifurcation of the issues of guilt of the defendant and whether one or more aggravating circumstances exist. "Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued [before the district court]." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 22, 414 P.3d 326. If the court bifurcates the proceedings, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist. *See* Rule 5-705(C) NMRA.

Although "the death penalty ha[s] been abolished . . . the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *Chadwick-McNally*, 2018-NMSC-018, ¶ 12 (internal quotation marks and citation omitted). In these cases, this instruction must be modified by the historical UJI to ensure proper consideration of aggravating and mitigating factors.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, revised and updated preliminary administrative, procedural and logistical introductions and instructions, clarified the language for certain aggravating circumstances, removed certain gender references, revised the Use Notes, and revised the committee commentary; in the heading, deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole"; added the first seven new undesignated sections titled "Introduction of Staff", "Introduction to Preliminary Instructions", "Scheduling During Hearing", "Note Taking Permitted", "Order of Hearing", "Questions by Jurors", and "Conduct of Jurors"; in the eighth undesignated section, in the heading, deleted "LADIES AND GENTLEMEN" and added "HEARING PROCEDURE", after "[the murder was of a witness to a crime", added "for the purpose of preventing report of the crime or testimony in any criminal proceeding]", after "[the murder was of a person likely to become a witness to a crime", added "for the purpose of preventing report of the crime or testimony in any criminal proceeding]", after "You will decide whether this aggravating circumstance was present beyond a reasonable doubt", deleted "If you unanimously agree beyond a reasonable doubt that this aggravating circumstance was present, you must then weigh this aggravating circumstance against any mitigating circumstance.", and deleted the next eight undesignated paragraphs; in Use Note 1, deleted "This instruction may only be used in death penalty sentencing proceedings where defendant has been convicted of a single

murder and a single aggravating circumstance has been charged" and added "This instruction is to be used if the defendant is charged with a crime carrying a sentence of life imprisonment without possibility of release or parole and the court adopts a bifurcated proceeding to determine whether an aggravating circumstance exists. It is to be used when the defendant has been convicted of a single murder and a single aggravating circumstance has been charged. (For cases where the death penalty remains an option, see UJI 14-7010 NMRA (2020), *available at* http://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink))."; after "It is to be given", added "at the start of the proceeding on the aggravating factor and", and after the second occurrence of "UJI 14-7011 NMRA", deleted "This instruction may be modified as appropriate in a bifurcated sentencing proceeding.", and added the last paragraph of Use Note 1; deleted Use Note 3, which provided "This instruction leaves it to the discretion of the judge as to whether or not jurors will be permitted to take notes during the sentencing proceeding."; and deleted Use Note 4, which provided "If the court permits the taking of notes, the court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations."

The 2001 amendment, effective August 1, 2001, in the first paragraph substituted "unanimously agree beyond a reasonable doubt that" for "find," substituted "the defendant" for "he"; in the list of aggravating circumstances, deleted the phrase "[the murder was of a peace officer who was performing his duties]," added the clause beginning "[at the time of the murder _____ (name of peace officer)," inserted " _____ (name of victim)" throughout; deleted the word "of" before "a person" throughout; added "the murder of" before the name of victim; added the phrase "beyond a reasonable doubt" in the first sentence after the list of aggravating circumstances; substituted "whether or not this aggravating circumstance exists" for "the sentence" after "In determining"; rewrote the paragraph beginning "You are not permitted to take notes"; added the paragraph beginning "You are permitted to take notes during the trial"; deleted the phrase "representing the parties" after "attorneys," substituted "pertinent evidence" for "the evidence relative to sentencing," substituted "find himself or herself with a question unanswered" for "have a question," substituted "me" or "I" for "the court"; deleted the phrase "impartially and" before "without regard"; substituted "[he] [she]" for "[he]" after "the prosecuting attorney," added the phrase "or may wait until later in the proceeding to do so"; substituted "expects the evidence to show" for "intends to prove"; added the final sentence of Use Note 1; substituted "alternative" for "bracketed alternative" in Use Note 2; added Use Notes 3 and 4; deleted from the committee commentary "At the court's discretion and in accordance with Rules 11-401 and 11-402 NMRA, evidence admitted during the trial in which the defendant was found guilty of murder may be admitted during the sentencing proceeding"; and made stylistic changes.

No requirement that aggravating circumstances outweigh mitigating circumstances beyond reasonable doubt. — There is no requirement in the Capital Felony Sentencing Act or the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State*

v. Finnell, 1984-NMSC-064, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

14-7011. Explanation of life imprisonment without possibility of release or parole proceeding; multiple aggravating circumstances.[1]

INTRODUCTION OF STAFF:

I am Judge _____ (name of Judge presiding over hearing). My bailiff, who will escort you and assist in communicating with the court, is _____. My administrative assistant is _____. If you need anything during this proceeding the bailiff or the administrative assistant would be happy to help. The court [reporter][monitor] is making a record of the proceeding. You must pay close attention to the testimony even though there is a [reporter][monitor] making a record of the proceeding because ordinarily transcripts of the witnesses testimony will not be provided to you.

INTRODUCTION TO PRELIMINARY INSTRUCTIONS:

As the proceeding begins, I have some instructions for you. These instructions, along with those previously given, are preliminary only and may be changed during or at the end of the proceeding. All of you must pay attention to the evidence. After you have heard all of the evidence I will read the final instructions of law to you. You will also receive a written copy of the instructions. You must follow the final instructions in reaching your verdict.

SCHEDULING DURING HEARING:

This proceeding is expected to last [until _____] [_____ days]. The usual hours of proceeding will be from ___ (a.m.) to ___ (p.m.) with lunch and occasional rest breaks. Unless a different starting time is announced, please report to the jury room by ___ (a.m.). Please do not come back into the courtroom until you are called by the bailiff.

NOTE TAKING PERMITTED

You are allowed, but not required, to take notes during this proceeding. Note paper will be provided for this purpose. Notes should not take the place of your independent memory of the evidence. When taking notes, please remember the importance of paying close attention to the proceeding. Listening and watching witnesses during their testimony will help you assess their appearance, behavior, memory and whatever else bears on their credibility. At each recess you must either leave your notes on your chair or take them with you to the jury room. At the end of the day, the bailiff will store your notes and return them to you when the proceeding resumes. When deliberations commence you will take your notes with you to the jury room. Ordinarily at the end of the case the notes will be collected and destroyed.[3]

ORDER OF HEARING

The proceeding generally begins with the lawyers telling you what they expect the evidence to show. These statements and other statements made by the lawyers during the course of the proceeding can be of considerable assistance to you in understanding the evidence as it is presented at the proceeding. Statements of the lawyers, however, are not themselves evidence. The evidence will be the testimony of witnesses, exhibits and any stipulations or facts agreed to by the parties. After you have heard all the evidence, I will give you final instructions on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a verdict.

It is my duty to decide what evidence you may consider. Your job is to find and determine the facts in this proceeding, which you must do solely upon the evidence received in court.

It is the duty of a lawyer to object to questions, testimony or exhibits the lawyer believes may not be proper, and you must not hold such objection against the objecting party. I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence I have told you to disregard. By itself, a question is not evidence. You must not speculate about what would be the answer to a question that I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits. You may take into account, among other things, the witness's ability and opportunity to observe, memory, manner, or any bias or prejudice that the witness may have and the reasonableness of the testimony considered in light of all of the evidence of the case.

No ruling, gesture or comment I make during the course of the proceeding should influence your decision in this case. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

QUESTIONS BY JURORS

Ordinarily, the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will have an unanswered question after all of the evidence is presented. However, if you feel an important question has not been asked or answered, write the question and your name it down on a piece of your note paper and give it to the bailiff before the witness leaves the stand. I will decide whether or when your question will be asked. Rules of evidence or other considerations apply to questions you submit and may prevent the question from being asked. If the question is not asked, please do not give it any further consideration, do not discuss it with the other jurors, and please do not hold it against either side that you did not get an answer.

CONDUCT OF JURORS

There are a number of important rules governing your conduct as jurors during the proceeding. You must reach your verdict based solely upon the evidence received in court. You must not consider anything you may have read or heard about the proceeding outside the courtroom. During the proceeding and your deliberations, you must avoid news accounts of the proceeding, whether they be on radio, television, the internet, or in a newspaper or other written publication. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the proceeding.

You, as jurors, must decide this proceeding based solely on the evidence presented here within the four walls of this courtroom. This means that during the proceeding you must not conduct any independent research about this proceeding, the matters in this proceeding and the individuals or corporations involved in the proceeding. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this proceeding or to help you reach your verdict. You are prohibited from attempting to find out information from any source outside the confines of this courtroom.

After the parties have made their closing statements, you will retire to deliberate. Until you retire to deliberate, you may not discuss this proceeding with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the verdict to be reached with your fellow jurors, but you cannot discuss the verdict with anyone else, including your family and friends, until the proceeding is at an end.

I know that many of you use cell phones, the internet, and other tools of technology. You are not to discuss or provide any information to anyone about this proceeding through telephone calls or text messages. You are also not to engage in any social media interaction, communication or exchange of information about this proceeding until I have accepted your verdict and this proceeding is at a close. This rule applies to all chats, comments, direct messages, instant messages, posts, tweets, blogs, vlogs or any other means of communicating, sharing, or exchanging information through social media.

It is important that you keep an open mind and not decide any part of the proceeding until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this proceeding you exercise your judgment impartially and without regard to sympathy, bias, or prejudice. Therefore, until you retire to deliberate, you must not discuss this proceeding or the evidence with anyone, even with each other, because you have not heard all the evidence, you have not been instructed on the law, and you have not heard the final arguments of the lawyers. If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

To minimize the risk of accidentally overhearing something that is not evidence, please continue to wear the jurors' badges while in and around the courthouse. If someone happens to discuss the case in your presence, report that fact at once to a member of the staff.

Although it is natural to visit with people you meet, please do not talk with any of the attorneys, parties, witnesses or spectators either in or out of the courtroom. If you meet in the hallways or elevators, there is nothing wrong with saying a "good morning" or "good afternoon," but your conversation should end there. If the attorneys, parties and witnesses do not greet you outside of court, or avoid riding in the same elevator with you, they are not being rude. They are just carefully observing this rule.

HEARING PROCEDURE:

I will outline the procedure for you to follow in reaching your verdict.

The state has charged that the following aggravating circumstances were present:

[at the time of the murder _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer];[2]

[the murder of _____ (*name of victim*) was committed during [the commission of] [an attempt to commit][2] kidnapping];

[the murder of _____ (*name of victim*) was committed during [the commission of] [an attempt to commit][2] criminal sexual contact of a minor];

[the murder of _____ (*name of victim*) was committed during [the commission of] [an attempt to commit][2] criminal sexual penetration];

[the murder of _____ (*name of victim*) was committed while attempting to escape from a penal institution];

[at the time of the murder, _____ (*name of victim*) was an inmate of a penal institution];

[at the time of the murder, _____ (*name of victim*) was lawfully on the premises of a penal institution];

[at the time of the murder, _____ (*name of victim*) was an employee of the corrections department];

[the murder of _____ (*name of victim*) was for hire];

[the murder was of a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was of a person likely to become a witness to a crime for the purpose of preventing report of the crime or testimony in any criminal proceeding];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will first consider each of the aggravating circumstances separately. You will then decide whether or not each one of the aggravating circumstances is present beyond a reasonable doubt.

The prosecuting attorney will now make an opening statement if [he] [she] desires. The defendant's attorney may make an opening statement if [he] [she] desires or may wait until later in the proceeding to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [he] [she] expects the evidence to show.

USE NOTES

1. This instruction is to be used if the defendant is charged with a crime carrying a sentence of life imprisonment without possibility of release or parole and the court adopts a bifurcated proceeding to determine whether aggravating circumstances exist. It is to be used when the defendant has been convicted of multiple murders or when the state has charged that multiple aggravating circumstances were present during a single murder. (For cases where the death penalty remains an option, *see* UJI 14-7011 NMRA (2020), *available at* https://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink)). It is to be given at the start of the proceeding on the aggravating factors and before opening statements. This instruction does not go to the jury room. There must be an independent factual basis for each aggravating circumstance. *See State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728. Aggravating circumstances to be given to the jury should be consecutively numbered.

If the court does not adopt a bifurcated proceeding, do not use this instruction or the other instructions in Chapter 70; instead give special verdict and special interrogatory instructions patterned on UJIs 14-6013 and 14-6014 NMRA for each alleged murder and aggravating circumstance.

2. Use only the applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — This instruction is to be used only in a proceeding involving a potential sentence of life imprisonment without possibility of release or parole when the court adopts a bifurcated proceeding and the state has charged multiple aggravating circumstances. Rule 5-705 NMRA allows for the bifurcation of the issues of guilt of the defendant and whether one or more aggravating circumstances exist. "Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued [before the district court]." *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 22, 414 P.3d 326. If the court bifurcates the proceedings, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist. *See* Rule 5-705(C) NMRA.

Although "the death penalty ha[s] been abolished . . . the death penalty remains a sentencing option for a limited number of cases alleging crimes committed before July 1, 2009." *Chadwick-McNally*, 2018-NMSC-018, ¶ 12 (internal quotation marks and citation omitted). In these cases, this instruction must be modified by the historical UJI to ensure proper consideration of aggravating and mitigating factors.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, revised and updated preliminary administrative, procedural and logistical introductions and instructions, clarified the language for certain aggravating circumstances, removed certain gender references, revised the Use Notes, and revised the committee commentary; in the heading, after "Explanation of", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole"; added the first seven new undesignated sections titled "Introduction of Staff", "Introduction to Preliminary Instructions", "Scheduling During Hearing", "Note Taking Permitted", "Order of Hearing", "Questions by Jurors", and "Conduct of Jurors"; in the eighth undesignated section, in the heading, deleted "LADIES AND GENTLEMEN" and added "HEARING PROCEDURE", after "[the murder was of a witness to a crime", added "for the purpose of preventing report of the crime or testimony in any criminal proceeding]", after "[the murder was of a person likely to become a witness to a crime", added "for the purpose of preventing report of the crime or testimony in any criminal proceeding]", after "You will then decide whether or not each one of the aggravating circumstances is present beyond a reasonable doubt", deleted "If you unanimously agree beyond a reasonable doubt that one or more of these aggravating circumstance were present, you must then weigh such aggravating circumstances against any mitigating circumstances.", and deleted the next eight undesignated paragraphs; in Use Note 1, deleted "This instruction may only be used in death penalty sentencing proceedings when the defendant has

been convicted of multiple murders or when the state has charged that multiple aggravating circumstances were present during a single murder." and added "This instruction is to be used if the defendant is charged with a crime carrying a sentence of life imprisonment without possibility of release or parole and the court adopts a bifurcated proceeding to determine whether aggravating circumstances exist. It is to be used when the defendant has been convicted of multiple murders or when the state has charged that multiple aggravating circumstances were present during a single murder. (For cases where the death penalty remains an option, *see* UJI 14-7011 NMRA (2020), *available at* http://nmonesource.com (follow "Historical New Mexico Rules Annotated" hyperlink))."; after "It is to be given", added "at the start of the proceeding on the aggravating factors and", and after "Aggravating circumstances to be given to the jury should be consecutively numbered.", deleted "If the judge decides to bifurcate the process by having the jury find the presence of an aggravating circumstance before considering any mitigating circumstances, this instruction may be modified as appropriate.", and added the last paragraph of Use Note 1; deleted Use Note 3, which provided "This instruction leaves it to the discretion of the judge as to whether or not jurors will be permitted to take notes during the proceeding."; and deleted Use Note 4, which provided "If the court permits the taking of notes, the court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations."

The 2001 amendment, effective August 1, 2001, in the first paragraph substituted "unanimously agree beyond a reasonable doubt that" for "find," substituted "the defendant" for "he"; in the list of aggravating circumstances, deleted the phrase "[with respect to the murder of _____ (name of victim), the murder was of a peace officer who was performing his duties]," added the clause beginning "[at the time of the murder _____ (name of peace officer)," inserted " _____ (name of victim)" throughout; substituted "victim" for "deceased" throughout; deleted the phrase "with respect to" throughout; added "the murder of" before name of victim, and deleted "the murder" after name of victim; deleted the word "AND" before successive items in the list of aggravating circumstances; substituted "consider each" for "decide whether one or more" after "first," and added the phrase beginning "separately" through "reasonable doubt"; substituted "whether or not this aggravating circumstance exists" for "the sentence" after "In determining"; rewrote the paragraph beginning "You are not permitted to take notes"; added the paragraph beginning "You are permitted to take notes during the trial"; deleted the phrase "representing the parties" after "attorneys," substituted "pertinent evidence" for "the evidence relative to sentencing," substituted "find himself or herself with a question unanswered" for "have a question," substituted "me" or "I" for "the court"; deleted the phrase "impartially and" before "without regard"; substituted "[he] [she]" for "[he]" after "the prosecuting attorney," added the phrase "or may wait until later in the proceeding to do so"; substituted "expects the evidence to show" for "intends to prove"; added the sentences beginning "There must be an independent factual basis" through the end of Use Note 1; substituted "alternative" for "bracketed alternative" in Use Note 2; added Use Notes 3 and 4; deleted from the committee commentary "At the court's discretion and in accordance with Rules 11-401 and 11-402 NMRA, evidence admitted during the trial in which the defendant was found

guilty of murder may be admitted during the sentencing proceeding"; added the sentence "Although this procedure is not recognized in any court rule, the committee recognizes that some judges are bifurcating the penalty phase"; and made stylistic changes.

No requirement that aggravating circumstances outweigh mitigating circumstances beyond reasonable doubt. — There is no requirement in the Capital Felony Sentencing Act or the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State v. Finnell,* 1984-NMSC-064, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

14-7012. Life imprisonment without possibility of release or parole proceeding; consideration of evidence.[1]

LADIES AND GENTLEMEN:

You have heard all of the evidence that is to be presented for this proceeding. In reaching your verdict you shall consider all of the evidence admitted during the trial[2] [and all of the evidence admitted during this proceeding].[3]

Now the lawyers will address you. What the lawyers say is not evidence. It is an opportunity for the lawyers to discuss the evidence and the law as I have instructed you. The state has the right to speak first; the defense may then speak; the state may then reply.

USE NOTES

1. This instruction must be given in every life imprisonment without possibility of release or parole proceeding after all the evidence has been completed.

2. Upon request of a party, the court may modify this instruction when evidence has been admitted for a limited purpose during the trial. A separate additional instruction may be necessary to explain how this evidence is to be considered during the proceeding.

3. Use bracketed phrase if additional evidence was admitted during the proceeding.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction may only be used in a proceeding involving a potential sentence of life imprisonment without possibility of release or parole when the court adopts a bifurcated proceeding and the state has charged one or more aggravating circumstances. Rule 5-705 NMRA allows for the bifurcation of the issues of guilt of the defendant and whether one or more aggravating circumstances

exist. “Whether bifurcated proceedings are appropriate must be determined on a case-by-case basis, after the issue has been properly raised and argued [before the district court].” *State v. Chadwick-McNally*, 2018-NMSC-018, ¶ 22, 414 P.3d 326. If the court bifurcates the proceedings, the court must determine whether or not the same jury that decides guilt will also determine if one or more aggravating circumstances exist. *See* Rule 5-705(C) NMRA.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction’s application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, revised the Use Notes, and completely rewrote the committee commentary; in the heading, deleted “Death penalty sentencing” and added “Life imprisonment without possibility of release or parole”, in the first undesignated paragraph, after “presented for this”, deleted “sentencing”, after “In”, deleted “deciding the sentence” and added “reaching your verdict”, and after “admitting during this”, deleted “sentencing”; in Use Note 1, after “given in every”, deleted “death penalty sentencing” and added “life imprisonment without possibility of release or parole”, and deleted “This instruction may be modified as appropriate if the judge decides to bifurcate the sentencing process by having the jury find the presence of an aggravating circumstance before proceeding further.”; in Use Note 2, after “considered during the”, deleted “sentencing”; in Use Note 3, after “admitting during the”, deleted “sentencing”; and deleted Use Note 4, which provided “If the sentencing proceeding has been bifurcated, this instruction must be given at each phase and may need to be modified.”

The 2001 amendment, effective August 1, 2001, substituted "consideration of evidence" for "issue of guilt" in the description; substituted "shall" for "must"; substituted "what the lawyers say" for "what is said"; added the sentence beginning "This instruction may be modified" through the end of Use Note 1; added Use Note 2; redesignated former Use Note 2 as 3; added Use Note 4.

14-7013. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances, is withdrawn, effective August 1, 2001.

14-7014. Life imprisonment without possibility of parole proceeding; aggravating circumstances; murder of a peace officer; essential elements.

The state has charged the aggravating circumstance of murder of a peace officer. Before you may find the aggravating circumstance of murder of a peace officer, you must find that the state has proved to your satisfaction beyond a reasonable doubt that at the time _____ (*name of victim*) was murdered, _____ (*name of victim*):

1. was a peace officer;

2. was performing the duties of a peace officer;

3. the defendant knew or should have known that _____ (*name of victim*) was a peace officer; [A peace officer is a public employee whose employment duties include maintaining the public order;][2] and

4. the defendant intended to kill or acted with a reckless disregard for human life and knew that [his] [her] acts carried a grave risk of death.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. If there is an issue as to whether or not the victim was a "peace officer" the bracketed definition is given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — "Peace officer" is defined in NMSA 1978, § 30-1-12 (1963). The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. *See State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 164.

The committee anticipates the defense of a peace officer not being in the lawful discharge of duty being raised. As there are a number of ways and situations in which this defense may be raised, it was not feasible to draft an essential elements instruction on this issue. *See State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464 for a discussion of "lawful discharge of duties".

The requirement that the defendant intended to kill or acted with reckless disregard has been added to this instruction to be consistent with *Tison v. Arizona*, 481 U.S. 137 (1987).

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of parole proceedings, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility of parole"; and in Use Note 1, after "This instruction is to be used only in a", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole".

The 2001 amendment, effective August 1, 2001, added the first sentence; added Paragraphs 3 and 4; added Use Note 2; in the committee commentary substituted "the duties of a peace officer" for "his duties," deleted "and Reporter's Addendum Number 2. In the event that there is a question of fact as to whether the victim in fact a peace officer or in the lawful discharge of his duties, a special instruction should be drafted." after the reference to UJI 14-2201 in the first paragraph; deleted "No intent to kill nor knowledge that victim was a peace officer is required to impose the death penalty where a peace officer is murdered" after the phrase "lawful discharge of duties"; and added the sentence beginning "The requirement that the defendant intended to kill," and deleted "A defendant who was not 18 years of age or older at the time of the commission of the capital felony may not be punished by death. Section 31-18-14 NMSA 1978" after that sentence.

Cross references. — *See* Section 31-20A-5A NMSA 1978.

14-7015. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder in the commission of kidnapping; essential elements.[1]

The state has charged the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] a kidnapping. Before you may find the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] kidnapping, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of] [an attempt to commit][2] kidnapping was committed;

2. _____ (*name of victim*) was murdered while _____ (*name of defendant*) was [committing] [or] [attempting to commit][2] kidnapping; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, Underlying felony offense; sample instruction. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — The penalty of life imprisonment without possibility of release or parole may be imposed if the defendant committed murder while committing or attempting to commit one of three felonies: kidnapping, criminal sexual contact of a minor or criminal sexual penetration. Even if the jury has found the defendant guilty of a felony murder in the commission of a kidnapping, it must also find that the murder was committed with an intent to kill in order to find this aggravating circumstance.

If the jury has not previously been instructed pursuant to UJI 14-403 NMRA, Kidnapping, and UJI 14-2801 NMRA, Attempt to Commit a Felony; UJIs 14-921 to 14-936 NMRA, Criminal Sexual Contact of a Minor; or UJI 14-941 to 14-963 NMRA, Criminal Sexual Penetration, the appropriate instruction must be given.

If UJI 14-7016 NMRA or UJI 14-7017 NMRA is to be given with this instruction, there must be evidence of an independent factual basis for each of the offenses. For example, the evidence may create a jury issue regarding the existence of a factually separate aggravating factor of murder during the course of a kidnapping.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility of release or parole"; throughout the instruction, changed the placement of the Use Note reference "2"; and in Use Note 1, after "This instruction is to be used only in a", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole".

The 2001 amendment, effective August 1, 2001, added the first sentence; substituted "defendant had" for "murder was committed with" in Paragraph 3; and added the paragraph beginning "If UJI 14-7016 or 14-7017 are to be given with this instruction" in committee commentary.

Cross references. — *See* Section 31-20A-5(B) NMSA 1978.

14-7016. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder in the commission of criminal sexual contact of a minor; essential elements.

The state has charged the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] criminal sexual contact of a minor. Before you may find the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] criminal sexual contact of a minor, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of] [an attempt to commit][2] criminal sexual contact of a minor was committed;

2. _____ (*name of victim*) was murdered while _____ (*name of defendant*) was [committing] [or] [attempting to commit][2] criminal sexual contact of a minor; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, Elements of uncharged crimes. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the

instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, and revised the Use Notes; in the heading, deleted “Death penalty sentencing” and added “Life imprisonment without possibility of release or parole”; throughout the instruction, changed the placement of the Use Note reference “2”; in Use Note 1, after “This instruction is to be used only in a”, deleted “death penalty sentencing” and added “life imprisonment without possibility of release or parole”; and in Use Note 2, after “UJI 14-140 NMRA”, deleted “Underlying felony offense; sample instruction” and added “Elements of uncharged crimes”.

The 2001 amendment, effective August 1, 2001, added the first sentence; added "_____ (name of" before "defendant"; and substituted "defendant had" for "murder was committed with" in Paragraph 3.

Cross references. — *See* Section 31-20A-5(B) NMSA 1978.

14-7017. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder in the commission of criminal sexual penetration; essential elements.

The state has charged the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] criminal sexual penetration. Before you find the aggravating circumstance of murder in [the commission of] [an attempt to commit][2] criminal sexual penetration, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. [The crime of] [an attempt to commit][2] criminal sexual penetration was committed;

2. _____ (*name of victim*) was murdered while defendant was [committing] [or] [attempting to commit][2] criminal sexual penetration; and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, “Underlying felony offense; sample instruction”. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, and revised the Use Notes; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility of release or parole"; throughout the instruction, changed the placement of the Use Note reference "2"; and in Use Note 1, after "This instruction is to be used only in a", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole".

The 2001 amendment, effective August 1, 2001, added the first sentence, and substituted "defendant had" for "murder was committed with" in Paragraph 3.

Cross references. — *See* Section 31-20A-5(B) NMSA 1978.

14-7018. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder during attempt to escape from penal institution; essential elements.[1]

The state has charged the aggravating circumstance of murder with the intent to attempt to escape from a penal institution. Before you may find the aggravating circumstance of murder while attempting to escape from a penal institution, you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. While attempting to escape from _____ *(name of penal institution)*, the defendant committed the murder of _____ *(name of victim)*;[2] and

2. The defendant had the intent to kill.

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

2. The court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140 NMRA, Underlying felony offense; sample instructions. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — NMSA 1978, Section 31-20A-5(C) (1981), provides that it is an aggravating circumstance if the defendant committed the murder while attempting to escape from a penal institution. The jury may have been instructed previously pursuant to UJI 14-2222 NMRA, Escape From the Penitentiary, UJI 14-2221 NMRA, Escape From Jail, or UJI 14-202 NMRA, Felony Murder. If not, the applicable escape instruction must be given along with any other instructions required by the essential elements instruction, including definitions. *See* committee commentary to UJI 14-2221 NMRA and 14-2222 NMRA.

Escape from the penitentiary includes escape from other facilities under the department of corrections. *See* committee commentary to UJI 14-2222 NMRA. This aggravating circumstance requires that the defendant must have intended to kill the victim.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility of release or parole"; and in Use Note 1, after "This instruction is to be used only in a", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole".

The 2001 amendment, effective August 1, 2001, added the first sentence; substituted "committed the murder of" for "murdered" in Paragraph 1; substituted "defendant had" for "murder was committed with" in Paragraph 2; and deleted "and Reporter's Addendum Number 2" after the reference to UJI 14-2221 and 14-2222 in the committee commentary.

14-7019. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder by an inmate of another inmate, a person lawfully on the premises of a penal institution or an employee of the corrections department; essential elements.[1]

The state has charged the aggravating circumstance of murder of a person who was at the time [incarcerated in a penal institution] [or] [lawfully on the premises of a penal institution] [or] [an employee of the state corrections department].[2]

Before you may find the aggravating circumstance of murder of [an inmate of a penal institution] [or] [a person lawfully on the premises of a penal institution] [or] [murder of an employee of the state corrections department],[2] you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. At the time defendant committed the murder of _____ (*name of victim*) the _____ (*name of defendant*) was incarcerated in _____[3] (*name of penal institution*);

2. At the time _____ (*name of victim*) was murdered _____ (*name of victim*), was

[incarcerated in _____ (*name of penal institution*);] [or]

[lawfully on the premises of _____ (*name of penal institution*);]

[or]

[an employee of the state corrections department];[2]

and

3. The defendant had the intent to kill.

USE NOTES

1. This instruction is only to be used in life imprisonment without possibility of release or parole proceedings when the victim was an inmate, a person who was lawfully on the premises of the penal institution or an employee of the state corrections department.

2. Use applicable alternatives.

3. Insert the name of the penal institution. “Penal institution” includes facilities under the jurisdiction of the state corrections department and county and municipal jails.

[Approved, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — One implication of the principle that the jury's sentencing discretion must be narrowed and channeled is the prohibition against "double counting", *e.g.*, in the submission of jury instructions suggesting to the jury the same set of facts constitutes more than one aggravating factor. "[D]ouble counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *United States v. McCullah*, 76 F.3d 1087, 1111 (10th Cir. 1996); *see also State v. Henderson*, 1990-NMSC-030, ¶ 45, 109 N.M. 655, 789 P.2d 603 (Ransom, J., concurring in part, dissenting in part) (reasoning that aggravating factor of murder in the course of a kidnapping and murder in the course of a sexual assault amounted to double counting under facts of case), *overruled on other grounds by Clark v. Tansy*, 1994-NMSC-098, ¶¶ 20-21, 118 N.M. 486, 882 P.2d 527, *cited with approval in State v. Allen*, 2000-NMSC-002, ¶ 74, 128 N.M. 482, 994 P.2d 728. "[S]imply because there are sufficient elements present to prove more than one crime in the same transaction does not mean that more than one aggravating circumstance has been proven." *Henderson*, 1990-NMSC-030, ¶ 22.

The problem of double counting thus may arise when two distinct statutory aggravators overlap under the facts of a particular case. *Cf. id.* In some instances, the capital felony sentencing statute appears to create situations in which one set of facts, if found by the jury, would automatically fit within multiple statutory aggravators.

For example NMSA 1978, § 31-20A-5(D) (1981) allows the jury to consider that "while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered a person who was at the time incarcerated in or lawfully on the premises of a penal institution in New Mexico." Facts that would prove the existence of this aggravator also would seem to describe Section 31-20A-5(E), which allows the jury to consider whether, "while incarcerated in a penal institution in New Mexico, the defendant, with the intent to kill, murdered an employee of the corrections and criminal rehabilitation department [corrections department]."

In most cases, murder by an inmate of an employee of the corrections department automatically will constitute the murder of a person "lawfully on the premises of a penal institution in New Mexico". The committee has addressed this problem by creating a single instruction for these aggravators. The use notes provide that in an individual case the court should select the applicable alternative.

In appropriate cases, a jury question also may exist whether two alleged aggravating factors, if supported by the evidence, are factually distinct from one another under the facts found by the jury. For example, the evidence may create a jury issue regarding the existence of a factually separate aggravating factor of murder during the course of a kidnapping. In such instances, the court may need to draft jury instructions to insure a separate factual basis exists for any finding of multiple aggravators by the jury. *Cf. Allen*, 2000-NMSC-002, ¶ 76 (failure to provide definitional instruction did not amount to fundamental error).

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility of release or parole"; throughout the instruction, changed the placement of the Use Note reference "2"; and in Use Note 2, after "This instruction is only to be used in", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole".

The 2001 amendment, effective August 1, 2001, substituted this instruction instead of UJI Criminal 14-7019, 14-7020 and 14-7021, and withdrew the latter two; added the introductory paragraph, and added the provisions concerning the victim being lawfully on the premises or an employee of the institution to Paragraph 2; added the phrase "Use applicable alternatives" as Use Note 2, but failed to redesignate or incorporate the existing Use Note 2, leaving two notes labeled Use Note 2; referenced Sections 31-20A-5(D) and (E) NMSA 1978; and inserted the committee commentary in place of that formerly appearing under 14-7021.

14-7020. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of person at penal institution while incarcerated in penal institution; essential elements, was withdrawn, effective August 1, 2001.

14-7021. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of employee of corrections department; essential elements, was withdrawn, effective August 1, 2001.

14-7022. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder for hire; essential elements.

The state has charged the aggravating circumstance of murder for hire.

Before you may find the aggravating circumstance of murder for hire, you must find that the state has proved to your satisfaction beyond a reasonable doubt that:

1. The murder of _____ (*name of victim*) was committed for hire; and

2. The defendant had the intent to kill.

USE NOTES

This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — The phrase "murder for hire" are words of common knowledge and normally requires no separate instruction.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction’s application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, revised the Use Notes, and revised the committee commentary; in the heading, deleted “Death penalty sentencing” and added “Life imprisonment without possibility of release or parole”; and in the Use Note, after “This instruction is to be used only in a”, deleted “death penalty sentencing” and added “life imprisonment without possibility of release or parole”.

The 2001 amendment, effective August 1, 2001, added the introductory sentence, added Paragraph 2; in the Committee Comment substituted "normally requires" in place of "require," deleted the word "also" after "See," deleted the reference to "UJI and apparently mistakenly deleted the phrase "definition in the essential elements instruction" after "normally requires no separate."

Cross references. — *See* Section 31-20A-5(F) NMSA 1978.

14-7023. Life imprisonment without possibility of release or parole proceeding; aggravating circumstances; murder of a witness; essential elements.[1]

The state has charged the aggravating circumstance of [[murder of a witness to a crime] [or] [murder of any person likely to become a witness to a crime]][2] [[for the purpose of [preventing the reporting of a crime][2] [or] [preventing testimony in a criminal proceeding]] [or] [murder in retaliation for having testified in a criminal proceeding].

Before you find the aggravating circumstance of [murder of a witness to a crime] [or] [murder of any person likely to become a witness to a crime] [or] [murder in retaliation for having testified in a criminal proceeding][2], you must find that the state has proved to your satisfaction beyond a reasonable doubt each of the following elements:

1. _____ (*name of victim*) [[was a witness] [or] [was likely to become a witness] to the [crime] [crimes] of _____ (*name of separate crime or crimes*)] [has testified in a criminal proceeding][2]; and

2. _____ (*name of defendant*) committed the murder of _____ (*name of victim*)

[with the motive to prevent _____ (*name of victim*) from reporting _____ (*name of crime*), and _____ (*name of crime*) was a separate crime from the murder of _____ (*name of victim*);][2]

[OR]

[with the motive to prevent _____ (*name of victim*) from testifying in a criminal proceeding regarding the crime of _____ (*name of crime*) and _____ (*name of crime*) was a separate crime from the murder of _____ (*name of victim*);]

[OR]

[with the motive of retaliation for _____ (*name of victim*) having testified in a criminal proceeding.]

USE NOTES

1. This instruction is to be used only in a life imprisonment without possibility of release or parole proceeding. This instruction may be used only if the motive for the murder was to prevent the victim from reporting or testifying or for having testified in any criminal proceeding. *See Clark v. Tansy*, 1994-NMSC-098, ¶ 25, 118 N.M. 486, 882 P.2d 527.

2. Use only applicable alternative or alternatives.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — NMSA 1978, § 31-20A-5(G) (1981) provides three alternatives: murder of a witness to prevent the report of a crime, murder of a witness to prevent testimony in a criminal proceeding and murder of a witness in retaliation for the witness having testified in a criminal proceeding. For a discussion of "a person likely to become a witness to a crime", *see State v. Bell*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50.

In those cases where the defendant intended only to intimidate the witness and not to kill him, it will be necessary to instruct on intimidation of a witness. *See* UJI 14-2403 NMRA. If the jury was instructed on this subject previously, it is not necessary to give such an instruction during this proceeding.

The touchstone of murder of a witness is evidence of the defendant's specific intent to prevent the witness from reporting another crime (or testifying or in retaliation). *See State v. Martinez*, 2006-NMSC-007, ¶¶ 12-15, 139 N.M. 152, 130 P.3d 731; *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728; *State v. Smith*, 1997-NMSC-017, 123 N.M. 52, 933 P.2d 851; *State v. Clark*, 1989-NMSC-010, 108 N.M. 288, 772 P.2d 322 (Clark I); *Clark v. Tansy*, 1994-NMSC-098, 118 N.M. 486, 882 P.2d 527 (Clark II); *Clark v. Tansy*, 13 F.3d 1407 (10th Cir., 1993); *State v. Clark*, 1999-NMSC-035, 128 N.M. 119, 990 P.2d 793 (Clark III); *State v. Henderson*, 1990-NMSC-030,109 N.M. 655, 789 P.2d 603, *overruled in part by Martinez*, 2006-NMSC-007, ¶ 30 (holding that, to the extent that *Henderson* can be read as upholding the murder-of-a-witness motive based on only the defendant's lack of other plausible motives and attempts to destroy evidence or conceal involvement in the crimes, *Henderson* intolerably relaxes the constitutional and statutory standard).

For an analysis of multiple of cases concerning the evidence to support the murder-of-a-witness aggravator across "a broad spectrum" *see Martinez*, 2006-NMSC-007, ¶¶ 17-31.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 1, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life

imprisonment without possibility of release or parole”; in the first undesignated paragraph, deleted “for the purpose of” preceding “preventing testimony in a criminal proceeding”; in the second undesignated paragraph, after “[murder of a witness to a crime]”, deleted Use Note reference “2”, and after “[murder in retaliation for having testified in a criminal proceeding]”, added Use Note reference “2”; in Element 1, after “(name of victim)”, deleted “was a witness to the [crime] [crimes][or][was likely to become a witness to the [crime][crimes]] of” and added “[[was a witness][or] [was likely to become a witness to the [crime] [crimes] of”, and after “[has testified in a criminal proceeding]”, deleted Use Note reference “3” and added Use Note reference “2”; and in Use Note 1, after “This instruction is to be used only in a”, deleted “death penalty sentencing” and added “life imprisonment without possibility of release or parole”, and after “Clark v. Tansy,”, added “1994-NMSC-098, ¶ 25,”.

The 2001 amendment, effective August 1, 2001, added the first paragraph; added the phrase beginning "[or] [murder of any person likely" through "in a criminal proceeding]" in the second paragraph; in Paragraph 1, substituted "the" for "a", added the phrase beginning "[crimes] [or likely to become a witness" through "criminal proceeding]"; in Paragraph 2 added "_____ (name of defendant) committed the murder of" before "(name of victim)," deleted the phrase "was murdered" after "(name of victim)," added the phrase "with the motive" before "to prevent (name of victim) from reporting," added the proviso concerning the crime being a separate crime from the murder, added the phrase "with the motive to prevent (name of victim) from testifying" through the end of the subsection; added to Use Note 1 the text after the first sentence; added in Use Note 2 the phrase "or alternatives"; in the Committee Comment noted that Subsection G of Section 31-20A-5 NMSA 1978 is now three alternatives and identified them; deleted the paragraph which read "The legislature intended to provide for the protection of a witness in any case. Therefore, an intent to kill is not required, and there can be transferred intent in this aggravating circumstance. In some cases a person could be killed during the commission of a crime, and the defendant could be prosecuted for having killed a person likely to become a witness to a crime. In such cases there must be some specific evidence independent of crime. This is a matter of proof as to motive."; added the references starting "See State v. Allen" to the end of the paragraph; and inserted the phrase "[or] [any person likely to become a witness to a crime]" in the Explanatory note.

14-7024. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of a person likely to be a witness; essential elements, was withdrawn, effective August 1, 2001.

14-7025. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to death penalty sentencing proceeding; aggravating circumstances; murder of a person in retaliation for his having testified in a criminal proceeding; essential elements, was withdrawn, effective August 1, 2001.

14-7026. Life imprisonment without possibility of release or parole proceeding; reasonable doubt; burden of proof.[1]

The burden is always on the state to prove beyond a reasonable doubt that [the aggravating circumstance was present] [one or more of the aggravating circumstances were present].[2]

It is not required that the state prove the existence of an aggravating circumstance beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.

USE NOTES

1. This instruction must be given in all life imprisonment without possibility of release or parole proceedings.

2. Use applicable alternative.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction must be given in life imprisonment without possibility of release or parole proceedings instead of UJI 14-5060 NMRA.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. NMSA 1978, § 31-20A-2 (2009); *see State v. Fry*, 2006-NMSC-001, ¶ 28, 138 N.M. 700, 126 P.3d 516 (“For the use of . . . felonies as an aggravating circumstance, [in a death penalty case] the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill.”).

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction’s application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, revised the Use Notes, and revised the committee

commentary; in the heading, deleted “Death penalty sentencing” and added “Life imprisonment without possibility of release or parole”; in the first undesignated paragraph, after “[the aggravating circumstance was present]”, deleted Use Note reference “2”, and after “[one or more of the aggravating circumstances were present]”, added Use Note reference “2”; and in use Note 1, after “This instruction must be given in all”, deleted “death penalty sentencing” and added “life imprisonment without possibility of release or parole”.

The 2001 amendment, effective August 1, 2001, added the phrase in the singular to allow for one or more aggravating circumstances and made stylistic changes for grammatical correctness in the first paragraph; added Use Note 2; in the committee commentary added the reference to *State v. Allen,* added the L. Ed. 2d reference for *Gregg v. Georgia,* and deleted the explanatory comment that formerly followed the reference to Gregg.

Specific standard for instructing jury on aggravating or mitigating circumstances not required. — Although New Mexico has adopted the standard that a defendant cannot be sentenced to death if the mitigating circumstances outweigh the aggravating circumstances, the constitution does not require the adoption of a specific standard for instructing the jury in its consideration of aggravating and mitigating circumstances. *State v. Cheadle,* 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708, cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

14-7027. Life imprisonment without possibility of release or parole proceeding; jury procedure for consideration of each aggravating circumstance.[1]

In this case, as to the aggravating circumstance of _____ (*insert the aggravating circumstance*), there are three possible verdicts:

(1) finding beyond a reasonable doubt that the aggravating circumstance exists;

(2) finding that the aggravating circumstance does not exist; or

(3) being unable to reach an agreement.

You must first consider whether the aggravating circumstance charged was present in this case. In order to find the aggravating circumstance, you must agree unanimously.

A special form has been prepared for [the] [each][2] aggravating circumstance charged. If you unanimously find the state has proved beyond a reasonable doubt that the aggravating circumstance was present, you shall complete the form indicating your finding, and have the foreperson sign this part. [You will then consider any other aggravating circumstances.][3]

If you unanimously find that the aggravating circumstance was not present, your finding shall be that the state has not proved beyond a reasonable doubt the aggravating circumstance. If you are unable to reach a unanimous agreement either way, the foreperson shall sign this part of the finding form.

[You will then consider any other aggravating circumstances until you have separately considered each aggravating circumstance. You must complete a form for each aggravating circumstance before returning to the court.][3]

If you do not find an aggravating circumstance beyond a reasonable doubt, then return to the courtroom.

USE NOTES

1. This instruction must be given in every life imprisonment without possibility of release or parole proceeding for each aggravating circumstance to be given to the jury. It is to be given immediately prior to UJI 14-7032 NMRA, sample form of findings.

2. Use only applicable alternative.

3. This alternative is to be given if more than one aggravating circumstance is to be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — At least one aggravating circumstance must be proved beyond a reasonable doubt to impose life imprisonment without possibility of release or parole. NMSA 1978, § 31-20A-2 (2009); *see State v. Fry*, 2006-NMSC-001, ¶ 28, 138 N.M. 700, 126 P.3d 516 ("For the use of . . . felonies as an aggravating circumstance, [in a death penalty case] the Legislature imposed the additional requirement of demonstrating beyond a reasonable doubt that the defendant had an intent to kill.").

This instruction provides the procedure for finding an aggravating circumstance and for completing the form in UJI 14-7032 NMRA as to the presence of one or more aggravating circumstances.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings,

made technical changes, revised the Use Notes, and revised the committee commentary; in the heading, deleted “Death penalty sentencing” and added “Life imprisonment without possibility of release or parole”; in the second undesignated paragraph, deleted “You may consider the penalty to be imposed only if you have found that the [aggravating circumstance has] [one or more aggravating circumstances have] been proven beyond a reasonable doubt.”; in the third undesignated paragraph, after “[the]”, deleted Use Note reference “2” and after “[each]”, added Use Note reference “2”, deleted “If you unanimously find beyond a reasonable doubt that an aggravating circumstance was present, you shall then consider the penalty to be imposed.]”; in Use Note 1, after “This instruction must be given in every”, deleted “death penalty sentencing” and added “life imprisonment without possibility of release or parole”, and after “UJI 14-7032”, added “NMRA” and deleted “and 14-7033”; and deleted Use Note 4.

The 2001 amendment, effective August 1, 2001, added alternative phrasing for both single and multiple aggravating circumstances, made related changes throughout, and clarified the conditional language; substituted "foreperson" for "foreman"; substituted "immediately prior to" for "with" in Use Note 1; and added Use Notes 2, 3 and 4.

Specific standard for instructing jury on aggravating or mitigating circumstances not required. — Although New Mexico has adopted the standard that a defendant cannot be sentenced to death if the mitigating circumstances outweigh the aggravating circumstances, the constitution does not require the adoption of a specific standard for instructing the jury in its consideration of aggravating and mitigating circumstances. *State v. Cheadle*, 1983-NMSC-093, 101 N.M. 282, 681 P.2d 708, cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

No requirement that aggravating circumstances outweigh mitigating circumstances beyond reasonable doubt. — There is no requirement in the Capital Felony Sentencing Act or the jury instructions which requires that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. *State v. Finnell*, 1984-NMSC-064, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

14-7028. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to death penalty sentencing proceeding; jury procedure for consideration of multiple aggravating circumstances, is withdrawn, effective August 1, 2001.

14-7029. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 21-8300-008, UJI 14-7029 NMRA, relating to death penalty sentencing proceeding, mitigating circumstances, was withdrawn effective December 31, 2021. For provisions of former instruction, *see* the 2020 NMRA on *NMOneSource.com*.

14-7030. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 21-8300-008, UJI 14-7030 NMRA, relating to death penalty sentencing proceeding, weighing the aggravating circumstances against the mitigating circumstances, was withdrawn effective December 31, 2021. For provisions of former instruction, *see* the 2020 NMRA on *NMOneSource.com*.

14-7030A. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 21-8300-008, UJI 14-7030A NMRA, relating to death penalty sentencing proceeding, explanation of sentence of life imprisonment, was withdrawn effective December 31, 2021. For provisions of former instruction, *see* the 2020 NMRA on *NMOneSource.com*.

14-7031. Life imprisonment without possibility of release or parole proceeding; jury deliberation procedure.

You shall now retire to the jury room [and select one of you to act as foreperson].[2] [You may select the foreperson from the trial portion to continue as foreperson or you may select a new foreperson.] That person will preside over your deliberations and will speak for the jury here in court.

Any findings and any verdict you reach in this case must be signed by your foreperson on the forms that will be provided, and then you shall return with them to this courtroom.

USE NOTES

1. This instruction must be given in every life imprisonment without possibility of release or parole proceeding.

2. Use first bracketed phrase only when a new jury is hearing the proceeding. Use second bracketed phrase if the original jury is hearing the proceeding.

This instruction is given last.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — The committee amended this instruction to make it clear that the foreperson from the trial may continue or that the jury may select a new foreperson for the proceeding.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility or release or parole"; in the first undesignated paragraph, after "you may select a new foreperson", deleted "for the death penalty sentencing proceeding"; in Use Note 1, after "This instruction must be given in every", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole"; and in Use Note 2, deleted "sentencing" preceding each occurrence of "proceeding".

The 2001 amendment, effective August 1, 2001, substituted "foreperson" for "foreman"; permitted selection of the same or a different foreperson for the sentencing procedure from the trial; added a new Use Note 1, leaving the existing Use Note 1 in place; and added the committee commentary explaining the instruction.

14-7032. Life imprisonment without possibility of release or parole proceeding; sample form of findings; aggravating circumstance findings.[1]

(style of case)

Sign only one of the following findings as to the aggravating circumstance of _____ (*insert the aggravating circumstance*). You must complete a form for each aggravating circumstance.

Finding Number 1. We unanimously find beyond a reasonable doubt the aggravating circumstance of _____ *(set forth the aggravating circumstance)*.

_____
FOREPERSON

Finding Number 2. We unanimously find the aggravating circumstance of _____ *(set forth the aggravating circumstance)* has not been proven beyond a reasonable doubt.

_____
FOREPERSON

Finding Number 3. We are unable to reach an agreement as to the aggravating circumstance of _____ *(set forth the aggravating circumstance)*.

_____
FOREPERSON

USE NOTES

1. This instruction is to be given immediately after UJI 14-7027 NMRA. This instruction is for use only in life imprisonment without possibility of release or parole proceedings. The court is to set forth only one aggravating circumstance on this form prior to submission to the jury. A separate form is to be submitted for each aggravating circumstance to be submitted to the jury.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — NMSA 1978, § 31-20A-2 (2009) establishes the procedure to be followed by the jury in determining the sentence to be imposed and requires a finding beyond a reasonable doubt of an aggravating circumstance before a sentence of life imprisonment without possibility of release or parole may be imposed. This instruction is the form to be used by the jury to indicate whether an aggravating circumstance charged was found.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, removed the instruction's application to death penalty sentencing proceedings to conform with the repeal of the death penalty in New Mexico, applied the instruction to life imprisonment without the possibility of release or parole proceedings, made technical changes, revised the Use Notes, and revised the committee commentary; in the heading, deleted "Death penalty sentencing" and added "Life imprisonment without possibility of release or parole"; deleted "You cannot consider the penalty to be imposed unless you have found that [the] [an] aggravating circumstance has been proven beyond a reasonable doubt.", and after "You must complete a form for

each aggravating circumstance.", deleted "If you signed Finding Number 1, as to any aggravating circumstance, then consider the penalty. If not, return to the courtroom."; in Use Note 1, after "This instruction is for use only in", deleted "death penalty sentencing" and added "life imprisonment without possibility of release or parole"; and deleted Use Notes 2 and 3, which provided "Use this alternative if only one aggravating circumstance is given" and "Use this alternative if more than one aggravating circumstance is given", respectively.

The 2001 amendment, effective August 1, 2001, added alternative phrasing for both single and multiple aggravating circumstances, made related changes throughout, and clarified the conditional language; substituted "foreperson" for "foreman"; in the introductory language deleted "If you sign finding number , continue to deliberate as instructed. If you sign finding number 2 or 3, return to the courtroom."; added the paragraph beginning "You must complete a form for each aggravating circumstance"; substituted "has not been proven beyond a reasonable doubt" for "is not present" in finding number 2; added the first sentence of Use Note 1 and Use Notes 2 and 3.

14-7033. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 21-8300-008, UJI 14-7033 NMRA, relating to death penalty sentencing proceeding, sample forms of findings, death penalty findings, was withdrawn effective December 31, 2021. For provisions of former instruction, *see* the 2020 NMRA on *NMOneSource.com*.

14-7034. Sentencing proceeding; duty to consult.

Your findings must represent the considered judgment of each juror.

It is your duty to consult with one another and try to reach an agreement. However, you are not required to give up your individual judgment. Each of you must decide the case for yourself, but you must do so only after a thorough review of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own view and change your opinion if you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the purpose of reaching a finding.

USE NOTES

This instruction must be given in every life imprisonment without possibility of release or parole proceeding. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given.

[As amended, effective August 1, 2001; as amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

Committee commentary. — This instruction is almost identical to UJI 14-6008 NMRA. It has been modified for use in life imprisonment without possibility of release or parole sentencing proceedings.

[As amended by Supreme Court Order No. 21-8300-008, effective for all cases filed or pending on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-008, effective December 31, 2021, revised the committee commentary; and, in the Use Note, after “This instruction must be given in every”, deleted “death penalty” and added “life imprisonment without possibility of release or parole”.

Part C
General Explanatory Matters

14-7040. Sentencing proceeding; credibility of witnesses.

You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account the witness's truthfulness or untruthfulness, the witness's ability and opportunity to observe, the witness's memory, the witness's manner while testifying, any interest, bias or prejudice the witness may have and the reasonableness of the witness's testimony considered in the light of all the evidence in the case.

USE NOTES

This is a basic instruction and may be given in all habitual criminal and death penalty sentencing proceedings.

[As amended, effective August 1, 2001.]

Committee commentary. — This instruction was taken from UJI 14-5020. *See* committee commentary to UJI 14-5020. This instruction may be used in either a habitual criminal or death penalty sentencing proceeding.

ANNOTATIONS

The 2001 amendment, effective August 1, 2001, substituted "the witness's" for "his" and "the witness" for "he" throughout.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Instructions to jury as to credibility of child's testimony in criminal case, 32 A.L.R.4th 1196.

14-7041. Sentencing proceeding; defendant not testifying; no inference of guilt.

You must not draw any inference of admission from the fact that the defendant did not testify in this sentencing proceeding, nor should this fact be discussed by you or enter into your deliberations in any way.

USE NOTES

This instruction must be given on request of a defendant who does not testify in a habitual criminal or death penalty sentencing proceeding and must not be given if the defendant objects.

Committee commentary. — This instruction is almost identical to UJI 14-5031. *See* committee commentary to UJI 14-5031.

14-7042. Sentencing proceeding; duty to follow instructions.

The law governing this case is contained in these instructions, and it is your duty to follow that law. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction or instructions and disregard others.

USE NOTES

This is a proper instruction to be given in all habitual criminal and death penalty sentencing proceedings.

Committee commentary. — This instruction is the same as UJI 14-6001. It has been included with this chapter in order to assure that it will be given in both habitual criminal and death penalty sentencing proceedings.

14-7043. Withdrawn.

ANNOTATIONS

Withdrawals. — This instruction, pertaining to sentencing proceeding; duty to consult, is withdrawn, effective August 1, 2001.

CHAPTER 71 to 79
(Reserved)

CHAPTER 80
Grand Juries

Part A
General Proceedings

14-8001. Grand jury proceedings; explanation of proceedings.[1]

LADIES AND GENTLEMEN OF THE GRAND JURY:

Function of Grand Jury.

You have been summoned to serve as members of the grand jury for _____ County to investigate _____[2]. An order by the court filed on the _____ day of _____, _____, convened this grand jury. You have been qualified as members of such grand jury, and it is my duty as judge to instruct you as to your duties, authority and special responsibilities as members of the grand jury.

I will guide you to assure that your actions are within your legal authority. At any time, it is appropriate for any grand juror to seek advice and guidance from me as to the scope and propriety of the grand jury's acts and investigations. The grand jury, however, is subject to no other supervision or control from any person, office or body.

Your purpose as grand jurors is to investigate the matter for which this grand jury was called and to determine from the evidence if there is probable cause to believe an offense has been committed.

Evidence.

The grand jury has the power to order the attendance of witnesses and to cause the production of public and private records or other evidence relative and relevant to its investigations. It has the authority of this court to subpoena witnesses and to obtain execution of subpoenas by any public officers charged with such duties. If you have reason to believe that evidence not presented to you is available that may excuse or disprove a charge or accusation or that would make an indictment unjustified, then you may order that evidence produced and presented to you.

In the course of your investigation and the presentation of charges by the prosecutor, you shall consider the evidence presented to you. Evidence means the oral testimony of witnesses under oath and any documentary or other physical evidence.

You must decide the case solely upon the evidence received during these proceedings. It is for you to decide whether that evidence is true or false. You may give the evidence whatever weight you believe it deserves. You must not consider anything you may have read or heard about the case except as a part of your inquiry as members of the grand jury.

In the course of your investigation, it is your duty to protect citizens against unfounded accusations, whether they come from the government or others, and to prevent anyone from being indicted through malice, hatred or ill will.

Probable Cause.

For you to return an indictment, you must find probable cause. "Probable cause" means the evidence presented would cause a reasonable person to believe that an offense has been committed and that the accused committed the offense. Probable cause does not require proof beyond a reasonable doubt.

Indictments will often contain more than one charge. You must decide whether there is probable cause for each charge separately. In finding probable cause on each charge, you must find that there is probable cause for every element of that crime.

Limits of Investigation.

The indiscriminate summoning of witnesses, on the mere chance that some crime may be discovered, is forbidden. The grand jury has no right to conduct an investigation into the personal affairs of citizens, nor the function, operation and housekeeping of any branch of government, except as may be necessary in the course of investigating criminal offenses.

Witnesses brought before the grand jury shall not be harassed nor subjected to unreasonable repeated appearances before the grand jury or the prosecuting attorney. This does not mean, however, that witnesses may not be brought before you on more than one occasion if either you or the prosecuting attorney shall so require.

Assistance for Grand Jury.

The court shall assign a clerk to you, as all testimony must be recorded. The court may also assign to you a bailiff, interpreter or others necessary to carry out your duties, but no one except members of the grand jury and court appointed interpreters may be present during your deliberations or upon your taking of a vote.

The district attorney’s office will assist you, examine witnesses, prepare indictments and reports at your request, and provide your foreperson with a form of oath to be administered by the foreperson to the witnesses who appear before you. The district attorney will advise you of the essential elements of any offense which is to be considered. The district attorney will answer, on the record, any questions you may have, if allowed by law.

The statutes of New Mexico will be available to you, and the district attorney can, at your request, explain our criminal laws to you. You will have a copy of this and other instructions for your guidance and information.

You may call upon this court for assistance and advice [and you may request this court to call upon the attorney general of the state to aid you][3]. If necessary, you may ask this court for legal or other assistance in your inquiry.

Secrecy of Grand Jury Proceedings.

If any person attempts to contact you with respect to any of your duties as a grand juror, advise that person that you cannot discuss any matter pertaining to your duties as a grand juror, obtain the person's name and address, if possible, and report the matter to the court without delay.

The law requires that all that you hear, see, say or vote upon shall be kept secret and shall not be revealed to anyone outside of the grand jury room except in your official reports, indictments and no-bills.

No grand juror shall, except in the performance of [his] official duty, disclose the fact that an indictment has been found against any person for any offense. You will not allow any unauthorized person into the grand jury room during your deliberations. You will not consult with anyone other than members of the grand jury as to how you should vote on any matter.

No one should have any advance information as to the activities of the grand jury or as to any activities which are planned by the grand jury.

As a grand juror, you may not be questioned about anything you say or any vote you cast relative to a matter legally pending before the grand jury except in prosecutions for violations of laws governing grand juries. You must strictly obey this requirement of secrecy in all matters before you. You will be asked to take an oath before serving as a grand juror. If you violate this oath, you may be prosecuted.

Although all proceedings in the grand jury room will be reported verbatim, your deliberations will not be reported.

If you learn of any violation of any rule governing these proceedings, you should report that violation to the court immediately. The court will address such violations appropriately.

Foreperson of Grand Jury.

The foreperson of the grand jury shall convene the grand jury during the regular hours of this court. The foreperson may appoint a clerk from among you to aid in keeping your records of votes during secret sessions when other persons are not able to be present. The foreperson shall sign all indictments and reports and shall swear all witnesses before you. The clerk must preserve the minutes of your deliberations, but no record shall be kept of the votes of the individual members of the grand jury on an indictment or on any other matter voted upon by the grand jury. You will be guided by

the orders of your foreperson, who shall preside over the sessions of the grand jury. The foreperson may recess the sessions of the grand jury and reconvene them. The foreperson, for good cause, may request the court to excuse or discharge individual grand jurors and to replace them with alternate grand jurors as necessary to continue the work of the grand jury.

Instructions by the Court.

It is your duty to follow the law described in these instructions and any other instructions you receive. You must consider these instructions as a whole. You must not pick out one instruction or parts of an instruction and disregard others.

The clerk will now administer the oath and give you a copy of these opening instructions[4].

_____
District Judge

USE NOTES

1. This instruction may be used before the grand jury hears any testimony or is addressed by the prosecuting attorney. If it is used, the instruction may be sent into the grand jury room for its guidance. In *District Court v. McKenna*, 118 N.M. 402, 881 P.2d 1387 (1994), the Supreme Court set forth the procedures to be followed before convening a grand jury on a citizen's petition.

2. Insert the reason for which the grand jury has been convened; e.g., offenses presented for consideration and indictment, special inquiry or investigation of a public officer regarding removal on a ground specified in 10-4-2 NMSA 1978 (1909).

3. The bracketed phrase is not to be given if the attorney general has already been asked to assist the grand jury.

4. If used, UJI 14-8002 NMRA is to be given by the clerk of the court immediately after this instruction is given.

STATE OF NEW MEXICO
COUNTY OF _____
IN THE DISTRICT COURT
IN THE MATTER OF THE CONVENING
OF A GRAND JURY

ORDER

The court, being advised in the premises and deeming it necessary, finds that a grand jury should be convened for the purpose of considering [criminal cases which

may be presented to it] [_____ (*state specific inquiry which petition charges the grand jury to investigate*)] [the removal of _____ (*name of public officer*) for _____ (*reason for removal of officer*)].

IT IS THEREFORE ORDERED that a grand jury in _____ County, New Mexico, be convened to meet at _____ o'clock a.m. on _____, the _____ day of _____, _____, to consider _____.

IT IS FURTHER ORDERED that the names of _____ (*state number*) potential jurors be selected and from the lists of said persons, twelve grand jurors and _____ alternates be chosen and qualified in open court prior to the convening of the grand jury on the _____ day of _____, _____.

_____
District Judge

[As amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008.]

Committee commentary. —

Convening the grand jury.

Article 2, Section 14 of the New Mexico Constitution provides that:

A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

Article 2, § 14 of the New Mexico Constitution prohibits holding a person to answer for a felony, capital or infamous crime, unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general.

The grand jury may present an accusation, in writing, for removal of any county, precinct, district, city, town or village officer elected by the people, and of any officer appointed to fill out the unexpired term of any such officer, to the district court of the county in or for which the officer accused is elected for any of the following causes:

a. conviction of any felony or of any misdemeanor involving moral turpitude;

b. failure, neglect or refusal to discharge the duties of the office, or failure, neglect or refusal to discharge any duty devolving upon the officer by virtue of his office;

c. knowingly demanding or receiving illegal fees as such officer;

d. failure to account for money coming into his or her hands as such officer;

e. gross incompetency or gross negligence in discharging the duties of the office; or

f. any other act or acts, which in the opinion of the court or jury amount to corruption in office or gross immorality rendering the incumbent unfit to fill the office. §§ 10-4-1 to 10-4-4 NMSA 1978.

The grand jury may make a presentment for the removal of a local, elected officer, but if it does not do so, it shall not denigrate that person's moral fitness to hold public office. § 31-6-10 NMSA 1978 (1979).

Territorial jurisdiction.

Selection of the grand jury.

Section 38-5-3 NMSA 1978 (2005) describes the procedure used to compile the random jury list for the selection of grand jurors. The names of jurors summoned for grand jury duty are drawn from the random jury list. § 31-6-1 NMSA 1978 (1983). The district judge then qualifies a grand jury panel comprised of twelve regular jurors and a sufficient number of alternates to ensure the continuity of the inquiry and the taking of testimony. § 31-6-1 NMSA 1978 (1983).

Term of grand jury.

The grand jury is convened as provided for in N.M. Const., art. 2, § 14 and discharged at such time as the court determines the business of the grand jury is completed, but not later than three months after it was convened. § 31-6-1 NMSA 1978 (1983); *State v. Raulie*, 35 N.M. 135, 290 P. 789 (1930). Function of the court.

"The district judge convening the grand jury shall charge it with its duties and direct it as to any special inquiry into violations of law that he wishes it to make." § 31-6-9 NMSA 1978 (1993).

In *District Court v. McKenna*, 118 N.M. 402, 407–408, 881 P.2d 1387, 1393–94 (1994), the Supreme Court set forth the duties of the district court prior to convening a grand jury upon a citizen’s petition.

When appropriate, the district judge shall "call to the attention of grand jurors," the provisions of §§ 23-1-5, 23-1-6 and 23-1-7 NMSA 1978 regarding the indebtedness of a

state institution exceeding the appropriations for such institution. § 23-1-8 NMSA 1978 (1953).

Assistance for grand jury.

The court is required to assign court reporters, security officers, interpreters, clerks or other persons as needed to aid the grand jury in carrying out their duties. Security personnel may be present only by special leave of the court and only if they are not potential witnesses or interested parties. §§ 31-6-4(C) and 31-6-7 (A) NMSA 1978 (2003).

A prosecuting attorney attending a grand jury shall act fairly and impartially at all times during grand jury proceedings. § 31-6-7(A) NMSA 1978 (2003). The duty of the prosecuting attorney is to attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury. § 31-6-7(A) NMSA 1978 (2003). The prosecuting attorney shall also advise the grand jury, on the record, of the essential elements of any offense which is considered by the grand jury. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546). This shall be done by using Uniform Jury Instructions Criminal, where available, and the criminal statutes if no uniform instructions are available. The district attorney will answer, on the record, any questions which the grand jury may have. The prosecuting attorney will not, however, guide or otherwise influence the grand jury. If requested by the grand jury, the prosecuting attorney should also explain a statute to the grand jury.

Evidence.

Evidence before the grand jury is the oral testimony of witnesses and documentary or physical evidence, and the grand jury has the duty to order evidence produced if it believes that there is lawful, competent, and relevant evidence available that may explain away or disprove a charge or accusation or that would make an indictment unjustified. § 31-6-11(A), (B) NMSA 1978 (2003). The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. § 31-6-12(A) NMSA 1978 (1979).

The sufficiency or competency of the evidence upon which an indictment is returned will not be subject to review absent a showing of bad faith on the part of the prosecutor assisting the grand jury. § 31-6-11 NMSA 1978 (2003); *Buzbee v. Donnelly*, supra; *State v. Chance*, 29 N.M. 34, 221 P. 183 (1923).

In Buzbee, the New Mexico Supreme Court overruled the holding in several court of appeals decisions regarding due process and exculpatory evidence. The court specifically overruled *State v. Payne*, 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981); *State v. Gonzales*, 95 N.M. 636, 624 P.2d 1033 (Ct. App. 1981); *State v. Sanchez*, 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980); *State v. Lampman*, 95 N.M. 279, 620 P.2d 1304 (Ct.

App. 1980); *State v. Harge*, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979); and *State v. Herrera*, 93 N.M. 442, 601 P.2d 75 (Ct. App. 1979).

Relying on *Costello v. United States*, 350 U.S. 359 (1956), the New Mexico Supreme Court did not perceive a federal due process violation when the only misconduct asserted was a withholding of exculpatory evidence from the grand jury. In so doing, the court implicitly rejected the dictum in *State v. McGill*, 89 N.M. 631, 556 P.2d 39 (Ct. App. 1976), which assumed the prosecutor could violate due process in withholding some evidence from the grand jury.

Because the function of the grand jury is merely to find probable cause for bringing a defendant to trial, the court reasoned that a stricter test of materiality should be placed on evidence withheld from the grand jury. Before remedial action by a reviewing court is justified, the quantum and materiality should be great. The court held that § 31-6-11 NMSA 1978 requires a prosecutor to present direct exculpatory evidence, but does not require the prosecutor to present circumstantial exculpatory evidence. The court also reaffirmed its 1923 holding in *State v. Chance*, supra, that absent clear statutory authority the court will not review the legality or competency of evidence unless there is a violation of due process. The court did emphasize, however, that the prosecutor has a statutory duty, under § 31-6-7 NMSA 1978 (2003), to conduct himself in a fair and impartial manner.

Finally, the court reaffirmed its holding in *Maldonado v. State*, 93 N.M. 670, 604 P.2d 363 (1979): Prosecutors must not use inadmissible evidence when they seek an indictment. They should avoid perjury, deceit or malicious overreaching. A prosecutor's conduct should not significantly impinge on the ability of the grand jury to exercise its independent judgment.

In 2003, the legislature amended § 31-6-11(B) NMSA 1978 (2003). The amended statute no longer requies the grand jury to consider "evidence that directly negates the guilt" of the target. It now states:

It is the duty of the grand jury to weigh all the evidence submitted to it, and when it has reason to believe that other lawful, competent and relevant evidence is available that would disprove or reduce a charge or accusation or that would make an indictment unjustified, then it shall order the evidence produced. At least twenty-four hours before grand jury proceedings begin, the target or his counsel may alert the grand jury to the existence of evidence that would disprove or reduce an accusation or that would make an indictment unjustified, by notifying the prosecuting attorney who is assisting the grand jury in writing regarding the existence of that evidence.

Interpreting the amended statute, the Court of Appeals held that § 31-6-11 does not authorize "judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *State v. Romero*, 2006-NMCA-105, 140 N.M. 281, cert. granted, 2006-NMCERT-008, 140 N.M. 423, cert. quashed, 2007-NMCERT-002, 141 N.M. 339. In *Romero*, the Court rejected challenges

to indictments on the grounds that the prosecutor (1) failed to present evidence that disproved or reduced a charge or that made indictments unjustified and (2) presented inadmissible hearsay to the grand jury.

The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. § 31-6-12 NMSA 1978 (1979).

Targets.

In 2003, the legislature amended § 31-6-11 NMSA 1978 (2003), which now states:

A district attorney shall use reasonable diligence to notify a person in writing that the person is the target of a grand jury investigation. Unless the district judge presiding over the grand jury determines by clear and convincing evidence that providing notification may result in flight by the target, result in obstruction of justice or pose a danger to another person, the target of a grand jury investigation shall be notified in writing of the following information:

(1) that he is the target of an investigation;

(2) the nature of the alleged crime being investigated and the date of the alleged crime and any applicable statutory citations;

(3) the target's right to testify no earlier than four days after receiving the target notice if he is in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(4) the target's right to testify no earlier than ten days after receiving the target notice if he is not in custody, unless for good cause the presiding judge orders a different time period or the target agrees to testify sooner;

(5) the target's right to choose to remain silent; and

(6) the target's right to assistance of counsel during the grand jury investigation.

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, in the Evidence Section: substituted "your legal authority" for "authority conferred upon you by law" and "At any time, it is appropriate for any grand juror" for "Any grand juror any time, with propriety", and deleted "In addition to this matter, you shall also consider the conditions of the jails or prisons in this county" from the Function of the Grand Jury section; added "and present to you" at the end of Paragraph one of the Evidence section; added "the evidence present to you. Evidence means" and deleted "exhibited to the grand jury" from the end of Paragraph two; deleted the previous Paragraph three, which read "It is for you to decide whether the witnesses

know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits"; and substituted the word "deserves" for the word "merits" in the second sentence of the current Paragraph three. In the Probable Cause section, added the second Paragraph. In Limits of Investigation section, rewrote the third sentence that previously read "It may not investigate the function, operation and housekeeping of any branch of government, except the jails or prisons within the county. It is not a function of the grand jury to criticize or regulate agencies of government or private persons or institutions except jails or prisons". In Assistance for Grand Jury section: added the phrase "and court appointed interpreters" to Paragraph one and deleted "You must carefully consider these elements prior to returning an indictment"; added "if allowed by law" to Paragraph two; and rewrote Paragraph three that read "The statutes of New Mexico will be available to you and the district attorney can explain at your request our criminal laws to you. A copy of this and other instructions will be placed in your hands for further guidance and information". In the Secrecy of Grand Jury Proceedings section: rewrote Paragraph three that previously read "No grand juror shall, except in the performance of his official duties, disclose the fact that an indictment has been found against any person for any offense. You will allow no one in the grand jury room during your deliberations, nor will you consult with anyone other than members of the grand jury as to how you should vote on any matter"; rewrote Paragraph five that previously read "A grand juror may not be questioned for anything he may say or any vote he may give relative to a matter legally pending before the grand jury except in the trial or prosecution of a witness for perjury before the grand jury. The institution of the grand jury and its requirements in the due administration of the criminal law require that grand jurors observe and obey strictly this requirement as to the secrecy of all matters transacted before them. Any person found to have violated this oath as a grand juror is guilty of a misdemeanor"; and substituted Paragraph seven for "Any violation of the orders of the court by a person committed in the presence of the grand jury should be reported to the court at once by any grand juror with knowledge thereof, and any public activity which violates this rule will be dealt with by the court in an appropriate manner". In Use Note 1, added the sentence containing the citation to *District Court v. McKenna* to and substantially rewrote the committee commentary.

Instruction in accord with general law prohibiting criticism of individuals or agencies. — This instruction to the grand jury sets limitations in accord with the general law prohibiting criticism of individuals or governmental agencies. 1982 Op. Att'y Gen. No. 82-14.

Advisement of elements of crime charged. — The practice of simply providing the grand jury with a written manual containing UJI instructions and not indicating on the record that the jury has been at least referred to the appropriate sections of the manual for each crime listed on indictments does not comply with this instruction, 31-6-8 and 31-6-10 NMSA 1978, or Rule 5-506(B) NMRA. *State v. Ulibarri,* 1999-NMCA-142, 128 N.M. 546, 994 P.2d 1164, *aff'd*, 2000-NMSC-007, 128 N.M. 686, 997 P.2d 818.

14-8002. Grand jury proceedings; oath to grand jurors.[1]

You will now stand and repeat the following oath:

Do you, as members of this grand jury, swear or affirm that:

you will conscientiously inquire into _____ (*state reason for which grand jury called*);

you will in returning any indictment or making any report or undertakings present the truth according to the best of your skill and understanding;

you will refrain from indicting any person through malice, hatred or ill will or not indicting any person through fear, favor or affection or for any reward or the hope or promise thereof;

you will forever keep secret whatever you or any other juror may have said or voted on during any matter you consider; and

you will keep secret the testimony of any witness heard by you unless ordered to disclose the same in the trial or prosecution of the witness for perjury before the grand jury?

You are now impaneled and sworn as grand jurors comprising the grand jury, drawn by the district court of the _____ judicial district of New Mexico within and for the county of _____.

You shall select one of your number as foreperson as your first order of business. After you have selected your foreperson, notify the court of your selection.

Your term as members of the grand jury expires _____[2] unless you are discharged or excused by the court prior to this time.

If you have any questions at any time, please do not hesitate to ask the court or any other district judge. You may now begin serving as grand jurors.

USE NOTES

1. This oath or affirmation or any other oath or affirmation which generally complies with 31-6-6 NMSA 1978 (1979) and Rule 11-603 NMRA must be administered prior to qualification of members of the grand jury.

2. Members of a grand jury may not serve for a period longer than three months. § 31-6-1 NMSA 1978 (1983).

[As amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008.]

Committee commentary. — Section 31-6-6 NMSA 1978 (1979) prescribes the oath to be administered by the district judge to the grand jurors and other participants in grand jury proceedings. Although the statute states in part: "the following oaths shall be administered by the district judge to jurors, officers of the court or others assigned to assist the grand jury, . ," the oath in UJI 14-8002, 14-8003, and 14-8004 does not follow the oath prescribed by the statute verbatim. No case has been found where a court considered the precise question of whether an oath, administered in court, was a matter of procedure or of substantive law. The committee is of the view that the actual oath given is a matter of procedure.

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, made non-substantive changes.

Cross references. — *See* Section 31-6-6 NMSA 1978.

14-8003. Grand jury proceedings; oath for officer or other person.

Do you swear or affirm that you will keep secret all proceedings occurring in your presence or of which you may learn as a result of your service in aid of the grand jury?

USE NOTES

This oath may be administered to each officer of the court, bailiff, security officer, clerk or other person authorized to assist the grand jury by 31-6-4 or 31-6-7 NMSA 1978.

Committee commentary. — *See* committee commentary under UJI 14-8002.

ANNOTATIONS

Cross references. — *See* Section 31-6-6 NMSA 1978.

14-8004. Grand jury proceedings; oath for witness.

Do you swear or affirm that the testimony which you are about to give will be the truth, the whole truth and nothing but the truth, under penalty of law?

USE NOTES

This oath may be administered to each witness prior to his testimony before the grand jury.

Committee commentary. — *See* committee commentary under UJI 14-8002.

ANNOTATIONS

Cross references. — *See* Section 31-6-6 NMSA 1978.

14-8005. Grand jury proceedings; sample instructions.[1]

Burglary; essential elements.

For you to return an indictment against the accused for the crime of burglary, you must find that there is probable cause[2] to believe each of the following elements of the crime:

1. The accused entered _____ (*identify structure*)[3] without authorization or permission; [the least intrusion constitutes an entry;][4]

2. When the accused entered the _____ (*name of structure*), intended to commit [a theft] [or] _____ (*name of felony*)][5] inside;

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

USE NOTES

1. This instruction and any other applicable instruction shall be given. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546).

2. UJI 14-8006 NMRA, which defines probable cause, shall be given with the essential elements instruction(s). If the prosecutor gives essential elements instructions for more than one offense, the prosecutor is not required to give the probable cause instruction more than once.

3. If the charge is burglary of a dwelling house, UJI 14-1631 NMRA shall be given with this instruction. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546).

4. Use bracketed phrase if entry is an issue.

5. If this instruction is used, it is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony should be given with this instruction.

[As amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008.]

Committee commentary. — Applicable uniform jury instructions giving the essential elements of an offense shall be prepared and presented by the district attorney when

the offense is being considered by the grand jury. *State v. Ulibarri*, 2000-NMSC-007, 128 N.M. 686 (adopting reasoning of Court of Appeals in *State v. Ulibarri*, 1999-NMCA-142, 128 N.M. 546). Any other instructions, such as definitions, which are to be given with the essential elements instruction, shall also be prepared for the grand jury as required by law.

If no uniform essential elements instruction is available for an offense, the prosecutor shall instruct the grand jury based on the applicable statute and shall give a copy of the statute or a written instruction derived from the statute to the grand jury for their consideration.

As it is not necessary for the grand jury to find beyond a reasonable doubt the essential elements of the offense, but only that there is probable cause to believe each of the elements, it is necessary to modify the existing uniform jury instructions. UJI 14-8005 is a sample of such a modification.

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, deleted the definition of probable cause from Paragraph 3; in Use Notes 1 and 3, added the citation to State v. Ulibarri; added a new Use Note 2; and amended the committee commentary.

14-8006. Grand jury proceedings; definition of probable cause.

"Probable cause" means the evidence presented would cause a reasonable person to believe that an offense has been committed and that the accused committed the offense. Probable cause does not require proof beyond a reasonable doubt.

USE NOTES

This instruction shall be given with the essential elements instruction(s). If the prosecutor gives essential elements instructions for more than one offense, the prosecutor is not required to give the probable cause instruction more than once.

[Approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008.]

Part B
Findings

14-8020. Grand jury proceedings; findings.

I hereby certify that at least eight members of the grand jury have found that there is probable cause to accuse _____ (*person accused*) of

_____ (*name of offense*) and to return an indictment against _____ (*person accused*).

_____
Foreperson

USE NOTES

If this instruction is used, a separate findings form should be used for each offense charged. An indictment, a "true bill," will then be returned by the grand jury for any offenses for which probable cause is found within twenty-four hours following the day upon which the indictment is voted. The indictment shall be filed with the district court clerk. If probable cause is found for one or more offenses, the district attorney will complete Rule 9-204 NMRA and present it to the grand jury for signing. If this instruction is used, it is not to be included in the district court file. It has been included as an aid to the district attorney in performing the duty of assisting the grand jury.

[Amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008.]

Committee commentary. — Eight grand jurors must concur in order to return an indictment. N.M. Const., art. 2, § 14; § 31-6-10 NMSA 1978 (1979).

The indictment must be signed by the foreperson of the grand jury. § 31-6-2 NMSA 1978 (1979).

In 2003, the legislature amended § 31-6-11 NMSA 1978 (2003), which governs evidence before the grand jury. Interpreting the amended statute, the Court of Appeals held that § 31-6-11 NMSA 1978 does not authorize "judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *State v. Romero*, 2006-NMCA-105, 140 N.M. 281, cert. granted, 2006-NMCERT-008, 140 N.M. 423, cert. quashed, 2007-NMCERT-002, 141 N.M. 339. In *Romero*, the Court rejected challenges to indictments on the grounds that the prosecutor (1) failed to present evidence that disproved or reduced a charge or that made indictments unjustified and (2) presented inadmissible hearsay to the grand jury. The Court held that § 31-6-11(A) NMSA 1978 "is directory and for the guidance of the grand jury," and that "the Legislature has not authorized judicial review of the evidence presented to a grand jury except for its sufficiency and then only upon a showing of prosecutorial bad faith." *Romero*, 2006-NMCA-105, ¶ 5, 140 N.M. at 282.

Notwithstanding the lack of power of the court to review the evidence to support the indictment, the court has power to quash an indictment if the grand jury proceedings fail to comply with statutory requirements. *Davis v. Traub*, 90 N.M. 498 (1977). The court may also expunge unauthorized grand jury action.

The grand jury is prohibited from naming persons as unindicted coconspirators in indictments. § 31-6-5 NMSA 1978 (2003).

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, added the last sentence to Use Note 1 and rewrote the committee commentary.

Compiler's notes. — *State v. Sanchez*, cited in the last sentence in the sixth paragraph of the committee commentary, may have been at least partially overruled by *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

14-8021. Grand jury proceedings; findings.

I hereby certify that the members of the grand jury have found that there is no probable cause to accuse _____ of _____.

_____
Foreperson

[Amended by Supreme Court Order No. 08-8300-008, effective March 21, 2008.]

USE NOTES

If this instruction is used, a separate findings form should be used for each offense charged. For all offenses for which no indictment is returned, a "no-bill" shall be returned and filed under seal with the district court clerk. If this instruction is used, it is not to be included in the district court file.

Committee commentary. — *See* committee commentary under UJI 14-8002 NMRA.

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-008, effective March 21, 2008, made non-substantive changes.

Cross references. — *See* Section 31-6-5 NMSA 1978.

CHAPTER 81 to 89
(Reserved)

CHAPTER 90
Children's Courts

14-9001. Children's court; general use note.

When a uniform instruction is provided for the elements of a crime, a defense or a general explanatory instruction on evidence or trial procedure, the uniform instruction shall be modified and used in the children's court for delinquent acts. In no event may an elements instruction be altered other than as required for use in the children's court. An instruction shall not be given on a subject for which a use note directs that no instruction be given. In all instructions, the word "child" should be substituted for the word "defendant." For any other matter, if the court determines that a uniform instruction must be altered, the reasons for the alteration must be stated in the record.

For a delinquent act for which no uniform instruction on essential elements is provided, an appropriate instruction stating the essential elements must be drafted. However, all other applicable uniform instructions must also be given. For other subject matters not covered by a uniform instruction, the court may give an instruction which is brief, impartial, free from hypothesized facts and otherwise similar in style to these instructions.

The printed version of these instructions varies the use of pronouns in referring to the defendant, witnesses or victims. When an instruction is prepared for use, it must fit the situation.

Many of the instructions contain alternative provisions. When the instructions are prepared for use, only the alternative or alternatives supported by the evidence in the case may be used. The word "or" should be used to connect alternatives, regardless of whether the word is bracketed in the printed version of the instruction.

14-9002. Children's court; explanation of trial procedure.

LADIES AND GENTLEMEN:

This is a children's court proceeding in which the State of New Mexico has filed a petition against the respondent _____ *(name of child)* alleging that _____ *(child)* has committed a delinquent act.

In children's court, the respondent is referred to as a child. A child is any person under the age of eighteen (18) years. Persons under eighteen (18) years are not charged with crimes, but rather delinquent acts.

A delinquent act is any act that would be a crime if committed by an adult. The child in this case _____ *(name of child)* is alleged to have committed the delinquent act of _____ *(common name of crime)*. _____ *(name of child)* has denied committing the delinquent act. The child is presumed to be innocent. The state has the burden to prove beyond a reasonable doubt that _____ *(name of child)* committed the delinquent act charged in the petition.

What I say now is an introduction to the trial of this case.

The children's court proceeding generally begins with the lawyers telling you what they expect the evidence to show. Next, the evidence will be presented to you. The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the lawyers. After you have heard all the evidence, I will instruct you on the law. The lawyers will argue the case, and then you will retire to the jury room to arrive at a verdict.

Your purpose as jurors is to find and determine the facts in this case from the evidence. It is my duty to decide what evidence you may consider.

It is the duty of a lawyer to object to evidence the lawyer believes may not be proper, and you must not hold such objection against the state or the respondent [because of such objections]. I will sustain objections if it is improper for you to consider the evidence. If I sustain an objection to evidence, you must not consider such evidence nor may you consider any evidence which I have told you to disregard. You must not speculate about what would be the answer to a question which I rule cannot be answered.

It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful. You may give the testimony of any witness whatever weight you believe it merits.

You must decide the case solely upon the evidence received in court. You must not consider anything you may have read or heard about the case outside the courtroom. During the trial and your deliberations, you must avoid news accounts of the trial, whether they be on radio or television or in the newspaper or other written publications. You must not visit the scene of the incident on your own. You cannot make experiments with reference to the case.

Until you retire to deliberate the case, you must not discuss this case or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you. Your special responsibility as jurors demands that throughout this trial you exercise your judgment impartially and without regard to any biases or prejudices that you may have.

[You are not permitted to take notes during the trial. In your deliberations you must rely on your individual memories of the evidence in the case.][2]

[You are permitted to take notes during trial, and the court will provide you with note taking material if you wish to take them. However, if you choose to take notes, be sure that your note taking does not interfere with your listening to and considering all the evidence. It is difficult to take notes and at the same time pay attention to what a witness is saying. In your deliberations you should rely on your own memory of the evidence rather than on the written notes of another juror. Do not take your notes with

you at the end of the day or discuss them with anyone before you begin your deliberations.][3]

If an exhibit is admitted in evidence, you should examine it yourself and not talk about it with other jurors until you retire to deliberate.

Ordinarily the attorneys will develop all pertinent evidence. It is the exception rather than the rule that an individual juror will find himself or herself with a question unanswered after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to me. Your name as juror should appear below the question. I must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if I deem the question to be proper.

No statement, ruling, remark or comment which I make during the course of the trial is intended to indicate my opinion as to how you should decide the case or to influence you in any way. At times I may ask questions of witnesses. If I do, such questions do not in any way indicate my opinion about the facts or indicate the weight I feel you should give to the testimony of the witness.

The prosecuting attorney will now make an opening statement if [he] [she] desires. The child's attorney may make an opening statement if [he] [she] desires or may wait until later in the trial to do so.

What is said in the opening statement is not evidence. The opening statement is simply the lawyer's opportunity to tell you what [he] [she] expects the evidence to show.

USE NOTES

1. For use after the jury is sworn and before opening statements. This instruction does not go to the jury room.

2. This instruction leaves it to the discretion of the trial judge as to whether or not jurors will be permitted to take notes during the trial.

3. If the court permits the taking of notes, the court must instruct the bailiff to pick up the notes at the conclusion of all jury deliberations. Absent a showing of good cause, the court shall destroy all notes at the conclusion of all jury deliberations.

[As amended, effective August 1, 1989; August 1, 2001.]

ANNOTATIONS

The 2001 amendment, effective August 1, 2001, added the phrase "of trial procedure" in the title; substituted "The child is presumed to be innocent" for "It is presumed that he did not commit the act charged in the petition," and "The state has the" for "It is the state's"; substituted "Next" for "Then"; added the sentence "The evidence will be the

testimony of witnesses, exhibits and any facts agreed to by the lawyers"; substituted "you may consider" for "will be admitted for your consideration. The evidence will the testimony of witnesses, exhibits and any facts agreed to by the lawyers"; deleted the word "which" after "evidence"; substituted "hold such objection" for "be prejudiced," "it is" for "I conclude that it would be legally" before "improper"; substituted "the" for "such" before "evidence"; added the sentence beginning "During the trial and your deliberations, you must avoid" through "publications"; substituted "In your deliberations you" for "You"; deleted the word "upon" after "must rely"; added the paragraph beginning "You are permitted to take notes"; deleted the phrase "If you have any question during the trial," and substituted the sentences from "Ordinarily the attorneys" through "you may"; deleted the phrases "sign it" and "give it to me," and added the sentences beginning "hand it to me. Your name as juror" through "proper"; substituted "[he] [she]" for "he"; and added Use Notes 2 and 3.

The 1989 amendment, effective for cases filed in the district courts on or after August 1, 1989, in the fourth paragraph from the end of the instruction, substituted "and ask the bailiff to give it to me" for "and give it to the bailiff " and, at the end of the last paragraph of the instruction, substituted "what he expects the evidence to show" for "what he intends to prove".

14-9003. Children's court; sample instruction.

Burglary; essential elements.

For you to find the child committed the delinquent act of burglary [as charged in Count _____][1], the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the act:

1. The child entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization [the least intrusion constitutes an entry;][3]

2. The child entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____ *(name of felony)*][4], once inside;

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

USE NOTES

1. Insert the count number if more than one count is charged.

2. If the charge is burglary of a dwelling house, UJI 14-1631 should be given.

3. Use bracketed phrase if entry is in issue.

4. It is not necessary to instruct on the elements of the theft. If intent to commit a felony is alleged, the essential elements of the felony must be given.

[As amended, effective August 1, 2001.]

ANNOTATIONS

The 2001 amendment, effective August 1, 2001, substituted "committed the delinquent act" for "guilty"; deleted "_____ (identify structure)" and "_____ (name of structure)" and replaced it with a list of structures to select among; deleted the phrase "or permission" after "authorization"; and substituted "once" for "when he got."

Cross references. — *See* Section 30-16-3 NMSA 1978.

14-9004. Children's court; sample forms of verdict.[1]

(style of case)

We find the child [_____][2] (*name*) COMMITTED the act of _____[3] *(name of act)* [as charged in Count _____[4]].

_____
FOREPERSON

(style of case)

We find the child [_____][2] *(name)* DID NOT COMMIT the act of _____[3] *(name of act)* [as charged in Count _____[4]].

_____
FOREPERSON

(style of case)

We find the child [_____][2] *(name)* DID NOT COMMIT any delinquent act.[5]

_____
FOREPERSON

(style of case)

We find the child [_____][2] *(name)* BY REASON OF INSANITY DID NOT COMMIT any delinquent act.

_____
FOREPERSON

(style of case)

Do you find that the child [_____][2] *(name)* is competent to stand trial?

_____ (*Yes or No*).

_____
FOREPERSON

USE NOTES

1. A form of verdict must be submitted to the jury for each delinquent act or lesser included offense, and each form must be typed on a separate page. This form is modified as needed. It is not exhaustive. *See* UJI 14-6010 to 14-6018.

2. Use this provision and insert name of each child when there are multiple respondents.

3. Insert the name of the delinquent act; do not leave blank for the jury to complete.

4. Insert the count number, if any; do not leave blank for the jury to complete.

5. This form is appropriate for lesser included offenses. *See* UJI 14-6012.

[As amended, effective August 1, 2001.]

ANNOTATIONS

The 2001 amendment, effective August 1, 2001, substituted "foreperson" for "foreman" throughout; in Use Note 1 added "or lesser included offense" after "delinquent act" and added the sentences beginning "This form is modified" to the end of Use Note 1.

14-9005. Children's court; special verdict; amenability specific factors.[1]

If you find that _____ (*name of child*) committed the offense of _____ (*name of offense*) [as charged in Count_____][2], then you must determine whether the offense was committed in an aggressive, violent, premeditated or willful manner; and whether a firearm was used to commit the offense; and whether the offense was against a person or against property; and whether the _____ (*name of child*) inflicted physical injury to a person. You must complete the special forms to indicate your findings.

For you to make a finding of “yes” to the first question, the state must prove to your satisfaction beyond a reasonable doubt that the offense was committed in an aggressive, violent, premeditated or willful manner.

For you to make a finding of “yes” to the second question, the state must prove to your satisfaction beyond a reasonable doubt that a firearm was used to commit the offense.

For you to make a finding of “yes” to the third question, the state must prove to your satisfaction beyond a reasonable doubt that the offense was against a person.

For you to make a finding of “yes” to the fourth question, the state must prove to your satisfaction beyond a reasonable doubt that the offense was against property.

For you to make a finding of “yes,” to the fifth question, the state must prove to your satisfaction beyond a reasonable doubt that _____ (*name of child*) inflicted physical injury to a person.

QUESTION [1]

Do you unanimously find beyond a reasonable doubt that the offense [as charged in Count _____], was committed in an aggressive, violent, premeditated or willful manner?[3]

_____ (Yes)
_____ (No)

QUESTION [2]

Do you unanimously find beyond a reasonable doubt that a firearm was used to commit the offense [as charged in Count ____]?

_____ (Yes)
_____ (No)

QUESTION [3]

Do you unanimously find beyond a reasonable doubt that the offense was against a person?

_____ (Yes)
_____ (No)

QUESTION [4]

Do you unanimously find beyond a reasonable doubt that the offense was against property?

_____ (Yes)
_____ (No)

QUESTION [5]

Do you unanimously find beyond a reasonable doubt that _____ (*name of child*) inflicted physical injury to a person[s]?

_____ (Yes)
_____ (No)

_____
FOREPERSON

USE NOTES

1. This instruction is to be submitted in all youthful offender cases on the question of whether the child can be rehabilitated or treated sufficiently to protect society's interests by the time the child reaches the age of twenty-one (21) and is therefore amenable to treatment or subject to adult penalties. This instruction only applies to the offenses enumerated in NMSA 1978, Section 32A-2-3(J)(1) (2009), and only when the child was fourteen to eighteen years of age at the time of the alleged offense.

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

3. All questions must be submitted to the jury unless the court makes a finding that a factor is not applicable to amenability under the facts of the particular case or there is a stipulation by parties as to a factor.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed on or after December 31, 2014.]

Committee commentary. — *State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22, 243 P.3d 726, held that while the inquiry of offense-specific factors is not a task traditionally performed by juries, it is prudent to submit the factors in NMSA 1978, Sections 32A-2-20(C)(2)(3) and (4) to the jury during the trial by way of special interrogatories so that only a minimal burden is placed on the process. Discussion regarding the omission of factors led to a consensus that the court could make a finding that a specific factor (such as use of a firearm) is not applicable to the amenability finding under the facts of the particular case and remove the question; or the parties could stipulate to the removal but that otherwise the factors should be presented as listed.

[Adopted by Supreme Court Order No. 14-8300-005, effective for all cases filed on or after December 31, 2014.]

Juror Handbook.

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Civic Duty

Some Terms You Will Hear in Court and Their Meaning

Right to a Jury Trial.

The Constitutions of the United States and the State of New Mexico guarantee the right of trial by jury. Juries consist of six or twelve members depending on the court and type of case.

Who May Serve.

Any person who is qualified to vote may be summoned for service as a juror.

Selection of Jurors.

Jurors are selected by the clerk of the district court, at random, by _____ _____ _____ *(set forth method used to select jurors)*.

Exemption from Service.

The following persons may be exempted from jury service:

persons incapable of serving because of physical or mental illness or infirmity;

persons exempted from jury service at the discretion of the district court;

persons who have served as members of a petit jury panel or a grand jury in either the courts of the United States or the State of New Mexico, within the preceding thirty-six (36) months are exempt from jury service in the courts of the state at the juror's option; and

persons exempted from jury duty by the judge upon satisfactory evidence presented to him, although the person requesting to be excused need not be personally present in court when making the request.

The clerk of the court will provide a juror with a form which must be completed in order to claim an exemption from jury service because of physical or mental illness or infirmity or to express a claim for exemption for other reason.

Length of Service.

A person is not required to remain a member of a jury panel for longer than _____ *(set forth the number)* months.

Obligation of Employers.

Employers who deprive their employees of employment or threaten or coerce them with respect to jury duty, upon conviction, are guilty of a petty misdemeanor.

Emergency.

If illness or other emergency requires that you be delayed or absent, telephone _____, promptly.

Failure to Appear.

Willful failure to appear as a juror is a criminal offense.

Compensation.

Jurors may be reimbursed for mileage for traveling to and from their place of residence to the court at the rate of _____ *(set forth rate)* cents ($.) per mile. In addition a juror may receive compensation for each hour in attendance and service as jurors at the prevailing minimum wage rate for New Mexico of _____ *(set forth minimum wage)*.

Meals.

The court may provide meals to jurors who are serving on a case. You are not required to eat with other jurors except when you are in deliberation or otherwise restricted by the judge.

Function of Jurors.

Jurors judge the facts in both criminal and civil cases. In a criminal case a jury determines the guilt or innocence of a person accused of committing a criminal offense. In a civil case a jury determines disputes involving money, property and other things of value.

Juror Responsibilities.

Members selected must not have personal knowledge regarding the facts of the particular case which might influence their decision. In order to reach this objective, the judge or attorneys question the jurors concerning their family relationship with or their personal knowledge of the parties or the attorneys and their personal knowledge of the facts of the case. This is called the "voir dire", meaning "to tell the truth". If the relationship or knowledge would tend to influence the juror's decision in the case, the juror is disqualified from serving in the case.

Disqualification of Jurors.

The qualification of jurors is one of the most important aspects of any trial, thus making the honest and forthright answers to the questions of the judge and attorneys unusually important. Jurors may be selected or rejected for many and various reasons, none of which reflect upon the individual juror. Jurors should not take it as a personal insult if they are not selected to serve. In the event that the questions asked by the judge or attorneys become offensive, a juror may request permission of the court to refuse to answer.

Juror Oath.

Once a jury has been selected, each juror selected is required to take an oath or affirmation that he will return a verdict according to the law and evidence as presented in court.

Types of Cases.

Jurors are called upon to hear both criminal and civil cases. Criminal cases are brought by the State of New Mexico, or in some cases, by a city or county, against an individual charged with a crime. The individual is not guilty until the jury unanimously makes that determination.

Civil cases vary somewhat from criminal cases in that the dispute is between individuals, business organizations or governmental entities, such as the state, a county or a municipality. Ordinarily, one party, called the plaintiff, will be making a claim for damages against another party called the defendant. In some instances, the defendant will also make a claim for damages against the plaintiff, called a counterclaim. A third party, called a third-party defendant, may also be a party in the action and damages or other relief may be requested from this party. In civil cases the jury determines the amount of money or other damages to be awarded.

In both civil and criminal cases after the evidence has been presented, an explanation of the law applicable to the case and other instructions to the jury are given. This is usually followed by closing arguments or statements by the lawyers. The jury is then asked to deliberate and reach a verdict in the manner described by the court.

Evidence.

Evidence is usually presented in the courtroom by question and answer. The attorneys or a party will question the witnesses and the answers become the evidence which you consider.

At times, the court will prohibit a witness from answering to avoid the jury from hearing improper evidence. The lawyers may object to certain evidence and the judge will then decide if the evidence may be presented to the jury. The jury should not consider as evidence any statement made by a witness or a lawyer which the judge has ruled to be improper evidence.

In listening to testimony, the jury should consider whether or not a witness is truthful. It is important that a jury's decision or verdict not be based upon false evidence.

Any documents, photographs or objects admitted into evidence are to be considered equally with the testimony of witnesses. The jury may also be asked to consider evidence in the form of depositions which are statements made by witnesses prior to trial. These will be read by the parties or attorneys and are just as important as other evidence.

Juror Conduct.

Jurors remain seated throughout the proceedings in court except when requested by the bailiff to stand.

The attitude and conduct of each juror throughout the trial is equally as important as that of the judge, parties, attorneys and witnesses. Because the jury has the important duty of deciding the true facts and applying those facts to the law applicable to the particular case, it is important that each juror understand the facts and apply the applicable law in order to reach a proper result.

It is important that jurors arrive at the time scheduled for the case to begin.

Jurors must remain alert throughout the trial. IF A JUROR IS UNABLE TO HEAR OR SEE THE EVIDENCE PRESENTED, IT IS THE JUROR'S DUTY TO MAKE THIS KNOWN TO THE JUDGE SO THAT APPROPRIATE ARRANGEMENTS CAN BE MADE.

Jurors may not discuss the case with anyone including the other jurors and if anyone attempts to discuss the case with a juror, it is the juror's duty to report this to the judge through the bailiff. Discussions concerning the evidence, witnesses or any aspect of the case with family members or friends is prohibited.

Jurors must avoid news accounts of the trial, whether they be on radio or television or in the newspaper or other written publications.

Jurors may not inspect the scene of the occurrence which is the subject of the trial unless the court specifically makes provision for a view of the scene. This is important because the place where the incident occurred may be entirely changed from what it was at the time of the occurrence.

Only in rare cases are members of the jury kept away from their home continuously during the trial. They can leave to go home at night, but they cannot discuss the case with anyone, not even a member of their family.

Jurors should dress comfortably and conservatively in order to avoid distracting others by their attire.

Jurors may not take notes or draw pictures, diagrams or other memoranda to remind them of the facts, but must rely entirely upon their memory. This is to avoid overemphasizing some facts and de-emphasizing others.

Deliberations of Jury.

After the judge has provided the jury with the law applicable to the case, it is the juror's sworn duty to follow the law as explained by the judge and apply it to the facts presented in court.

The manner in which the jury deliberates in the jury room is completely within the jury's control. The jurors should first select a foreman. The foreman may be either a woman or a man. Once a foreman of the jury is selected by the jurors, it is advisable that the foreman act as chairperson for the procedural guidance of the jury during its deliberations. The foreman has only one vote and should not be permitted to influence the other jurors any more than any other juror.

Each juror's vote should reflect the juror's opinion. No juror should permit himself to be pressured or pushed into a decision. Each juror should carefully consider the opinions and reasons of other jurors and avoid a stubborn attitude in order to prove a point. A juror may not agree with the law as explained by the judge in the instructions to the jury. Any disagreement as to the law should have no effect on the decision of the juror. The jury is not deciding the law, but is determining the true facts. The juror's duty is to carefully listen to the judge, witnesses and lawyers, to deliberate, and deliberate calmly and fairly, and to decide intelligently and justly.

Verdict of Jurors.

In criminal cases, the agreement of all jurors is required to reach a verdict.

In civil cases, if the jury consists of twelve persons, ten or more must concur in a verdict. If the jury consists of six persons, five or more must concur in a verdict.

After a verdict is reached by the jury, the foreman should notify the bailiff that the jury is ready to report to the judge.

Questions During Deliberation.

Jurors' questions that cannot be resolved among the jurors may be submitted by a note to the judge setting forth the question. The note should be folded so that it cannot be seen by anyone. It is delivered to the bailiff for delivery to the judge. Jurors should make every effort possible to resolve all questions among themselves in order to avoid any outside influence from anyone including the judge.

Time Spent Waiting.

Jurors may be required to sit and wait for periods of time prior to and during a trial. This time is usually spent by the judge and attorneys considering legal matters necessary for a fair determination of the rights of the persons involved or to save time later on in the proceedings. Oftentimes, however, the judge may be called upon to consider emergency matters.

Conflicts in schedules may sometimes develop which result in delays. The courts are constantly searching for and implementing new ways to eliminate or avoid jurors having to spend unnecessary waiting time.

The courts will appreciate any suggestions on how the process may be improved.

Civic Duty.

You have been summoned to render an important service as a juror. As a juror, you will serve as an officer of the court, along with the lawyers and the judges.

Trial by jury has long been one of the cornerstones of judicial administration. The right has survived through the centuries as a vigorous and necessary force in the lives of free men and women.

The decisions of the jury affect the property rights, and even the life and the liberty of those whose cases come before it. Those chosen for jury service should take pride in performing this most important duty to their country and to their fellow men.

The proper and efficient functioning of the jury system requires that each juror exercise intelligence, integrity, sound judgment and complete impartiality in the performance of his duty.

When you give to the performance of jury service the best combined efforts of your mind, heart and conscience, you will feel that you are making a substantial contribution to the stability and perpetuation of an institution which must be preserved if freedom under a democratic government is to endure.

SOME TERMS YOU WILL HEAR IN COURT AND THEIR MEANING

Action, Case, Suit, Lawsuit:

These words mean the same thing. They all refer to a legal dispute brought into court for trial.

Answer:

The paper in which the defendant answers the claims of the plaintiff.

Bailiff:

The bailiff is an officer of the court who waits upon the court and the jury and maintains order in the court.

Civil Case:

A lawsuit is called a "civil case" when it is between persons in their private capacities or relations, or when the government, whether federal, state or local, or some department thereof, sues an individual under the law, as distinguished from prosecuting a criminal charge. It results generally in a verdict for the plaintiff or the defendant and, in many cases, involves the giving or denying of damages.

Clerk:

The clerk sits at the desk in front of the judge during selection of the jury, is an officer of the court and keeps a record of papers filed. The clerk has custody of the pleadings and records of the trial of the case, orders made by the court during the trial and the verdict at the end of the trial.

Complaint:

The document or legal pleading in which the person who brings the lawsuit sets forth allegations, accusations or charges against another person.

Court Reporter:

The court reporter takes down in shorthand or on a machine everything that transpires which constitutes the stenographic record in the case. The notes so made are subject to transcription later, should occasion, such as an appeal, require it.

Criminal Case:

A lawsuit is called a "criminal case" when it is between the state on one side, as plaintiff, and a person on the other side, as defendant, charging the defendant with committing a crime, the verdict usually being "guilty" or "not guilty".

Cross Examination:

The questions asked by a lawyer to the opposing party or witnesses of the opposing party.

Defendant:

In a civil case, the defendant is the person against whom the lawsuit is brought. In a criminal case, the defendant is the person charged with an offense.

Deposition:

Testimony taken under oath in the same manner as during a trial. This is ordinarily done because of illness or absence of a party, or to determine prior to trial how a witness will testify at trial.

Examination, Direct Examination:

The questions which the lawyer asks the lawyer's client or the client's own witnesses.

Exhibits:

Objects including pictures, books, letters and documents which are produced as evidence in a case. These are called "exhibits".

Instructions or "Charge" to Jury:

The outline of the rules of law which the jury must follow in their deliberations in deciding the factual issues submitted to them.

Issue:

A disputed question of fact is referred to as an "issue". It is sometimes spoken of as one of the "questions" which the jury must answer in order to reach a verdict.

Jury Panel:

The whole number of prospective jurors from which the trial jury is chosen.

Objection:

A reason or argument by a lawyer that a question asked or statement made was not proper or in accordance with the law.

Objection Overruled:

This term means that, in the judge's opinion, the lawyer's objection is not proper or correct under the rules of law. The judge's ruling, so far as a juror is concerned, is final and may not be questioned.

Objection Sustained:

When a lawyer objects to a question or the form of a question, the judge may say "objection sustained". This means that the judge agrees that under the rules of the law, the lawyer's objection to a statement or a question is proper. This ruling likewise is not subject to question by the jurors.

Opening Statement:

Before introducing any evidence for their side of the case, lawyers are permitted to tell the jury what the case is about and with what evidence they intend to prove their side of the case. This is called the "opening statement".

Parties:

The plaintiff and defendant in the case. They are also sometimes called the "litigants".

Plaintiff:

The person who starts a lawsuit.

Pleadings:

The parties in a lawsuit must file in court papers stating their claims against each other. In a civil case, these usually consist of a complaint filed by the plaintiff, an answer filed by the defendant and, oftentimes, a reply filed by the plaintiff. These are called the "pleadings".

Record:

This refers to the pleadings, the exhibits and the word-for-word record made by the court of all the proceedings at the trial.

Rests:

This is a legal phrase which means that the party has concluded the evidence he/she wants to introduce in that stage of the trial.

Striking Testimony:

On some occasions, after a witness has testified, the judge will order certain evidence deleted from the record and will direct the jury to disregard it. When this is done, the jury will treat this evidence as though it had never been given and will wholly disregard it.

Subpoena:

The document which is issued for service upon a witness to compel the witness to appear in court.

Verdict:

The finding made by the jurors on the issues submitted to them is the "verdict".

[Approved, effective September 1, 1981.]

Table Of Corresponding Instructions

The first table below reflects the disposition of the former Uniform Jury Instructions - Criminal. The left-hand column contains the former instruction number, and the right-hand column contains the corresponding present instruction.

The second table below reflects the antecedent provisions in the former Uniform Jury Instructions - Criminal (right-hand column) of the present instructions (left-hand column).

Former Instruction	UJI
1.00	14-101
1.01	None
1.02	14-102
1.03	14-103
1.04	14-104
1.05	14-105
1.06	14-106
1.07	14-107
1.08	14-108
1.09	14-120
1.10	14-121
1.11	14-122
1.12	14-123
1.13	14-109
1.20	14-130
1.21	14-131
1.30	14-140
1.50	14-141
2.00	14-201
2.01	None
2.02	None
2.03	None
2.04	14-202
2.05	14-203
2.10	14-210

Former Instruction	UJI
3.12	14-313
3.13	14-314
3.14	14-315
3.50	14-320
3.51	14-321
3.52	14-322
3.53	14-323
4.00	14-401
4.01	14-402
4.02	14-403
4.03	14-404
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7.02	14-703
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9.01	14-903
9.02	14-904
9.03	14-905

2.11	14-211
2.20	14-220
2.21	14-221
2.22	14-222
2.30	14-230
2.31	14-231
2.40	14-250
2.50	14-251
2.51	14-252
2.52	14-253
2.53	14-254
2.54	14-255
2.60	14-240
2.61	14-241
2.62	14-242
2.63	14-243
3.00	14-301
3.01	14-302
3.02	14-303
3.03	14-304
3.04	14-305
3.05	14-306
3.06	14-307
3.07	14-308
3.08	14-309
3.09	14-310
3.10	14-311
3.11	14-312

Former Instruction	UJI
9.04	14-906
9.05	14-907
9.06	14-908
9.07	14-909
9.08	14-910
9.09	14-911
9.10	14-912
9.11	14-913
9.12	14-914
9.13 to 9.15	None
9.16	14-915
9.20	14-921
9.21	14-922
9.22	14-923
9.23	14-924
9.24	14-925
9.25	14-928
9.26	14-927
9.27	14-928
9.29	14-930
9.30	14-931
9.31	14-932
9.32	14-933
9.33	14-934
9.34	14-935
9.35 to 9.37	None
9.38	14-936
9.40	14-941

Former Instruction	UJI
9.41	14-942
9.42	14-943
9.43	14-944
9.44	14-945
9.45	14-946
9.46	14-947
9.47	14-948
9.48	14-949
16.74	14-1684
16.75	14-1685
16.76	14-1686
16.77	14-1687
16.78	14-1688
16.79	14-1689
16.80	14-1690
16.81	14-1691

9.49	14-950	16.82	14-1692
9.50	14-951	16.83	14-1693
9.51	14-952	16.84	14-1694
9.52	14-953	16.85	14-1695
9.53	14-954	16.86	14-1696
9.54	14-955	16.87	14-1697
9.55	14-956	17.00	14-1701
9.56	14-957	17.01	14-1702
9.57	14-958	17.02	14-1703
9.58	14-959	17.03	14-1704
9.59	14-960	17.04	14-1705
9.60	14-961	17.05	14-1706
9.70	14-970	17.06	14-1707
9.72	14-971	20.00	14-2001
9.80	14-980	22.00	14-2201
9.81	None	22.01	14-2202
9.82	14-981	22.02	14-2203
9.83	None	22.03	14-2204
9.84	14-982	22.04	14-2205
9.85	None	22.05	14-2206
9.86	14-983	22.06	14-2207
14.00	14-1401	22.07	14-2208
14.01	14-1402	22.08	14-2209
14.02	14-1403	22.09	14-2210
14.03	14-1410	22.10	14-2211
14.10	14-1420	22.11	14-2212
16.00	14-1601	22.12	14-2213
16.01	14-1602	22.13	14-2214
16.02	14-1603	22.14	14-2215
16.05	14-1610	22.20	14-2220
16.06	14-1611	22.21	14-2221
16.10	14-1620	22.22	14-2222
16.11	14-1621	22.23	14-2223
16.20	14-1630	22.24	14-2224
16.21	14-1631	22.25	14-2225
16.22	14-1632	22.26	14-2226
16.23	14-1633	22.27	14-2227
16.30	14-1640	22.28	14-2228

16.31	14-1641
16.32	14-1642
16.33	14-1643
16.34	14-1644
16.40	14-1660
16.41	14-1651
16.42	14-1652
16.50	14–1650
16.60	14-1670
16.61	14-1671
16.62	14-1672
16.63	14-1673
16.64	14-1674
16.65	14-1675
16.70	14-1630
16.71	14-1681
16.72	14-1682
16.73	14-1683

22.29	14-2229
22.40	14-2240
22.41	14-2241
22.50	14-2250
22.51	14-2251
22.52	14-2252
22.53	14-2253
22.54	14-2254
22.55	14-2255
25.01	14-2501
28.10	14-2801
28.11 to 28.19	None
28.20	14-2610
28.21	14-2811
28.22	None
28.23	14-2812
28.24	14-2813
28.25	14-2814

Former Instruction	UJI
28.26	14-2815
28.27	14-2816
28.28	14-2817
28.30	14-2822
28.31	14-2820
28.32	14-2821
28.39	14-2823
35.01	14-4501
35.02	14-4502
35.03	14-4503
35.04	14-4504
35.05	14-4505
36.00	14-3101
36.01	14-3102
36.02	14-3103
36.03	14-3104
36.10	14-3110
36.11	14-3111

Former Instruction	UJI
40.01	14-5002
40.02	14-5003
40.03	14-5004
40.04	14-5005
40.05	14-5006
40.06	14-5007
40.07	14-5008
40.08	14-5009
40.09	14-5010
40.10	14-5011
40.11	14-5012
40.12	14-5013
40.13	14-5014
40.14	14-5015
40.20	14-5020
40.21	14-5021
40.22	14-5022
40.23	14-5023

36.12	14-3112	40.24	14-5024
36.13	14-3113	40.25	14-5025
36.20	14-3105	40.26	14-5026
36.30	14-3120	40.27	14-5027
36.31	14-3121	40.28	14-5028
36.32	14-3122	40.29	14-5029
36.40	14-3130	40.30	14-5030
36.41	14-3131	40.31	14-5031
36.43	14-3140	40.32	14-5032
39.00	14-7001	40.33	14-5033
39.01	14-7002	40.34	14-5034
39.02	14-7003	40.35	14-5035
39.03	14-7004	40.36	14-5036
39.04	14-7005	40.40	14-5040
39.05	14-7006	40.41	14-5041
39.06	14-7007	40.45	14-5042
39.10	14-7010	40.50	14-5050
39.11	14-7011	40.51	14-5051
39.12	14-7012	40.60	14-5060
39.13	14-7013	40.61	14-5061
39.14	14-7014	41.00	14-5101
39.15	14-7015	41.01	14-5102
39.16	14-7016	41.02	14-5103
39.17	14-7017	41.03	14-5104
39.18	14-7018	41.05	14-5105
39.19	14-7019	41.06	14-5106
39.20	14-7020	41.10	14-5110
39.21	14-7021	41.11	14-5111
39.22	14-7022	41.15	14-5120
39.23	14-7023	41.16	14-5121
39.24	14-7024	41.20	14-5130
39.25	14-7025	41.21	14-5131
39.26 to 39.29	None	41.22	14-5132
39.30	14-7026	41.26	14-5140
39.31	14-7027	41.30	14-5150
39.32	14-7028	41.35	14-5160
39.83	14-7029	41.40	14-5170
39.34	14-7030	41.41	14-5171

39.35	14-7031
39.36	14-7032
39.37	14-7033
39.40	14-7040
39.41	14-7041
39.42	14-7042
39.43	14-7043
40.00	14-5001

41.42	14-5172
41.43	14-5173
41.44	14-5174
41.45, 41.46	None
41.50	14-5180
41.51	14-5181
41.52	14-5182
41.53	14-5183

Former Instruction	UJI
41.54	14-5184
41.60	14-5190
41.61	14-5191
50.00	14-6001
50.01	14-6002
50.02	14-6003
50.03	14-6004
50.04	14-6005
50.05	14-6006
50.06	14-6007
50.07	14-6008
50.10	14-6010
50.11	14-6011
50.12	14-6012
50.13	14-6013
50.14	14-6014
50.15	14-6015

Former Instruction	UJI
50.16	14-6016
50.17	14-6017
50.20	14-6020
50.30	14-6030
60.00	14-8001
60.01	14-8002
60.02	14-8003
60.03	14-8004
60.04 to 60.09	None
60.10	14-8005
60.11	None
60.20	14-8020
60.21	14-8021
61.00	14-9001
61.01	14-9002
61.02	14-9003
61.03	14-9004

UJI	Former Form
14-101	1.00
14-102	1.02
14-103	1.03
14-104	1.04
14-105	1.05
14-106	1.06
14-107	1.07
14-108	1.08
14-109	1.13
14-120	1.09

UJI	Former Form
14-702	7.01
14-703	7.02
14-704	7.03
14-901	None
14-902	9.00
14-903	9.01
14-904	9.02
14-905	9.03
14-906	9.04
14-907	9.05

14-121	1.10	14-908	9.06
14-122	1.11	14-909	9.07
14-123	1.12	14-910	9.08
14-130	1.20	14-911	9.09
14-131	1.21	14-912	9.10
14-140	1.30	14-913	9.11
14-141	1.50	14-914	9.12
14-201	2.00	14-915	9.16
14-202	2.04	14-920	None
14-203	2.05	14-921	9.20
14-210	2.10	14-922	9.21
14-211	2.11	14-923	9.22
14-220	2.20	14-924	9.23
14-221	2.21	14-925	9.24
14-222	2.22	14-926	9.25
14-230	2.30	14-927	9.26
14-231	2.31	14-928	9.27
14-240	2.60	14-929	9.28
14-241	2.61	14-930	9.29
14-242	2.62	14-931	9.30
14-243	2.63	14-932	9.31
14-250	2.40	14-933	9.32
14-251	2.50	14-934	9.33
14-252	2.51	14-935	9.34
14-253	2.52	14-936	9.38
14-254	2.53	14-940	None
14-255	2.54	14-941	9.40
14-301	3.00	14-942	9.41
14-302	3.01	14-943	9.42
14-303	3.02	14-944	9.43
14-304	3.03	14-945	9.44
14-305	3.04	14-946	9.45
14-306	3.05	14-947	9.46
14-307	3.06	14-948	9.47
14-308	3.07	14-949	9.48
14-309	3.08	14-950	9.49
14-310	3.09	14-951	9.50
14-311	3.10	14-952	9.51

14-312	3.11
14-313	3.12
14-314	3.13
14-315	3.14
14-320	3.50
14-321	3.51
14-322	3.52
14-323	3.53
14-401	4.00
14-402	4.01
14-403	4.02
14-404	4.03
14-405	4.04
14-406	4.06
14-601	6.10
14-701	7.00

14-953	9.52
14-954	9.53
14-955	9.54
14-956	9.55
14-957	9.56
14-958	9.57
14-959	9.58
14-960	9.59
14-961	9.60
14-970	9.70
14-971	9.72
14-980	9.80
14-981	9.82
14-982	9.84
14-983	9.86
14-1401	14.00

UJI	Former Form
14-1402	14.01
14-1403	14.02
14-1410	14.03
14-1420	14.10
14-1601	16.00
14-1602	16.01
14-1603	16.02
14-1610	16.05
14-1611	16.06
14-1620	16.10
14-1621	16.11
14-1630	16.20
14-1631	16.21
14-1632	16.22
14-1633	16.23
14-1640	16.30
14-1641	16.31
14-1642	16.32
14-1643	16.33
14-1644	16.34

UJI	Former Form
14-2209	22.08
14-2210	22.09
14-2211	22.10
14-2212	22.11
14-2213	22.12
14-2214	22.13
14-2215	22.14
14-2220	22.20
14-2221	22.21
14-2222	22.22
14-2223	22.23
14-2224	22.24
14-2225	22.25
14-2226	22.26
14-2227	22.27
14-2228	22.28
14-2229	22.29
14-2240	22.40
14-2241	22.41
14-2250	22.50

14-1650	16.40	14-2251	22.51
14-1651	16.41	14-2252	22.52
14-1652	16.42	14-2253	22.53
14-1660	16.50	14-2254	22.54
14-1670	16.60	14-2255	22.55
14-1671	16.61	14-2501	25.01
14-1672	16.62	14-2801	28.10
14-1673	16.63	14-2810	28.20
14-1674	16.64	14-2811	28.21
14-1675	16.65	14-2812	28.23
14-1680	16.70	14-2813	28.24
14-1681	16.71	14-2814	28.25
14-1682	16.72	14-2815	28.26
14-1683	16.73	14-2816	28.27
14-1684	16.74	14-2817	28.28
14-1685	16.75	14-2820	28.31
14-1686	16.76	14-2821	28.32
14-1687	16.77	14-2822	28.30
14-1688	16.78	14-2823	28.39
14-1689	16.79	14-3101	36.00
14-1690	16.80	14-3102	36.01
14-1691	16.81	14-3103	36.02
14-1692	16.82	14-3104	36.03
14-1693	16.83	14-3105	36.20
14-1694	16.84	14-3110	36.10
14-1695	16.85	14-3111	36.11
14-1696	16.86	14-3112	36.12
14-1697	16.87	14-3113	36.13
14-1701	17.00	14-3120	36.30
14-1702	17.01	14-3121	36.31
14-1703	17.02	14-3122	36.32
14-1704	17.03	14-3130	36.40
14-1705	17.04	14-3131	36.41
14-1706	17.05	14-3140	36.43
14-1707	17.06	14-4501	35.01
14-2001	20.00	14-4502	35.02
14-2201	22.00	14-4503	35.03
14-2202	22.01	14-4504	35.04

14-2203	22.02
14-2204	22.03
14-2205	22.04
14-2206	22.05
14-2207	22.06
14-2208	22.07

14-4505	35.05
14-5001	40.00
14-5002	40.01
14-5003	40.02
14-5004	40.03
14-5005	40.04

UJI	Former Form
14-5006	40.05
14-5007	40.06
14-5008	40.07
14-5009	40.08
14-5010	40.09
14-5011	40.10
14-5012	40.11
14-5013	40.12
14-5014	40.13
14-5015	40.14
14-5020	40.20
14-5021	40.21
14-5022	40.22
14-5023	40.23
14-5024	40.24
14-5025	40.25
14-5026	40.26
14-5027	40.27
14-5028	40.28
14-5029	40.29
14-5030	40.30
14-5031	40.31
14-5032	40.32
14-5033	40.33
14-5034	40.34
14-5035	40.35
14-5036	40.36
14-5040	40.40
14-5041	40.41
14-5042	40.45

UJI	Former Form
14-6003	50.02
14-6004	50.03
14-6005	50.04
14-6006	50.05
14-6007	50.06
14-6008	50.07
14-6010	50.10
14-6011	50.11
14-6012	50.12
14-6013	50.13
14-6014	50.14
14-6015	50.15
14-6016	50.16
14-6017	50.17
14-6020	50.20
14-6030	50.30
14-7001	39.00
14-7002	39.01
14-7003	39.02
14-7004	39.03
14-7005	39.04
14-7006	39.05
14-7007	39.06
14-7010	39.10
14-7011	39.11
14-7012	39.12
14-7013	39.13
14-7014	39.14
14-7015	39.15
14-7016	39.16

14-5050	40.50
14-5051	40.51
14-5060	40.60
14-5061	40.61
14-5101	41.00
14-5102	41.01
14-5103	41.02
14-5104	41.03
14-5105	41.05
14-5106	41.06
14-5110	41.10
14-5111	41.11
14-5120	41.15
14-5121	41.16
14-5130	41.20
14-5131	41.21
14-5132	41.22
14-5140	41.26
14-5150	41.30
14-5160	41.35
14-5170	41.40
14-5171	41.41
14-5172	41.42
14-5173	41.43
14-5174	41.44
14-5180	41.50
14-5181	41.51
14-5182	41.52
14-5183	41.53
14-5184	41.54
14-5195	41.60
14-5196	41.61
14-6001	50.00
14-6002	50.01
14-7017	39.17
14-7018	39.18
14-7019	39.19
14-7020	39.20
14-7021	39.21
14-7022	39.22
14-7023	39.23
14-7024	39.24
14-7025	39.25
14-7026	39.30
14-7027	39.31
14-7028	39.32
14-7029	39.33
14-7030	39.34
14-7031	39.35
14-7032	39.36
14-7033	39.37
14-7040	39.40
14-7041	39.41
14-7042	39.42
14-7043	39.43
14-8001	60.00
14-8002	60.01
14-8003	60.02
14-8004	60.03
14-8005	60.10
14-8020	60.20
14-8021	60.21
14–9001	61.00
14–9002	61.01
14–9003	61.02
14–9004	61.03