UNIFORM JURY INSTRUCTIONS - CRIMINAL

CONTENTS

14-001.

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
IN THE MATTER OF THE WITHDRAWAL :
OF UNIFORM JURY
INSTRUCTIONS : 8000 Misc.
CRIMINAL 1.01 and 39.15 :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Federici, Senior Justice Sosa, Justice Riordan, Justice Stowers, and Justice Walters concurring:

NOW, THEREFORE, IT IS ORDERED that UJI Criminal 1.01 and 39.15 are hereby withdrawn;

IT IS FURTHER ORDERED that the withdrawal of UJI Criminal 1.05 and 39.15 shall be effective on or after October 1, 1984;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of this withdrawal by publishing the same in the NMSA 1978.

DONE at Santa Fe, New Mexico this 4th day of April, 1984.

/s/ WILLIAM R. FEDERICI
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ WILLIAM RIORDAN
Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice

14-002.

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

IN THE MATTER OF THE ADOPTION AND THE :
AMENDMENT OF UNIFORM JURY
INSTRUCTIONS : 8000 Misc.
CRIMINAL :

This matter coming on for consideration by the court, and the court being sufficiently advised, Chief Justice Federici, Senior Justice Sosa, Justice Riordan, Justice Stowers, and Justice Walters concurring:

NOW, THEREFORE, IT IS ORDERED that UJI Criminal 1.10, 39.10, 39.11, 39.12, 39.13 and 39.14 be the same and are hereby amended;

IT IS FURTHER ORDERED that the following UJI Criminal be and the same are hereby amended and re-numbered as follows: 39.16 to 39.18, 39.17 to 39.19, 39.18 to 39.21, 39.19 to 39.22, 39.20 to 39.23, 39.31 to 39.30, 39.32 to 39.31, 39.30 to 39.33, 39.33 to 39.34 and 39.34 to 39.36.

IT IS FURTHER ORDERED that the following UJI Criminal be and the same are hereby adopted: 39.15, 39.16, 39.17, 39.20, 39.24, 39.25, 39.32, 39.35 and 39.37.

IT IS FURTHER ORDERED that the above UJI Criminal be and the same are hereby amended and adopted effective for cases filed in the district court on or after October 1, 1984;

IT IS FURTHER ORDERED that the clerk of the court be and she hereby is authorized and directed to give notice of these amendments and additions to the UJI Criminal by publishing the same in the NMSA 1978.

DONE at Santa Fe, New Mexico this 4th day of April, 1984.

/s/ WILLIAM R. FEDERICI
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ WILLIAM RIORDAN
Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice

14-003.

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

IN THE MATTER OF THE ADOPTION AND :
AMENDMENT OF UNIFORM JURY INSTRUCTIONS -
: 8000 Misc.
CRIMINAL :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Federici, Senior Justice Sosa, Justice Riordan, Justice Stowers, and Justice Walters concurring:

NOW, THEREFORE, IT IS ORDERED that Uniform Jury Instructions - Criminal 1.50, 2.61, 39.12, 39.36, 39.37, 41.15, 41.40, 41.41, 41.42, 41.43, 41.44, 41.50, 41.51, 41.52, 41.53 and 41.54 are hereby amended;

IT IS FURTHER ORDERED that Uniform Jury Instructions - Criminal 35.01, 35.02, 35.03, and 35.05 are hereby adopted;

IT IS FURTHER ORDERED that these amendments and adoptions of Uniform Jury Instructions - Criminal, are hereby effective October 1, 1985.

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of these amendments and adoptions by publishing the same in the Bar Bulletin and the NMSA 1978.

DONE at Santa Fe, New Mexico this 2nd day of July, 1985.

/s/ WILLIAM R. FEDERICI
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ WILLIAM RIORDAN
Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice

14-004.

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

IN THE MATTER OF THE AMENDMENT, :
ADOPTION AND WITHDRAWAL OF
UNIFORM : 8000 Misc.
JURY INSTRUCTIONS FOR CRIMINAL CASES :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Scarborough,

Senior Justice Sosa, Justice Stowers, Justice Walters and Justice Ransom concurring:

NOW, THEREFORE, IT IS ORDERED that the amendment of instructions 14-101, 14-311, 14-312, 14-313, 14-1671, 14-1672, and 14-5061; the adoption of instructions 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320 and 14-4321; and the withdrawal of instruction 14-315 of the Uniform Jury Instructions for Criminal Cases be and the same are hereby approved;

IT IS FURTHER ORDERED that the above amendment, adoption and withdrawal of Uniform Jury Instructions for Criminal Cases shall be effective for cases filed in the district courts on or after September 1, 1988.

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment, adoption and withdrawal of Uniform Jury Instructions for Criminal Cases by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 16th day of June, 1988.

/s/ TONY SCARBOROUGH
Chief Justice
/s/ DAN SOSA, JR.
Senior Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ MARY C. WALTERS
Justice
/s/ RICHARD E. RANSOM
Justice

14-005.

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

IN THE MATTER OF THE AMENDMENT, :
ADOPTION AND WITHDRAWAL OF
UNIFORM : 8000 Misc.
JURY INSTRUCTIONS FOR CRIMINAL CASES :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Sosa, Justice Stowers, Justice Scarborough, Justice Ransom and Justice Baca concurring:

NOW, THEREFORE, IT IS ORDERED that the amendment of instructions 14-240, 14-243, 14-4503, 14-7033 and 14-9002; the

adoption of instruction 14-962; and the withdrawal of instructions 14-242, the general use note to the habitual criminal instructions and 14-7001 to 14-7007, of the Uniform Jury Instructions for Criminal Cases be and the same are hereby approved;

IT IS FURTHER ORDERED that the above amendment, adoption and withdrawal of Uniform Jury Instructions for Criminal Cases shall be effective for cases filed in the district courts on or after August 1, 1989;

IT IS FURTHER ORDERED that the clerk of the court is hereby authorized and directed to give notice of the amendment, adoption and withdrawal of Uniform Jury Instructions for Criminal Cases by publishing the same in the SCRA 1986.

DONE at Santa Fe, New Mexico this 2nd day of May, 1989.

/s/ DAN SOSA, JR.
Chief Justice
/s/ HARRY E. STOWERS, JR.
Justice
/s/ TONY SCARBOROUGH
Justice
/s/ RICHARD E. RANSOM
Justice
/s/ JOSEPH F. BACA
Justice

14-006.

IN THE SUPREME COURT OF THE

STATE OF NEW MEXICO

IN THE MATTER OF THE AMENDMENT :
AND ADOPTION OF UNIFORM
JURY : 8000 Misc.
INSTRUCTIONS FOR CRIMINAL CASES :

This matter coming on for consideration by the court and the court being sufficiently advised, Chief Justice Ransom, Justice Baca, Justice Montgomery, Justice Franchini and Justice Frost concurring:

NOW, THEREFORE, IT IS ORDERED that 14-925 of the Uniform Jury Instructions - Criminal be and the same is hereby amended;

IT IS FURTHER ORDERED that the following new Uniform Jury Instructions - Criminal 14-937, 14-1501 and 14-1510 be and the same are hereby approved;

IT IS FURTHER ORDERED that the above amendment and adoption

of Uniform Jury Instructions for criminal cases shall be effective for cases filed in the district courts on or after October 1, 1992;

IT IS FURTHER ORDERED that the clerk of the Court is hereby authorized and directed to give notice of the adoption and amendment of Uniform Jury Instructions for Criminal Cases by publishing the same in the Bar Bulletin and in the SCRA 1986.

DONE at Santa Fe, New Mexico this 13th day of August, 1992.

/s/ RICHARD E. RANSOM
Chief Justice
/s/ JOSEPH F. BACA
Justice
/s/ SETH D. MONTGOMERY
Justice
/s/ GENE E. FRANCHINI
Justice
/s/ STANLEY F. FROST
Justice

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 must be used without substantive modification or substitution. In no event may an elements instruction be altered or an instruction given on a subject which a use note directs that no instruction be given. 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 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 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 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 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.

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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 which 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 which substantially follow the language of the statute or use equivalent language are normally sufficient. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973).

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, 66 N.M. 397, 349 P.2d 118 (1960). However, any question of venue may be waived by proceeding to trial. State v. Shroyer, 49 N.M. 196, 160 P.2d 444 (1945). 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.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

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

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, 76 N.M. 187, 413 P.2d 469 (1966).

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, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 84 N.M. 60, 499 P.2d 378 (Ct. App. 1972); State v. Armstrong, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973).

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, 89 N.M. 770, 558 P.2d 39 (1976).

Instructions should be confined to issues upon which testimony was given at trial. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

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

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, 75 N.M. 348, 404 P.2d 304 (1965).

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, 77 N.M. 7, 419 P.2d 219 (1966).

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

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, 72 N.M. 280, 383 P.2d 247 (1963).

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, 86 N.M. 335, 524 P.2d 198 (Ct. App. 1974).

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., 80 N.M. 468, 457 P.2d 987 (Ct. App. 1969).

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, 72 N.M. 280, 383 P.2d 247 (1963).

It is error to single out one instruction for undue emphasis. State v. Lindwood, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

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, 82 N.M. 432, 483 P.2d 313 (Ct. App.), cert. denied, 404 U.S. 880, 92 S. Ct. 217, 30 L. Ed. 2d 161 (1971).

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, 85 N.M. 552, 514 P.2d 603 (1973).

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

It is not error to refuse requested instruction which is misstatement of law. State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973); State v. Robertson, 90 N.M. 382, 563 P.2d 1175 (Ct. App.); 90 N.M. 637, 567 P.2d 486 (1977).

Instructing jury by reference to indictment is improper. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

It would have been improper to instruct the jury by a reference to the indictment. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

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

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, 76 N.M. 636, 417 P.2d 444 (1966); State v. McFerran, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969); State v. Rushing, 85 N.M. 540, 514 P.2d 297 (1973).

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, 68 N.M. 394, 362 P.2d 779 (1961), and instructions in response to jury questions have likewise been approved. State v. Lindwood, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

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, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

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, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

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, 103 N.M. 320, 706 P.2d 862 (Ct. App.), cert. denied, 103 N.M. 287, 705 P.2d 1138 (1985).

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, 4 N.M. 236, 13 P. 30 (1887).

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.

II. ELEMENTS OF CRIME.

Failure to instruct on essential crime elements is jurisdictional. - State v. Montoya, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

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, 100 N.M. 487, 672 P.2d 660 (1983).

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, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983).

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, 86 N.M. 172, 521 P.2d 134 (Ct. App. 1974).

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, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

III. FAILURE TO INSTRUCT.

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

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, 76 N.M. 187, 413 P.2d 469 (1966); State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

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, 62 N.M. 147, 306 P.2d 640 (1957).

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, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

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, 77 N.M. 488, 424 P.2d 402 (1967).

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, 79 N.M. 475, 444 P.2d 986 (1968).

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, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969); State v. Coulter, 84 N.M. 647, 506 P.2d 804 (Ct. App. 1973); State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

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, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

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, 58 N.M. 489, 272 P.2d 688 (1954).

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, 78 N.M. 108, 428 P.2d 647 (1967); State v. Rodriquez, 81 N.M. 503, 469 P.2d 148 (1970); State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

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, 79 N.M. 732, 449 P.2d 334 (Ct. App. 1968), 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, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 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, 51 N.M. 328, 184 P.2d 301 (1947); State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

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., 66 N.M. 424, 349 P.2d 337 (1960).

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, 83 N.M. 619, 495 P.2d 797 (Ct. App. 1972).

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, 82 N.M. 95, 476 P.2d 65 (Ct. App. 1970); State v. Tucker, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

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, 46 N.M. 463, 131 P.2d 273 (1942).

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, 82 N.M. 750, 487 P.2d 178 (Ct. App. 1971); State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

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, 91 N.M. 96, 570 P.2d 927 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

The failure to object to instruction waives any errors or defects in the instructions. State v. Hatley, 72 N.M. 280, 383 P.2d 247 (1963); State v. Minor, 78 N.M. 680, 437 P.2d 141 (1968); State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969); 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, 67 N.M. 97, 352 P.2d 1010 (1960).

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, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974).

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, 82 N.M. 432, 483 P.2d 313 (Ct. App.); 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, 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, 15 N.M. 187, 106 P. 383 (1909); 195 F. 244 (8th Cir. 1912).

GENERAL INSTRUCTIONS

PART A
GENERAL EXPLANATORY MATTERS BEFORE AND DURING TRIAL

14-101. Explanation of trial procedure.1

LADIES AND GENTLEMEN:

This is a criminal case commenced by the state against the defendant _____ *(name of defendant)* . The defendant has been charged with _____ *(common name of crime)* [in Count 1] and _____ *(common name of crime)* in Count 2, etc.] of _____. [Each count is a charge of a separate crime.] The defendant has pleaded "not guilty" and is presumed to be innocent. The state has the burden of proving the guilt of the defendant beyond a reasonable doubt. What I will say now is an introduction to the trial of this case.

A criminal trial generally begins with the lawyers telling you what they expect the evidence to show. Then 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 will be admitted for your consideration.

It is the duty of a lawyer to object to evidence which the lawyer believes may not be proper, and you must not be prejudiced against the state or the defendant because of such objections. I will sustain objections if I conclude that it would be legally improper for you to consider such 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.]*2*

[You are permitted to take notes during trial. However, if you choose to take notes, be sure that your taking of notes 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. There is also the risk that a juror might tend to rely more heavily on the written notes of another rather than the juror's own memory of the evidence. 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 defendant'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 NOTE

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 and destroy all notes at the conclusion of all jury deliberations.

[As amended, effective September 1, 1988; January 1, 1994.]

*** * * * * * * * * * * * * * * * * * ***

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 - Order of trial. The adoption of these instructions and the amendment to Rule 5-607 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 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).

ANNOTATIONS

I. GENERAL CONSIDERATION.

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".

The 1994 amendment, effective January 1, 1994, in the instruction, 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, and inserted "[she]" following "[he]" in the thirteenth and fourteenth paragraphs.

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, 82 N.M. 393, 482 P.2d 257 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971), 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, 104 N.M. 660, 725 P.2d 1228 (Ct. App. 1986).

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.

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, 82 N.M. 367, 482 P.2d 70 (Ct. App. 1971).

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, 99 N.M. 456, 659 P.2d 908 (Ct. App. 1983).

IV. STATEMENTS BY COURT.

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, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

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, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

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, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

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, 76 N.M. 570, 417 P.2d 56 (1966).

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, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980).

Curative instruction held to have eradicated any prejudice which may have existed. See State v. Shoemaker, 97 N.M. 253, 638 P.2d 1098 (Ct. App. 1981).

14-102. Explanation; presentation of evidence.1

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 NOTE

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

*** * * * * * * * * * * * * * * * * * ***

See committee commentary under UJI 14-101.

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, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

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.1

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

USE NOTE

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

*** * * * * * * * * * * * * * * * * * ***

See committee commentary under UJI 14-101.

ANNOTATIONS

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

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, 100 N.M. 487, 672 P.2d 660 (1983).

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.1

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 NOTE

1. 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.

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See committee commentary under UJI 14-101.

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 anexhibit [and you may examine it].*2*

With regard to this .....(name of exhibit) and any otherexhibits 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 NOTE

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.

****

See committee commentary under UJI 14-101.

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.

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 NOTE

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.

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See committee commentary under 14-101.

ANNOTATIONS

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

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 NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

See committee commentary under UJI 14-101.

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] ..... 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 NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

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.1

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 NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

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. - As to disqualification of judge in proceedings where his impartiality might be questioned, see Code of Judicial Conduct, Rule 21-400.

PART B
VOIR DIRE; OATH

14-120. Voir dire of jurors by court.1

LADIES AND GENTLEMEN:

You have been summoned here as prospective jurors to determine the innocence or guilt of the defendant(s) charged in this case.

This is a criminal case in which the defendant(s) [is] [are]*2* charged by [indictment] [information].*2* In the [indictment] [information]*2*
the state charges
.....(offense charged) *3*

At this time, I will ask the attorneys and the defendant(s) to stand when I state their names:

.....(names of defendant(s), defense counsel(s) and prosecutor(s))

Do any of you know the defendant?

Do any of you know Assistant District Attorney ....? (name of prosecutor)

Do any of you know Mr. .....(name of defense counsel) [or Mr. ..... attorney(s) for thedefendant?

Do any of you know any of the members of the defendant's family?

Do any of you or any member of your family have any connection or relationship with the defendant(s)?

I have read to you the charge against the defendant(s). Do any of you have any prejudice against someone who is charged

with such an offense?
Do any of you know anything about this case?
Do you know of any reason whatever why you could not sit with complete impartiality as to both the prosecution and the defendant(s) as a juror in this case?
Do each of you conscientiously believe that if you are selected as a juror in this case, you can and will render a fair and impartial verdict?
Are there any other questions which the government desires the court to ask the prospective jurors?
Are there any other questions which the defendant(s) desires the court to ask the prospective jurors?
The state may proceed to question the jurors.
The defendant(s) may proceed to question the jurors.

USE NOTE

1. For use before jury selection. By addressing all the jurors at one time, there is no need to repeat the same statements and questions to each group of jurors as they are directed into the jury box. This instruction does not go to the jury room. This instruction is an example of the preferred type of voir dire examination by the court, but the particular case will control the precise interrogation by the court.

2. Use only the applicable bracketed alternative.

3. Fill in the charge as stated on the indictment or information.

****

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.

14-121. Voir dire; death penalty cases.

LADIES AND GENTLEMEN:

You have been summoned here as prospective jurors to determine the innocence or guilt of the defendant(s) charged in this case.

This is a criminal case commenced by the state against the defendant
.....(name of defendant)
The defendant has been charged [with murder in the first

degree]*2* [with .... counts of murder in the first degree]. [Each count is a separate crime].

[The defendant has also been charged with ..... (common name of crime) [in Count 1][and] [..... (common name of crime) in Count ... etc.]

At this time, I will ask the attorneys and the defendant(s) to stand when I state their names: ..... (names of defendant(s), defense cousel(s) and prosecutor(s))

You will now be asked some questions which are very important to the process of selecting a jury. Each juror is duty bound to answer fully and truthfully all questions asked.

Do any of you know the defendant?

Do any of you know Assistant District Attorney .....? (name of prosecutor)

Do any of you know Mr. .....(name of defense counsel) [orMr. ..... Attorney(s) for the defendant?

Do any of you know any of the members of the defendant's family?

Do any of you or any member of your family have any connection or relationship with the defendant(s)?

I have read to you the charge against the defendant(s). Do any of you have any prejudice against someone who is charged with such an offense?

Do any of you know anything about this case?

Do you know of any reason whatever why you could not sit with complete impartiality as to both the prosecution and the defendant(s) as a juror in this case?

Do each of you conscientiously believe that if you are selected as a juror in this case, you can and will render a fair and impartial verdict?

In this state if a person is found guilty of first degree murder, there are two possible punishments he may receive, death or life imprisonment.

New Mexico has a two-phase trial in those murder cases in which the death penalty may be imposed. In the first phase, the jury decides the issue of guilt. In the second phase, the jury will determine the punishment.

In deciding the issue of guilt, the jury should not consider the consequences of the verdict or the possible sentence that might be imposed.

The defendant has pleaded "not guilty" and is presumed innocent. The state has the burden of proving the guilt of the defendant beyond a reasonable doubt.

I am going to ask you specific questions concerning your view of the death penalty. If you do not understand the questions, do not hesitate to tell me and I will repeat the question which you do not understand.

1. If you have strong feelings either for or against the death penalty, please raise your hand.

2. If you think you would favor the death penalty in every murder case, please raise your hand.*3*

3. [If a defendant is found guilty, would you automatically vote for the death penalty in every murder case regardless of the evidence you hear? If so, please raise your hand.]

4. If you think you would oppose the death penalty in every murder case, please raise your hand.*3*

5. [If a defendant is found guilty, would you refuse to impose the death penalty regardless of the evidence you hear? If so, please raise your hand.]

[At this time, the court will recess and ask some jurors questions individually.*4*]

USE NOTE

1. For use only in cases where death penalty may be imposed. These questions are not mandatory.

2. Use only the applicable alternative.

3. If the answer to this question is in the negative, it is not necessary to proceed with the subsequent bracketed question.

4. Further voir dire, if necessary, is to be held outside the presence of the panel.

****

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 venireman cannot be excluded from serving on a jury in a case where the death penalty may possibly be imposed unless he 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 venireman answers the first question in the negative, it is not necessary to ask the second question, and the venireman may be excused. If the answer is in the affirmative, the second question must be asked. The venireman may then be excused only if the second question is answered in the affirmative.

ANNOTATIONS

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, 100 N.M. 297, 669 P.2d 1092 (1983).

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, 99 N.M. 616, 661 P.2d 1315 (1983).

Prospective jurors answering "yes" to instruction's first and third questions may be excluded. - Prospective jurors who answer "yes" to the first and third questions of this instruction may properly be excluded for cause, because by answering "yes" to these questions, the prospective jurors are in effect saying that they can neither follow the laws of New Mexico nor their oaths as jurors. State v. Hutchinson, 99 N.M. 616, 661 P.2d 1315 (1983).

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?

*** * * * * * * * * * * * * * * * * * ***

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 prior to qualification of jurors and voir dire examination.

ANNOTATIONS

Cross-references. - As to Uniform Law on Notarial Acts, see 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?

*** * * * * * * * * * * * * * * * * * ***

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. - As to Uniform Law on Notarial Acts, see 14-14-1 to 14-14-11 NMSA 1978.

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 NOTE

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.

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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. § 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

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, 99 N.M. 345, 657 P.2d 1194 (Ct. App. 1983).

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, N.M. , 864 P.2d 307 (Ct. App. 1993).

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, 99 N.M. 190, 656 P.2d 240 (Ct. App. 1982).

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 NOTE

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

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-1-12A NMSA 1978.

Committee commentary. - This instruction was derived from the statutory definition of great bodily harm. See § 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

Not jurisdictional error not to give instruction as part of voluntary manslaughter instruction. - The failure to give former version of this instruction as part of the instruction on voluntary manslaughter where the defendant did not request that such instruction be given did not amount to jurisdictional error because there was no omission of an essential element of voluntary manslaughter. State v. Padilla, 90 N.M. 481, 565 P.2d 352 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

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, 110 N.M. 507, 797 P.2d 296 (Ct. App. 1990).

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).

PART D
GENERAL INSTRUCTIONS

14-140. Underlying felony offense; sample instruction.1

In New Mexico, the elements of the crime of .....are asfollows:
.....*2* (summarize elements of offense)

USE NOTE

1. For use in any case in which an underlying felony offense is not charged, but is an element of an offense charged. For example, see UJI 14-202, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-601, 14-954, 14-971, 14-1630, 14-1632, 14-1697, 14-2204, 14-2205, 14-2206, 14-2801, 14-2820, 14-2821, 14-2822, and 14-7015.

2. Summarize the essential elements instruction, omitting venue and date.

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 NOTE

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.

****

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, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975); State v. Gonzales, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974). The adoption of the instruction also supersedes dicta in State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973), 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, State v. Gunzelman, supra, with State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975). For a further discussion on the law of criminal intent, see the reporter's addendum to this commentary, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

ANNOTATIONS

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, 94 N.M. 356, 610 P.2d 760 (Ct. App. 1980) (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, 98 N.M. 734, 652 P.2d 756 (Ct. App. 1982).

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, 105 N.M. 592, 734 P.2d 1275 (Ct. App. 1987), overruled on other grounds Zurla v. State, 109 N.M. 640, 789 P.2d 588 (1990).

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

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, 100 N.M. 481, 672 P.2d 654 (1983).

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, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

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, 94 N.M. 356, 610 P.2d 760 (Ct. App. 1980).

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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

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, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

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, 84 N.M. 397, 503 P.2d 1175 (Ct. App. 1972).

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, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

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, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

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, 98 N.M. 576, 651 P.2d 111 (Ct. App. 1982).

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, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).

Giving this instruction in tax fraud case is not per se reversible error. State v. Martin, 90 N.M. 524, 565 P.2d 1041 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

This instruction is required in prosecutions for false statements on tax returns. State v. Sparks, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985).

If UJI Crim. 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, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985).

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

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

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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, 84 N.M. 756, 508 P.2d 26 (Ct. App.), aff'd, 85 N.M. 204, 510 P.2d 1075 (1973); State v. Fuentes, 84 N.M. 757, 508 P.2d 27 (Ct. App.), aff'd, 85 N.M. 274, 511 P.2d 760 (1973); State v. Vickery, 84 N.M. 758, 508 P.2d 28 (Ct. App.), aff'd, 85 N.M. 389, 512 P.2d 962 (1973); State v. Boyer, 84 N.M. 759, 508 P.2d 29 (Ct. App. 1973).

Instruction properly given for violation of Imitation Controlled Substances Act, 30-31A-1 NMSA 1978. State v. Castleman, N.M. , 863 P.2d 1088 (Ct. App. 1993).

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 ..... 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 ...., 19 ...

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 NOTE

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, Instruction 14-250 must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-2-1A(1) NMSA 1978.

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 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 note. - 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. The withdrawn instructions appear in the 1982 Replacement Pamphlet for UJI Criminal.

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, 90 N.M. 360, 563 P.2d 1153 (1977).

Instruction does not contravene definition of "express malice" in former 30-2-2 NMSA 1978 by allowing an inference of intent from the facts and circumstances of the case. The guidelines in the instruction for consideration of deliberate intention are clear, unambiguous and remarkably free of "legalese." State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

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, 67 N.M. 336, 355 P.2d 275 (1960).

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

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, 90 N.M. 25, 559 P.2d 402 (1976).

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, 90 N.M. 25, 559 P.2d 402 (1976).

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, 85 N.M. 540, 514 P.2d 297 (1973).

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, 98 N.M. 527, 650 P.2d 811 (1982).

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, 93 N.M. 607, 603 P.2d 717 (1979).

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, 89 N.M. 458, 553 P.2d 1265 (1976).

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, 113 N.M. 335, 825 P.2d 1245 (1992).

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 guilty of felony murder, which is first degree murder, [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 [committed]*2* [attempted to commit] the crime of ..... (name of felony) [under circumstances or in a manner dangerous to human life]*4*;

2. During [the commission of]*2* [the attempt to commit] .....(name of felony) the defendantcaused*5* the death of .....; (name of victim)

3. This happened in New Mexico on or about the ... day of ...., 19 ..

USE NOTE

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, 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).

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

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

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Statutory reference. - Section 30-2-1A(2) NMSA 1978.

Committee commentary. - See Section 30-2-1A(2) NMSA 1978. Proof of malice aforethought or deliberate intention is not required as an element of felony murder. State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933). At common law, malice was implied as a matter of law if the murder occurred during the perpetration of a felony. See generally, LaFave & Scott, Criminal Law 529 & 545 (1972). See also, Perkins, A Reexamination of Malice Aforethought, 43 Yale L.J. 537, 547 (1934).

Felony murder may be charged as part of an open count of murder by also charging the underlying felony, State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979) and consecutive sentences may be imposed for the felony murder and the underlying felony as the two offenses do not merge. State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981); State v. Stephens, supra.

New Mexico is one of the few states having a statute which purports to make all murder perpetrated in the commission of or attempt to commit any felony first degree murder. See Perkins, Criminal Law, 89 n.30 (2d ed. 1969). See State v. Hines, 78 N.M. 471, 432 P.2d 827 (1967) and Hines v. Baker, 422 F.2d 1002 (10th Cir. 1970). See generally, Annot., 50 A.L.R.3d 397 (1973). However, the breadth of the statute has been limited by State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977). The court held that ". . . in a felony murder charge . . . [the] felony must be inherently dangerous or committed under circumstances that are inherently dangerous." The first issue is a question of law to be determined by the court; the second is a jury issue.

Under the general rule, the felony murder doctrine does not apply to a murder when the felony is a possible lesser included offense to homicide, generally aggravated or "felonious" assaults. See Annot., 40 A.L.R.3d 1341 (1971). In State v. Smith, 51 N.M. 184, 181 P.2d 800 (1947), the supreme court upheld a case going to the jury with both a willful and deliberate murder instruction and a felony murder instruction, although the facts indicate that the felony was an assault with a deadly weapon. However, in State v.

Harrison, supra, the court made it clear that New Mexico follows the general rule that the felony must be independent of or collateral to the homicide.

The homicide must be so clearly connected to the felony as to fall within the "res gestae" of the felony. State v. Harrison, supra; State v. Nelson, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877 (1959) and State v. Smelcer, 30 N.M. 122, 228 P. 183 (1924). See also, State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971). Note, 7 Cal. W.L. Rev. 522 (1971) and Note, 22 Stan. L. Rev. 1059 (1970). Moreover, "Causation must be physical; causation consists of those acts of defendant or his accomplice initiating and leading to the homicide without an independent force intervening, even though defendant's or his accomplice's acts are unintentional or accidental." State v. Harrison, supra. 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, No. 14-251.

For cases discussing the liability of defendant for a killing by someone resisting the felony, see Annot., 56 A.L.R.3d 239 (1974). For cases dealing with termination of the felony, see generally Annot., 58 A.L.R.3d 851 (1974).

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 generally, commentary to Instruction 14-5110. 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, e.g., People v. Mosher, 1 Cal.3d 379, 82 Cal.Rptr. 379, 461 P.2d 659 (1969). See generally, commentary to Instruction 14-5111.

Before a defendant can be convicted of felony murder, he 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 him to prepare his defense. State v. Stephens, supra; State v. Hicks, 89 N.M. 568, 571, 555 P.2d 689 (1976). Rule 5-303 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, 89 N.M. 458, 461, 553 P.2d 1265 (1976).

ANNOTATIONS

Felony murder instruction parallels the statutory language and contains all the essential elements of the crime of felony murder. State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979).

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, 112 N.M. 554, 817 P.2d 1196 (1991).

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, 94 N.M. 169, 608 P.2d 145 (1980).

And 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, 93 N.M. 73, 596 P.2d 516 (1979).

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, 93 N.M. 45, 601 P.2d 428 (1979).

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, 90 N.M. 439, 564 P.2d 1321 (1977).

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 his act was greatly dangerous to the lives of others;

5. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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

2. Instruction 14-251 must also be used if causation is in issue.

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Statutory reference. - Section 30-2-1A(3) NMSA 1978.

Committee commentary. - See 30-2-1A(3) NMSA 1978. See LaFave & Scott, Criminal Law 529 (1972). This provision is used for a killing which resulted from extremely negligent conduct or "perpetrated by any act imminently dangerous to another, and evincing a depraved mind, regardless of human life, though without any premeditated design to effect the death of any particular individual." Warren on Homicide 393 (2d ed. 1938).

It is generally believed that this murder occurs when the accused does an act which is dangerous to more than one person. Some examples of conduct which have been held to come within the depraved mind murder category are: firing a bullet into a room occupied by several people; shooting into a passing train or a moving automobile; driving a car at very high speeds along a busy street. See generally, LaFave & Scott, Criminal Law 543 (1972) and Perkins, Criminal Law 37 (2d ed. 1969).

This instruction sets forth a subjective test for "depraved mind murder." Second-degree murder provides an objective test for depraved mind murder.

LaFave & Scott believe that:

most depraved-heart murder cases do not require a determination of the issue of whether the defendant actually was aware of the risk entailed by his conduct; his conduct was very risky and he himself was reasonable enough to know it to be so. It is only the unusual case which raises the issue - where the defendant is more absent-minded, stupid or intoxicated than the reasonable man.

LaFave & Scott, supra at 544.

ANNOTATIONS

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, 100 N.M. 671, 675 P.2d 120 (1984).

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, 99 N.M. 272, 657 P.2d 128 (1983).

Instruction held improper. - 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, 102 N.M. 274, 694 P.2d 922 (1985).

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

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 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 ....., 19 .....

USE NOTE

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. Instruction 14-255 must also be given following Instruction 14-220, Voluntary manslaughter; lesser included offense.

4. The following instructions must also be given after Instruction 14-220, Voluntary manslaughter, lesser included offense:

Instruction 14-141, General criminal intent;

Instruction 14-131, definition of great bodily harm;

Instruction 14-222, definition of sufficient provocation; and

Instruction 14-250, Jury procedure for various degrees of homicide.

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Statutory reference. - Section 30-2-1B NMSA 1978.

Committee commentary. - See committee commentary to Instruction 14-211 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).

ANNOTATIONS

Court of appeals has no authority to review claim that instruction is erroneous. State v. King, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

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, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

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

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, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

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 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 ....., 19 .....

USE NOTE

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. Instruction 14-131, 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, Instruction 14-255 must also be given.

5. Instruction 14-141, General criminal intent, must also be given.

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See Section 30-2-1B NMSA 1978. Second degree murder is committed when death results from acts which the defendant knew created a strong probability of death or great bodily harm. This was formerly known as "depraved-heart" murder, which is also murder in the first degree. See 30-2-1A(3) NMSA 1978. The intent necessary for this crime was formerly defined by the courts as "implied" or "inferred" malice. See commentary to UJI 14-201 and 14-203 and State v. Smith, 26 N.M. 482, 488, 194 P. 869 (1921). See generally, Perkins, Criminal Law 34-35, 88, 770 (2d ed. 1969) and LaFave & Scott, Criminal Law 529 (1972).

Implied malice, the intent required as an element of the crime, may be inferred from certain facts, for example, the use of a deadly weapon. 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). Although the New Mexico court in *Duran* and in other cases refers to the inference as "implying malice," the committee believed that the inference of malice was more appropriate. See Instruction 14-5061. See generally Perkins, "A Reexamination of Malice Aforethought," 43 Yale L.J. 537, 549 (1934). Malice may also be inferred where the defendant does not use a deadly weapon. See State v. Garcia, 61 N.M. 291, 299 P.2d 467 (1956). See generally Annot., 22 A.L.R.2d 854 (1952).

The New Mexico Supreme Court in State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933), a felony murder case, indicated that second degree murder could be found where there is "independent" evidence of an intent to kill. It is assumed that this decision was impliedly overruled by State v. Reed, 39 N.M. 44, 39 P.2d 1005 (1934).

The court in State v. Reed, supra, held that where the evidence clearly indicates a certain means was used, for example, the torture used by the defendants in that case, a conviction for second degree murder could not be sustained and the defendants were discharged. This case supports the approach of the committee to the lesser included offense problem and requires the district judge to exercise careful judgment in submitting second degree murder to the jury. The decision in *Reed* was sought to be overruled by a statute which says that the defendant cannot complain if convicted of a lesser degree of homicide although the evidence clearly establishes that a higher degree was actually committed. This law has not been repealed but is no longer in the annotated statutes. N.M. Laws 1937, ch. 199, § 1 (formerly compiled as Section 41-13-1 NMSA 1953 Comp.). This law is unconstitutional insofar as it purports to authorize conviction of a lesser included offense when there is no evidence of one or more elements of the lesser offense. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Element 2 of UJI 14-210 and of UJI 14-211 was revised in 1981 to be consistent with the 1980 amendments to Section 30-2-1 NMSA 1978.

Although the 1980 Legislature amended 30-2-1 NMSA 1978 to provide that 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.

ANNOTATIONS

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

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).

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. This happened in New Mexico on or about the ... day of ...., 19 ...

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 NOTE

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

2. Instruction 14-131, 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. Instruction 14-255 must also be given following this instruction.

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

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Statutory reference. - Section 30-2-3A NMSA 1978.

Committee commentary. - See Section 30-2-3A NMSA 1978. 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, 79 N.M. 282, 442 P.2d 594 (1968); State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App. 1970), cert. denied, 81 N.M. 668, 472 P.2d 382.

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

There must be evidence that the defendant acted immediately or soon after the provocation. In State v. Trujillo, 27 N.M. 594, 203 P. 846 (1921), 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, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028 (1968); State v. Burrus, 38 N.M. 462, 35 P.2d 285 (1934). 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, 89 N.M. 770, 558 P.2d 39 (1979).

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.

It is not a violation of due process if the state is not required to prove, beyond a reasonable doubt, the absence of facts which mitigate the degree of criminality to reduce the crime from second degree murder to voluntary manslaughter. Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). The supreme court stated in that case, "To recognize at all a mitigating circumstance does not require the state to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." The court went on to say, "We thus decline to adopt the constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused."

The court further explained:

We therefore will not disturb the balance struck in previous cases holding that the due process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

In the case, the New York statute reduced murder in the second degree to voluntary manslaughter if the defendant "acts under the influence of extreme emotional disturbance, ... " 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." Once the state has proved, beyond a reasonable doubt, the elements of second degree murder, the burden may be placed on the defendant to prove the mitigating circumstances constituting sufficient provocation without violating due process. Patterson v. New York, supra. In State v. Smith, 89 N.M. 777, 558 P.2d 46 (Ct. App.), 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.

ANNOTATIONS

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, 89 N.M. 770, 558 P.2d 39 (1976).

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

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, 79 N.M. 277, 442 P.2d 589 (1968), 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, 94 N.M. 706, 616 P.2d 419 (1980); State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980); State v. Maestas, 95 N.M. 335, 622 P.2d 240 (1981); State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

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, 95 N.M. 260, 620 P.2d 1285 (1980).

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, 98 N.M. 786, 653 P.2d 162 (1982).

Error to submit issue of manslaughter where no such issue is involved. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

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, 89 N.M. 770, 558 P.2d 39 (1976).

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, 94 N.M. 706, 616 P.2d 419 (1980).

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, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

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, 90 N.M. 256, 561 P.2d 1349 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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.

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, 89 N.M. 770, 558 P.2d 39 (1976).

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, 89 N.M. 770, 558 P.2d 39 (1976).

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

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, 113 N.M. 489, 827 P.2d 1303 (Ct. App. 1992).

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, 93 N.M. 95, 597 P.2d 280 (1979).

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, 95 N.M. 421, 622 P.2d 1041 (1981).

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, 93 N.M. 95, 597 P.2d 280 (1979).

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, 93 N.M. 95, 597 P.2d 280 (1979).

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, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983).

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, 98 N.M. 786, 653 P.2d 162 (1982).

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

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, 98 N.M. 786, 653 P.2d 162 (1982).

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, 98 N.M. 786, 653 P.2d 162 (1982).

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, 93 N.M. 95, 597 P.2d 280 (1979); State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981), aff'd, 107 N.M. 369, 758 P.2d 783 (1988).

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, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

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, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

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, 98 N.M. 786, 653 P.2d 162 (1982).

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 ...., 19 .....

USE NOTE

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. Instruction 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. Instruction 14-255 must also be given.

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

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

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-2-3A NMSA 1978.

Committee commentary. - As explained in the commentary to Instruction 14-220, 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.

ANNOTATIONS

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, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

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.

14-222. 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.

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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, 97 N.M. 738, 643 P.2d 607 (1982).

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, 98 N.M. 786, 653 P.2d 162 (1982).

Exercise of legal right, no matter how offensive, is not adequate provocation to reduce homicide from murder to manslaughter. State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

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, 98 N.M. 786, 653 P.2d 162 (1982).

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, 98 N.M. 786, 653 P.2d 162 (1982).

Provocation must concur with sudden anger or heat of passion. State v. Reynolds, 98 N.M. 527, 650 P.2d 811 (1982).

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, 98 N.M. 786, 653 P.2d 162 (1982).

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, 113 N.M. 489, 827 P.2d 1303 (Ct. App. 1992).

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, 98 N.M. 527, 650 P.2d 811 (1982).

Actions of police officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation. State v. Martinez, 97 N.M. 540, 641 P.2d 1087 (Ct. App. 1982).

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, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

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, 97 N.M. 738, 643 P.2d 607 (1982).

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. Involuntary manslaughter; unlawful act not amounting to a felony; essential elements.

For you to find the defendant guilty of involuntary manslaughter [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 ..... (describe the unlawful act)

2. The act of the defendant caused[3] the death of.....; (name of victim)

3. This happened in New Mexico on or about the .....day of ....., 19 ....

USE NOTE

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

2. If the unlawful act is a "crime," the essential elements must be included in this description.

3. If the unlawful act is a mere malum prohibitum offense, a special instruction on proximate cause requiring foreseeability must be prepared and given. If the unlawful act is one malum in se, e.g., battery, assault, etc., then no instruction on proximate cause need be given unless a question of causation is in issue, in which case Instruction 14-251 must be given.

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See § 30-2-3B NMSA 1978. The term "unlawful act" probably includes any act punishable as a crime, including misdemeanors and ordinance violations. See generally LaFave & Scott, Criminal Law 594-602 (1972). See, e.g., State v. Grubbs, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973), and cf. State v. Rogers, 31 N.M. 485, 247 P. 828 (1926). The unlawful act apparently need not be identified in terms of a traditional misdemeanor. For example, in State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973), the court held that a "beating" of the victim constituted an unlawful act.

Unlawful act manslaughter does not involve an intentional killing. State v. Pruett, 27 N.M. 576, 203 P. 840, 21 A.L.R. 579 (1921). However, if the unlawful act is the type of offense, which when tried by itself would require an instruction on general criminal intent, and such offense is the basis for the involuntary manslaughter charge, then Instruction 14-141 must also be given.

Under the general rule, if the unlawful act is one which is malum in se, then the defendant may be found guilty of involuntary manslaughter without regard to the foreseeability of the victim's death. LaFave & Scott, supra, at 597. In State v. Nichols, 34 N.M. 639, 288 P. 407 (1930), the court said that the unlawful act must be the proximate cause of the homicide in order to constitute involuntary manslaughter. The act, not expressly characterized by the court as malum in se or malum prohibitum, was carrying a concealed weapon. The weapon fell from the defendant's pocket, discharged and killed the victim. By implication the act was characterized as merely malum prohibitum.

Accidental homicide by vehicle is now a specific crime and must be charged rather than manslaughter. Cf. State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966); State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936).

ANNOTATIONS

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, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

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, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

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 § 71.

41 C.J.S. Homicide § 88 et seq.

14-231. Involuntary manslaughter; negligent act; essential elements.

For you to find the defendant guilty of involuntary manslaughter [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 .....; (describe defendant's act)

2. The defendant's act was such that an ordinary person would anticipate that death might occur under the circumstances;

3. The defendant knew or should have known of the danger involved and acted with a total disregard or indifference for the safety of others;

4. The defendant's act caused the death of .....; (name of victim)

5. This happened in New Mexico on or about the ..... day of ...., 19 ...

USE NOTE

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

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See § 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 Instruction 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 Instruction 14-210.

ANNOTATIONS

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, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977).

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, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

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, 115 N.M. 93, 847 P.2d 327 (Ct. App. 1993).

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. Vehicle homicide; great bodily harm; essential elements.

For you to find the defendant guilty of causing [death] [or] [great bodily harm]*1* by vehicle [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 operated a motor vehicle*3*

[while under the influence of intoxicating liquor]*4*

[while under the influence of ..... , a drug]*5*

2. The defendant thereby caused*6* the [death] [or] [great bodily harm]*1* of ..... (name of victim);

3. This happened in New Mexico on or about the ..... day of ...., 19 ...

USE NOTE

1. Use only applicable alternative or alternatives. If defendant is charged with great bodily harm by vehicle, the definition of "great bodily harm", Instruction 14-131, must also be given.

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

3. Use the bracketed alternatives that are applicable.

4. Instruction 14-243, Vehicle homicide; "driving under the influence of intoxicating liquor"; defined, must be given if this element is given.

5. Instruction 14-243, Vehicle homicide; "driving under the influence of intoxicating liquor"; defined, must also be given if this element is given.

6. If causation is in issue, Instruction 14-251, the definition of causation, must also be used.

[As amended, effective August 1, 1989.]

*** * * * * * * * * * * * * * * * * * ***

See 66-8-101 to 66-8-113 NMSA 1978. This crime is a fourth degree felony. See 31-18-15 NMSA 1978. It is a general intent crime. State v. Jordon, 83 N.M. 571, 494 P.2d 984 (Ct. App. 1972). The use of a vehicle to commit a homicide may under certain circumstances result in a charge of murder. See, e.g., State v. Montoya, 72 N.M. 178, 381 P.2d 963 (1963); see generally, Annot., 21 A.L.R.3d 116 (1968).

Driving while intoxicated must be the direct and proximate cause of the death when the homicide is based on that provision. State v. Sisneros, 42 N.M. 500, 505-06, 82 P.2d 274 (1938). State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975). However, since driving while intoxicated is an act malum in se., State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973), foreseeability is not an element of proximate cause. Compare with Instruction 14-230 and commentary.

On the theory that the homicide by vehicle is not an offense consisting of different degrees, the court of appeals has held there is no lesser included offense. For example, driving under the influence of intoxicating liquor, 66-8-102 NMSA 1978, was held not to be a lesser included offense to a vehicular homicide resulting from driving under the influence of intoxicating liquor. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973). Also, improper passing, 66-7-315 NMSA 1978, was held not to be a lesser included offense to a vehicular homicide caused by reckless driving. State v. Villa, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973). See also, commentary to Instruction 14-6002.

The statute by its terms would appear to allow the conviction of a person causing a death or great bodily harm by vehicular homicide simply because he was an habitual user of a narcotic drug without any proof that he was actually under the influence of the

drug at the time of the accident. The committee had considerable doubt about the constitutionality of such a provision. Cf. Robinson v. California, 370 U.S. 660 (1962).

The statute, 66-8-102 NMSA 1978, does not define narcotic drug. Narcotic drugs are defined under the Controlled Substances Act for the purpose of prohibitory possession, distribution, etc. See 30-31-2P and 30-31-6 and 30-31-7 NMSA 1978. If the definition of narcotic drugs in the Controlled Substances Act is used for a definition under this crime, marijuana is not a narcotic drug. The state would have to prove that it is in the "any other drug" category under 66-8-102 NMSA 1978 and that the defendant was under its influence to such a degree so as to render him incapable of driving safely.

The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. See State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936); State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966).

See 66-8-101 to 66-8-109 NMSA 1978. This crime is a third degree felony. See 31-18-15 NMSA 1978. It is a general intent crime. State v. Jordon, 83 N.M. 571, 494 P.2d 984 (Ct. App. 1972). The use of a vehicle to commit a homicide may under certain circumstances result in a charge of murder. See, e.g., State v. Montoya, 72 N.M. 178, 381 P.2d 963 (1963); see generally, Annot., 21 A.L.R.3d 116 (1968). 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 vehicle homicide. See State v. Omar-Muhammad, 105 N.M. 788, 792, 737 P.2d 1165 (1987).

Driving while intoxicated must be the direct and proximate cause of the death when the homicide is based on that provision. State v. Sisneros, 42 N.M. 500, 505-06, 82 P.2d 274 (1938). State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975). However, the general intent to cause death or great bodily harm is satisfied by evidence that the defendant voluntarily became under the influence and voluntarily drove the vehicle. State v. Dutchover, 85 N.M. 72, 509 P.2d 264 (Ct. App. 1973). Compare with Instruction 14-230 and commentary.

On the theory that the homicide by vehicle is not an offense consisting of different degrees, the court of appeals has held there is no lesser included offense. For example, driving under the influence of intoxicating liquor, 66-8-102 NMSA 1978, was held not to be a lesser included offense to a vehicular homicide resulting from driving under the influence of intoxicating liquor. State v. Trujillo, 85 N.M. 208, 510 P.2d 1079 (Ct. App. 1973). Also, improper passing, 66-7-315 NMSA 1978, was held not to be a lesser included offense to a vehicular homicide caused by reckless driving. State v. Villa, 85 N.M. 537, 514 P.2d 56 (Ct. App. 1973). See also, commentary to Instruction 14-6002.

The statute for homicide by vehicle controls over the general, involuntary manslaughter statute and must be used. See State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936); State v. Lujan, 76 N.M. 111, 412 P.2d 405 (1966).

Section 66-8-102 NMSA 1978 was amended in 1983 to delete "habitual offender" and "narcotic" and to add a new Subsection C creating the crime of driving with 1/10th of 1% or more alcohol in the blood. (See Laws 1983, Chapter 76, Section 2) Section 66-8-110 NMSA 1978 was amended in 1984 to remove the statutory presumption that a person was driving while under the influence if he was driving with 1/10th of 1% or more alcohol. Use note 4 was amended to reflect the withdrawal of Instruction 14-242.

Although it is now a crime under Subsection C of Section 66-8-102 to drive with 1/10th of 1% or more alcohol in the blood, the crime is not "driving while intoxicated". The crime of driving while intoxicated is set forth in Subsection A of Section 66-8-102.

UJI 14-243 does not apply to the offense of driving with more than the 1/10th of 1%, but does apply to vehicular homicide.

ANNOTATIONS

The 1989 amendment, effective for cases filed in the district courts on or after August 1, 1989, in Element 1 in the instruction, deleted "[while an habitual user of _____, a narcotic drug]" following the first item, "narcotic" preceding "drug" in the third item, and deleted the former last two items, which read "[while under the influence of any drug to a degree that rendered him incapable of driving safely]" and "[recklessly]"; in the Use Note, deleted the former first sentence of Item 4, which read "Instruction 14-242 must also be used if the results of the chemical test introduced under Section 66-8-110 NMSA 1978 are used to establish a presumption concerning the influence of alcohol", deleted former Item 6, which read "Instruction 14-241, the definition of 'reckless driving', must also be used", and redesignated former Item 7 as present Item 6.

Compiler's note. - Section 66-8-102 NMSA 1978, referred to throughout the committee commentary, was amended in 1982 and no longer specifically refers to either "narcotic drug" or to "any other drug."

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

This instruction and UJI Crim. 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, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

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 Crim. 14-241 and this instruction. State v. Blakley, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

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. Vehicle homicide; "reckless driving"; defined.

For you to find that the defendant was driving recklessly, you must find that he drove with willful disregard of the rights or safety of others and [(at a speed) *1* or (in a manner)] which [(endangered) *2* or (was likely to endanger)] any person or property.

USE NOTE

1. Use only applicable parenthetical alternative.

2. Use only applicable parenthetical alternative.

*** * * * * * * * * * * * * * * * * * ***

See 66-8-113 NMSA 1978. Prior to the adoption of the homicide-by-vehicle statute, involuntary manslaughter by reckless driving was often characterized as identical to the conduct required for civil liability under the guest statute. See State v. Hayes, 77 N.M. 225, 421 P.2d 439 (1966). The committee was of the opinion that the wanton and willful phrase found in the prior cases was not particularly helpful.

ANNOTATIONS

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, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

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 Crim. 14-240 and this instruction. State v. Blakley, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

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

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.

*** * * * * * * * * * * * * * * * * * ***

In 1984 the legislature amended Section 66-8-110 to delete the .10 of 1% statutory presumption.

ANNOTATIONS

Compiler's note. - Pursuant to a court order dated May 2, 1989, this instruction was withdrawn effective for cases filed in the district courts on or after August 1, 1989.

Blood alcohol percentage material to state's conviction for vehicular homicide. - Where the state's conviction for vehicular homicide is based primarily upon the defendant's driving under the influence of intoxicating liquor, his blood alcohol percentage is clearly material to his guilt or innocence. State v. Lovato, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 8 Am. Jur. 2d Automobiles and Highway Traffic § 906.

61A C.J.S. Motor Vehicles § 666(1).

14-243. Vehicle homicide; "under the influence of intoxicating liquor"; defined.1

A person is [under the influence of intoxicating liquor] [under the influence of a drug] [under the combined influence of intoxicating liquor and a drug] *2* when as a result of [drinking such liquor] [and] [using a drug] *2* he 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 himself and the public. *2*

USE NOTE

1. This instruction may be given immediately after UJI Criminal 14-240.

2. Use only the bracketed paragraph or paragraphs applicable under the evidence presented.

[As amended, effective August 1, 1989.]

*** * * * * * * * * * * * * * * * * * ***

A definition of "under the influence" has been provided as the dictionary definition of this term is not adequate. The definition is taken directly from several New Mexico Supreme

Court and court of appeals decisions. See State v. Myers, 88 N.M. 16, 536 P.2d 280 (1975) and State v. Sisneros, 42 N.M. 500, 82 P.2d 274 (1938).

ANNOTATIONS

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".

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, 105 N.M. 788, 737 P.2d 1165 (1987).

Trial court must give requested instructions on vehicular homicide while under the influence of drugs as a lesser included offense of first degree depraved mind murder only where the evidence could support a conviction for the lesser offense. State v. Omar-Muhammad, 105 N.M. 788, 737 P.2d 1165 (1987).

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 wilfully 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 _____, 19_____

USE NOTE

1. Use only applicable alternative or alternatives. If defendant is charged with causing great bodily harm by vehicle, the definition of "great bodily harm", Instruction 14-131, must also be given.

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

3. If causation is in issue, Instruction 14-251, the definition of causation, must also be used.

4. Use the bracketed alternatives that are applicable.

[Adopted, effective July 1, 1993.]

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 66-8-101F NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated May 21, 1993, this instruction is effective for cases filed in the district courts on or after July 1, 1993.

PART F
GENERAL HOMICIDE INSTRUCTIONS

14-250. Jury procedure for various degrees of homicide.

You have been instructed on the crimes of first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter.*1* 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 will then discuss and decide whether the defendant is guilty of murder in the first degree.*1* If you unanimously agree that the defendant is guilty of murder in the first degree, you will return a verdict of guilty of murder in the first degree. If you do not agree, you should discuss the reasons why there is a disagreement.

If, after reasonable deliberation, you do not agree that the defendant is guilty of murder in the first degree you should move to a discussion of murder in the second degree. If you unanimously agree that the defendant is guilty of murder in the second degree, you

will return a verdict of guilty of murder in the second degree. If you do not agree you should discuss the reasons why there is a disagreement.

If, after reasonable deliberation, you do not agree that the defendant is guilty of murder in the second degree, you should consider whether the defendant is guilty of voluntary manslaughter. If you unanimously agree that the defendant is guilty of voluntary manslaughter, you will return a verdict of guilty of voluntary manslaughter. If you do not agree, you should discuss the reasons why there is a disagreement.

If, after reasonable deliberation, you do not agree that the defendant is guilty of voluntary manslaughter, you should consider whether the defendant is guilty of involuntary manslaughter. If you agree that the defendant is guilty of involuntary manslaughter, you will return a verdict of guilty of involuntary manslaughter.

You may not find the defendant guilty of more than one of the foregoing crimes. If you have a reasonable doubt as to whether the defendant committed any one of the crimes, you must determine that he is not guilty of that crime. If you find him not guilty of all of these crimes, you must return a verdict of not guilty.

USE NOTE

1. The form of this instruction must be altered depending on what crimes are to be considered by the jury.

*** * * * * * * * * * * * * * * * * * ***

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, 67 N.M. 336, 355 P.2d 275 (1960). This could involve instructing the jury on various types of first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter. Cf. State v. McFall, 67 N.M. 260, 354 P.2d 547 (1960). Instruction 14-250 attempts to direct the method of jury consideration, recognizing the difficulty that juries can have with homicide cases. The committee considered, but expressly decided against, advising the jury what they should do if they are unable to reach any verdict. The instruction also satisfies the holding of the supreme court in State v. Jones, 51 N.M. 141, 179 P.2d 1001 (1947). The instruction in that case which required the jury to give to the defendant the benefit of doubt between degrees need not be given.

ANNOTATIONS

Defendant entitled to manslaughter instruction upon showing of enough circumstantial evidence. - 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, 95 N.M. 421, 622 P.2d 1041 (1981).

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, 94 N.M. 706, 616 P.2d 419 (1980).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide § 525.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense, 15 A.L.R.4th 118.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 A.L.R.4th 861.

41 C.J.S. Homicide § 335.

14-251. Homicide; "proximate cause"; defined.1

For you to find the defendant guilty of ....., (name of crime) the state must prove to yoursatisfaction beyond a reasonable doubt that the act of the defendant caused the death of ..... (name of victim)

The cause of a death is an act which, in a natural and continuous chain of events, produces the death and without which the death would not have occurred.

[There may be more than one cause of death. If the acts of two or more persons contribute to cause death, each such act is a cause of death.]*2*

USE NOTE

1. For use only if causation is in issue. See also Instructions 14-252, 14-253, and 14-254 for other specific causation situations.

2. Use the bracketed language if the acts of more than one person contributed to the death of the victim.

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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 on the victim.

ANNOTATIONS

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, 94 N.M. 169, 608 P.2d 145 (1980).

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, 93 N.M. 458, 601 P.2d 428 (1979).

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, 94 N.M. 172, 608 P.2d 148 (1980).

And 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, 94 N.M. 172, 608 P.2d 148 (1980).

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.

Negligence of the deceased [or some other person] *2* which may have contributed to the cause of death does not relieve the defendant of responsibility for an act which also contributed to the cause of the death. However, if you find that negligence of the deceased [or some other person] *2* was the only cause of death, then the defendant is relieved of all responsibility for the death of the deceased.

USE NOTE

1. For use in conjunction with Instruction 14-251. Instruction 14-253 should be given in lieu of this instruction if medical "negligence" is in issue.

2. Use the bracketed phrase only if negligence of a third person is in issue.

*** * * * * * * * * * * * * * * * * * ***

See State v. Romero, 69 N.M. 187, 191, 365 P.2d 58 (1961), and State v. Myers, 88 N.M. 16, 536 P.2d 280 (Ct. App. 1975).

ANNOTATIONS

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, 99 N.M. 490, 660 P.2d 132 (Ct. App. 1983).

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, 94 N.M. 172, 608 P.2d 148 (1980).

And 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, 94 N.M. 172, 608 P.2d 148 (1980).

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. Homicide; effect of improper medical treatment.

Medical treatment which may have contributed to the cause of death does not relieve the defendant of responsibility for an act which also caused the death. However, if you find that the medical treatment was the only cause of death, then the defendant is relieved of all responsibility for the death of the deceased.

USE NOTE

1. For use, if applicable, in conjunction with Instruction 14-251.

*** * * * * * * * * * * * * * * * * * ***

See State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968); Territory v. Yee Dan, 7 N.M. 439, 37 P. 1101 (1894). See generally Annot., 100 A.L.R.2d 769, 783 (1965).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide § 19.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 A.L.R.2d 769.

40 C.J.S. Homicide § 7.

14-254. Homicide; unlawful injury accelerating death.1

One who kills is not relieved of responsibility even though the victim [was previously weakened by disease, injury or physical condition, and even if it appears probable that a person in sound physical condition would not have died from the injury] *2* [would have died soon thereafter from another cause and the injury merely hastened the death].

USE NOTE

1. For use in conjunction with Instruction 14-251.

2. Use only the applicable bracketed phrase.

*** * * * * * * * * * * * * * * * * * ***

See generally LaFave & Scott, Criminal Law 257 (1972).

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide § 16.

40 C.J.S. Homicide § 5.

14-255. Intent to kill one person; another killed.1

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 NOTE

1. 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 Instruction 14-201 supplies the necessary "transferred intent" instruction.

*** * * * * * * * * * * * * * * * * ***

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

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried [but failed]*2* to .; (describe act and name victim) *3*

2. The defendant intended to .....; (describe act and name victim) *3*

3. The defendant acted in a rude, insolent or angry manner;

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use bracketed material only if instruction is given as a lesser included offense to any battery.

3. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-3-1A NMSA 1978.

Committee commentary. - See § 30-3-1A & 30-3-1B NMSA 1978. Although assault is a petty misdemeanor, instructions on assault are included in UJI Criminal because they may be given to the jury as a necessarily included offense to an aggravated assault. See, e.g., State v. Mitchell, 43 N.M. 138, 87 P.2d 432 (1939); Chacon v. Territory, 7 N.M. 241, 34 P. 448 (1893). See also commentary to Instruction 14-6001.

There are three separate instructions on assault for use depending on the evidence. If the evidence supports the theory of assault by attempted battery, the first of the three instructions is to be given; if the evidence supports the theory of assault by a threat or by menacing conduct, the second instruction is to be given; if the evidence supports both theories, only the third instruction is to be given.

Instructions 14-301 and 14-303 contain the elements of statutory battery as the attempted act of assault. Therefore, the defendant must attempt but fail to unlawfully and intentionally touch or apply force to another in a rude, insolent or angry manner. See § 30-3-4 NMSA 1978. Following the general pattern of UJI Criminal, the jury is not told that the attempted application of force must be done unlawfully. The concept of unlawfulness is intended to be covered by the description of the act, i.e., when done in a rude, angry or insolent manner. See Perkins, Criminal Law 108 (2d ed. 1969). The term unlawfully means simply that the action is not authorized by law. State v. Mascarenas, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974). The intentional element is not given the jury in this instruction, but the general criminal intent instruction, Instruction 14-141, is given.

An assault by an attempted battery requires an intent to commit the battery. See generally Perkins, supra, at 116. Cf. § 30-28-1 NMSA 1978. See generally reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions. Proof of the intent to commit a battery may require an actual possibility or present ability to carry out the attempt. See Perkins, supra, at 121; LaFave & Scott, Criminal Law 609-10 (1972).

Assault by threat or menacing conduct (Instructions 14-302 and 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, Criminal Law 116-18 (2d ed. 1969). 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, Criminal Law 611 (1972).

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 § 30-3-1C NMSA 1978. The elements of this type of assault were not included in the assault instructions. The committee was of the opinion that the elements would not be used to support an aggravated assault; therefore, this type of assault would not be a necessarily included offense. If the state attempts to prove an assault by insulting language, etc., a special instruction must be drafted.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....; (describe threat or menacing conduct)

2. This caused ..... (name of victim) to believe he was about to be .....;*2* (describe act)

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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-3-1B NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-301.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried [but failed]*3* to.....(describe act and name victim)
.....*4*;
The defendant intended to
.....*4*; and (describe act and name victim) The defendant acted in a rude, insolent or angry manner;
[OR]
The defendant.....; (describe threat or menacing conduct)
This caused.....(name of victim) to believe that he wasabout to be
.....*4*; (describe act) and
A reasonable person in the same circumstances as
.....(name of victim) would have had the same belief;
AND

2. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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 bracketed material only if instruction is given as a lesser included offense to any battery.

4. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-3-1B NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-301.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried [but failed]*2* to *.3;* (describe act and name victim)

2. The defendant intended to .....*3;* (describe act and name victim)

3. The defendant acted in a rude, insolent or angry manner;

4. The defendant used .....*4*; (deadly weapon)

5. This happened in New Mexico on or about the ..... day of ....., 19 .

USE NOTE

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

2. Use bracketed material only if instruction is given as a lesser included offense to any battery.

3. Use laymen's language to describe the touching or application of force.

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."

****

Statutory reference. - Section 30-3-2A NMSA 1978.

Committee commentary. - See § 30-3-2A NMSA 1978. See commentary to Instructions 14-301, 14-302, and 14-303. An aggravated assault by use of a deadly weapon requires only a general criminal intent. 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 30-1-12 B 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 under the definition given in the use note. See 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.

For an explanation of how to use the three instructions, see commentary to Instructions 14-301, 14-302, and 14-303.

ANNOTATIONS

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.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant.....; (describe threat or menacing conduct)

2. This caused.....(name of victim) to believe hewas about to be .....*2*; (describe act)

3. A reasonable person in the same circumstances as ..... (name of victim) wouldhave had the same belief;

4. The defendant used ..... (deadly weapon)

5. This happened in New Mexico on or about the .... day of ....., 19 ..

USE NOTE

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. 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."

****

Statutory reference. - Section 30-3-2A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-304.

ANNOTATIONS

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, 99 N.M. 177, 655 P.2d 1021 (1982).

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, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

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.

Kicking as an aggravated assault, or an assault with a deadly weapon, 33 A.L.R.3d 922.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant tried [but failed]*3* to.....(describe act and name victim)
.....*4*;
The defendant intended to .....*4*; (describe act and name victim) and
The defendant acted in a rude, insolent or angry manner;
[OR]
The defendant .....; (describe threat or menacing conduct)
This caused .....(name of victim) to believe he wasabout to be
.....*4*; (describe act) and
A reasonable person in the same circumstances as .....(name of victim) would havehad the same belief;
AND

2. The defendant used .....*5*; (deadly weapon)

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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 bracketed material only if instruction is given as a lesser included offense to any battery.

4. Use laymen's language to describe the touching or application of force.

5. 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."

****

Statutory reference. - Section 30-3-2A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-304.

ANNOTATIONS

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; disguise; essential elements.

For you to find the defendant guilty of aggravated assault in disguise [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 .....; (describe threat or menacing conduct)

2. This caused ..... (name of victim) to believe he was about to be ..... (describe act)

3. A reasonable person in the same circumstances as .....(name of victim) would have hadthe same belief;

4. The defendant was [wearing a .....*3*]*4*[disguised] for the purpose of concealing

his identity;

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use only the applicable bracketed element.

****

Statutory reference. - Section 30-3-2B NMSA 1978.

Committee commentary. - See § 30-3-2B 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.

The element of "for the purpose of concealing identity" is not an intent to do a further act or achieve a further consequence. Compare Instruction 14-702 and commentary. See generally reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

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 ..... [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 tried [but failed]*3* to.....(describe act and name victim)
.....*4;* (describe act and name victim)

2. The defendant intended to .....*4;* (describe act and

name victim)

3. The defendant acted in a rude, insolent or angry manner;

4. The defendant intended to commit the crime of *1*;

5. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

1. Insert the name of the felony in the disjunctive. The essential elements of the felony must also be given immediately following this instruction.

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

3. Use bracketed material only if instruction is given as a lesser included offense to any battery.

4. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-3-2C NMSA 1978.

Committee commentary. - See § 30-3-2C NMSA 1978. The felony intended must be other than a violent felony as defined in Section 30-3-3 NMSA 1978. See Instructions 14-311, 14-312, and 14-313 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). The attempt to commit the felony may therefore be a necessarily included offense to the aggravated assault. See Perkins, supra, at 119. The committee's reporter found no New Mexico cases interpreting this particular type of assault. Because it requires an act coupled with an intent to commit a further act, this is a specific intent crime. See reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

For an explanation of how to use the three instructions, see commentary to Instructions 14-301, 14-302, and 14-303.

ANNOTATIONS

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 ..... [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 .....; (describe threat or menacing conduct)

2. This caused .....(name of victim) to believe he wasabout to be .....*3*; (describe act)

3. A reasonable person in the same circumstances as .....(name of victim) would have hadthe same belief;

4. The defendant intended to commit the crime of *1*;

5. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of the felony or felonies must also be given immediately following this instruction.

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

3. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-3-2C NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-308.

ANNOTATIONS

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 ..... [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 tried [but failed]*4* to.....(describe act and name victim)
.....*5;*
The defendant intended to .....*5;* (describe act and name victim) and
The defendant acted in a rude, insolent or angry manner;
[OR]
The defendant .....; (describe threat or menacing conduct)
This caused .....(name of victim) to believe he wasabout to be
.....*5;* (describe act) and
A reasonable person in the same circumstances as .....(name of victim) would have had the same belief;
AND

2. The defendant intended to commit the crime of *2;*

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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 name of the felony or felonies in the disjunctive. The essential elements of the felony or felonies must also be given immediately following this instruction.

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

4. Use bracketed material only if instruction is given as a lesser included offense to any battery.

5. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-3-2C NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-308.

ANNOTATIONS

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 ..... [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 tried [but failed]*4* to.....(describe act and name victim)
.....*5*;

2. The defendant intended to .....*5*; (describe act and name victim)

3. The defendant acted in a rude, insolent or angry manner;

4. The defendant intended to [kill] [or]*1* [commit.....*2*];

5. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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., murder, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For murder, see second degree murder, Instruction 14-210. For mayhem, see Instruction 14-314. For criminal sexual penetration in the first, second or third degree, see Instructions 14-941 to 14-961. For robbery, see Instruction 14-1620. For burglary, see Instruction 14-1630.

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

4. Use bracketed material only if instruction is given as a lesser included offense to any battery.

5. Use laymen's language to describe the touching or application of force.

[As amended, effective September 1, 1988.]

****

Statutory reference. - Section 30-3-3 NMSA 1978.

Committee commentary. - See § 30-3-3 NMSA 1978. See also commentary to Instruction 14-306.

Instructions 14-311, 14-312, and 14-313 are used only where the assault is accompanied by an intent to commit murder, 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, 49 N.M. 181, 159 P.2d 768 (1945), 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 makes little sense under the instructions adopted by UJI because the malice required for second degree murder has been defined as an intent to kill or do great bodily harm. See Instruction 14-210 and commentary.

Furthermore, the courts have not always been sure of what type of murder could be the basis for an assault with intent to murder. In State v. Martin, 32 N.M. 48, 250 P. 842 (1926), the court said that the manner of carrying out the intent was not important so long as the result would have been murder if the victim had died. However, in State v. Rogers, 31 N.M. 485, 247 P. 828 (1926), the court held that a depraved-mind murder could not form the basis for an assault with intent to murder. A depraved-mind murder does not require either ordinary malice aforethought or the express malice required for a willful and deliberate murder. See Instruction 14-203 and commentary. The committee believed that the statute should be interpreted to mean common-law or second degree murder. See commentary to Instruction 14-210.

For an explanation of how to use the three instructions, see commentary to Instructions 14-311, 14-312 and 14-313.

ANNOTATIONS

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 Instruction 14-315".

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 ..... [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 .....; (describe threat or menacing conduct)

2. This caused .....(name of victim) to believe he wasabout to be .....*4*; (describe act)

3. A reasonable person in the same circumstances as.....(name of victim) would have had

the same belief;

4. The defendant intended to [kill] [or]*1* [commit.....*2*];

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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., murder, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For murder, see second degree murder, Instruction 14-210. For mayhem, see Instruction 14-314. For criminal sexual penetration in the first, second or third degree, see Instructions 14-941 to 14-961. For robbery, see Instruction 14-1620. For burglary, see Instruction 14-1630.

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

4. Use laymen's language to describe the touching or application of force.

[As amended, effective September 1, 1988.]

****

Statutory reference. - Section 30-3-3 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-311.

ANNOTATIONS

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 Instruction 14-315".

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 ..... [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 tried [but failed]*5* to..*6;* (describe act and name victim)

The defendant intended to .....*6;* (describe act and name victim) andThe defendant acted in a rude, insolent or angry manner;

[OR]

The defendant .....; (describe threat or menacing conduct)

This caused .....(name of victim) to believe he wasabout to be .....*6;* (describe act) and

A reasonable person in the same circumstances as.....(name of victim) would have had the same belief;

AND

2. The defendant intended to [kill] [or]*2* [commit .....*3*];

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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. 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., murder, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For murder, see second degree murder, Instruction 14-210. For mayhem, see Instruction 14-314. For criminal sexual penetration in the first, second or third degree, see Instructions 14-941 to 14-961. For robbery, see Instruction 14-1620. For burglary, see Instruction 14-1630.

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

5. Use bracketed material only if instruction is given as a lesser included offense to any battery.

6. Use laymen's language to describe the touching or application of force.

[As amended, effective September 1, 1988.]

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-3-3 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-311.

ANNOTATIONS

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 Instruction 14-315".

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 his body, making him less able to fight.

USE NOTE

1. To be used only with Instructions 14-311, 14-312, and 14-313.

*** * * * * * * * * * * * * * * * * * ***

New Mexico no longer has a statutory crime of mayhem. The Act of February 15, 1854 (see Code 1915, § 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, § 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. See § 30-1-3 NMSA 1978. The definition used in Instruction 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

Compiler's note. - Section 1476, Code 1915, referred to in the second sentence in the first paragraph of the committee commentary, was compiled as 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

Compiler's note. - Pursuant to a court order dated June 16, 1988, this instruction is withdrawn effective for cases filed in the district courts on or after September 1, 1988.

PART B
BATTERY

14-320. Battery; essential elements.

For you to find the defendant guilty of battery [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 .....*2*; (describe act and name victim)

2. The defendant acted in a rude, insolent or angry manner;

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-3-4 NMSA 1978.

Committee commentary. - See § 30-3-4 NMSA 1978. See, e.g., State v. Seal, 76 N.M. 461, 415 P.2d 845 (1966). The statutory element of an intentional act is covered by the general intent instruction, Instruction 14-141. The statutory element of unlawfulness is covered by the language of this instruction requiring that the defendant act in a rude, insolent or angry manner. See Perkins, Criminal Law 108 (2d ed. 1969). This instruction was included in UJI because the petty misdemeanor is a necessarily included offense to aggravated battery offenses. See State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

ANNOTATIONS

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, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2;* (describe act and name victim)

2. The defendant intended to injure.....(name of victim) [or another]*3;*

3. The defendant caused.(name of victim) [painful temporary disfigurement]*4*
[OR]
[a temporary loss or impairment of the use of ...]; name of organ or member

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

4. Use only the applicable bracketed element established by the evidence.

****

Statutory reference. - Section 30-3-5B NMSA 1978.

Committee commentary. - See §§ 30-3-5A & 30-3-5B NMSA 1978. See also commentaries to Instructions 14-320 and 14-322. 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 Instructions 14-322 and 14-323 provide distinct and separate instructions for the crime of aggravated battery. It is error to give the jury, over the defendant's objection, types of aggravated battery not supported by the evidence. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

ANNOTATIONS

Instruction inconsistent with charge not jurisdictional error. - A claim that the instruction defining aggravated battery covered three alternatives and, thus, was inconsistent with the specific charge of aggravated battery does not amount to a claim of jurisdictional error. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

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, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2* (describe act and name victim) with .....

2. The defendant intended to injure.....(name of victim) [or another]*4;*

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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. 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."

4. Use this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-3-5C NMSA 1978.

Committee commentary. - See § 30-3-5A & 30-3-5C NMSA 1978. See also commentary to Instruction 14-320.

In place of an act in a rude, insolent or angry manner, 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). See also reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions. 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.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

An aggravated battery by use of a deadly weapon may be proven where the defendant shoots the victim, striking him in the leg with a bullet. State v. Santillanes, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974). The fact that the victim invites the defendant to shoot does not constitute a legal defense of consent. State v. Fransua, 85 N.M. 173, 510 P.2d 106, 58 A.L.R.3d 656 (Ct. App. 1973).

ANNOTATIONS

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, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2;* (describe act and name victim)

2. The defendant intended to injure.....(name of victim) [or another]*3;*

3. The defendant [caused great bodily harm*4* to .....]*5* (name of victim) [or] [acted in a way that would likely result in death or great bodily harm*4* to .....]; (name of victim)

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 this bracketed phrase if the intent was directed generally or at someone other than the ultimate victim.

4. The definition of great bodily harm, Instruction 14-131, must also be given.

5. Use only the applicable bracketed element established by the evidence.

****

Statutory reference. - Section 30-3-5C NMSA 1978.

Committee commentary. - See § 30-3-5A & 30-3-5C NMSA 1978. See also commentaries to Instructions 14-320 and 14-322.

ANNOTATIONS

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, 99 N.M. 177, 655 P.2d 1021 (1982).

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.

CHAPTER 4
KIDNAPPING

14-401. False imprisonment; essential elements.

For you to find the defendant guilty of false imprisonment [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 [restrained]*2* [confined] ..... (name of victim) against her will;

2. The defendant knew that he had no authority to [restrain]*2* [confine]..... ..... (name of victim)

3. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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

2. Use applicable alternative or alternatives.

****

Statutory reference. - Section 30-4-3 NMSA 1978.

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).

14-402. Criminal use of ransom; essential elements.

For you to find the defendant guilty of criminal use of ransom [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]*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 knew or believed that it was ransom.

3. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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

2. Use applicable alternative or alternatives.

3. The definition of "ransom," Instruction 14-406, must be given after this instruction.

****

Statutory reference. - Section 30-4-2 NMSA 1978.

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 Instruction 14-1650, a kidnapper may be guilty of criminal use of ransom.

14-403. Kidnapping; no great bodily harm; essential elements.

For you to find the defendant guilty of kidnapping [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 [took]*2* [restrained] [confined] .....(name of victim) by [force]*2* [deception];

2. The defendant intended to [hold .(name of victim) for ransom*3*]*2* [confine .....(name of victim) as a hostage against her will] [hold ..... (name of victim) for serviceagainst her will*4*];

3. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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

2. Use applicable alternative or alternatives.

3. The definition of "ransom," Instruction 14-406, should be given after this instruction.

4. The definition of "hold for service," Instruction 14-405, should be given if sexual molestation is in issue.

****

Statutory reference. - Section 30-4-1 NMSA 1978.

Committee commentary. - See Section 30-4-1 NMSA 1978. This instruction is for the crime of second degree felony kidnapping where the victim is freed without great bodily harm having been inflicted.

The supreme court construed a prior version of this statute to create three separate types of kidnapping. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969). The court ruled that Section 30-4-1 NMSA 1978 required an intent to confine against the victim's will when the victim is held for ransom or as a hostage but that holding to service against the victim's will does not require an intent to confine the victim against his will. This construction distinguished the crime of kidnapping from the crime of false imprisonment

by requiring elements of intent in kidnapping which were not required for false imprisonment.

Section 30-4-1 NMSA 1978 was revised in 1973. As rewritten, the requirement that there be an intent to confine against the victim's will if the victim is held for ransom was eliminated. The specific intent to confine against the victim's will is now required for the crime of kidnapping by holding for service.

The court of appeals has held that false imprisonment is a necessarily included offense of kidnapping by holding to service against the victim's will because 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. State v. Armijo, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

In State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972), the supreme court held that the phrase "held to service against the victim's will" has a common meaning which can be understood by the general public. However, a definition has been provided for use if sexual molestation is in issue.

ANNOTATIONS

Proof in kidnapping by deception. - Proof of the victim's state of mind is not essential to prove kidnapping by deception. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

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, 97 N.M. 76, 636 P.2d 895 (Ct. App. 1981).

14-404. Kidnapping; great bodily harm; essential elements.

For you to find the defendant guilty of kidnapping resulting in great bodily harm [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 [took]*2* [restrained] [confined] .....(name of victim) by [force]*2* [deception];

2. The defendant intended to [hold ..... (name of victim) for ransom*3*]*2* [confine.....(name of victim) as a hostage against her will]

[hold ..... (name of victim) for service against her will*4*];

3. The defendant inflicted great bodily harm*5* on .....; (name of victim)

4. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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

2. Use applicable alternative or alternatives.

3. The definition of "ransom," Instruction 14-406, should be given after this instruction.

4. The definition of "hold for service," Instruction 14-405, should be given if sexual molestation is in issue.

5. The definition of "great bodily harm," Instruction 14-131, must be given after this instruction.

****

Statutory reference. - Section 30-4-1 NMSA 1978.

Committee commentary. - See Section 30-4-1 NMSA 1978. This instruction is for the crime of first degree felony kidnapping; that is, kidnapping where the defendant inflicts great bodily harm upon the victim. See State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977). See also, commentary to Instruction 14-403.

ANNOTATIONS

"Held to service". - The instruction conveys the notion that one is held to service when he or she is made to submit his or her will to the direction and control of another. State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

The definition of "service" as being so compelled or induced - "for the purpose of performing some act" - probably could be better stated; for example, using Webster's: "for the purpose of assisting or benefiting someone or something". Such an explanation serves to distinguish kidnapping from false imprisonment, which is a lesser offense included within kidnapping. State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

14-405. Hold for service; definition.

"Hold for service" includes holding for sexual purposes.

****

See Section 30-4-1 NMSA 1978. The supreme court in State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972), held that the phrase "held to service against the victim's will" has a common meaning which can be understood by the general public. For purposes of clarity, this definition should be used when sexual molestation or intercourse is the type of service in question.

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 NOTE

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 ..... 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] to:*3* (name of child) [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 .....)]*3* (name of child)

[OR]

[conduct (himself)*3* (herself) in a manner injurious to (his)*3* (her) (the) (morals)*3* (health) (welfare) (of .....*5*)]*3*; (name of child)

3. .....(name of child) was under the age of 18;

4. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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.

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.

****

Statutory reference. - Section 30-6-3 NMSA 1978.

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, Instruction 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

Compiler's note. - 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, 110 N.M. 705, 799 P.2d 574 (1990).

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

14-602. Child abuse; intentional or negligently "caused"; great bodily harm; essential elements.

For you to find _____ (name of defendant) guilty of child abuse resulting 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) [intentionally*2*] [or] [negligently*3*]*4* [and without justification]*5* caused _____ (name of child)[to be placed in a situation which 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]*4* _____ (name of child);]

[2. To find that _____ (name of defendant) negligently caused child abuse to occur, you must find that _____ (name of defendant) knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of

_____ (name of child);]*6*

3. _____'s (name of defendant) [actions] [or] [failure to act]*4* resulted in [the death of] [great bodily harm to7]*4* _____ (name of child);

4. _____ (name of child) was under the age of 18;

5. This happened in New Mexico on or about the _____ day of _____, 19_____.

USE NOTE

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

2. If this alternative is given, the definition of "intentionally", Instruction 14-610, must also be given.

3. Use this alternative and element 2 of this instruction if negligence is in issue.

4. Use only applicable alternative or alternatives.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. If there is sufficient evidence that the defendant negligently caused child abuse to occur, this element must be given.

7. If this alternative is given, the definition of "great bodily harm", Instruction 14-131, must also be given.

[Effective October 1, 1993.]

****

Statutory reference. - Section 30-6-1C NMSA 1978.

Committee commentary.

Criminal offense

Subsection C of Section 30-6-1 NMSA 1978 provides that it is a criminal offense for any person, without justifiable cause, to intentionally or negligently permit or cause:

(1) a child to be placed in a situation dangerous to the life or health of the child;

(2) a child to be tortured, cruelly confined or cruelly punished; or

(3) a child to be exposed to the inclement weather.

Negligence

Instructions 14-602, 14-603, 14-604 and 14-605 incorporate a criminal negligence standard of conduct for child abuse cases. This is consistent with the Supreme Court's opinion in Santillanes v. State, ____ N.M. ____, 849 P.2d 358 (1993).

Caused or Permitted

In State v. Leal, 104 N.M. 506, 723 P.2d 977 (Ct.App. 1986), the New Mexico Court of Appeals reversed the conviction of a mother because the mother was charged with "permitting" child abuse while the jury was instructed that the mother either "caused or permitted" the child abuse. The Court of Appeals held that permitting child abuse and causing child abuse were separate and distinct and that the state must prove that the defendant permitted the abuse to take place, not that she caused or permitted the abuse to take place. If properly charged in the alternative, child abuse may be committed by either "causing" or "permitting" the abuse. In such case, both an instruction on "caused" (UJI 14-602 or UJI 14-604) and an instruction on "permitted" (UJI 14-603 or UJI 14-605) is to be given. Although separate instructions (UJI 14-603 and 14-605) have been drafted for "permitting" child abuse, this does not make "causing" and "permitting" child abuse separate offenses. If the defendant is charged with having "caused or permitted" child abuse, a single jury verdict form is to be used for "caused or permitted" child abuse.

Separate Offenses

In State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990), the New Mexico Supreme Court noted that Section 30-6-1(C)(1) creates alternative ways of characterizing the same abusive act. A conviction of multiple counts of child abuse may be sustained only if the state charges and proves that the acts of child abuse arose as separate and distinct episodes. In Pierce, supra, the Supreme Court also held that:

Depending upon the facts of a particular case, the offense of child abuse resulting in death or great bodily harm, contrary to Section 30-6-1(C), may be a lesser included offense of first-degree murder as defined in Section 30-2-1(A)(1) . (citing authority). The rule of merger precludes an individual's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. (citing authority) Although the state properly may charge in the alternative, State v. Roque, 91 N.M. 7, 569 P.2d 417 (Ct.App. 1977), where defendant is convicted of

one or more offenses which have merged into the greater offense he may be punished for only one .

Since child abuse resulting in death of a child includes first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter, a transitional instruction between 14-602 and first degree murder does not seem feasible.

Separate counts of child abuse

A defendant may be convicted of multiple counts of child abuse (either child abuse resulting in death or child abuse not resulting in death only when each conviction is supported by evidence that:

(1) a single abusive act or a continuous series of abusive acts was interrupted and then another act or series was commenced, and

(2) each separate act or series of acts was accompanied by the requisite unlawful conduct.

See State v. Pierce, supra.

Enhanced Penalty

Section 30-6-1 NMSA 1978 provides that it is a third degree felony for the first offense of child abuse not resulting in death or great bodily harm and a second degree felony for a second or subsequent offense. If death or great bodily harm results from the abuse, it is a first degree felony. In State v. Lucero, supra, the defendant was convicted of three counts of child abuse and was sentenced to three fourth degree felonies rather than as a second offender under Section 30-6-1 NMSA 1978. Each of these sentences were enhanced under the Habitual Offender Act. See also State v. Fulton, 99 N.M. 348, 657 P.2d 1197 (Ct.App. 1983). In State v. Sanders, 93 N.M. 450, 601 P.2d 83 (Ct.App.1979) the conviction was reversed because the state introduced evidence of prior child abuse to prove the incident in question was not an accident.

Intent

If there is evidence that the offense was committed intentionally, Instruction 14-610 is to be given and not 14-141, general criminal intent. [As revised September 10, 1993.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

14-603. Child abuse; negligently "permitting" child abuse; [with great bodily harm] [without great bodily harm]; essential elements.

_____ (name of defendant) has [also]*1* been charged with negligently permitting child abuse resulting in death or great bodily harm. For you to find _____ (name of defendant) guilty of child abuse resulting in death or 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. _____ (name of defendant) negligently [and without justification]*3* permitted _____ (name of child)[to be placed in a situation which 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]*4* _____ (name of child);]

2. _____ (name of defendant) knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of _____ (name of child);

3. _____ (name of defendant) was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child's welfare;

4. _____'s (name of defendant) [actions] [or] [failure to act]*4* resulted in [the death of] [great bodily harm to*5*]*4* _____ (name of child);

5. _____ (name of child) was under the age of 18;

6. This happened in New Mexico on or about the _____ day of _____, 19_____

USE NOTE

1. The bracketed word "also" is included when Instruction 14-602 is also given.

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

3. If "justification" is in issue, if requested, this bracketed alternative must be given.

4. Use only applicable alternative or alternatives.

5. If this alternative is given, the definition of "great bodily harm", Instruction 14-131, must also be given.

[Effective October 1, 1993.]

****

Statutory reference. - Section 30-6-1C NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

14-604. Child abuse; intentionally or negligently "caused"; without great bodily harm or death; essential elements.

For you to find _____ (name of defendant) guilty of child abuse 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) [intentionally]*2* [or] [negligently*3*]*4* [and without justification]*5* caused _____ (name of child)[to be placed in a situation which 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]*4* _____ (name of child);]

[2. To find that _____ (name of defendant) negligently caused child abuse to occur, you must

find that _____ (name of defendant) knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of _____ (name of child);]*6*

3. _____ (name of child) was under the age of 18;

4. This happened in New Mexico on or about the _____ day of _____, 19_____

USE NOTE

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

2. If this alternative is given, the definition of "intentionally", Instruction 14-610, must also be given.

3. Use this alternative and element 2 of this instruction if negligence is in issue.

4. Use only applicable alternative or alternatives.

5. If "justification" is in issue, if requested, this bracketed alternative must be given.

6. If there is sufficient evidence that the defendant negligently caused child abuse to occur, this element must be given.

[Effective October 1, 1993.]

****

Statutory reference. - Section 30-6-1C NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

14-605. Child abuse; negligently "permitting" child abuse; without great bodily harm; essential elements.

_____ (name of defendant) has [also]*1* been charged with negligently permitting child abuse which did not result in death or great bodily harm. For you to find _____ (name of defendant) guilty of child abuse which did not result in death or 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. _____ (name of defendant) negligently [and without justification]*3* permitted _____ (name of child) [to be placed in a situation which 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]*4* _____ (name of child);]

2. _____ (name of defendant) knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of _____ (name of child);

3. _____ (name of defendant) was a parent, guardian or custodian of the child, or the defendant had accepted responsibility for the child's welfare;

4. _____ (name of child) was under the age of 18;

5. This happened in New Mexico on or about the _____ day of _____, 19_____

USE NOTE

1. The bracketed word "also" is included when Instruction 14-604 is also given.

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

3. If "justification" is in issue, if requested, this bracketed alternative must be given.

4. Use only applicable alternative or alternatives.

[Effective October 1, 1993.]

****

Statutory reference. - Section 30-6-1C NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

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] [guardian] [or] [custodian]*2* of _____ name of child;

2. _____ (name of defendant) intentionally*3* left or abandoned _____ (name of child);

3. As a result of _____ (name of defendant) leaving or abandoning _____ (name of child), _____ (name of child) was without proper parental care and control necessary for _____'s (name of child) well being;

4. _____ (name of defendant) had the ability to provide proper parental care and control necessary for _____'s (name of child) well-being;

5. _____'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] [great bodily harm to*4*]*2* _____ (name of child);

6. _____ (name of child) was under the age of 18;

7. This happened in New Mexico on or about the _____ day of _____, 19_____.

USE NOTE

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, Instruction 14-250 must also be given.

2. Use only applicable alternatives.

3. The definition of "intentionally", Instruction 14-610, must also be given immediately after this instruction.

4. If this alternative is given, the definition of "great bodily harm", Instruction 14-131, must also be given.

[Effective October 1, 1993.]

****

Statutory reference. - Section 30-6-1B NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

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] [guardian] [or] [custodian]*2* of _____ (name of child);

2. _____ (name of defendant) intentionally*3* left or abandoned _____ (name of child);

3. As a result of _____ (name of defendant) leaving or abandoning _____ (name of child), _____ (name of child) was without proper parental care and control necessary for _____'s (name of child) well-being;

4. _____ (name of defendant) had the

ability to provide proper parental care and control necessary for _____'s (name of child) well-being;

5. _____ (name of child) was under the age of 18;

6. This happened in New Mexico on or about the _____ day of _____, 19_____

USE NOTE

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, Instruction 14-250 must also be given.

2. Use only applicable alternatives.

3. The definition of "intentionally", Instruction 14-610, must also be given immediately after this instruction.

[Effective October 1, 1993.]

****

Statutory reference. - Section 30-6-1B NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

14-610. Child abuse; "intentional" defined1

A person acts intentionally when the person purposely does an act. Whether the _____ (name of defendant) acted intentionally may be inferred from all of the surrounding circumstances, such as _____'s actions or failure to act, conduct and statements.

USE NOTE

1. This instruction is to be given with child abuse and abandonment cases when required by Instruction 14-602, 14-603, 14-606 or 14-607. Instruction, 14-141, general criminal intent, shall not be given in child abuse cases and child abandonment cases.

[Effective October 1, 1993.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated July 1, 1993, this instruction is effective for cases filed in the district courts on or after October 1, 1993.

CHAPTER 7
FIREARMS; DEADLY WEAPONS

14-701. Receipt, transportation or possession of firearms by a felon; essential elements.

For you to find the defendant guilty of receipt, transportation or possession of firearms by a felon [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, transported, or possessed a [shotgun]*2* [rifle] [handgun] [firearm]*3*.

2. The defendant was previously convicted of the crime of .....

3. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternative.

3. Give Instruction 14-704, Definition of firearm, if applicable.

4. Insert the name of the crime that the trial court determines meets the statutory criteria of Section 30-7-16C(1) NMSA 1978.

[Adopted, effective May 1, 1986.]

ANNOTATIONS

Statutory reference. - Section 30-7-16 NMSA 1978.

Pursuant to the court order of February 10, 1986, this instruction is applicable to all cases tried after May 1, 1986.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. ..... is licensed to dispense alcoholic beverages;

2. While he was in ..... the defendant was carrying a loaded or unloaded firearm*3*;

[3. The defendant did not have legal authority to have the firearm in his possession in .....

4. This happened in New Mexico on about the ... day of ...., 19 ...

USE NOTE

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

2. Insert the name of the establishment.

3. Give Instruction 14-704, definition of firearm, if applicable.

4. Give bracketed information if this is an issue.

[Adopted, effective May 1, 1986.]

****

Statutory reference. - Section 30-7-3 NMSA 1978.

ANNOTATIONS

Compiler's note. - Pursuant to the court order of February 10, 1986, this instruction is applicable to all cases tried after May 1, 1986.

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 ..... 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*2* into a [building]*3* [vehicle];]*4*
[OR]

[1. The defendant discharged a firearm*2* knowing that he was endangering [a person]*3* [property];]
[OR]

[1. The defendant was carrying a firearm*2* while he was under the influence of [alcohol]*3* [narcotics];]
[OR]

[1. The defendant endangered the safety of another, by handling or using a [deadly weapon]*3* [firearm]*2* in a negligent manner;]
[OR]

[1. Without permission of the owner or occupant, the defendant discharged a firearm*2* within one hundred and fifty yards of an occupied [dwelling]*3* [building];]

2. This happened in New Mexico on or about the .... day of ...., 19 ...

USE NOTE

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

2. Give Instruction 14-704, definition of firearm, if applicable.

3. Use only the applicable alternative.

4. Use only the applicable bracketed phrase.

[Adopted, effective May 1, 1986.]

ANNOTATIONS

Cross-references. - See 30-7-4 NMSA 1978.

Compiler's note. - Pursuant to the court order of February 10, 1986, this instruction is applicable to all cases tried after May 1, 1986.

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. Rivera, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

14-704. Firearm; definition.

A firearm is any handgun, rifle, shotgun or any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosion including the frame, receiver, muffler or silencer of any such weapon.

USE NOTE

1. For use with Instructions 14-701, 14-702, and 14-703.

[Adopted, effective May 1, 1986.]

ANNOTATIONS

Statutory reference. - Section 30-7-16C(2) NMSA 1978.

Pursuant to the court order of February 10, 1986, this instruction is applicable to all cases tried after May 1, 1986.

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

REFER TO THE BOOK FOR THE PROPER TABLE

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) withouther consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant used physical force or physical violence;

3. ..... (name of victim) was 18 years of age or older;

[4. ..... (name of victim) was not the spouse of the defendant;]*4*

5. This happened in New Mexico on or about the ... day of ....., 19 ..

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12B and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-12B 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 defined as physical force or physical violence. 30-9-10A NMSA 1978.

The other definitions of force or coercion are contained in Instructions 14-903 (threats) and 14-904 (unconscious, etc.). Instruction 14-905 combines 14-902, 14-903 and 14-904. 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 "bared 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.

The committee was of the opinion that the parts of the body included in the term "primary genital area" are those set forth in 30-9-14 NMSA 1978 relating to indecent exposure. Definitions for those terms are provided in Instruction 14-981 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 Instruction 14-903. 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. 30-9-10A NMSA 1978. Cf. State v. Sanchez, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967), a robbery case. 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.

If the victim is the spouse of the defendant, sexual contact is not a crime. However, Paragraph 4 of the instruction is not an essential element of the offense, upon which the court is required to instruct in every case. State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977). If there is sufficient evidence to raise the issue, and if the defendant requests, then Paragraph 4 should be given. See the commentary to Instruction 14-983 for a discussion of the meaning of "spouse."

The committee recognized that other unconsented touchings are covered by 30-3-4 NMSA 1978, relating to battery. See commentary to Instruction 14-320.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant*2*

[used threats of physical force or physical violence against .....(name of victim or ..... other person)

[OR]

[threatened to .....*4*;]

3. ..... (name of victim) believed that the defendant would carry out the threat;

4. ..... (name of victim) was 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]*5*

6. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12B, 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See Section 30-9-12B 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 threats. 30-9-10A(2) and 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 Instruction 14-902.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) without herconsent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. .....(name of victim) was [unconscious]*2* [asleep] [physically helpless] [suffering from amental 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 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]*4*

6. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12B and 30-9-10A(4) NMSA 1978.

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 Instruction 14-902.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the unclothed ..... of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the *4* of the defendant;]

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 ....*5*);

AND .....(name of victim) believed that the defendant would carry out the threat;]

[OR]

[.....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (suffering froma 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 eighteen (18) years of age or older;

4. ..... (name of victim) was not the spouse of the defendant;]*6*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12B and 30-9-10A NMSA 1978.

Committee commentary. - See Section 30-9-12B NMSA 1978: misdemeanor.

This instruction combines Instructions 14-902 (physical force or physical violence), 14-903 (threats) and 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 (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. 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 Instructions 14-902, 14-903 and 14-904.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) withouther consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in .....

4. ..... (name of victim) was 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]5

6. This happened in New Mexico on or about the .... day of ...., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

5. 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, must also be given.

****

Statutory reference. - Sections 30-9-12A(1) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-12A(1) NMSA 1978: fourth degree felony.

Four separate instructions have been prepared for criminal sexual contact which results in personal injury to the victim. Instructions 14-906 (physical force or physical violence), 14-907 (threats) and 14-908 (unconscious, etc.) contain separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-906, 14-907, 14-908 and 14-909 are the same as Instructions 14-902, 14-903, 14-904 and 14-905, respectively, with the additional element of personal injury to the victim.

Instruction 14-909 combines Instructions 14-906, 14-907 and 14-908 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. 30-9-10C NMSA 1978.

See also commentaries to Instructions 14-902, 14-903 and 14-904.

ANNOTATIONS

UJI 14-946 proper instruction for fellatio. - UJI Crim. 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, 92 N.M. 93, 582 P.2d 1306 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Rape § 4.

75 C.J.S. Rape § 82.

14-907. 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant*2*

[used threats of physical force or physical violence against .....(name of victim or ..... other person)

[OR]

[threatened to .....

3. ..... (name of victim) believed that the defendant would carry out the threat;

4. The defendant's acts resulted in .....

5. ..... (name of victim) was 18 years of age or older;

[6. ..... (name of victim) was not the spouse of the defendant;]*6*

7. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

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, must also be given.

****

Statutory reference. - Sections 30-9-12A(1), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-906.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) withouther consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. .....(name of victim) was [unconscious]*2* [asleep] [physically helpless] [suffering from amental 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 .....

5. ..... (name of victim) was 18 years of age or older;

[6. ..... (name of victim) was not the spouse of the defendant;]*5*

7. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

5. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12A(1) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-906.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the unclothed ..... of .....(name of victim) withouther consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

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 ..... AND ..... (name of victim) believed that thedefendant would carry out the threat;]

[OR]

[..... .....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (suffering from amental 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 .....

4. ..... (name of victim) was 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]7

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

7. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12A(1) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-906.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of

.....(name of victim) withouther consent;]

[OR]

[caused ..... (name of victim) to touch the ..... 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 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]*4*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be be given.

****

Statutory reference. - Sections 30-9-12A(2) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-12A(2) NMSA 1978: fourth degree felony.

Four separate instructions have been prepared for criminal sexual contact when the perpetrator is aided or abetted by one or more persons. Instructions 14-910 (physical force or physical violence), 14-911 (threats) and 14-912 (unconscious, etc.) contain separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-910, 14-911, 14-912 and 14-913 are the same as Instructions 14-902, 14-903, 14-904 and 14-905, respectively, with the additional element of aided or abetted.

Instruction 14-913 combines Instructions 14-910, 14-911 and 14-912 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 Instructions 14-902, 14-903 and 14-904.

ANNOTATIONS

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, 93 N.M. 504, 601 P.2d 737 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant*2*

[used threats of physical force or physical violence against .....(name of victim) ..... (other person)

[OR]

[threatened to .....

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. ..... (name of victim) was 18 years of age or older;

[6. ..... (name of victim) was not the spouse of the defendant;]*5*

7. This happened in New Mexico on or about the ..... day of ..., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. 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, must also be given.

****

Statutory reference. - Sections 30-9-12A(2), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-910.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. .....(name of victim) was [unconscious]*2* [asleep] [physically helpless] [suffering from amental 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. ..... (name of victim) was 18 years of age or older;

[6. ..... (name of victim) was not the spouse of the defendant;]*4*

7. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12A(2) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-910.

ANNOTATIONS

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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the unclothed ..... *4* of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the *4* of the defendant;]

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 .....*5*);

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 acted with the help or encouragement of one or more persons;

4. ..... (name of victim) was 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]*6*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A NMSA 1978: (1) use of physical force or physical violence; (2) threats; (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. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

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, must also be given.

****

Statutory reference. - Sections 30-9-12A(2) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-910.

ANNOTATIONS

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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the unclothed ..... of .....(name of victim) without her consent;]

[OR]

[caused ..... (name of victim) to touch the *3* of the defendant;]

2. The defendant was armed with and used .....

3. ..... (name of victim) was 18 years of age or older;

[4. ..... (name of victim) was not the spouse of the

defendant;]*5*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

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 bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of "spouse," Instruction 14-983, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-9-12A(3) NMSA 1978.

Committee commentary. - See Section 30-9-12A(3) NMSA 1978: fourth degree felony.

Instruction 14-914 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 Instruction 14-1621 (armed robbery), Instruction 14-1632 (aggravated burglary) and 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.

See also commentary to Instruction 14-902.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the unclothed ..... of .....(name of victim) withouther consent;]

[OR]

[caused ..... (name of victim) to touch the *4* of the defendant;]

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 ..*5*); 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 amental 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 .....

3. The defendant's acts resulted in .....*6*; OR, the defendant acted withthe help or encouragement of one or more persons;

4. ..... (name of victim) was 18 years of age or older;

[5. ..... (name of victim) was not the spouse of the defendant;]7

6. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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, in the alternative, two of the three types of criminal sexual contact in the fourth degree in Section 30-9-12A NMSA 1978: (1) contact resulting in personal injury; (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), Instruction 14-914 must also be given.

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

3. Use only the applicable alternatives.

4. Name one or more of the following parts of the anatomy touched: "groin," "anus," "buttocks," "breast," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

7. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-12A(1), 30-9-12A(2) and 30-9-10A NMSA 1978.

Committee commentary. - See Section 30-9-12A NMSA 1978: fourth degree felony.

This instruction combines Instructions 14-906 (physical force or physical violence; personal injury), 14-907 (threats; personal injury), 14-908 (unconscious, etc.; personal injury), 14-910 (physical force or physical violence; aided or abetted), 14-911 (threats; aided or abetted) and 14-912 (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 Instruction 14-912 (deadly weapon). It is awkward and confusing to combine it with the other fourth degree sexual contacts because Instruction 14-914 contains no definitions of force or coercion. If the evidence also supports the charge that the defendant was armed with a deadly weapon, Instruction 14-914 must be given. That is because the use of the deadly weapon element of Instruction 14-914 supplants the force or coercion set forth in Instruction 14-915.

See also commentary to Instruction 14-902.

ANNOTATIONS

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

REFER TO THE BOOK FOR THE PROPER TABLE

14-921. Criminal sexual contact of a minor; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;]
(name of victim)
[OR]

[caused ..... (name of victim) to touch the ..*3* of the defendant;]

2. The defendant used physical force or physical violence;

3. .....(name of victim) was at least 13 but less than 18 years old;

[4. .....(name of victim) was not the spouse of the defendant;]*4*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina."

When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-13B and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-13B NMSA 1978: fourth degree felony.

Four separate instructions have been prepared for criminal sexual contact of a minor. Instructions 14-921 (physical force or physical violence), 14-922 (threats) and 14-923 (unconscious, etc.) contain separate definitions of "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-921, 14-922, 14-923 and 14-924 are the same as Instructions 14-902, 14-903, 14-904 and 14-905, respectively, with the additional element that the victim is a minor.

Instruction 14-924 combines Instructions 14-921, 14-922 and 14-923 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 Section 30-3-4 NMSA 1978 relating to battery. See commentary to Instruction 14-320.

The statute requires that the touching be intentional. This element is covered by the general intent instruction, Instruction 14-141.

The parts of the body which are protected by 30-9-13 NMSA 1978 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 30-9-14 NMSA 1978 relating to indecent exposure. Definitions for those terms are provided in Instruction 14-981 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 "buttock" 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.

30-9-13 NMSA 1978 requires that the sexual contact be both unlawful and intentional. The term "unlawful" means "without consent." Sex offenses may be defined in terms of "force" or "nonconsent" since these terms are substantially the same. See Perkins, Criminal Law 156 (2d ed. 1969). Force or coercion is merely a factor negating consent. Under this statute a minor may consent to sexual contact. If the minor did not consent, the touching is unlawful.

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 18. A person 18 years of age has reached majority. 28-6-1 NMSA 1978.

If the victim is the spouse of the defendant, sexual contact is not a crime. However, Paragraph 4 of the instruction is not an essential element of the offense, upon which the court is required to instruct in every case. State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977). If there is sufficient evidence to raise the issue, and if the defendant requests, then Paragraph 4 should be given. See the commentary to Instruction 14-975 for a discussion of the meaning of "spouse."

See commentaries to Instructions 14-902, 14-903 and 14-904 for a discussion of the definitions of "force or coercion."

ANNOTATIONS

Compiler's note. - 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.

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;] (name of victim)

[OR]

[caused ..... to touch the (name of victim) *3* of the defendant;]

2. The defendant*2*

[used threats of physical force or physical violence against .....(name of victim or ..... other person)

[OR]

[threatened to .....

3. ..... (name of victim) believed that the defendant would carry out the threat;

4. ..... (name of victim) was at least 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the defendant;]*5*

6. This happened in New Mexico on or about the .... day of ...., 19 ..

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-13B and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-921.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;]
(name of victim)
[OR]

[caused ..... (name of victim) to touch the ..*3* of the defendant;]

2. .....(name of victim) was [unconscious]*2* [asleep] [physically helpless] [suffering froma 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 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the defendant;]*4*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

****

Statutory reference. - Sections 30-9-13B and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-921.

ANNOTATIONS

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; force or coercion; essential elements.1

For you to find the defendant guilty of criminal sexual contact of a minor [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*3*

[touched or applied force to the ..... of .....;]
(name of victim)
[OR]

[caused ..... (name of victim) to touch ..... of the defendant;]

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 ..*5*); 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. ..... (name of victim) was not the spouse of the defendant;]*6*

5. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

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, must also be given.

****

Statutory reference. - Sections 30-9-13B and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-921.

ANNOTATIONS

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; child under thirteen; essential elements.

For you to find the defendant guilty of criminal sexual contact of a child under the age of 13 [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 unlawfully*2* and intentionally*3*

[touched or applied force to the ..... of ..... (name of victim);]*5*

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]*5*

2. ..... (name of victim) was 12 years of age or younger;

3. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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

2. UJI 14-937, "unlawful defined", must be given after this instruction.

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

4. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after the instruction; otherwise, no definition need be given unless the jury requests one.

5. Use only the applicable alternatives.

[As amended, effective October 1, 1992.]

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Statutory reference. - Section 30-9-13A(1) NMSA 1978.

Committee commentary. - See Section 30-9-13A(1) NMSA 1978: third degree felony.

This instruction contains the essential elements for criminal sexual contact 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 a child under the age of 13 is not a defense. Perez v. State, 111 N.M. 160, 162, 803 P.2d 249 (1990); 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 Section 40-1-6B NMSA 1978.

This instruction was revised in 1992 to comply with the Supreme Court's opinion in State v. Osborne, 111 N.M. 654, 808 P.2d 624 (1991). See also footnote 3 of State v. Orosco, 113 N.M. 780, 833 P.2D 1146 (1992) the New Mexico Supreme Court which further clarifies the Court's earlier decision in Osborne.

In 1991, Section 30-9-13 NMSA 1978 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". [As revised, September 10, 1993.]

ANNOTATIONS

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.

Compiler's note. - Sections 40A-9-3 and 40A-9-9, 1953 Comp., referred to in the second sentence of the second paragraph of committee commentary, were repealed by Laws 1975, ch. 109, § 8.

Use of term "groin" in instruction proper. - See State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

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, 110 N.M. 705, 799 P.2d 574 (1990).

Element of unlawfulness under prior instruction. - Each of the various instructions on criminal sexual contact with a minor, except this one, includes a provision intended to address the issue of unlawfulness; such a provision was omitted from this instruction. Nevertheless, unlawfulness is an element of the offense. State v. Orosco, 113 N.M. 780, 833 P.2d 780 (1992) (decided prior to 1992 amendment).

For case applying holding of *State v. Orosco,* 113 N.M. 780, 833 P.2d 1146 (1992), that failure to instruct on unlawfulness was not fundamental error, see State v. Conn, N.M. , 847 P.2d 746 (Ct. App. 1992), cert. quashed, N.M. , 847 P.2d 746 (1993).

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of ..... (name of victim)

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant was a person who by reason of his relationship to .....(name of victim) wasable to exercise undue influence over ....(name of victim) and used this authority to coerceher to submit to sexual contact;

3. ..... (name of victim) was at least 13 but less than 18 years old;

[4. ..... (name of victim) was not the spouse of the defendant;]*4*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-9-13A(2)(a) NMSA 1978.

Committee commentary. - See Section 30-9-13A(2)(a) NMSA 1978: third degree felony.

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," with its three definitions, 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.

See also the commentary to Instruction 14-921.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 41 Am. Jur. 2d Incest § 10; 65 Am. Jur. 2d Rape § 41.

75 C.J.S. Rape § 15.

14-927. Criminal sexual contact of a minor; 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 .....] the state must prove to your satisfaction beyond a reasonable

doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;]
(name of victim)
[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in .....

4. ..... (name of victim) was at least 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the defendant;]*5*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

5. 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, must also be given.

****

Statutory reference. - Sections 30-9-13A(2)(b) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-13A(2)(b) NMSA 1978: third degree felony.

Four separate instructions have been prepared for criminal sexual contact of a minor which results in personal injury to the victim. Instructions 14-927 (physical force or physical violence), 14-928 (threats) and 14-929 (unconscious, etc.) contain separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-927, 14-928, 14-929 and 14-930 are the same as Instructions 14-921, 14-922, 14-923 and 14-924, respectively, with the additional element of personal injury to the victim.

Instruction 14-930 combines Instructions 14-927, 14-928 and 14-929 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. 30-9-10C NMSA 1978.

See commentaries to Instructions 14-902, 14-903 and 14-904 for a discussion of each of the definitions of force or coercion.

See also the commentary to Instruction 14-921.

ANNOTATIONS

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; 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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;]
(name of victim)
[OR]

[caused ..... (name of victim) to touch the *3* of the defendant;]

2. The defendant*2*

[used threats of physical force or physical violence against .....(name of victim ..... or other person)
[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 13 but less than 18 years old;

[6. ..... (name of victim) was not the spouse of the defendant;]*6*

7. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

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, must also be given.

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Statutory reference. - Sections 30-9-13A(2)(b) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-927.

ANNOTATIONS

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; 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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;]
(name of victim)

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. .....(name of victim) was [unconscious]*2* [asleep] [physically helpless] [suffering froma 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 .....

5. ..... (name of victim) was at least 13 but less than 18 years old;

[6. ..... (name of victim) was not the spouse of the defendant;]*5*

7. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

5. 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, must also be given.

****

Statutory reference. - Sections 30-9-13A(2)(b) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-927.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the ..... of .....;] (name of victim)
[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

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 ..*5*); AND
.... (name of victim) believed that the defendant would carry out the threat;]
[OR]

[..... .....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (suffering froma 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 .....

4. ..... (name of victim) was at least 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the defendant;]7

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

7. 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, must also be given.

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Statutory reference. - Sections 30-9-13A(2)(b) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-927.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of ..... (name of victim)

[OR]

[caused ..... (name of victim) to touch the ..... 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 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the defendant;]*4*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

****

Statutory reference. - Sections 30-9-13A(2)(c) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-13A(2)(c) NMSA 1978: third degree felony.

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. Instructions 14-931 (physical force or physical violence), 14-932 (threats) and 14-933 (unconscious, etc.) contain separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-931, 14-932, 14-933 and 14-934 are the same as Instructions 14-921, 14-922, 14-923 and 14-924, respectively, with the additional element of "aided or abetted."

Instruction 14-934 combines Instructions 14-931, 14-932 and 14-933 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.

See the commentary to Instruction 14-910 for a discussion of the element of "aided or abetted."

See commentaries to Instructions 14-902, 14-903 and 14-904 for a discussion of each of the definitions of "force or coercion."

See also the commentary to Instruction 14-921.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of .....;]
(name of victim)

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant*2*

[used threats of physical force or physical violence against .....(name of victim ..... or other person)

[OR]

[threatened .....

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 13 but less than 18 years old;

[6. ..... (name of victim) was not the spouse of the defendant;]*5*

7. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

5. 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, must also be given.

****

Statutory reference. - Sections 30-9-13A(2)(c) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-931.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of ..... (name of victim)

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. ..... (name of victim) was [unconscious]*2* [asleep] [physically helpless] [sufferingfrom 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. ..... (name of victim) was at least 13 but less than 18 years old;

[6. ..... (name of victim) was not the spouse of the defendant;]*4*

7. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

4. 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, must also be given.

****

Statutory reference. - Sections 30-9-13A(2)(c) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-931.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond

a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the ..... of ..... (name of victim)
[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

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 ..*5*); AND

.... (name of victim) believed that the defendant would carry out the threat;]
[OR]

[.....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (suffering froma 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 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the defendant;]*6*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-13A(2)(c) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-931.

ANNOTATIONS

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; 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*2*

[touched or applied force to the ..... of ..... (name of victim)

[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. The defendant was armed with and used .....

3. ..... (name of victim) was at least 13 but less than 18 years old;

[4. ..... (name of victim) was not the spouse of the defendant;]*5*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternatives.

3. Name one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

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 bracketed sentence upon request if sufficient evidence has been presented to raise the issue of spousal relationship. The definition of "spouse," Instruction 14-983, must also be given.

****

Statutory reference. - Section 30-9-13A(2)(d) NMSA 1978.

Committee commentary. - See Section 30-9-13A(2)(d) NMSA 1978: third degree felony.

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 Instruction 14-914 for a discussion of the meaning of "while armed with a deadly weapon."

See also the commentary to Instruction 14-921.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant*3*

[touched or applied force to the ..... of ..... (name of victim)
[OR]

[caused ..... (name of victim) to touch the ..... of the defendant;]

2. [The defendant (used threats of physical force or physical violence against..)*3* (name of victim or other person) (OR) (threatened to ..... AND .....(name of victim) believed that the defendant would carry out the threat;]
[OR]

[.....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (sufferingfrom 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*; (name of victim) OR the defendant acted with thehelp or encouragement of one or more persons;

4. ..... (name of victim) was at least 13 but less than 18 years old;

[5. ..... (name of victim) was not the spouse of the

defendant;]7

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 four types of criminal sexual contact of a minor 13 to 18 in the third degree in Section 30-9-13A(2) NMSA 1978: (1) contact 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 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 13 to 18 in the third degree, the appropriate instruction or instructions must also be given: (1) Instruction 14-926 for contact by a person in position of authority; (2) Instruction 14-935 for contact 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 one or more of the following parts of the anatomy touched: "buttock," "breast," "groin," "anus," "mons pubis," "penis," "testicles," "mons veneris," "vulva" or "vagina." When definitions are provided in Instruction 14-981, they must be given after this instruction; otherwise, no definition need be given unless the jury requests one.

5. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

6. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

7. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-13A(2)(b) and 30-9-13A(2)(c) and 30-9-10A NMSA 1978.

Committee commentary. - See Sections 30-9-13A(2)(b) and 30-9-13A(2)(c) NMSA 1978: third degree felony.

This instruction combines Instructions 14-927 (physical force or physical violence; personal injury), 14-928 (threats; personal injury), 14-929 (unconscious, etc.; personal injury), 14-931 (physical force or physical violence; aided or abetted), 14-932 (threats; aided or abetted) and 14-933 (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 UJI should be given for these essential elements.

This combined instruction does not include Instruction 14-926 (position of authority), nor Instruction 14-935 (deadly weapon). It is awkward and confusing to combine either with the other third degree sexual contacts because Instructions 14-926 and 14-935 contain no definitions of force or coercion. If the evidence also supports the giving of Instruction 14-926 or 14-935, that individual instruction should also be given.

See also commentary to Instruction 14-921.

ANNOTATIONS

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. Criminal sexual contact of a minor; unlawful defined.1

In addition to the other elements of criminal sexual contact of a minor, the State must prove beyond a reasonable doubt that the behavior was unlawful. For the behavior to have been unlawful it must have been done with the intent to arouse or gratify sexual desire, or to intrude upon the bodily integrity or personal safety of ..... (name of victim). Criminal sexual contact of a minor does not include a touching for purposes of [reasonable medical treatment]*2* [nonabusive (parental)*2* (or) custodial care].

USE NOTE

1. This instruction is to be used with UJI 14-925.

2. Use only applicable alternative.

[Effective October 1, 1992.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated August 13, 1992, this rule is effective October 1, 1992.

PART C
CRIMINAL SEXUAL PENETRATION

14-940. Chart.

SECTION 30-9-11 NMSA 1978

CRIMINAL SEXUAL PENETRATION

Third Degree, Second Degree and First Degree

REFER TO THE BOOK FOR THE PROPER TABLE

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 ..... 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 ..... of ..... (name of victim);]

2. The defendant used physical force or physical violence;

[3. ..... (name of victim) was not the spouse of the defendant;]*6*

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11C and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-11C NMSA 1978: third degree felony.

Instructions 14-941 (physical force), 14-942 (threats) and 14-943 (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 Instructions 14-902, 14-903 and 14-904 for a discussion of the definitions of "force or coercion."

Instruction 14-944 combines Instructions 14-941, 14-942 and 14-943, 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 UJI 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, Instruction 14-141.

The statute provides that criminal sexual penetration may be committed: (1) by unlawfully and intentionally causing another, other than one's spouse, 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 [other than one's spouse]. It is noted that the legislature used the terms "unlawful and intentional" and "other than one's spouse" in describing the first type of criminal sexual penetration, sexual intercourse, etc., but it did not use these terms in describing the second type of criminal sexual penetration, penetration with any other object. The committee was of the opinion that the legislature intended these terms to apply to both types of criminal sexual penetration.

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.

If the victim is the spouse of the defendant, sexual penetration is not a crime. However, Paragraph 4 of the instruction is not an essential element of the offense, upon which the court is required to instruct in every case. State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977). If there is sufficient evidence to raise the issue, and if the defendant requests, then Paragraph 4 should be given. See the commentary to Instruction 14-983 for a discussion of the meaning of "spouse."

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 Instruction 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." Instruction 14-981 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

Specific intent essential element of attempted sodomy. - As it is reversible error to fail to instruct regarding an essential element of the offense and as, even reading the instructions as a whole, there were no instructions regarding the required element of specific intent, the defendant's conviction for attempted sodomy was reversed and remanded for a new trial. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Not incumbent upon state to prove victim not wife. - In a rape case, 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, 90 N.M. 134, 560 P.2d 925 (1977).

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 ..... 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 ..... of .....;]
(name of victim)

2. The defendant*2*

[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. ..... (name of victim) was not the spouse of the defendant;]7

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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 30-9-10A(3) NMSA 1978 for examples of types of threats.

7. 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, must also be given.

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Statutory reference. - Sections 30-9-11C and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-941.

ANNOTATIONS

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 .... 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 ..... of .....;]
(name of victim)

2. ..... (name of victim) was [unconscious]*2* [asleep] [physically helpless] [sufferingfrom 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 not the spouse of the defendant;]*6*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11C and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-941.

ANNOTATIONS

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 ..... 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 ..... 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]

[.....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (sufferingfrom 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 not the spouse of the defendant;]*8*

4. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 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 must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

8. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11C and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-941.

ANNOTATIONS

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 16 year old; 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 13 to 16 by use of coercion by a person in a position of authority [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*2*

[caused ..... (name of victim) to engage in .....*3*;]

[OR]

[caused the insertion, to any extent, of a .....*4*into the ..... of .....;] (name of victim)

2. ..... (name of victim) was at least 13 but less than 16 years old;

3. The defendant was a person who by reason of his relationship to .....(name of victim) was able to exercise undue influence over .....(name of victim) and used his position ofauthority to coerce her to submit to the act;

[4. ..... (name of victim) was not the spouse of the defendant;]*6*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

****

Statutory reference. - Section 30-9-11B(1) NMSA 1978.

Committee commentary. - See Section 30-9-11B(1) NMSA 1978: second degree felony.

This instruction contains the essential elements of criminal sexual penetration of a child 13 to 16 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," with its three definitions, 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.

See also the commentary to Instruction 14-941.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 41 Am. Jur. 2d Incest § 10; 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 ..... 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 ..... of .....;]
(name of victim)

2. The defendant used physical force or physical violence;

3. The defendant's acts resulted in *6;*

[4. ..... (name of victim) was not the spouse of the defendant;]7

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 must be given after this instruction.

6. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

7. 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, must also be given.

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Statutory reference. - Sections 30-9-11B(2) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-11B(2) NMSA 1978: second degree felony.

Four separate instructions have been prepared for criminal sexual penetration which results in personal injury to the victim. Instructions 14-946 (physical force or physical violence), 14-947 (threats) and 14-948 (unconscious, etc.) contains separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-946, 14-947, 14-948 and 14-949 are the same as Instructions 14-941, 14-942, 14-943 and 14-944, respectively, with the additional element of personal injury to the victim.

Instruction 14-949 combines Instructions 14-946, 14-947, and 14-948 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. 30-9-10C NMSA 1978.

See commentaries to Instructions 14-902, 14-903, and 14-904 for a discussion of the definitions of "force or coercion."

See also the commentary to Instruction 14-941.

ANNOTATIONS

This instruction is appropriate when offense is fellatio, rather than UJI 14-906 stating the elements of criminal sexual contact. State v. Gabaldon, 92 N.M. 93, 582 P.2d 1306 (Ct. App. 1978).

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, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

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 ..... 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 ..... of .....;]
(name of victim)

2. The defendant*2*

[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. ..... (name of victim) was not the spouse of the defendant;]*8*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

7. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

8. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11B(2) and 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-946.

ANNOTATIONS

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 ..... 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 ..... of .....;]
(name of victim)

2. .....(name of victim) was [unconscious]*2* [asleep] [physically helpless] [sufferingfrom 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. ..... (name of victim) was not the spouse of the defendant;]7

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 must be given after this instruction.

6. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

7. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11B(2) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-946.

ANNOTATIONS

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 ..... 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 ..... 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 thethreat;]
[OR]

[.....
.....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (suffering froma 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. ..... (name of victim) was not the spouse of the defendant;]*9*

5. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 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 must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

8. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

9. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11B(2) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-946.

ANNOTATIONS

Evidence not found to support third degree instruction. - Where there was no evidence tending to establish that the criminal sexual penetration was committed by force or coercion without resultant personal injury, since the only evidence was that the defendant used force which resulted in personal injury, beating the victim with his fists, twisting her breasts and pulling her hair immediately prior to sexual intercourse, there was no evidence supporting an instruction on third degree criminal sexual penetration. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

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 ..... 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 ..... 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. ..... (name of victim) was not the spouse of the defendant;]*6*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

****

Statutory reference. - Sections 30-9-11B(3) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-11B(3) NMSA 1978: second degree felony.

Four separate instructions have been prepared for criminal sexual penetration when the perpetrator is aided or abetted by one or more persons. Instructions 14-950 (physical force or physical violence), 14-951 (threats), 14-952 (unconscious, etc.) contain separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-950, 14-951, 14-952 and 14-953 are the same as Instructions 14-941, 14-942, 14-943 and 14-944, respectively, with the additional element of "aided or abetted."

Instruction 14-953 combines Instructions 14-950, 14-951 and 14-952 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.

See the commentary to Instruction 14-910 for a discussion of the element of "aided or abetted."

See commentaries to Instructions 14-902, 14-903 and 14-904 for a discussion of each of the definitions of "force or coercion."

See also the commentary to Instruction 14-941.

ANNOTATIONS

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, 93 N.M. 504, 601 P.2d 737 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

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 ..... 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 ..... of .....;]
(name of victim)

2. The defendant*2*

[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 acted with the help or encouragement of one or more persons;

[5. ..... (name of victim) was not the spouse of the defendant;]7

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 must be given after this instruction.

6. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

7. 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, must also be given.

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Statutory reference. - Sections 30-9-11B(3), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-950.

ANNOTATIONS

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 ..... 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 ..... 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. ..... (name of victim) was not the spouse of the defendant;]*6*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11B(3) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-950.

ANNOTATIONS

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 ..... 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 ..... 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 ..... AND
.....(name of victim) believed that the defendant would carry out the threat;]
[OR]

[..... (name of victim) was (unconscious)*3* (asleep) (physically helpless) (sufferingfrom 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 not the spouse of the defendant;]*8*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 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 must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

8. 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, must also be given.

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Statutory reference. - Sections 30-9-11B(3) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-950.

ANNOTATIONS

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 ..... 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 ..... of .....;]
(name of victim)

2. The defendant committed the act during the commission of *6*;

[3. ..... (name of victim) was not the spouse of the defendant;]7

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 must be given after this instruction.

6. Identify the felony, and give the essential elements unless they are covered in an essential element instruction for the substantive offense.

7. 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, must also be given.

****

Statutory reference. - Section 30-9-11B(4) NMSA 1978.

Committee commentary. - See Section 30-9-11B(4) NMSA 1978: second degree felony.

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.

The felony must be other than a violation of 30-9-10 through 30-9-14 NMSA 1978. It might have to be other than an aggravated assault or battery on the victim. Cf. the commentary to Instruction 14-202, felony murder.

Note the language that the felony must be "in the commission of any other felony." The language might be construed to mean within the "res gestae" of the felony. See commentary to Instruction 14-202.

See also the commentary to Instruction 14-941.

ANNOTATIONS

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 ..... 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 ..... of .....;]
(name of victim)

2. The defendant was armed with and used *6*;

[3. ..... (name of victim) was not the spouse of the defendant;]7

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 must be given after this instruction.

6. 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 which, when used as a weapon, could cause death or very serious injury."

7. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-9-11B(5) NMSA 1978.

Committee commentary. - See Section 30-9-11B(5) NMSA 1978: second degree felony.

This instruction contains the essential elements of criminal sexual penetration when the perpetrator is armed with a deadly weapon. See the commentary to Instruction 14-914 for a discussion of "armed with a deadly weapon."

See also the commentary to Instruction 14-941.

ANNOTATIONS

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 .....] 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 .....
[OR]

[caused the insertion, to any extent, of a .....*5* into the ..... 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]

[..... .....(name of victim) was (unconscious)*3* (asleep) (physically helpless) (sufferingfrom 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 helpor encouragement of one or more persons;

[4. ..... (name of victim) was not the spouse of the defendant;]*9*

5. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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) Instruction 14-945 for penetration of a person 13 to 16 years old by a person in a position of authority; (2) Instruction 14-954 for penetration during the commission of a felony; (3) Instruction 14-955 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 Instruction 14-982 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 14-980 must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

8. Name victim and describe personal injury or injuries. See Section 30-9-10C NMSA 1978 for types of personal injuries.

9. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11B(2), 30-9-11B(3) and 30-9-10A NMSA 1978.

Committee commentary. - See Section 30-9-11B NMSA 1978: second degree felony.

This instruction combines Instructions 14-946 (physical force or physical violence; personal injury), 14-947 (threats; personal injury), 14-948 (unconscious, etc.; personal injury), 14-950 (physical force or physical violence; aided or abetted), 14-951 (threats; aided or abetted) and 14-952 (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 UJI should be given for these essential elements.

This combined instruction does not include Instruction 14-945 (position of authority), nor Instruction 14-954 (commission of a felony) nor Instruction 14-955 (deadly weapon). It is awkward and confusing to combine these methods of commission of the offense with the other second degree sexual penetrations because Instructions 14-945, 14-954 and 14-955 contain no definitions of "force or coercion." If the evidence also supports the giving of Instructions 14-945, 14-954 and 14-955, that individual instruction should also be given.

See the commentary to Instruction 14-941.

ANNOTATIONS

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.

14-957. 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 13 [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*2*

[caused ..... (name of victim) to engage in .....*3*;]

[OR]

[caused the insertion, to any extent, of a .....*4* into the ..... of .....;]
(name of victim)

2. ..... (name of victim) was 12 years of age or younger;

[3. ..... (name of victim) was not the spouse of the defendant;]*6*

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-9-11A(1) NMSA 1978.

Committee commentary. - See Section 30-9-11A(1) NMSA 1978: first degree felony.

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 40A-9-3 and 40A-9-9 NMSA 1953 Comp. (now repealed) (a reasonable belief that the child was 16 years of age or older is a defense to statutory rape and sexual assault, respectively).

If the child is "spouse" to the defendant, sexual penetration is not a crime. Marriage may be permitted at any age by the children's court or family court. 40-1-6B NMSA 1978.

See also the commentary to Instruction 14-941.

ANNOTATIONS

Compiler's note. - Sections 40A-9-3 and 40A-9-9, 1953 Comp., referred to in the second sentence of the second paragraph of the committee commentary, were repealed by Laws 1975, ch. 109, § 8.

Phraseology of instruction not prejudicial. - In a prosecution for criminal sexual penetration in the first degree, the defendant is not prejudiced by the giving of jury instructions, such as this instruction, referring to "sexual intercourse" or "penis." State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

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, 97 N.M. 232, 638 P.2d 1077 (1982).

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 ..... 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 ..... 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. ..... (name of victim) was not the spouse of the defendant;]*8*

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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. The definition of "great bodily harm," Instruction 14-131, must be given after this instruction.

7. The definition of "great mental anguish," Instruction 14-980, must be given after this instruction.

8. 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, must also be given.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11A(2) and 30-9-10A(1) NMSA 1978.

Committee commentary. - See Section 30-9-11 A(2) NMSA 1978: first degree felony.

Four separate instructions have been prepared for criminal sexual penetration which results in great bodily harm or great mental anguish to the victim. Instructions 14-958 (physical force or physical violence), 14-959 (threats) and 14-960 (unconscious, etc.) contain separate definitions for "force or coercion." 30-9-10A NMSA 1978.

Instructions 14-958, 14-959, 14-960 and 14-961 are the same as Instructions 14-941, 14-942, 14-943 and 14-944, respectively, with the additional element of great bodily harm or great mental anguish to the victim.

Instruction 14-961 combines Instructions 14-958, 14-959 and 14-960 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 definitions of "great bodily harm" and "great mental anguish" are contained in Instructions 14-131 and 14-980, respectively.

See also the commentary to Instruction 14-941.

ANNOTATIONS

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 ..... 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 ..... into the ..... of ..... (name of victim);]

2. The defendant*1*

[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 [great bodily harm*7*]*1* [great mental anguish*8*]to .....; (name of victim)

[5. ..... (name of victim) was not the spouse of the defendant;]*9*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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 30-9-10A(3) NMSA 1978 for examples of types of threats.

7. The definition of "great bodily harm," Instruction 14-131, must be given after this instruction.

8. The definition of "great mental anguish," Instruction 14-980, must be given after this instruction.

9. 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, must also be given.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-9-11A(2), 30-9-10A(2) and 30-9-10A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-958.

ANNOTATIONS

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 ..... 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*;]

[OR]

[caused the insertion, to any extent, of a .....*4* into the ..... of .....;]

(name of victim)

2. .... (name of victim) was [unconscious]*1* [asleep] [physically helpless] [sufferingfrom 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 anguish7]to .....; (name of victim)

[5. ..... (name of victim) was not the spouse of the defendant;]*8*

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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. The definition of "great bodily harm," Instruction 14-131, must be given after this instruction.

7. The definition of "great mental anguish," Instruction 14-980, must be given after this instruction.

8. 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, must also be given.

****

Statutory reference. - Sections 30-9-11A(2) and 30-9-10A(4) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-958.

ANNOTATIONS

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 ..... 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 .....
[OR]

[caused the insertion, to any extent, of a .....*5* into the ..... 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) (OR)
(threatened to .....7); (name of victim) ANDbelieved that the defendant would carry out the threat;]
[OR]

[..... (name of victim) was (unconscious)*2* (asleep) (physically helpless) (sufferingfrom 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. ..... (name of victim) was not the spouse of the defendant;]*10*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. This instruction sets forth the elements of all three types of "force or coercion" in Section 30-9-10A 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 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 must be given after this instruction.

7. Describe threats used against the victim or another in layman's language. See Section 30-9-10A(3) NMSA 1978 for examples of types of threats.

8. The definition of "great bodily harm," Instruction 14-131, must be given after this instruction.

9. The definition of "great mental anguish," Instruction 14-980, must be given after this instruction.

10. 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, must also be given.

****

Statutory reference. - Sections 30-9-11A(2) and 30-9-10A NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-958.

ANNOTATIONS

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 ..... 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 ..... 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)

[4 ..... (name of victim) was not the spouse of the defendant];*6*

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 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, must also be given.

[As adopted, effective August 1, 1989.]

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Statutory reference. - Sections 30-9-11D NMSA 1978.

Committee commentary. - See Section 30-9-11D NMSA 1978. See also Instruction 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 Section 40-1-5 and 40-1-6 NMSA 1978 for marriage of minors.

ANNOTATIONS

Effective dates. - Pursuant to a court order dated May 2, 1989, this instruction is effective for cases filed in the district courts on or after August 1, 1989.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each ofthe following elements of the crime:

1. The defendant exposed his .....*2* to public view;

[2. The defendant did this before a child under the age of 13;]*3*

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 Instruction 14-981 must be given after this instruction.

3. Use this bracketed element only if applicable.

****

Statutory reference. - Section 30-9-14 NMSA 1978.

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.), cert. denied, 80 N.M. 234, 453 P.2d 597 (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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Lewdness, Indecency, and Obscenity § 41.

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.

14-971. Enticement of a child; essential elements.1

For you to find the defendant guilty of enticement of a child [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*3*

[(enticed)*3* (persuaded) (attempted to persuade) .....(name of child) to enter a .....

[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 ....., 19 ...

USE NOTE

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.

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Statutory reference. - Section 30-9-1 NMSA 1978.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 43 C.J.S. Infants § 93.

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.

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See 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.

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.

*** * * * * * * * * * * * * * * * * ***

Neither 30-9-12 nor 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 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 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.

*** * * * * * * * * * * * * * * * * * ***

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."

ANNOTATIONS

Cunnilingus is not limited to acts involving penetration. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

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.

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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 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, 101 N.M. 38, 677 P.2d 1074 (Ct. App. 1984).

CHAPTERS 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 ..... 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 leastintrusion constitutes an entry;]*2*

2. This property was not open to the public at that time;

3. The defendant knew or should have known that he did not

have permission to enter;

4. This happened in New Mexico on or about the ... day of ...., 19 ...

USE NOTE

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

2. Use bracketed phrase if entry is in issue.

****

Statutory reference. - Section 30-14-4A(1) NMSA 1978.

Committee commentary. - UJI 14-1401 is limited to criminal trespass of public property.

UJI 14-1402 and UJI 14-1403 apply to criminal trespass of private or state or local government property.

In State v. Cutnose, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), Chief Judge Wood carefully traced the history of New Mexico's criminal trespass statutes. It is helpful to review this decision, and subsequent statutory enactments in deciding which statute is applicable to public and private property criminal trespasses. In *Cutnose,* Judge Wood concluded that former Section 40A-14-1 NMSA 1953 (now Section 30-14-1 NMSA 1978) did not apply to remaining upon public property and that since Paragraph (2) of Subsection A of Section 40A-14-5 NMSA 1953 (present Section 30-14-4) had previously been declared unconstitutional in State v. Jaramillo, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972) there was no statute dealing with remaining on public property without consent.

In 1975, presumably following Judge Wood's opinion in State v. Cutnose, the New Mexico legislature enacted Chapter 52, Laws 1975. Section 1 of this 1975 act enacted a new Subsection B to Section 40A-14-1 NMSA 1953 (now Subsection B of 30-14-1 NMSA 1978). As amended by the 1981 legislature, present Section 30-14-1 NMSA 1978 provides that criminal trespass also includes unlawfully entering or remaining upon lands owned by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian of the lands.

In addition to adding a new Subsection B to present Section 30-14-1 NMSA 1978, Chapter 52, Laws 1975 also amended former Section 40A-20-10 NMSA 1953 (now Section 30-20-13 NMSA 1978) prohibiting interference with the lawful use of public property. Subsection C of present Section 30-20-13 NMSA 1978 also provides that it is criminal trespass for a person to willfully refuse or fail to leave the property of, or any building owned by, the state or its political subdivisions. This would seem to apply to the

same unlawful conduct covered by Subsection B of Section 30-14-1 NMSA 1978; however, Section 30-20-13 adds a further element that the trespasser must also threaten to commit or incite others to commit any act which would disrupt the lawful mission, processes, procedures or function of the property, building or facility involved.

Prior to the 1975 amendment to Section 30-20-13 NMSA 1978 this section applied only to institutions of higher education and was enacted in 1970 as a part of a bill appropriating $1.00 to district attorneys.

It is assumed that the 1975 session of the legislature was responding to the court of appeals decision in *Cutnose,* supra, when it amended both Sections 30-14-1 and 30-20-13 NMSA 1978 to make both sections of the law applicable to property owned or under the control of the state or its political subdivisions. The legislature is also presumed to have been aware that Section 30-20-13 NMSA 1978 had been found to be constitutional in State v. Silva, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974). These two sections have been construed together as creating separate offenses. See UJI 14-1401.

Section 30-14-4 NMSA 1978 also governs unlawfully entering a public building. The provisions of this section which were not ruled unconstitutional in *Cutnose,* supra, are deemed by the committee to have been superseded by Sections 30-14-1 and 30-20-13 NMSA 1978 insofar as they relate to buildings owned or under the control of governmental entities. Section 30-14-4 NMSA 1978 is thought to be the applicable law for "wrongful use" of property owned or controlled by private educational institutions, religious organizations, charitable organizations and recreational associations, even though the elements of the crime are identical to Section 30-14-1 NMSA 1978.

Section 30-14-6 governs trespass cases when the property is not owned or controlled by the state or a political subdivision, but is posted or fenced.

"Lands" as used in Section 30-14-1 NMSA 1978 includes buildings and fixtures. State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

A criminal trespass is a lesser included offense of the crime of burglary. See State v. Ruiz, supra.

ANNOTATIONS

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, this meets the requirement of this rule, and it was no defense that defendant did not believe warnings applied to press. State v. McCormack, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).

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 ..... 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) withoutpermission from the [owner]*2* [occupant] [custodian] of that property; [the least intrusion constitutes an entry;]*3*

2. The defendant knew or should have known that permission to enter or remain had been [denied]*2* [withdrawn];

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternative. If custodian is used, give Instruction 14-1420, Custodian; definition.

3. Use bracketed phrase if entry is in issue.

****

Statutory reference. - Section 30-14-1A and B and 30-14-1.1 NMSA 1978.

Committee commentary. - UJI 14-1402 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 should be used instead of UJI 14-1402 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.

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

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 ..... 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 ....., 19 ....

USE NOTE

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.

****

Statutory reference. - Section 30-14-1C NMSA 1978.

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

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
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 ..... [the dismantling of .....

3. This happened in New Mexico on or about the ..... day of ....., 19 ....

USE NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-14-8 NMSA 1978.

Committee commentary. - The territory of New Mexico passed New Mexico's first "breaking and entering" statute in 1876 (Laws 1876, ch. 9, § 4) which was codified as § 1524 in the 1915 Code. This original statute dealt with unlawfully entering into an occupied home "by breaking or piercing the wall, or without breaking the same, climb upon any roof or in any other manner . . ." (1915 Code § 1524). This section remained exactly the same until its repeal in 1963 (Laws 1963, ch. 303, § 30-1) except for a change in title from "Unlawfully entering house" to "Entering house without consent - Breaking with intent to enter."

Breaking and entering as a separate offense undoubtedly arose out of common law burglary. To constitute burglary at common law, the following elements had to have been proven: (1) breaking and; (2) entering of; (3) a dwelling house; (4) of another; (5) in the nighttime; (6) with intent to commit a felony therein. The requirements of breaking and entering have remained the same while dwelling house has been expanded to include "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable" (30-16-3 NMSA 1978); the requirement that the act take place in the nighttime has been eliminated in most jurisdictions (New Mexico included), and; the intent to commit a felony has been changed in New Mexico to include "the intent to commit a felony or theft therein." (30-16-3 NMSA 1978.)

"Statutory burglary" is the term used to describe acts which are similar to, but do not include all the requirements of, common law burglary. Such legislative expansion of the common law crime of burglary was necessary because that social interest intended to be protected by common law burglary, i.e., privacy of one's home and belongings, was not adequately protected by strict adherence to the common law burglary requirements.

Common types of statutory burglary involve unlawful invasions which would be common law burglary except that they do not require one or more or any of the following: That the misconduct (1) occur during the nighttime, or (2) include a breaking, or (3) involve a dwelling or building within the curtilage, or (4) an intended crime which constitutes a felony or petty larceny.

R. Perkins, Perkins on Criminal Law, 2nd Ed., Ch. 3, § 1H, pp. 215-16.

New Mexico's breaking and entering statute is a type of statutory burglary. It requires no intent to commit a crime upon entering, only the breaking and entering need be shown. The doctrine of "breaking," however, appears to be more specific than when used in the context of burglary. In burglary, "the breaking need not involve force or violence. Thus, the opening of a door or window which was closed but not locked in any way was a sufficient breaking." LaFave & Scott, Criminal Law, Ch. 8, § 96, p. 708. The breaking and entering statute specifically requires "the breaking or dismantling of any part . . . or breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft,

dwelling or other structure." (30-14-8 NMSA 1978). To put it another way, if a person opens an unlocked door or window to enter a dwelling with the intent merely to go in and lie down, that person would be guilty of neither burglary nor breaking and entering. It would not be burglary since lying down does not constitute a felony or theft, and it would not be breaking and entering since the door was not locked and no breaking or dismantling occurred. In this instance, the individual would most likely be guilty of criminal trespass.

As in burglary, though, the use of fraud or deception to gain entrance into the dwelling, aircraft, watercraft, vehicle, or other structure will be deemed constructive entry. The theory behind this is that there was actually no consent to enter given since the consent was based on fraud or deception. Also, the mere intrusion of a finger will constitute enough of an entry. LaFave & Scott, supra, p. 710.

It is unclear why the legislature failed to reenact a breaking and entering provision in the new Criminal Code adopted in 1963. Perhaps they surmised that if the crime committed did not meet all of the requirements of burglary (e.g., no intent to commit a felony or theft), then the criminal trespass statute (30-14-1 NMSA 1978) would be an adequate offense to charge. However, the 1980 case, State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980), pointed out the need for a law making it an offense to break and enter where there is no intent to commit a felony or theft, or where, because of some impairment, it was impossible for the defendant to form the requisite intent to commit a felony or theft.

In *Ruiz,* the issue was whether the defense should have been allowed to introduce hospital records to support the defendant's contention that he had ingested PCP (phencyclidine, aka "angel dust") just prior to committing the alleged burglary. This introduction of evidence should have been allowed, said the court of appeals, because it was crucial to the defendant's "no intent" defense to the burglary charge. Intoxication may be shown to negate the specific intent required to prove burglary under 30-16-3 NMSA 1978. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct. App. 1971). The question of actual intoxication, and further, whether such intoxication prevented the defendant from being able to form the specific intent required for burglary are for the jury to answer.

In *Ruiz,* it was determined that an instruction on criminal trespass should have been given, since the court held that criminal trespass is a lesser included offense of burglary of a dwelling. See UJI 14-1401 through 14-1403 for criminal trespass instruction. (Criminal trespass is *not* a lesser included offense when the burglary is of a vehicle, watercraft or aircraft, since they are not real property within the meaning of Section 30-14-1 NMSA 1978). However, breaking and entering does encompass vehicles, watercraft and aircraft, so this instruction may be used as a lesser included offense of burglary, if intent is at issue. Furthermore, while criminal trespass is a misdemeanor offense, breaking and entering is a fourth degree felony with a more severe penalty than trespass.

PART C
DEFINITIONS

14-1420. Custodian; definition.1

The term "custodian" means any person including a law enforcement officer who has charge or control of the property, building or facility.

USE NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction is to be used 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. 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, supra.

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 Instruction 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 .....] 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 ....., 19 ..

USE NOTE

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.

[Effective October 1, 1992.]

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-15-1 NMSA 1978.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated August 13, 1992, this rule is effective October 1, 1992.

14-1502 to 14-1509. Reserved.

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 NOTE

This instruction is to be used with UJI 14-1501.

[Effective October 1, 1992.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated August 13, 1992, this rule is effective October 1, 1992.

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 ..... 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 $ .....

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 ....., 19 ...

USE NOTE

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

2. See Instruction 14-1603 if "asportation" is in issue.

3. See Instruction 14-1602 for definition of market value.

4. If the charge is a third degree felony, (over $2,500), use $2,500 in blank. If the charge is a fourth degree felony, (over $100), use $100 in blank.

5. This bracketed provision should not be used if: (a) the property is a firearm with a value of less than $2,500; or (b) if the property is livestock. In either case, value is not in issue.

****

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, Instruction 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

This instruction and UJI Crim. 14-141 correctly state law applicable to larceny. Lopez v. State, 94 N.M. 341, 610 P.2d 745 (1980).

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, 91 N.M. 296, 573 P.2d 230 (Ct. App.), cert. denied, 91 N.M. 249, 572 P.2d 1257 (1977).

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, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 110 N.M. 525, 797 P.2d 314 (Ct. App. 1990).

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, 113 N.M. 339, 825 P.2d 1249 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Larceny § 174.

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.

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 .....*2*.
(criminal act)

USE NOTE

1. For use if market value is in issue. This instruction should be given immediately after Instruction 14-1601, 14-1640, 14-1641 or 14-1650.

2. Theft, receipt of stolen goods, etc.

*** * * * * * * * * * * * * * * * * * ***

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 § 45.

52A C.J.S. Larceny § 147.

14-1603. Larceny; "carried away"; defined.1

"Carried away" means moving the property from the place where it was kept or placed by the owner.

USE NOTE

1. This instruction is to be given with Instructions 14-1601, 14-1620 and 14-1621 when there is a question as to whether the evidence establishes the element of asportation.

*** * * * * * * * * * * * * * * * * * ***

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, 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 § 15.

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 ..... 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 $ .....

3. This merchandise was offered for sale to the public in a store;]*6*

4. At the time he 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 ..., 19 ...

USE NOTE

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

2. Use Instruction 14-130 if "possession" is in issue.

3. Use applicable alternative.

4. See Instruction 14-1602 for definition of market value.

5. If the charge is a third degree felony, (over $2,500), use $2,500 in blank. If the charge is a fourth degree felony, (over $100), use $100 in blank.

6. For use if there is an issue as to whether or not the items taken were merchandise in a store.

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Statutory reference. - Section 30-16-20 NMSA 1978.

Committee commentary. - UJI Crim. 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 Crim. 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 Crim. 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 Crim. 14-5061, Presumptions or inferences, should be given.

14-1611. Shoplifting; alteration of label or container; essential elements.

For you to find the defendant guilty of shoplifting [as charged in Count ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
The defendant [altered a label, price tag or marking upon .....]*2* (describe merchandise) [transferred
.....
.....from the container (in)*2* (on) which it was displayed (describe merchandise) to another container];

2. The [altered]*2* [transferred] merchandise had a market value*3* [over $ .....

[3. The (altered)*2* (transferred) 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 thevalue of this merchandise;

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use applicable alternative.

3. See Instruction 14-1602 for definition of market value.

4. 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 $100), use $100 in the blank.

5. For use if there is an issue as to whether or not the items were merchandise in a store.

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Statutory reference. - Section 30-16-20 NMSA 1978.

Committee commentary. - See commentary to UJI Crim. 14-1610.

PART C
ROBBERY

14-1620. Robbery; essential elements.

For you to find the defendant guilty of robbery [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 took and carried away*2* ....., (identify property) from ...., (name of victim) or from his immediate control intending to permanentlydeprive ..... (name of victim)

of the property; [the .....(property) had some value;]*3*

2. The defendant took the ..... (property) by [force or violence]*4* [or] [threatenedforce or violence];

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use Instruction 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.

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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, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Robbery § 10.

77 C.J.S. Robbery § 49.

14-1621. Armed robbery; essential elements.

For you to find the defendant guilty of armed robbery [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 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 .....

3. The defendant took the .....(property) by [force or violence]*5* [or] [threatenedforce or violence];

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

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, 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 § 49.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered .....*2* (identify structure) without permission; [the least intrusionconstitutes an entry;]*3*
When the defendant entered the ..... (name of structure) he intended to commit [a theft] [or]
[..... (name of felony) when he got inside;

3. This happened in New Mexico on or about the ... day of ...., 19 ...

USE NOTE

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

2. If the charge is burglary of a dwelling house, Instruction 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.

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Statutory reference. - Section 30-16-3 NMSA 1978.

Committee commentary. - See § 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 Instruction 14-6002.

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

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 NOTE

1. For use in conjunction with Instruction 14-1630.

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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

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, 92 N.M. 274, 587 P.2d 52 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

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, 96 N.M. 366, 630 P.2d 765 (Ct. App. 1981).

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.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered ..... (identify sturcture) without authorization or permission;

2. When the defendant entered the ..... (name of structure) he intended to commit [atheft] [or] [..... (name of felony) when he got inside;

3. The defendant

[was armed with a .....*3*]*4*

[armed himself with a .....*3* after entering]

[touched or applied force to ..... (name of victim) in a rude orangry manner while entering or leaving, or while inside];

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

3. 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."

4. Use the applicable bracketed phrase.

*** * * * * * * * * * * * * * * * * * ***

See § 30-16-4 NMSA 1978. See commentary to Instruction 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 § 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

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, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

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, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

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, 93 N.M. 773, 606 P.2d 183 (1980).

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 ..... 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) which are designedfor or commonly used in the commission of a burglary;

2. The defendant intended that these .....(tools or devices) be used for the purpose ofcommitting a burglary;

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. See Instruction 14-130 for definition of "possession," if the question of possession is in issue.

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See § 30-16-5 NMSA 1978. No New Mexico appellate decision defines burglary tools. See generally Annot., 33 A.L.R.3d 798 (1970).

Constructive possession is sufficient for conviction of possession of burglary tools. State v. Langdon, 46 N.M. 277, 127 P.2d 875 (1942). Cf. Annot., 51 A.L.R.3d 727, 810 (1973).

ANNOTATIONS

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 ..... 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][2] [misrepresented a fact] to ....., intending to deceive (name of victim) or cheat .....; (name of victim)

2. Because of the [promise][2] [misrepresentation] and .....'s (name of victim) relianceon it, defendant obtained ..... (describe property or state amount of money)

3. This ..... (property) belonged to someone other than the defendant; and

[4. The ..... (property) had a market value[4] of over $ .....

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 $2500" or "over $100."

4. See Instruction 14-1602 for definition of "market value."

5. Use this bracketed provision for property other than money.

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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, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969). See also Perkins, Criminal Law 297 (2d ed. 1969).

Fraudulent intent must exist at the time the defendant obtains the property or the crime is embezzlement. State v. Gregg, 83 N.M. 397, 492 P.2d 1260 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

"Fraudulent intent" and "fraudulently" are frequently defined as "with intent to defraud" or "with intent to cheat or deceive." See, e.g., State v. Probert, 19 N.M. 13, 140 P. 1108 (1914); State v. Harris, 313 S.W.2d 664 (Mo. 1958); People v. Leach, 168 Cal. App. 2d 463, 336 P.2d 573 (1959); Roderick v. State, 9 Md. App. 120, 262 A.2d 783 (1970); Clark v. State, 287 A.2d 660, appeal dismissed and cert. denied, 409 U.S. 812, 93 S. Ct. 139, 34 L. Ed. 2d 67 (Del. 1972). Perkins, supra. See also State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

ANNOTATIONS

Fraud includes the intentional taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations. State v. Thoreen, 91 N.M. 624, 578 P.2d 325 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

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, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

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, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Instruction amplifying element of crime of fraud properly refused. - See State v. Hamilton, 94 N.M. 400, 611 P.2d 223 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

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, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

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 ..... 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*; (describe property or amount of money [This ..... (property) had a market value*3* of over $ .....

2. The defendant converted this ..... (property or money) to his own use;

3. At the time he converted .....(property or money) to his own use, he intended to deprive theowner of his property;

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

"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 intended by the owner.

USE NOTE

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

2. If money is involved, state whether the amount charged is "over $2500" or "over $100."

3. See Instruction 14-1602 for definition of market value.

4. Use this bracketed provision for property other than money.

5. Use the applicable bracketed phrase.

****

See § 30-16-8 NMSA 1978. 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. 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, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L.Ed.2d 232 (1962). In contrast to the intent to permanently deprive in larceny, this crime requires only intent to deprive the owner of his property, even temporarily. State v. Moss, supra; State v. Prince, 52 N.M. 15, 18, 189 P.2d 993 (1948). Although the statute uses the word "fraudulent" to modify the intent to deprive, that concept is not specifically included in the instruction because the concept is adequately covered by the other elements. Cf. State v. Gregg, 83 N.M. 397, 492 P.2d 1260 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972). Implicit in the proof of embezzlement is the fact that the property belonged to another; it is not necessary, however, to require the jury to find ownership.

Embezzlement, like larceny, is divided into degrees depending on the value of the property. See generally LaFave & Scott, Criminal Law 654 (1972).

ANNOTATIONS

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, 99 N.M. 734, 663 P.2d 710 (Ct. App.), 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, N.M. , 861 P.2d 954 (1993).

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, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Embezzlement § 60.

29A C.J.S. Embezzlement § 49.

14-1642. Extortion; essential elements.

For you to find the defendant guilty of extortion [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

threatened*2*

[to injure the person or property of ..... (name of victim) or another]

[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) oranother]

[to expose any secret of ..... (name of victim) or another]

[to kidnap ..... (name of victim) or another],

intending to*3*

[obtain anything of value from .....] (name of victim)

[compel ..... (name of victim) to do something he would not have done]

[compel ..... (name of victim) to refrain from doing something he would have done];

2. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use applicable threatening acts.

3. Use the applicable element.

****

See § 30-16-9 NMSA 1978. See generally Perkins, Criminal Law 372-75 (2d ed. 1969). In a case decided under a prior wording of the statute, the court held that the indictment must follow the statute; that is, both the exact threat and the intent with which the threat was made must conform to the statutory language. State v. Strickland, 21 N.M. 411, 155 P. 719 (1916).

No New Mexico cases define "another." A Florida decision, interpreting the term in a similar statute, holds that a particular relationship to the victim need not be proved. It is only necessary to show that the relationship is such that the victim would meet the demands of the extortioner in order to prevent the threat from being carried out. State v. McInnes, 153 So.2d 854 (Fla. App. 1963). The defendant in McInnes threatened to accuse a corporation, in which the victim had an interest, of income tax evasion. The Model Penal Code uses the word "anyone." Model Penal Code § 223.4 (Proposed Official Draft 1962). The code draftsmen thought that "the relationship between the victim and the person he chooses to protect is immaterial." Model Penal Code § 206.3, Commentary (Tent. Draft No. 2; 1954) (numbering changed in official draft).

ANNOTATIONS

Crime of extortion is complete when person makes threat, intending to compel victim to do something he would not have done. State v. Wheeler, 95 N.M. 378, 622 P.2d 283 (Ct. App. 1980).

Evidence sufficient for charge of extortion to go to jury. - See State v. Barber, 93 N.M. 782, 606 P.2d 192 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Extortion, Blackmail, and Threats § 9.

Danger to reputation as within penal extortion statute requiring threat of "injury to the person,", 74 A.L.R.3d 1255.

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 ..... 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 falsesignature] [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) oranother;

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only the applicable alternative bracketed provisions.

****

See § 30-16-10 NMSA 1978. 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.

ANNOTATIONS

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, 66 N.M. 363, 348 P.2d 484 (1960).

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 ..... 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 .....*2* (name of writing) [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. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use only applicable alternative bracketed provisions.

****

See § 30-16-10B NMSA 1978. Since the writing must be forged, this instruction contains all of the elements of forgery. See commentary to Instruction 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 Instruction 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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Forgery § 20.

37 C.J.S. Forgery § 37.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
The ..... (describe the property in question) had been stolen [by another]*2*;

2. The defendant [acquired possession*3* of]*4* [kept] [disposed of] this property;

3. At the time he [acquired possession*3* of]*4* [kept] [disposed of] 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 $ .....

6. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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 Instruction No. 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 Instruction 14-1602 for definition of market value.

7. 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 $100) use $100 in the blank.

8. This bracketed provision need not be used if the property is a firearm with a value of less than $2,500.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-16-11 NMSA 1978.

Committee commentary. - See 40A-16-11 NMSA 1953 Comp. [30-16-11 NMSA 1978]. 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, 22 N.M. St. B. Bull. 18 (Ct. App., Jan. 6, 1983), the court held that, under Section 30-16-11 NMSA 1978, embezzled property does not come within the meaning of stolen property.

ANNOTATIONS

Intent-to-return defense. - The Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate. State v. Lopez, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

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, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Receiving and Transporting Stolen Goods § 3.

76 C.J.S. Receiving Stolen Goods § 21.

14-1651. Receiving stolen property; dealers; statutory presumptions on knowledge or belief.

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 NOTE

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 Instruction 14-1602 for the definition of market value.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 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 ..... 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 ...., 19 ...

USE NOTE

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

2. Use Instruction 14-130 "Possession" defined, if possession is in issue.

****

Statutory reference. - Section 66-3-505 NMSA 1978.

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 Crim. 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 Crim. 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 Crim. 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).

PART G
UNLAWFUL TAKING OF VEHICLE

14-1660. Unlawful taking of vehicle; essential elements.

For you to find the defendant guilty of unlawfully taking a vehicle [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 took ..... (describe vehicle) without the owner's consent;

2. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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

****

See 66-3-504 NMSA 1978. 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 Instruction 14-141. See 66-8-9 NMSA 1978 for the penalty for this crime.

ANNOTATIONS

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 ..... 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 $ ..... to .....; (identify person or company)

2. .... (identify person or company) gave [money]*4* [..... which had somevalue] 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 anotherby use

of the check;

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Instruction 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. Instruction 14-1675, the definition of credit, may be given immediately following this instruction if requested.

****

Statutory reference. - Section 30-36-1 et seq., NMSA 1978.

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, Instruction 14-1640, "cheat" does not mean to permanently deprive a person of his money or property.

14-1671. Worthless checks; statutory presumption regarding intent when defendant had no account.1

Evidence has been presented that the defendant delivered the check at a time when he had no account in the bank upon which the check was drawn. If you find that the defendant gave or issued the check and that at the time he gave or issued the check he had no account in the bank upon which the check was drawn, and that the bank refused

payment because the defendant had no account, then you may but are not required to find that the defendant knew that there were insufficient funds in or credit with the bank with which to pay the check, and that he intended to cheat or deceive someone by use of the check. Upon consideration of all of the evidence, you must be convinced beyond a reasonable doubt that the defendant did know that there were insufficient funds in or credit with the bank with which to pay the check, and that he did intend to cheat or deceive by use of the check.

USE NOTE

1. For use when there is sufficient evidence that the defendant was the maker of the check and that the check was dishonored because the defendant had no account, unless there is evidence that the defendant had credit with the bank.

[As amended, effective September 1, 1988.]

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-36-7A NMSA 1978.

Committee commentary. - This instruction sets out the statutory presumption contained in Section 30-36-7A NMSA 1978.

Essential elements are presumed; hence, the cautionary language of the last sentence is required. Evidence Rule 11-303(c). See also State v. Jones, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

This instruction should not be given if there is evidence of credit with the bank. When the issue is whether the defendant thought he had a credit arrangement with the bank, it would be inappropriate to infer an intent to defraud from the fact that the defendant had no checking account in the bank.

ANNOTATIONS

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in the second sentence, substituted "defendant gave or issued the check and that at the time he gave or issued the check" for "the defendant wrote, signed and delivered the check, and that at the time he delivered the check" and, in the last sentence, substituted "Upon consideration of all of the evidence, you must be convinced" for "However, you may do so only if on considering all of the evidence you are convinced".

14-1672. Worthless checks; statutory presumption regarding intent when notice of dishonor given.1

Evidence has been presented that the bank refused to pay the check. If you find that the defendant gave or issued the check, and that the bank upon which it was drawn refused to pay the check because of insufficient funds or credit in the account, and that thereafter the defendant was given notice that the check was not honored by the bank and that the defendant failed to pay the check in full within three (3) business days after such notice, then you may but are not required to find that the defendant knew that there were insufficient funds in the account and that the defendant intended to deceive or cheat someone by use of the check. You must consider all of the evidence in making your determination. In order to find the defendant guilty of ..... (set forth offense) [as charged in Count ..... you must be convinced beyond a reasonable doubt that the defendant did know that there were insufficient funds in the account and that the defendant intended to deceive or cheat by use of the check.

Notice may be given orally or in writing. [If you find that written notice was addressed to the defendant at his address as it appears on the check and was deposited in the United States mail as certified mail, then you may but are not required to find that the defendant was given notice. You must consider all of the evidence in making your determination. In order to find the defendant guilty of ..... (set forth offense) [as charged in Count ..... you must be convinced beyond a reasonable doubt that the defendant did receive such notice.]*3*

USE NOTE

1. For use when there is sufficient evidence that the defendant was the maker of the check and that the check was dishonored for insufficient funds or credit with the bank.

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

3. Use the bracketed material when there is evidence supporting this theory of notice.

[As amended, effective September 1, 1988.]

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Statutory reference. - Section 30-36-7B NMSA 1978.

Committee commentary. - This instruction sets out the statutory presumptions contained in Section 30-36-7B NMSA 1978. Essential elements are presumed; hence, the cautionary language of the last sentence of the first paragraph is required. Evidence Rule 11-303(c). See also State v. Jones, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

The last sentence of the bracketed material in the second paragraph is not required by Evidence Rule 11-303, because notice is not an essential element of the crime. However, the sentence is included because of what appears to be a statutory presumption on a statutory presumption in this instruction. See State v. Serrano, 74 N.M. 412, 394 P.2d 262 (1964).

Although the statute requires payment of the check and protest fees and costs to void the presumption, the instruction refers only to payment of the check. The inference of intent to defraud cannot rationally be drawn from a failure to pay protest fees.

The 1979 legislature amended Section 30-36-7 NMSA 1978, effective June 15, 1979, to require payment of a dishonored check within three business days. It is not clear whether "business day" means that part of any day, excluding Saturday, Sunday and legal holidays, the business of the payee is open to the public for carrying on substantially all of its functions or the business day of the financial institution. Legal holidays for banks are set forth in Section 12-5-2 NMSA 1978. See also Section 55-4-104(1)(c) NMSA 1978 for the definition of a banking "day." The general rule for computation of time is that the first day shall be excluded and the last included unless the last falls on a Saturday, Sunday or legal holiday, in which case the time is extended to include all of the next business day. See Section 12-2-2 NMSA 1978.

ANNOTATIONS

The 1988 amendment, effective for cases filed in the district courts on or after September 1, 1988, in the first paragraph, substituted "defendant gave or issued the check" for "defendant wrote, signed and delivered the check" and "to deceive or cheat someone" for "to defraud someone" in the second sentence, and, in the last sentence of the paragraph, substituted "the defendant intended to deceive or cheat" for "he did intend to defraud"; in both the first and second paragraphs, substituted the present language in the third and fourth sentences through "you must be convinced" for "However, you may do so only if on considering all of the evidence, you are convinced"; inserted Item 2 in the Use Note; and made minor stylistic changes.

14-1673. Defense of notice to payee that check is worthless.1

Evidence has been presented [as to Count ..... that ..... was on notice that the check was an insufficient funds check. If ..... *3* was on notice that the check was an insufficient funds check, then you must find the defendant not guilty [of Count .....

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 ..... was not on notice that the check was an insufficient funds check.

USE NOTE

1. For use when there is an issue as to an exception under the Worthless Check Act.

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.

****

Statutory reference. - Section 30-36-6 NMSA 1978.

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.

14-1674. Check; definition.1

A check is a written order to a bank or other depository for the payment of money.

USE NOTE

1. 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

Statutory reference. - Section 30-36-2A NMSA 1978.

14-1675. Worthless checks; "credit"; defined.1

"Credit" means an understanding with the bank to pay the check although there is not sufficient money in the account.

USE NOTE

1. For use when the jury requests a definition of "credit."

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-36-2E NMSA 1978.

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, Instruction 14-1670, because the word "credit" is commonly understood in this context, and it is unlikely that the jury will need a definition.

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 ..... 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 ....., 19 ...

USE NOTE

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

2. Use applicable alternative.

3. Instruction 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.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-16-26 NMSA 1978.

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. (For a complete discussion on merger and other aspects of charging and sentencing, see Addendum 3 to these instructions.)

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 permanent 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 Crim. 14-1642 for essential elements of

statutory extortion.

LaFave & Scott at p. 704.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant has in his possession*2* a credit card*3* issued to .....;

2. The defendant knew or had reason to know that the credit card had been stolen;

3. 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 ..., 19 ...

USE NOTE

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

2. Instruction 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.

****

Statutory reference. - Section 30-16-26 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 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.

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 ..... 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 ....., 19 ...

USE NOTE

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. Instruction 14-130, "Possession" defined, is to be given if the question of possession is in issue.

****

Statutory reference. - Section 30-16-27 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680.

For possession of a stolen credit card, see UJI Crim. 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."

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 ..... 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 ....., 19 ...

USE NOTE

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

2. Instruction 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.

****

Statutory reference. - Section 30-16-28 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 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 Crim. 14-1640 for a review of the elements of fraud.

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 ..... 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 ....., 19 ...

USE NOTE

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

2. Instruction 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.

****

Statutory reference. - Section 30-16-28 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680.

See UJI Crim. 14-1640 for a review of the elements of fraud.

See commentary to UJI Crim. 14-1663.

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 ..... 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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-16-29 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680. Also see commentary to UJI Crim. 14-1683 for discussion of fraudulent transfer or receipt of a credit card. For a review of the elements of fraud, see UJI Crim. 14-1640.

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 ..... 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 ....., 19 ...

USE NOTE

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

2. Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-16-30 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 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. For further information on lesser included offenses and related subjects, see Reporter's Addendum 3, Avoidance of Double Jeopardy Problems in Charging and Sentencing.

The committee did not include the term "sale" in Element 1, as any sale is also a transfer.

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 ..... 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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-16-31 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 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 Crim. 14-1640 for a review of the elements of fraud.

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 ..... 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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-16-32 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 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.

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 ..... 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 $300.00];*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 issurer [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 ....., 19 ...

USE NOTE

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 Instruction 14-1602 for definition of "market value."

4. If the value of all goods or services exceeds $300.00, use bracketed phrase.

5. Use only the applicable bracketed phrase or phrases.

****

Statutory reference. - Paragraph (1) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

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 at 665. 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 Crim. 14-1686.

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]*1* [a revoked] [an expired] credit card [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 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]*1* [value over $300.00];

3. At the time the defendant used the credit card, the credit card [was invalid]*1* [had expired] [had been revoked];

4. The defendant intended to deceive or cheat;

5. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Paragraph (2) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680. Also see commentary to UJI Crim. 14-1689 for a discussion of fraudulent use of credit cards.

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 ..... 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]*3* [value over $300.00];

3. The defendant was not the cardholder*2*;

4. The defendant represented by words or conduct [that he was the cardholder]*3* [that he was authorized by the cardholder to use the credit card];

5. The defendant intended to deceive or cheat;

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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 applicable alternative.

****

Statutory reference. - Paragraph (3) of Subsection A, Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680. Also see commentary to UJI Crim. 14-1689 for a discussion of fraudulent use of credit cards.

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 ..... 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. The goods or services had a [value]*3* [value over $300.00];

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 ....., 19 ...

USE NOTE

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 applicable alternative.

****

Statutory reference. - Paragraph (4) of Subsection A of Section 30-16-33 NMSA 1978 or Subsection B if value over $300.00.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680. Also see commentary to UJI Crim. 14-1689 for a discussion of fraudulent use of credit cards.

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 ..... 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*]*3* [an employee of .....],the defendant[furnished]*3* [allowed to be furnished] .....; (describe money, goods or services furnished)

2. These goods or services had a market value*3* [over $300.00]*4*;

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 ....., 19 ...

USE NOTE

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. See Instruction 14-1602 for definition of "market value."

4. If the value of the goods or services exceeds $300.00, use bracketed phrase.

****

Statutory reference. - Section 30-16-34A NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680.

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 Crim. 14-1689.

See UJI Crim 14-1640 for a review of the elements of fraud.

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 ..... 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*]*3* [an employee of ..... 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 marketvalue*4* of ....;

2. The defendant [did not furnish such goods or services]*3* [furnished goods or services of a market value only of .....

3. The defendant intended to deceive or cheat;

4. This happened in New Mexico on or about the ..... day of ..., 19 ...

USE NOTE

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 Instruction 14-1602 for definition of "market value."

****

Statutory reference. - Section 30-16-34B NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680. Also see commentary to UJI Crim. 14-1673 for a discussion of fraudulent acts by merchants or their employees.

See UJI Crim. 14-1640 for a review of the elements of fraud.

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 ..... 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 ...., 19 ...

USE NOTE

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

2. Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-16-35A NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 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 Crim. 14-1640 for a review of the elements of fraud.

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 ..... 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 ...., 19 ...

USE NOTE

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

2. Instruction 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.

****

Statutory reference. - Section 30-16-35B NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680. Also see commentary to UJI Crim. 14-1695 for a discussion of Section 30-16-35 NMSA 1978. For a review of the elements of fraud, see UJI Crim. 14-1640.

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 ..... 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 ...., 19 ...

USE NOTE

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 Instruction 14-140.

****

Statutory references. - Section 30-16-36 NMSA 1978.

Section 30-14-1 NMSA 1978.

Section 30-14-8 NMSA 1978.

Committee commentary. - For general information on credit card crimes, see committee commentary to UJI Crim. 14-1680.

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 Crim. 14-1689.

The committee is of the opinion that one or more of the alternatives set forth in Element 3 may be given. See UJI Crim. 14-1686.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [started a fire] [or]*2* [caused an explosion];

2. He did so with the intent to destroy or damage ....., (identify property) which belonged toanother and which had a [market]*3* value of over $ .....;

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use applicable bracketed phrase.

3. Unless the property has no market value, this bracketed word should be used and Instruction 14-1707 also given.

****

See § 30-17-5 NMSA 1978. 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, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969). 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.

The present statute, enacted in 1970, made six important changes: (1) it substituted the words "maliciously or willfully" for "intentionally"; (2) it added the phrase "with the purpose of destroying or damaging"; (3) it added a provision for arson with intent to defraud an insurer; (4) it added a new substantive crime of negligent arson; (5) it added "occupied structure" to the list of property and defined the term; (6) it divided "regular arson" and "intent to defraud arson" into degrees based on the value of the property. Changes (2) through (5) appear to be derived from the Model Penal Code § 220.1 (Proposed Official Draft 1962). But see State v. Atwood, 83 N.M. 416, 422, 492 P.2d 1279, 1285 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972) (dissenting opinion).

The words "willful and malicious" embrace the additional common-law arson concept. See, e.g., 2 Wharton, Criminal Law and Procedure § 390 (Anderson ed. 1957). The phrase is still used in other arson statutes. See, e.g., Calif. Penal Code § 448a; Mass. Gen. Laws Ann. C. 266, § 1. The phrase has consistently been interpreted to mean deliberate and intentional or the like. People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972); Commonwealth v. Lamothe, 343 Mass. 417, 179 N.E.2d 245, 1 A.L.R. 1160 (1961); Crow v. State, 136 Tenn. 333, 189 S.W. 687 (1916). The Model Penal Code omitted the phrase on the ground that it had acquired an "artificial and uncertain meaning." Model Penal Code § 220.1, Comment. (Tent. Draft No. 11, 1960). Some recent penal codes use the word "intentionally" in place of "willful and malicious." See, e.g., N.Y. Penal Code § 150.15; 18 Consol. Pa. Stat. Ann. Tit. 18, § 3301(a).

The committee concluded that the concept of willful and malicious is covered as an intentional and deliberate act and limited this instruction to the burning of another's property. Because arson is a crime requiring criminal intent and Instruction 14-141 must be given with Instruction 14-1701, the latter instruction does not include the "intentional" element. To include the element here would result in a confusing duplication.

The inclusion of the phrase "with the purpose of destroying or damaging any building" in Section 30-17-5A NMSA 1978 adds an additional element to common-law arson. The phrase, with the addition of the word "damaging," is derived from the Model Penal Code. The code commentary says that the requirement of a purpose to destroy makes it clear that the mere employment of fire with more limited purposes is not regular arson but may be negligent arson. Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960).

The Model Penal Code provision is based on a New York statute, since repealed. The New York law provided that burning of a building without the "intent to destroy it, is not arson." The New York court of appeals held that the statute required a "specific intent to destroy," not a necessary element of arson at common law. The statute was, therefore, strictly construed as being in derogation of the common law. People v. Fanshawe, 137 N.Y. 68, 32 N.E. 1102 (1893). See also Practice Commentary, N.Y. Penal Code § 150.

Pennsylvania recently adopted a new criminal code based on the Model Penal Code. Toll, "Criminal Law Reform in Pennsylvania: The New Crimes Code," 78 Dick. L. Rev. 1, 2 (1973). The Pennsylvania statute substituted "with the intent of " for "with the purpose of." Consol. Pa. Stat. Ann. Tit. 18, § 3301(b).

The Model Penal Code provision limited "regular" arson to the burning, etc., of a building or occupied structure of another. The New Mexico provision includes a catch-all word "property," apparently extending the crime to arson of personalty.

Arguably, the New Mexico version does not limit the burning of a bridge, utility line, fence or sign to that "of another," presumably making it a crime to burn one's own bridge, etc. ("Another" is defined in Section 30-1-12D NMSA 1978.) That result may make this portion of the statute unconstitutional under the rationale of State v. Dennis, supra. The committee chose to limit this instruction to the burning, etc., of the property of another. If, for example, the defendant is charged with burning his own bridge, this instruction must be modified.

Although the definition of "occupied structure," Section 30-17-5C NMSA 1978, applies to this type of arson, as a practical matter it may not be important since all "property" of another is included by statute.

ANNOTATIONS

Compiler's note. - 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.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [started a fire]*2* [or] [caused an explosion] with the intent to destroy or damage ..... (identify property) which had a [market]*3* value of over $ .....;

2. He did so for the purpose of collecting insurance for the loss;

3. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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 Instruction 14-1707 must also be given.

****

See § 30-17-5A NMSA 1978. See the commentary to Instruction 14-1701. Arson with intent to defraud an insurer is a statutory addition to common-law arson. See generally 2 Wharton, Criminal Law & Procedure § 402 (Anderson ed. 1957). It is usually stated as a burning, etc., "with intent to injure or defraud the insurer." See, e.g., Calif. Penal Code § 450a. With that language, it has been recognized that the intent to defraud is the essence of the crime. People v. Rose, 38 Cal. App. 493, 176 P. 694 (1918). Cf. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

New Mexico adopted the Model Penal Code language, "with the purpose of destroying [or damaging] any property, whether [the person's] own or another's, to collect insurance for such loss." The commentary to the code makes it clear that the draftsmen were merely restating the "intent to defraud" concept. Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960). See also 18 Consol. Pa. Stat. Ann. Tit. 18, § 3301(b).

This type of arson is also 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."

ANNOTATIONS

Compiler's note. - 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 § 2.

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 ..... 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)

[bodily injury to .....] (name of victim)

[the damage to another's building]

[the damage to another's .....

[the destruction of another's building]

[the destruction of another's .....

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. See Instruction 14-1704 for definition of "recklessly."

3. Use only applicable bracketed word or phrase.

4. Instruction 14-1705 must also be used if causation is in issue.

5. Insert name or description of the appropriate occupied structure.

****

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, Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

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 NOTE

1. Use applicable bracketed word.

****

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., Instruction 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
.... 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 ..... which belonged to another;

2. His act caused*4* ..... to (name of victim) 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 ....., 19 ...

USE NOTE

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 Instruction 14-1705 if causation is in issue.

5. Use applicable bracketed phrase depending on the great bodily harm caused.

****

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 Instruction 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 Instruction 14-141 and commentary. To include the element in this instruction would duplicate the element. See also commentary to Instruction 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 § 45.

6A C.J.S. Arson § 24.

14-1707. Arson; "market value"; defined.1

"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 NOTE

1. For use in conjunction with Instructions 14-1701 and 14-1702.

*** * * * * * * * * * * * * * * * * * ***

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 commentary to Instruction 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.

CHAPTERS 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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
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;
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 sturcture)

4. This happened in New Mexico on or about the ... day of ...., 19 ...

USE NOTE

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 Instruction 14-1420, Custodian; definition.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-20-13C NMSA 1978.

Committee commentary. - UJI Crim. 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 Crim. 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.

CHAPTER 21
(RESERVED)

CHAPTER 22
CUSTODY; CONFINEMENT; ARREST

PART A
ASSAULT AND BATTERY AGAINST PEACE OFFICERS; ESSENTIAL ELEMENTS

14-2201. Aggravated assault on a peace officer; attempted battery with a deadly weapon; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [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 tried [but failed]*2* to *.3;* (describe act and name victim)

2. The defendant intended to .....*3*; (describe act and name victim)

3. The defendant acted in a rude, insolent or angry manner;

4. The defendant used ..... (deadly weapon)

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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

2. Use bracketed material only if instruction is given as a lesser included offense to any battery.

3. Use laymen's language to describe the touching or application of force.

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."

****

Statutory reference. - Section 30-22-22A(1) NMSA 1978.

Committee commentary. - See § 30-22-22A(1) NMSA 1978. This crime follows the elements of an aggravated assault by use of a deadly weapon. See State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974). See commentary to Instructions 14-304, 14-305, and 14-306.

Instructions 14-2201, 14-2202, and 14-2203 assume that the victim, by whatever official title he is known, is a peace officer as that term is defined in Section 30-1-12 NMSA 1978. The question of whether or not the victim is a peace officer is therefore normally a question of law to be decided by the court. See State v. Rhea, 94 N.M. 168, 608 P.2d 144 (1980). In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

Section 30-22-22A(1) NMSA 1978, supra, provides that the peace officer must be in the lawful discharge of his duties at the time of the assault. The committee was of the opinion that the issue of lawfulness was almost always a question of law to be decided by the judge. (See Reporter's Addendum to Chapter 22, Appendix). If the officer was attempting to make an arrest while not in the lawful discharge of his duties, an appropriate defense instruction for "resisting an unlawful arrest" must be prepared. See State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978) for a discussion of "lawful discharge of duties."

For an explanation of how to use the three instructions provided, see commentary to Instructions 14-301, 14-302, and 14-303.

ANNOTATIONS

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, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

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.

For you to find the defendant guilty of aggravated assault on a peace officer by use of a deadly weapon [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 .....; (describe threat or menacing conduct)

2. This caused ..... (name of victim) to believe he was about to be ..... (describe act)

3. A reasonable person in the same circumstances as .....(name of victim) would have had the same belief;

4. The defendant used ..... (deadly weapon)

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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. 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."

****

Statutory reference. - Section 30-22-22A(1) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-2201.

ANNOTATIONS

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, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979).

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 ..... the state must prove to your satisfaction beyond

a reasonable doubt each of the following elements of the crime:

1. The defendant tried [but failed]*3* to .....(describe act) ..... (name of victim) The defendant intended to ....*4*; (describe act and name victim) and the defendant acted in a rude, insolent or angry manner;

[OR]

The defendant .....; (describe threat or menacing conduct) this caused ..... (name of victim) to believe he was about to be ..... (describe act) and a reasonable person in the same circumstances as .....(name of victim) would have had the same belief;

AND

2. The defendant used ..... (deadly weapon)

3. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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 bracketed material only if instruction is given as a lesser included offense to any battery.

4. Use laymen's language to describe the touching or application of force.

5. 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."

ANNOTATIONS

Statutory reference. - Section 30-22-22A(1) NMSA 1978.

****

Committee commentary. - See committee commentary under Instruction 14-2201.

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 ..... [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 tried [but failed]*3* to .....(describe act ..... and name victim)

2. The defendant intended to .....*4*; (describe act and name victim)

3. The defendant acted in a rude, insolent or angry manner;

4. The defendant intended to commit the crime of *1*;

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of the felony or felonies must also be given immediately following this instruction.

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

3. Use bracketed material only if instruction is given as a lesser included offense to any battery.

4. Use laymen's language to describe the touching or application of force.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-22-22A(3) NMSA 1978.

Committee commentary. - See § 30-22-22A(3) NMSA 1978. This crime includes the elements of an aggravated assault with intent to commit a felony. See commentary to Instructions 14-308, 14-309, and 14-310. See also commentary to Instructions 14-2201, 14-2202, and 14-2203.

For an explanation of how to use the three instructions provided, see commentary to Instructions 14-301, 14-302, and 14-303.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

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 ..... [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 .....; (describe threat or menacing conduct)

2. This caused ..... (name of victim) to believe he was about to be ..... (describe act)

3. A reasonable person in the same circumstances as ..... (name of victim) would have had thesame belief;

4. The defendant intended to commit the crime of *1*;

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of the felony or felonies must also be given immediately following this instruction.

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

3. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-22-22A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-2204.

ANNOTATIONS

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 ..... [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 tried [but failed]*4* to .....(describe act ..... and name victim) The defendant intended to .....*5*; (describe act and name victim) andThe defendant acted in a rude, insolent or angry manner;

[OR]

The defendant .....; (describe threat or menacing conduct) this caused ..... (name of victim) to believe he was about to be .....*5*; (describe act) andA reasonable person in the same circumstances as .....(name of victim) would have had the same belief;

AND

2. The defendant intended to commit the crime of *2*;

3. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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 name of the felony or felonies in the disjunctive. The essential elements of the felony or felonies must also be given immediately following this instruction.

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

4. Use bracketed material only if instruction is given as a lesser included offense to any battery.

5. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-22-22A(3) NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-2204.

ANNOTATIONS

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 [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 tried [but failed]*2* to .....(describe act and name victim)

2. The defendant intended to .....*3;* (describe act and name victim)

3. The defendant acted in a rude, insolent or angry manner;

4. The defendant intended to kill .....; (name of victim)

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. Use bracketed material only if instruction is given as a lesser included offense to any battery.

3. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-22-23 NMSA 1978.

Committee commentary. - See § 30-22-23A NMSA 1978. Compare Instructions 14-311, 14-312, 14-313 and commentary. See also, commentary to Instructions 14-2201, 14-2202, and 14-2203.

For an explanation of how to use the three instructions provided, see commentary to Instructions 14-301, 14-302, and 14-303.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....; (describe threat or menacing conduct)

2. This caused ..... (name of victim) to believe he was about to be .....*2*; (describe act)

3. A reasonable person in the same circumstances as ..... (name of victim) would have had thesame belief;

4. The defendant intended to kill .....; (name of victim)

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-23 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-2207.

ANNOTATIONS

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 or 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 [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 tried [but failed]*3* to .....(describe act

..... and name victim)

The defendant intended to .....*4*; (describe act and name vicitm) and the defendant acted in arude, insolent or angry manner;

[OR]

The defendant .....; (describe threat or menacing conduct)

This caused ..... (name of victim) to believe he was about to be .....*4*; (describe act) and a reasonable person in the same circumstances as .....(name of victim) would have had the same belief;

AND

2. The defendant intended to kill .....; (name of victim)

3. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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; 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 bracketed material only if instruction is given as a lesser included offense to any battery.

4. Use laymen's language to describe the touching or application of force.

****

Statutory reference. - Section 30-22-23 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-2207.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant. .....; (describe threat or menacing conduct)

2. This caused ..... (name of victim) to believe he was about to be ..... (describe act)

3. A reasonable person in the same circumstances as .....(name of victim) would have had the same belief;

4. The defendant was [wearing a ..... [disguised] for the purpose of concealing his identity;

5. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

6. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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. Identify the mask, hood, robe or other covering upon the face, head or body.

4. Use only the applicable bracketed element.

****

Statutory reference. - Section 30-22-22A(2) NMSA 1978.

Committee commentary. - See § 30-22-22A(2) NMSA 1978. This crime includes the elements of regular aggravated assault in disguise. See Instruction 14-307 and commentary. See also commentary to Instructions 14-2201, 14-2202, and 14-2203.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant.....*2;* (describe act and name victim)

2. The defendant acted in a rude, insolent or angry manner;

3. At the time, ... (name of victim) was a .....

4. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-24 NMSA 1978.

Committee commentary. - See § 30-22-24 NMSA 1978. See commentaries to Instructions 14-320 and 14-2201, 14-2202, and 14-2203.

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 Section 30-22-26 NMSA 1978 and, therefore, provided no instruction for the latter offense. In almost every conceivable situation, the state will probably want to proceed under Section 30-22-24 NMSA 1978, charging one who assists in the battery upon a peace officer as an accessory. See § 30-1-13 NMSA 1978.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

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. Thus the statute is not vague or overbroad. State v. Cruz, 110 N.M. 780, 800 P.2d 214 (Ct. App. 1990).

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, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

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, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2* (describe act and name victim) with a .....

2. The defendant intended to injure .....; (name of victim)

3. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

4. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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. 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."

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-22-25C NMSA 1978.

Committee commentary. - See § 30-22-25A & 30-22-25 NMSA 1978. See commentaries to Instructions 14-322 and 14-2201, 14-2202, and 14-2203.

This is a specific intent crime. See reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2;* (describe act and name victim)

2. The defendant intended to injure .....; (name of victim)

3. The defendant [caused great bodily harm*3* to .....]*4* (name of victim) [or] [acted in a way that would likely result in death or great bodily harm*3* to ... . (name of victim)

4. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

5. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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. The definition of "great bodily harm," Instruction 14-131, must also be given.

4. Use only the applicable bracketed element established by the evidence.

****

Statutory reference. - Section 30-22-25C NMSA 1978.

Committee commentary. - See § 30-22-25A & 30-22-25C NMSA 1978. See commentaries to Instructions 14-131, 14-320, 14-322, 14-2201, 14-2202, and 14-2203.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court.

In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2*; (describe act and name victim)

2. The defendant intended to injure .....; (name of victim)

3. The defendant caused .....(name of victim) [painful temporary disfigurement]*3* [or] [a temporary loss or impairment of the use of ..... (name of organ or member)

4. At the time, ... (name of victim) was a .....(official title) and was performing his duties;

5. This happened in New Mexico on or about the ..... day of ....., 19 ..

USE NOTE

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.

****

Statutory reference. - Section 30-22-25B NMSA 1978.

Committee commentary. - See § 30-22-25A & 30-22-25B NMSA 1978. See commentaries to Instructions 14-321, 14-2201, 14-2202, and 14-2203.

"Peace officer" is defined in Section 30-1-12C NMSA 1978. The question of whether or not the victim is a peace officer is normally a question of law to be decided by the court. In the event that there is a question of fact as to whether the victim is in fact a peace officer, a special instruction would have to be drafted.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. .....(name of victim) was a [peace officer]*3* [judge] [magistrate] in the lawfuldischarge of his duties; [and]

[2. The defendant, with the knowledge that .....(name of victim) was attempting toapprehend or arrest him, fled, attempted to evade or evaded the officer;]*4*

[OR]

[2. The defendant resisted or abused .....] (name of

victim)

3. This happened in New Mexico, on or about the ... day of ...., 19 ..

USE NOTE

1. This instruction is to be used only if the defendant is charged under Subsection B or D of Section 30-22-1 NMSA 1978. If a charge is brought under Subsection A or C, the appropriate instruction should be drafted.

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

3. Use only the applicable alternative.

4. Use only the applicable bracketed phrase.

****

Statutory reference. - Section 30-22-1B and D NMSA 1978.

ANNOTATIONS

Committee commentary. - Pursuant to the court order of February 10, 1986, this instruction is applicable to cases tried after May 1, 1986.

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 ..... 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) [confinement];

2. ..... (name of prisoner) was [under conviction of ..... [charged with .....

3. The defendant freed .....; (name of prisoner)

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-7 NMSA 1978.

Committee commentary. - See § 30-22-7 NMSA 1978. The intentional element of the statutory crime is covered by the general intent instruction, Instruction 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 Criminal, Instruction 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

Compiler's note. - 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.

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 3.

77 C.J.S. Rescue § 1.

14-2221. Escape from jail; essential elements.

For you to find the defendant guilty of escape from 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 was committed to jail;

2. The defendant [escaped] *2* [or] [attempted to escape] from jail;

3. This happened in New Mexico on or about the ... day of ..... , 19 ...

USE NOTE

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

2. Use only the applicable bracketed element established by the evidence.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-22-8 NMSA 1978.

Committee commentary. - See § 30-22-8 NMSA 1978. See generally Perkins, Criminal Law 500-07 (2d ed. 1969). In State v. Weaver, 83 N.M. 362, 492 P.2d 144 (Ct. App. 1971), the court held that an escape from the kitchen of the jail was the same as escape from the jail.

Section 30-22-8 NMSA 1978 requires that the defendant must have been lawfully committed for the crime of escape from jail to be committed. 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.)

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 1.

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 ..... 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. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-9 NMSA 1978.

Committee commentary. - See § 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. (See "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 1.

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 ..... 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 .....

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 ....., 19 .

USE NOTE

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.

****

Statutory reference. - Section 30-22-10 NMSA 1978.

Committee commentary. - See § 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 "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 1.

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 ..... 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) [confinement at .....

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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-11A NMSA 1978.

Committee commentary. - See § 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 Instruction 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 "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 3, 5.

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 ..... 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 ...., 19 ...

USE NOTE

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

****

Statutory reference. - Section 30-22-11B NMSA 1978.

Committee commentary. - See § 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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 21 to 24, 26.

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 ..... 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 ..... (an explosive substance) without the express

consent of the officer in charge of .....
[OR]

[a ..... 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 ...., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-12 NMSA 1978.

Committee commentary. - See § 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 Instruction 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. (See "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

The third element of Instruction 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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 3.

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 ..... 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 ..... [a jail]*4* [a prison] [place of confinement of prisoners];

2. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-19 NMSA 1978.

Committee commentary. - See § 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. See also reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

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. (See "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions.)

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30A C.J.S. Escape § 25.

14-2228. Escape; inmate-release program; essential elements.

For you to find the defendant guilty of escape from the state penitentiary inmate-release program [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 was committed to the state penitentiary;*2*

2. The defendant was released from the penitentiary to

[attend school]*3*

[work in private business]

[work in public employment]

[visit .....

3. The defendant failed to return to confinement within the time fixed for his return;

4. The defendant did not intend to return within the time fixed;

5. This happened in New Mexico on or about the ..... day of ...., 19 ...

USE NOTE

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. Use only the applicable bracketed alternative.

4. Describe or name place to be visited.

****

Statutory reference. - Sections 33-2-43 through 33-2-47 NMSA 1978.

Committee commentary. - See § 33-2-46 NMSA 1978. The inmate-release program was established by Chapter 166, Laws 1969. In 1975, Section 33-2-46 NMSA 1978 was amended to make escape from the inmate-release program the equivalent of a third degree felony.

The inmate-release program is described in Sections 33-2-43 to 33-2-47 NMSA 1978. Since this is a specific offense carrying a lesser penalty than escape from the penitentiary, the essential elements include the specific reasons for the prisoner's release. Unless the prisoner is released for one of the specific purposes set forth in Section 33-2-44 [or] 33-2-45 NMSA 1978, an escape from custody by the prisoner is governed by Section 30-22-9 NMSA 1978, escape from the penitentiary. (See "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," following these instructions, discussing "constructive custody.")

ANNOTATIONS

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.

Failure of prisoner to return at expiration of work furlough or other permissive release period as crime of escape, 76 A.L.R.3d 658.

14-2229. Escape; 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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant was released on the condition that he appear at all times required by the court;

2. The defendant failed to appear as required by the court;

3. This happened in New Mexico on or about the ..... day of ...., 19 ...

USE NOTE

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

****

Statutory reference. - Section 31-3-9 NMSA 1978.

Committee commentary. - See § 31-3-9 NMSA 1978.

Section 31-3-9 NMSA 1978, supra, provides that the defendant must willfully fail to appear. This statutory element is satisfied by the general intent instruction, Instruction 14-141.

ANNOTATIONS

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [concealed]*2* [gave aid to] ....., (name of felon) with the intent that ..... (name of felon) [escape]*2* [avoid arrest, trial, conviction or punishment];

2. The defendant knew that ..... (name of felon) had committed .....

3. This happened in New Mexico on or about the ..... day of ...., 19 ...

USE NOTE

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

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

3. Identify the felony committed.

****

Statutory reference. - Section 30-22-4 NMSA 1978.

Committee commentary. - See § 30-22-4 NMSA 1978. 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, 88 N.M. 441, 541 P.2d 430 (1975).

The statute 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 State v. Lucero, supra.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking and Rescue § 5.

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 ..... 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] .....

2. The defendant intended to [prevent the apprehension, prosecution or conviction of ..... (name) [create the false impression that ..... (name) had committed a crime];

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

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

3. Identify the physical evidence.

****

Statutory reference. - Section 30-22-5 NMSA 1978.

Committee commentary. - See § 30-22-5 NMSA 1978.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 276, 277, 292.

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 inCount ..... 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 .....*2* (name of officer, employee or visitor) to believehe 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 ....., 19 ...

USE NOTE

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," Instruction 14-131, must also be given.

4. Identify the place of custody or confinement.

****

Statutory reference. - Section 30-22-17A NMSA 1978.

Committee commentary. - See § 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 Instructions 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 ..... 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* .....*3* (describe act and insert name of victim) 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 ....., 19 ...

USE NOTE

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," Instruction 14-131, must also be given.

****

Statutory reference. - Section 30-22-17B NMSA 1978.

Committee commentary. - See § 30-22-17B NMSA 1978. This crime is essentially as assault by an attempt to commit a modified aggravated battery. Compare Instruction 14-304 and Instruction 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 .....] the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant .....*2* (describe act and insert name of victim) whowas 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 ....., 19 ...

USE NOTE

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," Instruction 14-131, must also be given.

****

Statutory reference. - Section 30-22-17B NMSA 1978.

Committee commentary. - See § 30-22-17B NMSA 1978. This crime is essentially a modified aggravated battery. Compare Instruction 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 ..... 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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-17C NMSA 1978.

Committee commentary. - See § 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 or explosive by a prisoner; essential elements.

For you to find the defendant guilty of possession of [a deadly weapon]*1* [an explosive] by a prisoner [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 was in custody or confinement*3* at *4*;

2. The defendant was in possession*5* of [..... [an explosive substance];

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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.

4. Identify the place of custody or confinement.

5. Use Instruction 14-130 if possession is in issue.

6. Insert the name of the weapon if 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."

****

Statutory reference. - Section 30-22-16 NMSA 1978.

Committee commentary. - See § 30-22-16 NMSA 1978.

14-2255. 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 ..... 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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-22-13 NMSA 1978.

Committee commentary. - See § 30-22-13 NMSA 1978.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 72 C.J.S. Prisons § 22.

CHAPTERS 23 AND 24

(RESERVED)

CHAPTER 25
PERJURY AND FALSE AFFIRMATIONS

14-2501. Perjury; essential elements.

For you to find the defendant guilty of perjury [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 made a false statement under oath or affirmation;*2*

2. The defendant knew such statement to be untrue;

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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

2. The issue of materiality is a matter of law to be decided by the judge.

ANNOTATIONS

Statutory reference. - 30-25-1 NMSA 1978.

CHAPTERS 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 ..... [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 intended to commit the crime of *1*;

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

3. This happened in New Mexico on or about the .... day of ....., 19 ...

USE NOTE

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.

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

****

Statutory reference. - Section 30-28-1 NMSA 1978.

Committee commentary. - See Section 30-28-1 NMSA 1978.

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.), 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.

See the reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

ANNOTATIONS

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, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

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; essential elements.

For you to find the defendant guilty of conspiracy to commit ..... [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 and another person by words or acts agreed together to com-mit .....

2. The defendant and the other person intended to commit .....

3. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

1. Insert the name of the felony or felonies in the alternative and give the essential elements other than venue immediately after this instruction unless they are covered by essential element instructions relating to the substantive offenses.

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

****

Statutory reference. - Section 30-28-2 NMSA 1978.

Committee commentary. - See Section 30-28-2 NMSA 1978.

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. No overt act in furtherance of the conspiracy need be proved. Perkins, Criminal Law 616 (2d ed. 1969).

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, 74 N.M. 87, 390 P.2d 966 (1964); State v. Dressel, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973).

A defendant may be charged with conspiracy to commit a felony or felonies. However, a conspiracy to commit two felonies has been held to constitute only a single conspiracy. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974). If the conspiracy is alleged to be for the purpose of committing more than one felony, the essential elements of each felony must be given.

The statute includes a conspiracy to commit a felony outside of New Mexico. In such cases, the foreign law is controlling as to the essential elements of the felony. See State v. Henneman, 40 N.M. 166, 56 P.2d 1130 (1936).

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, 79 N.M. 765, 449 P.2d 781 (1969).

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. - 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).

14-2811. 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 NOTE

1. No instruction on this subject shall be given.

****

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 Instructions 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 NOTE

1. This instruction is appropriate for a multiple-defendant trial in which a charge of conspiracy is submitted to the jury. Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction replaces Instruction 14-6003 in cases in which a charge of conspiracy is being submitted to the jury. Instruction 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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Evidence Rule 11-107.

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Evidence Rule 11-107.

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Evidence Rule 11-104. 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. Evidence Rule 11-801 D(2)(e). 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 Evidence Rule 11-104(A). 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 Evidence Rule 11-104(B) 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. Evidence Rule 11-104(B). 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 Instruction 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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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. Instruction 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 Instruction 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 (Instruction 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). Instruction 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 ..... 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. 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 ...., 19 ..

USE NOTE

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. See Instruction 14-140 for example of how essential elements instructions are to be modified when not given as separate offense.

3. Use applicable alternative.

****

Statutory reference. - See 30-28-3 NMSA 1978.

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.

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 he himself did not do the acts constituting the attempt, if the state proves to your satisfaction beyond a reasonable doubt that:

1. The defendant intended that the crime be committed;

2. An attempt to commit the crime was committed;

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 NOTE

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 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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-1-13 NMSA 1978.

Committee commentary. - See Section 30-1-13 NMSA 1978.

See commentary to Instruction 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 Instruction 14-2801, the essential elements of attempt, be given along with this instruction on aiding and abetting. Further, since Instruction 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, Instruction 14-2801 should also be given, and the essential elements of the felony attempted should be given in some form.

ANNOTATIONS

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.

14-2821. Aiding or abetting accessory to felony murder.

The defendant may be found guilty of felony murder [as charged in Count ..... even though he himself did not [commit]*3* [or] [attempt to commit]
the
.....
.....*4*, (name of felony) if thestate proves to your satisfaction beyond a reasonable doubt that:

1. During [the commission of]*3* [or] [the attempt to commit] the .....*4* (name of felony) [undercircumstances or in a manner dangerous to human life]*5*, someone caused*6* the death of .....; (name of victim)

2. The defendant helped, encouraged or caused [the .....*4* (name of felony) to becommitted]*3* [or] [the attempt to commit the ..... (name of felony)

3. The defendant intended that the ..... (name of felony) be committed;

4. This happened in New Mexico on or about the ..... day of ....., 19 ...

USE NOTE

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. Insert the name of the felony or felonies underlying the felony murder charge. The essential elements of this felony or these felonies must also be given unless they are otherwise covered by the instructions.

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

6. Instruction 14-251 must also be used if causation is in issue.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-1-13 NMSA 1978.

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 commentary to Instruction 14-202 (felony murder).

See also the commentary to Instruction 14-2822.

This instruction is considerably different from Instruction 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 Instruction 14-202.

ANNOTATIONS

"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, 112 N.M. 544, 817 P.2d 1186 (1991).

The requirement that "the defendant helped, encouraged or caused the crime to be committed" refers, by use of the phrase "the crime", to the underlying felony; it does not expressly deal with the situation in which the defendant has helped, encouraged or caused (through the accomplice) the killing to be committed. This instruction should be revised to better reflect this distinction. State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

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, 112 N.M. 554, 817 P.2d 1196 (1991).

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, 94 N.M. 169, 608 P.2d 145 (1980).

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.

The defendant may be found guilty of a crime even though he himself did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt that:

1. The defendant intended that the crime be committed;

2. The crime was committed;

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 NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-1-13 NMSA 1978.

Committee commentary. - See Section 30-1-13 NMSA 1978.

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, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

The aider and abettor must share the criminal intent required for the conviction of the principal. State v. Ochoa, 41 N.M. 589, 72 P.2d 609 (1937). However, 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 upon his own acts and intent, and not upon the intent of the other, entertained without knowledge of the aider and abettor. State v. Wilson, 39 N.M. 284, 46 P.2d 57 (1935).

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; Instruction 14-2820 covers the attempts; and Instruction 14-2821 covers felony murder.

ANNOTATIONS

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, 93 N.M. 504, 601 P.2d 737 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

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, 112 N.M. 544, 817 P.2d 1186 (1991).

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, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983), rev'd on other grounds, 100 N.M. 583, 673 P.2d 1316 (1984).

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, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

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, 85 N.M. 535, 514 P.2d 54 (Ct. App. 1973) (decided under former Rule 41, N.M.R. Crim. P.)

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, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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

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, 113 N.M. 789, 833 P.2d 1155 (Ct. App. 1991).

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.

CHAPTERS 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 ..... 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 ....., 19 ...

USE NOTE

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. Instruction 14-3130, the definition of possession in controlled substance cases, should be given if possession is in issue. Instruction 14-3131, the definition of marijuana, should be given if there is an issue as to whether the substance is marijuana.

****

Statutory reference. - Section 30-31-23B(1), 30-31-23B(2), 30-31-23B(3) NMSA 1978.

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, Instruction 14-141 must be given.

Instruction 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 Instruction 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 Instruction 14-3132.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Failure to instruct on possession as lesser included offense found not error. - The trial court's failure to instruct the jury on possession of a controlled substance as a lesser included offense of trafficking in controlled substances was not error, since the defendant's tendered instruction was incorrect, in that it would have submitted to the jury, as a factual question, whether heroin was a narcotic drug, but heroin actually was a narcotic drug by statutory definition. State v. Romero, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

But 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, 69 N.M. 113, 364 P.2d 594 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16, 21.

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.

28 C.J.S. Supp. Drugs and Narcotics § 222.

14-3102. Controlled substance; possession; essential elements.1

For you to find the defendant guilty of possession of ..... [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 had ..... in his possession*4*;

2. The defendant knew it was ..... [or believed it to be ..... [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 NOTE

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. Instruction 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.

****

Statutory reference. - Section 30-31-23B(4), 30-31-23B(5) NMSA 1978.

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, Instruction 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 Instruction 14-3101.

ANNOTATIONS

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, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16, 17.

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.

28 C.J.S. Supp. Drugs and Narcotics § 222.

14-3103. Controlled substance; distribution; essential elements.

For you to find the defendant guilty of "distribution of ..... [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 [transferred]*4* [caused the transfer of] [attempted to transfer] ..... to another;

2. The defendant knew it was ..... [or believed it to be ..... [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 ....., 19 ...

USE NOTE

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.

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Statutory reference. - Section 30-31-22A NMSA 1978.

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, Instruction 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 of Criminal Procedure 5-608 and Instruction 14-6002 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 Instructions 14-3101 and 14-3102.

For a discussion of the requirement of knowledge, see commentary to Instructions 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, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 16.

28 C.J.S. Supp. Drugs and Narcotics § 223.

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 ..... [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 had ..... in his possession*4*;

2. The defendant knew it was ..... [or believed it to be ..... [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 ....., 19 ...

USE NOTE

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. Instruction 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.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-31-22A NMSA 1978.

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 35-31-2G 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 Instruction 14-3103.

For a discussion of exceptions and exemptions as a defense, see commentary to Instructions 14-3101 and 14-3132.

For a discussion of the requirement of knowledge, see commentary to Instructions 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. Supp. Drugs and Narcotics § 163.

14-3105. Controlled substance; distribution to a minor; essential elements.

For you to find the defendant guilty of "distribution of ..... to a minor" [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 [transferred]*3* [caused the transfer of]

[attempted to transfer] .....
to .....; (name of transferee)

2. The defendant knew it was ..... [or believed it to be ..... [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 ...., 19 ...

USE NOTE

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.

****

Statutory reference. - Section 30-31-21 NMSA 1978.

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 Instruction 14-3101.

See also commentary to Instruction 14-3103.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 34.

Giving, selling or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

28 C.J.S. Supp. Drugs and Narcotics §§ 151, 164, 172, 176.

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 ..... , 19 ...

USE NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-31-20A(2) NMSA 1978.

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 Instruction 14-3103.

Note that this crime requires only a general criminal intent. Therefore, Instruction 14-141 must be given.

The definition of "deliver" includes an attempted transfer. Apparently Instruction 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 Instructions 14-3101 and 14-3132.

For a discussion of the requirement of knowledge, see commentary to Instructions 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, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

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, 91 N.M. 670, 579 P.2d 796 (1978).

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 Crim. 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, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

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(1) and (2) NMSA 1978 (relating to penalties for possession). State v. Bustamante, 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16, 17.

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. Supp. Drugs and Narcotics § 164.

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 ..... 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*4*;

2. The defendant knew it was ..... [or believed it to be ..... [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 ....., 19 ...

USE NOTE

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. Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-31-20A(3) NMSA 1978.

Committee commentary. - See Section 30-31-20A(3) NMSA 1978. See also commentary to Instruction 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 Instructions 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 Instructions 14-3101 and 14-3132.

For a discussion of the requirement of knowledge, see commentary to Instructions 14-3101 and 14-3102.

For a discussion of the use of the word transfer, see commentary to Instruction 14-3103.

ANNOTATIONS

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. Supp. Drugs and Narcotics § 163.

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 ..... 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] .....

2. The defendant knew it was .....

3. This happened in New Mexico on or about the .... day of ....., 19 ...

"Manufactured" means produced, prepared, compounded, converted or processed.

USE NOTE

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

2. Use only the applicable alternatives.

3. Identify the controlled substance.

****

Statutory reference. - Sections 30-31-20A(1) and 30-31-2N NMSA 1978.

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 Instructions 14-3101 and 14-3132.

Any controlled substance enumerated in Schedules I through V may be manufactured.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Supp. Drugs and Narcotics § 170.

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 ..... by misrepresentation or deception, [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 did [intentionally acquire or obtain]*1* [attempt to acquire or obtain] possession of .....

2. The defendant did so by misrepresentation or deception;

3. The defendant knew it was ..... [or believed it to be ..... [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 ...., 19 ..

USE NOTE

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.

****

Statutory reference. - Section 30-31-25A(3) NMSA 1978.

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 ..... 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 ..... on .....

2. The unauthorized ..... falsely represented the manufacturer, distributor or dispenser of the .....

3. The defendant knew that the use of the ..... was unauthorized;

4. The defendant knew the substance was ..... [or believed it to be ..... [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 ....., 19 ...

USE NOTE

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.

****

Statutory reference. - Sections 30-31-22B and 30-31-2F NMSA 1978.

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 Instruction 14-3103. See also commentary to Instructions 14-3102 and 14-3104.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Supp. Drugs and Narcotics § 179.

14-3121. Counterfeit substance; delivery; essential elements.

For you to find the defendant guilty of "delivering a counterfeit substance" [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 [transferred]*2* [caused the transfer of] [attempted to transfer] ..... to another;

2. The ..... had an unauthorized ..... which falsely represented its manufacturer, distributor or dispenser;

3. The defendant knew that the use of the ..... was unauthorized;

4. The defendant knew the substance was ..... [or believed it to be ..... [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 ..20, 19 ...

USE NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Sections 30-31-22B, 30-31-2F and 30-31-2G NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-3120.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Supp. Drugs and Narcotics § 151.

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 ..... 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*3*;

2. The defendant knew the substance was ..... [or believed it to be ..... [or believed it to be some drug or other substance the possession of which is regulated or prohibited by law];

3. The ..... had an unauthorized ..... which falsely represented its manufacturer, distributor or dispenser;

4. The defendant knew that the use of the ..... was unauthorized;

5. The defendant intended to transfer the ..... to another;

6. This happened in New Mexico on or about the ..... day of ..20, 19 ...

USE NOTE

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

2. Identify the substance.

3. Instruction 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.

****

Statutory reference. - Sections 30-31-22B and 30-31-2F NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-3120.

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 hisperson 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 NOTE

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.

****

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 Instruction 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

"Possession" may be actual or constructive. State v. Montoya, 92 N.M. 734, 594 P.2d 1190 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

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, 92 N.M. 734, 594 P.2d 1190 (Ct. App.), cert. denied, 92 N.M. 675, 593 P.2d 1078 (1979).

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, 95 N.M. 755, 626 P.2d 292 (Ct. App.), 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).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Supp. Drugs and Narcotics § 222.

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 NOTE

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

Statutory reference. - 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 § 2.

28 C.J.S. Supp. Drugs and Narcotics § 1.

PART E
EXCEPTIONS AND EXEMPTIONS

14-3140. Exceptions and exemptions; burden of proof.

If ..... the defendant is not guilty of ..... [as charged in Count ..... the burden is on the state to prove beyond a reasonable doubt that .....

USE NOTE

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.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 30-31-37 NMSA 1978.

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 Instruction 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 negative those exceptions. State v. Roybal, 100 N.M. 155, 667 P.2d 462 (Ct. App. 1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 2727.

28 C.J.S. Supp. Drugs and Narcotics § 190.

Set 14, Chapters 32 to 42

(Reserved) (1994 Supp.)
CHAPTERS 32 TO 42

(RESERVED)

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)*1* (or) (sale of) 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)*1* (or) (sold) a security*3*;

2. The security was required by the state securities law to be registered with the State of New Mexico prior to the (sale)*1* (or) (offer for sale)*4*;

3. The security was not registered as required by the state securities law;

4. This happened in New Mexico on or about the ..... day of ...., 19 .....

USE NOTE

1. Use only the applicable alternatives.

2. Insert the Count Number if more than one count is charged.

3. Instruction 14-4310, 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, 14-4320 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, 14-4321 must be given.

5. Instruction 14-141, General criminal intent, must also be given with this instruction.

[Approved, effective September 1, 1988.]

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Statutory reference. - Section 58-13B-20 NMSA 1978.

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 Criminal 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 Criminal 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

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

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)*2* (sold) (offered to purchase) (or) (purchased) a security*3*;

2. In connection with the (offer to sell)*2* (sale) (offer to purchase) (or) (purchase) 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 ....., 19 .....

USE NOTE

1. Insert the Count Number if more than one count is charged.

2. Use only the applicable alternatives.

3. Instruction 14-4310, the definition of "security", must also be given immediately after this instruction.

4. Instruction 14-141, General criminal intent, must also be given.

[Approved, effective September 1, 1988.]

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Statutory reference. - Section 58-13B-30 NMSA 1978.

Committee commentary. - Unlike general "criminal fraud", the fraudulent sale of securities is not a specific intent crime. State v. Ross, 104 N.M. 23, 26, 715 P.2d 471 (Ct.App., 1986). UJI Criminal 14-141, 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 Criminal 14-4301.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

PART B
DEFINITIONS

14-4310. "Security"; defined.

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) *2* (receipt for) (guarantee of) the right to purchase a security.]

[a 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.]

[a 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]

[any 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) *5* (call) *5* (straddle) *5* (or) (option) *5* entered into on a national securities exchange relating to foreign currency.]

[(put) *5* (call) *5* (straddle) *5* (or) (option) *5* on any (security) *2* (group or index of securities including any interest therein or based on the value thereof).]

[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 NOTE

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 Securities Act of 1986 to describe a security. If a term is not provided in this instruction, 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 Instruction 14-4311 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.]

*** * * * * * * * * * * * * * * * * * ***

The question of whether a specific instrument is a "security" is a mixed question of law and fact. See Commentary to UJI Criminal 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 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. 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 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

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

14-4311. Securities; additional definitions.1

"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 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 NOTE

1. The definitions in this Instruction may be used with the definitions set forth in Instruction 14-4310.

[Approved, effective September 1, 1988.]

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

14-4312. "Isolated transaction"; definition.

An "isolated transaction" is a transaction which is unique, occurs only once or sporadically.

[Approved, effective September 1, 1988.]

*** * * * * * * * * * * * * * * * * * ***

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, 105 N.M. 366, 732 P.2d 1389 (Ct. App. 1986). See also State v. Sheets, 94 N.M. 356, 364, 610 P.2d 760 (Ct. App. 1980) (cert. den. 94 N.M. 675, 615 P.2d 992) for the definition of "isolated sale".

White v. Solomon, supra, adopts the sale of business doctrine. The New Mexico Court of Appeals improperly relies upon the United States Supreme Court decision of

Tcherepnin v. Knight, 389 U.S. 332, 88 S. Ct. 548, 19 L.Ed.2d 564 (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, 105 S. Ct. 2297, 85 L.Ed.2d 692 (1985). See Committee commentary to UJI Criminal 14-4301 for a discussion of the Tcherepnin and Landreth decisions.

It is noted that even though the sale of 100% of the stock of a business may not have to be registered in New Mexico, the transaction is still subject to the fraud provisions of the the New Mexico Securities Act of 1986. See State v. McCall, 101 N.M. 616, 629, 686 P.2d 958 (Ct. App. 1983).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

PART C
DEFENSES

14-4320. Defense; exempt security.1

Evidence has been presented that the security which was (sold)*2* (offered for sale) [as charged in Count ..... was an exempt security and was not required to be registered under the State Securities Act. A security which is

[(issued by)*2* (insured by) (guaranteed by) a .....

[an option issued by ..... [a .....
is an exempt security and is not required to be registered by the state securities law.

If you find that the security was

[(issued by)*2* (insured by) (guaranteed by) a .....

[an option issued by ..... [a .....
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)*2* (offered for sale) was not an exempt security.

USE NOTE

1. For use if there is an issue that the sale or offer for sale was an exempt security under the State Securities Act.

2. Use only the applicable alternative.

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

4. See Section 58-13B-26 NMSA 1978 for the types of exempt securities. Many of the terms set forth in Section 58-13B-26 NMSA 1978 have been defined in Instructions 14-4310 and 14-4311.

[Approved, effective September 1, 1988.]

*** * * * * * * * * * * * * * * * * * ***

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, et al., 102 N.M. 629, 698 P.2d 902 (Ct. App., 1985) (cert. den. 102 N.M. 613).

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

State Securities Act. - The reference in the first paragraph 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

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 Evidence has been presented that the security which was
(sold)2 (offered for sale) [as charged in Count  .......  was an
exempt transaction and was not required to be registered under
the state securities law.
    [An isolated transaction4,]2
  [OR]
    [A transaction (by)2 (between) (in)  .......
  is an exempt transaction which is not required to be
registered under the state securities law.
    If you find that the (sale)2 (offer to sell) of the
unregistered security was
    [an isolated transaction,]2
  [OR]
```

[a transaction (by)*2* (between) (in) .....
you must find the defendant not guilty of the sale of an unregistered security as charged in [Count .....
The burden is on the state to prove beyond a reasonable doubt that the security (sold)*2* (offered for sale) was not an exempt transaction.

USE NOTE

1. For use if there is an issue that the sale or offer for sale was an exempt transaction. See Section 58-13B-27 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 Criminal 14-4312 is to be given immediately following this alternative.

5. Set forth the elements of the exempt transaction. See Section 58-13B-27 NMSA 1978 for the type of exempt securities transactions.

[Approved, effective September 1, 1988.]

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Although the sale of all of the stock of a business is a transaction subject to the New Mexico Securities Act of 1986, 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, 105 N.M. 366, 732 P.2d 1389 (Ct. App., 1986); State v. Sheets, supra; and State v. Shafer, for the definition of "isolated sale". See also the Committee commentaries to UJI Criminal 14-4301 and 14-4312.

ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated June 16, 1988, this instruction is effective for cases filed in the district courts on or after September 1, 1988.

CHAPTER 44
(RESERVED)

CHAPTER 45
MOTOR VEHICLE OFFENSES

PART A

DRIVING 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 ....., the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant drove a motor vehicle;*2*

2. At the time, he was under the influence of intoxicating liquor;*3*

3. This happened in New Mexico, on or about the ..... day of ..., 19 ..

USE NOTE

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

2. For definition of "motor vehicle," see Section 66-1-4B(39) NMSA 1978.

3. Give UJI Crim. 14-243 if requested.

****

Statutory reference. - Section 66-8-102A NMSA 1978.

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.

Although there is no case law in New Mexico which defines the phrase "to drive," as stated in 66-8-102 NMSA 1978, courts in other jurisdictions have held that the phrase "to drive" means the steering and controlling of a vehicle while it is in motion. Circumstantial evidence may be used to show that a driver drove the vehicle to the place where he or she was arrested. State v. Phillips, 389 So.2d 1260 (La., 1980); People v. Jordan, 75 Cal. App. 3d Supp. 1, 142 Cal. Rptr. 401 (1977); State v. Pritchett, 53 Del. 583, 173 A.2d 886 (1961).

A criminal defendant 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 one-tenth of one percent or more by weight of alcohol in the blood. 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.

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 ..... the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant drove a motor vehicle;*2*

2. At that time, he was under the influence of drugs to such a degree that he was incapable of safely driving a vehicle;*3*

3. This happened in New Mexico, on or about the ..... day of ..., 19 ..

USE NOTE

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

2. For definition of "motor vehicle," see Section 66-1-4B(39) NMSA 1978.

3. Do not give UJI 14-243.

****

Statutory reference. - Section 66-8-102B NMSA 1978.

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 him 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." Narcotic drugs are defined in the Controlled Substances Act [30-31-2P NMSA 1978]. If the drug is not a "narcotic drug" as defined in the Controlled Substances Act, the jury must decide if the substance was "any other drug" under 66-8-102B NMSA 1978, and that the defendant was under its influence to such a degree as to render him or her incapable of driving safely.

The Committee is of the opinion that UJI Crim. 14-4504 which defines the phrase "under the influence of intoxicating liquor," should not be given if the defendant is charged under 66-8-102B. Driving while under the influence "of any drug" refers to a broader category of substances than the term "intoxicating liquor." The legislature intended that driving while under the influence of intoxicating liquor [66-8-102A] and driving while under the influence of any drug [66-8-102B] to be two separate and distinct offenses. Therefore, in this instruction, the statutory definition of "driving while under the influence of any drug" as stated in Element 2 of UJI Crim. 14-4502 was used.

For a discussion of the meaning of the phrase "to drive," see Committee Commentary to UJI Crim. 14-4501.

14-4503. Driving with a blood alcohol content of .10 or more; essential elements.

For you to find the defendant guilty of driving with one-tenth of one percent or more by weight of alcohol in his blood, [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 drove a motor vehicle;*2*

2. At that time, he had one-tenth of one percent or more by weight of alcohol in his blood;

3. This happened in New Mexico, on or about the ..... day of ..., 19 ..

USE NOTE

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

2. For definition of "motor vehicle," see Section 66-1-4B(39) NMSA 1978.

[As amended, effective August 1, 1989.]

****

Statutory reference. - Section 66-8-102C NMSA 1978.

Committee commentary. - This instruction pertains to the recently enacted section of the Motor Vehicle Code which makes it a criminal offense to drive any vehicle within New Mexico while having one-tenth of one percent (0.10%) or more by weight of alcohol in the blood. It is commonly known as the "per se" violation.

A violation of Section 66-8-102C NMSA 1978 requires all of the elements of the crime of driving while under the influence of intoxicating liquor [66-8-102A NMSA 1978] except the concept of "under the influence" or "impairment."

Section 66-8-110 NMSA 1978 states, "If the blood of the person tested contains one-tenth of one percent or more by weight of alcohol, the arresting officer shall charge him with a violation of Section 66-8-102 NMSA 1978." Therefore, Section 66-8-102C and Section 66-8-110 NMSA 1978, 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 66-8-102C NMSA 1978.

For a discussion of alternative charges under Sections 66-8-102A and 66-8-102C NMSA 1978, see Committee Commentary for UJI Crim. 14-4501.

For a discussion of the meaning of the phrase "to drive," see Committee Commentary for UJI Crim. 14-4501.

ANNOTATIONS

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".

14-4504. Reckless driving; essential elements.1

For you to find the defendant guilty of reckless driving [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 drove 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 ....., 19 ...

USE NOTE

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. For definition of "motor vehicle," see Section 66-1-4B(39) NMSA 1978.

ANNOTATIONS

Statutory reference. - Section 66-8-113 NMSA 1978.

Pursuant to the court order of February 10, 1986, this instruction applies to all cases tried after May 1, 1986.

14-4505. Careless driving; essential elements.

For you to find the defendant guilty of careless driving [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 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 ..., 19 ..

USE NOTE

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

2. For definition of "motor vehicle," see Section 66-1-4B(39) NMSA 1978.

3. For definition of "highway," see Section 66-1-4B(63) NMSA 1978.

****

Statutory reference. - Section 66-8-114 NMSA 1978.

Committee commentary. - Careless driving applies only to driving on the highways. Section 66-8-114A NMSA 1978, provides "any person operating a vehicle on the highway shall give his full time and entire attention to the operation of the vehicle." In comparison, the reckless driving statute, Section 66-8-113 NMSA 1978, omits any reference to driving a vehicle only on the highway.

Element 2 of this instruction lists alternative methods of committing the offense of careless driving. The committee considered the use of brackets to enclose the words "careless," "inattentive," and "imprudent," and the words "width," "grade," "curves," "corners," "traffic," "weather," "road conditions," and "all other attendant circumstances." It was the opinion of the committee that these words should not be enclosed by brackets, because the jury needs the entire list of descriptive words in order to determine whether or not the offense of careless driving was committed.

The committee also decided that the language of Section 66-8-114 NMSA 1978, should be used in this instruction because the statute gives examples of the types of actions which amount to the offense of careless driving.

Section 66-8-114 NMSA 1978, has been found to be constitutional and not void for vagueness with regard to the unpredictability of the circumstances by which a driver is not paying enough attention to the driving of the vehicle. State v. Baldonado, 92 N.M. 272, 587 P.2d 50 (Ct. App. 1978), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

CHAPTERS 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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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

Approach to instructions concerning witnesses in UJI Crim. is that instructions dealing with specific categories of witnesses should not be given unless required by statute or rule of court. State v. Smith, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

Instructions implicitly adopt policy against using instructions which comment on evidence. State v. Padilla, 90 N.M. 481, 565 P.2d 352 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Traditional distinction between direct and circumstantial evidence has been disapproved by this instruction and UJI 14-5002. State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977).

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, 91 N.M. 445, 575 P.2d 954 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Circumstantial evidence may be used to establish element of crime. State v. Sanchez, 98 N.M. 428, 649 P.2d 496 (Ct. App. 1982).

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, 91 N.M. 445, 575 P.2d 954 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

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, 75 N.M. 608, 409 P.2d 128 (1965) (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, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Circumstantial evidence alone can be sufficient to prove guilt beyond a reasonable doubt. State v. Duncan, 113 N.M. 637, 830 P.2d 554 (Ct. App. 1990).

Circumstantial evidence must exclude every reasonable hypothesis other than the guilt of the defendant. State v. Seal, 75 N.M. 608, 409 P.2d 128 (1965).

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, 83 N.M. 487, 493 P.2d 972 (Ct. App.), cert. denied, 83 N.M. 473, 493 P.2d 958 (1972).

Guilty knowledge is rarely susceptible to direct and positive proof and generally can be established only through circumstantial evidence. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

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, 82 N.M. 619, 485 P.2d 375 (Ct. App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

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, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

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, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Evidence § 1091.

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. Circumstantial evidence; sufficiency.

You are not permitted to find the defendant guilty of [the] [any] crime charged against him based on circumstantial evidence alone, unless the chain of circumstances excludes every other reasonable explanation except the defendant's guilt beyond a reasonable doubt.

USE NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language in this instruction is the test for reviewing the evidence on appeal, State v. Mares, 82 N.M. 682, 486 P.2d 618 (Ct. App.), rev'd, 83 N.M. 225, 490 P.2d 667 (1971), and on a motion for directed verdict, State v. Malouff, 81 N.M 619, 471 P.2d 189 (Ct. App. 1970). The adoption of this instruction and use note eliminates the requirement that the jury must also be instructed on the issue when the state's case rests solely on circumstantial evidence. See, e.g., State v. Duran, 86 N.M. 594, 526 P.2d 188 (Ct. App.), cert. denied, 86 N.M 593, 526 P.2d 187 (1974); Territory v. Lermo, 8 N.M. 566, 46 P. 16 (1896); State v. Garcia, 61 N.M. 291, 299 P.2d 467 (1956); and compare State v. McKnight, 21 N.M. 14, 42-43, 153 P. 76 (1915), appeal dismissed per curiam, 246 U.S. 653, 38 S. Ct. 335, 62 L. Ed. 923 (1917).

The committee believed that once the court has found that the state has met the legal test for sufficiency of the evidence, nothing is added by instructing the jury on this subject. The jury is instructed on its duty to find the facts and that it must be satisfied beyond a reasonable doubt of the defendant's guilt. Furthermore, this instruction would constitute a comment on the evidence prohibited by Rule 11-107 of the Rules of Evidence.

ANNOTATIONS

Traditional distinction between direct and circumstantial evidence has been disapproved by UJI Crim. 14-5001 and this instruction. State v. Bell, 90 N.M. 134, 560 P.2d 925 (1977).

Refusal to instruct jury on circumstantial evidence is proper because such an instruction is not to be given. State v. Williams, 91 N.M. 795, 581 P.2d 1290 (Ct. App. 1978); State v. Smith, 92 N.M. 533, 591 P.2d 664 (1979).

Circumstantial proof to support conviction must be inconsistent with any reasonable hypothesis of the defendant's innocence. State v. Brito, 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969).

The defendants were convicted on circumstantial evidence. To support a conviction, circumstantial evidence must be inconsistent with any reasonable hypothesis of the defendants' innocence. State v. Hardison, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

Location of crime, as one 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, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Sufficient circumstantial evidence to sustain conviction. - Evidence that both men were wearing boots when arrested and both sets of boots had cleats matching the description of the cleats in the tracks observed by the officer and, furthermore, the boots of the men were taken to the scene and these boots matched the tracks at the scene, both in length and width, "just exactly the size of the track," was held sufficient to sustain a conviction based on circumstantial evidence. State v. Hardison, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

The defendant's flight from the crime, together with the circumstances that the defendant came to the store with intent of breaking in, and gave a false name when arrested, absent an explanation of his reasons or motive, permits an inference of guilt. The circumstances exclude every reasonable hypothesis other than the defendant's guilt and are sufficient to sustain a conviction. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Evidence § 1125.

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.

23A C.J.S. Criminal Law § 1251.

14-5003. Consciousness of guilt; falsehood.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 14-5002.

ANNOTATIONS

Instructions implicitly adopt policy against using instructions which comment on evidence. State v. Padilla, 90 N.M. 481, 565 P.2d 352 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

As comment on evidence is matter that should be left for argument. State v. Padilla, 90 N.M. 481, 565 P.2d 352 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 of the Rules of Evidence.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 292, 293.

23A C.J.S. Criminal Law § 1225.

14-5005. Efforts by others than defendant to fabricate evidence.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language of this instruction was derived from California Jury Instructions Criminal, 2.05. See the commentaries to Instructions 14-5003 and 14-5004.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence § 293.

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language of this instruction was derived from California Jury Instructions Criminal, 2.06. See the commentary to Instruction 14-5003.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29 Am. Jur. 2d Evidence §§ 292, 293.

23A C.J.S. Criminal Law § 1225.

14-5007. Evidence limited to one defendant.1

Evidence concerning ..... (describe evidence) has been admitted
against .....(name of defendant) but not admitted against
.....
..... .
name of defendant

[At the time this evidence was admitted, you were instructed that it could not be considered by you against ..... (name of defendant)

You are [again]*2* instructed that you must not consider such evidence against ..... (name of defendant)

Your verdict as to each defendant must be reached as if he were being tried separately.

USE NOTE

1. Upon request, the court must instruct the jury of the limited scope of evidence admitted only as to one party.

2. Use only if jury was admonished at the time the evidence was admitted.

****

Rule 11-105 of the Rules of Evidence 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." Rule 11-105 was, in part, derived from the California Evidence Code, Section 355. See 56 F.R.D. 183, 200 (1973). This instruction is derived from California Jury Instructions Criminal, 2.07, which was also based upon the California Evidence Code.

ANNOTATIONS

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.1

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 NOTE

1. No instruction on this subject shall be given.

****

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 of the Rules of Criminal Procedure, 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. In that event, this instruction would, of course, be unnecessary.

In the event that the defendant overlooks his remedy under Rule 5-203 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

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.]*2*
You are [again]*2* instructed that you must not consider such evidence
for any purpose other than
.....(proof)

USE NOTE

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 Instructions 14-5010, 14-5022, 14-5028, 14-5034, and 14-5035.

2. Use only if jury was admonished at the time the evidence was admitted.

****

This instruction is required by Rule 11-105 of the Rules of Evidence. It was derived from California Jury Instructions Criminal, 2.09, which was based upon the California Evidence Code, Section 355. See also the commentary to Instruction 14-5007.

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, Instruction 14-5010; impeachment of the defendant by other crimes or wrongs, Instruction 14-5022; impeachment of the defendant by use of otherwise inadmissible confessions, Instruction 14-5034; impeachment of the defendant by use of inadmissible real evidence, Instruction 14-5035. For a case where this instruction would have been appropriate, see State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

ANNOTATIONS

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.

Evidence has been admitted concerning statements made by the defendant in the course of a mental examination or treatment. These statements may be considered only for the limited purpose of showing the information upon which an expert based his opinion as to the defendant's mental capacity.

USE NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

Under Rule 11-504 of the Rules of Evidence, a statement made in the course of a court-ordered mental examination is not privileged. Under Rule 5-602 of the Rules of Criminal Procedure, 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 of the Rules of Evidence, (see, e.g., State v. Milton, 86 N.M. 639, 526 P.2d 436 (Ct. App. 1974)), the statement will be admitted under the restrictions of Rule 5-602 of the Rules of Criminal Procedure. In construing a similar federal statute, 18 U.S.C. § 4244, the Tenth Circuit has noted that because "such statements could be prejudicial . [t]he 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).

The language of this instruction was derived from California Jury Instructions Criminal, 2.10, and altered to conform to Rule 5-602 of the Rules of Criminal Procedure.

ANNOTATIONS

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language of this instruction was derived from California Jury Instructions Criminal, 2.11. Following the precedent of UJI Civil 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, 98 N.M. 798, 653 P.2d 174 (Ct. App. 1982).

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, 99 N.M. 117, 654 P.2d 570 (Ct. App. 1982).

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.

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 NOTE

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.

****

This instruction was derived from California Jury Instructions Criminal, 2.12, and UJI Civil, 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 of the Rules of Evidence.

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, 91 N.M. 266, 572 P.2d 1274 (Ct. App. 1977).

14-5013. Facts established by judicial notice.1

Without requiring testimony or other evidence, the court has taken notice that ..... You may, but are not required to, accept this as a fact.

USE NOTE

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.

****

Paragraph G of Rule 11-201 of the Rules of Evidence 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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

This instruction sets out the rule that an inference may be drawn from the failure of a party to call a witness. UJI Civil, 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 Evidence Rule 11-107.

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 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 Evidence Rule 11-107.

ANNOTATIONS

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 his truthfulness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case.

USE NOTE

1. This is a basic instruction and may be given in all cases.

*** * * * * * * * * * * * * * * * * * ***

This instruction was derived from UJI Civil 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 of the Rules of Evidence. Compare New Mexico UJI Civil, 13-2004.

This instruction, together with the reasonable doubt instruction, 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

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, 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

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, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

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, 115 N.M. 458, 853 P.2d 160 (Ct. App. 1993).

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, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

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, 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975).

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, 99 N.M. 48, 653 P.2d 879 (Ct. App. 1982).

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, 95 N.M. 755, 626 P.2d 292 (Ct. App.), 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).

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, as this rule operates only when there is complete failure to instruct upon a necessary issue; therefore, as the defendant made no objection to this instruction, he will not be heard on appeal. State v. Cardona, 86 N.M. 373, 524 P.2d 989 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974) (decided under former Rule 41, N.M.R. Crim. P.).

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language of this instruction was derived from California Jury Instructions Criminal, 2.20. Under Rule 11-801D(1) of the Rules of Evidence, 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 Instruction 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

Evidence has been admitted that the defendant [was convicted of the crime[s] of ..... [committed the act of ..... You may consider such evidence for the purpose of determining whether the defendant told the truth when he testified in this case and for that purpose only.

USE NOTE

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 Instruction 14-5028 may not be included in this instruction.

*** * * * * * * * * * * * * * * * * * ***

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 of the Rules of Evidence. Under Rule 11-105 of the Rules of Evidence, the court, if requested, must instruct the jury on the limited purpose of the evidence.

Although Rules 11-608 and 11-609 cover impeachment of all witnesses, it is obviously not necessary to give the jury a limiting instruction for witnesses other than the defendant. Instruction 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 of the Rules of Evidence. See commentary to Instruction 14-5028.

ANNOTATIONS

Testimony from defendant as to his prior convictions relates only to his credibility. State v. Archunde, 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

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, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968).

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.1

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language of this instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 12.05. See also UJI Civil 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.1

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 NOTE

1. No instruction on this subject shall be given.

****

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 hisrefusal 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 NOTE

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.

****

The language of this instruction was derived from California Jury Instructions Criminal, 2.26. Under Rule 11-513C of the Rules of Evidence, "[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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

Under Rule 11-404A(1) of the Rules of Evidence, 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, Rules of Evidence.

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 of the Rules of Evidence 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 Crim. 14-5060 is adequate. State v. Robinson, 94 N.M. 693, 616 P.2d 406 (1980).

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.1

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 ..............................................................
.............(name of witness) has testified to the good
character of the defendant and oncross-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.
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USE NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

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 of the Rules of Evidence. 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

Evidence has been admitted concerning whether the defendant committed*2* [.....*3*][..... other than the crime charged in this case.

The evidence was received and you may consider it only 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*].

USE NOTE

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.

****

The form of this instruction was derived from California Jury Instructions Criminal, 2.50. Its use, upon request, is required by Rule 11-105 of the Rules of Evidence. 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, Rules of Evidence. 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 of the Rules of Evidence, 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 of the Rules of Evidence 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, unlike Rule 11-609 of the Rules of Evidence, (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 Instruction 14-230 (involuntary manslaughter by an act not amounting to a felony).

ANNOTATIONS

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, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

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, 93 N.M. 450, 601 P.2d 83 (Ct. App. 1979).

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 14-5002 and Rule 11-107 of the Rules of

Evidence. 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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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. - 29 Am. Jur. 2d Evidence § 228; 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.1

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 NOTE

1. This instruction must be given on request of a defendant who does not testify and must not be given if the defendant objects.

*** * * * * * * * * * * * * * * * * * ***

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 note. - 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, 97 N.M. 585, 642 P.2d 188 (Ct. App. 1982).

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.1

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 NOTE

1. No instruction on this subject shall be given.

****

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 Instruction 14-1644 and commentary; receiving stolen property with knowledge that the property had been stolen - see Instruction 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.1

```
 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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * ***

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., Instruction 14-1630. In addition, some special defenses still apply only to this element. See Instruction 14-5111 and commentary. See generally the reporter's addendum to commentary to Instruction

14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

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.

[During cross-examination, the defendant was asked about] [Evidence has been admitted concerning] *2* certain statements [he] [the defendant] *2* made to the authorities during the investigation of the case. You may consider the statement[s] for the purpose of determining whether the defendant told the truth when he testified in this case and for that purpose only.

USE NOTE

1. Upon request, this instruction must be given when the state uses an otherwise inadmissible statement for impeachment.

2. Use these bracketed alternative provisions when the statement has been introduced through extrinsic evidence.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 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 Instruction 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 Instruction 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 of the Rules of Evidence.

ANNOTATIONS

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, 93 N.M. 728, 605 P.2d 236 (Ct. App. 1979), aff'd, 93 N.M. 724, 605 P.2d 232 (1980).

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, 67 N.M. 241, 354 P.2d 533 (1960).

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

[Evidence has been admitted concerning .....]*2*. (describe circumstances) [On cross-examination,the defendant was asked about ....]. (describe circumstances) You may consider such evidencefor the purpose of determining whether the defendant told the truth when he testified in this case and for that purpose only.

USE NOTE

1. Upon request, this instruction must be given when the state uses illegally seized evidence to impeach the defendant.

2. Use this bracketed alternative provision when the evidence has been introduced through extrinsic evidence.

*** * * * * * * * * * * * * * * * * * ***

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 of the Rules of Evidence.

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 of the Rules of Evidence.

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Evidence Rule 11-107. 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.

Evidence has been admitted concerning a statement allegedly made by the defendant. Before you consider such statement 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.

USE NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

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, 84 S. Ct. 1774, 12 L. Ed. 2d 908, 1 A.L.R.3d 1205 (1964); State v. Martinez, 30 N.M. 178, 192, 230 P. 379 (1924). See also Rule 11-104C, Rules of Evidence. If the court finds that the statement is voluntary (and also was given after compliance with Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (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, 82 N.M. 466, 469-70, 483 P.2d 940, 943-44, (Ct. App.), cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (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, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972). Under New Mexico law, failure to submit the voluntariness question is harmless error if the defendant substantially admits the facts which are contained in the confession. State v. Barnett, 85 N.M. 301, 512 P.2d 61 (1973), rev'g 84 N.M. 455, 504 P.2d 1088 (Ct. App. 1972).

Under Rule 11-801 of the Rules of Evidence, a nonverbal "assertion" may be admissible. The federal committee drafting the Rules of Evidence did not include any special provisions for an "admission by silence" made during custodial interrogation. The federal committee appears to doubt that the admission would be admissible under federal constitutional law. See 56 F.R.D. 183, 298 (1973). Cf. United States v. Hale, 442 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975). Consequently, the language of this instruction is based on the assumption that the statement is an oral or written assertion and not an admission by silence.

ANNOTATIONS

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, 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

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, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

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, 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Statement of defendant can be induced by promise or threat of third persons. State v. Zamora, 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

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, 74 N.M. 591, 396 P.2d 422 (1964).

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, 82 N.M. 455, 483 P.2d 510 (Ct. App. 1971).

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, 73 N.M. 152, 386 P.2d 246 (1963).

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, 73 N.M. 152, 386 P.2d 246 (1963).

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, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

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, 82 N.M. 358, 482 P.2d 61 (1971).

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, 91 N.M. 470, 575 P.2d 1355 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978) (court of appeals declined to define word "threat").

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, 93 N.M. 708, 604 P.2d 1242 (1980).

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, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

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, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

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, 88 N.M. 574, 544 P.2d 289 (Ct. App. 1975).

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, 85 N.M. 549, 514 P.2d 306 (Ct. App. 1973).

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, 74 N.M. 591, 396 P.2d 422 (1964).

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, 55 N.M. 312, 232 P.2d 982 (1951). See also State v. Minor, 78 N.M. 680, 437 P.2d 141 (1968).

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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.

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 NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

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 Evidence Rule 11-104B. 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 Evidence Rules 11-801D(2)(e) and 11-104B. 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 NOTE

1. Upon request, this instruction may be given whenever an expert has testified or when a layman has been allowed to state an opinion.

*** * * * * * * * * * * * * * * * * * ***

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 of the Rules of Evidence, both lay witnesses and experts may give opinions under certain conditions. In addition, Rule 11-405A permits testimony in the form of an opinion on the question of character or a trait of character. Furthermore, under Rule 11-704, 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 Civil 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

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

Under Rule 11-705 of the Rules of Evidence, 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 Civil 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.1

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 NOTE

1. This instruction must be given in all cases.

****

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 Instruction 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 Instruction 14-5020, Credibility of witnesses. See State v. Mazurek, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

ANNOTATIONS

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

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, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

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, 94 N.M. 693, 616 P.2d 406 (1980).

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, 90 N.M. 154, 560 P.2d 945 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

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, 79 N.M. 475, 444 P.2d 986 (1968).

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, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Evidence § 1175; 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 ..... you must be convinced beyond a

reasonable doubt that the defendant .... (set forth presumed fact).

USE NOTE

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 Instructions 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.]

****

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 of the Rules of Evidence, 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 Instructions 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, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

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.

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" of .....
"guilty" of .....;
"not guilty";
"not guilty by reason of insanity";
"guilty but mentally ill"]*4*.

Only one of these forms is to be completed [for each crime charged].*2*

You will first consider whether the defendant committed the crime.

If you determine that the defendant committed the act charged, but 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.

If you find that the defendant is guilty, you should then consider if the defendant was mentally ill at the time.

If you find that the defendant is guilty of the crime charged, but he was mentally ill at the time, you should find him "guilty, but mentally ill."

If you find that the defendant is guilty and was not insane or mentally ill at the time of the commission of the offense, you should return a verdict of guilty.

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]*5* [testimony of lay witnesses] [acts and conduct of the defendant].

USE NOTE

1. This instruction should be given prior to 14-5102 and 14-5103. 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.

2. Use the bracketed language when there is more than one crime charged.

3. Insert name of greater of offense [offenses].

4. Use only applicable verdicts.

5. Use only applicable bracketed alternative.

*** * * * * * * * * * * * * * * * * * ***

This instruction does not deal specifically with the problem of burden of proof. Initially, there is a presumption that the defendant is sane. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971). Once the defendant introduces evidence which creates a reasonable doubt as to his sanity, the state must prove that the defendant is sane beyond a reasonable doubt. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973). However, the state is not required to present any evidence on the issue, and it may instead simply rely on the presumption. State v. Wilson, supra. See generally, Annot., 17 A.L.R.3d 146 (1968).

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. State v. James, 85 N.M. 230, 51 P.2d 556 (Ct. App. 1973).

In New Mexico, the jury is not required to first determine if the defendant committed the elements of the crime and then proceed to the question of insanity. State v. Victorian, 84 N.M. 491, 494, 505 P.2d 436, 439 (1973). This instruction slightly modifies the holding in *Victorian* by suggesting that the jury first find that the acts have been committed. This does not necessarily mean that they have to find the elements of the crime. Defense counsel may want to point out in closing argument that, if the jury is not persuaded that the crime was committed, the defendant is entitled to a verdict of not guilty. A determination of not guilty by reason of insanity by the jury is a prerequisite to a determination of present sanity by the judge under Rule 5-602 of the Rules of Criminal Procedure. Rule 5-602A(2) of the Rules of Criminal Procedure 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." State v. Chambers, 84 N.M. 309, 502 P.2d 599 (1972).

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 them to decide whether to afford greater weight to expert testimony. "The purpose of psychiatry is to diagnose and cure mental illnesses, not to assess blame for acts

resulting from these illnesses. The law seeks to find facts and assess accountability. . . ." Psychiatric testimony, however, is relevant evidence in determining accountability. State v. Dorsey, 93 N.M. 607, 609, 603 P.2d 717 (1979).

ANNOTATIONS

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, 82 N.M. 358, 482 P.2d 61 (1971).

There is a presumption of sanity which must be rebutted by the defendant, whereupon the jury shall make its determination. State v. Torres, 82 N.M. 422, 483 P.2d 303 (1971).

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, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

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, 84 N.M. 491, 505 P.2d 436 (1973).

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, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

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, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

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, 84 N.M. 491, 505 P.2d 436 (1973).

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, 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

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, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

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, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

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, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

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, 84 N.M. 309, 502 P.2d 999 (1972).

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.

22 C.J.S. Criminal Law §§ 56, 58 to 60.

14-5102. Insanity.

The defendant was insane at the time of the commission of the crime if, because of a mental disease, as explained below, he:

[did not know what he was doing or understand the consequences of his act,] [or] *2*

[did not know that his act was wrong,] [or]

[could not prevent himself from committing the act].

A mental disease is a specific disorder of the mind which both substantially affects mental processes and substantially impairs behavior controls. This specific disorder must also be a long-standing disorder. It 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.

USE NOTE

1. This instruction should immediately follow the elements instruction and Instruction 14-5101. Instruction 14-5103 should immediately follow this instruction.

2. Use only the alternatives established by the evidence.

*** * * * * * * * * * * * * * * * * * ***

Test.

New Mexico employs a test for determining insanity which combines the traditional "right/wrong" analysis with the "irresistible impulse" test. That is, the jury is given three separate ways in which to find a defendant insane: the defendant did not know what he was doing or understand the consequences of his act; the defendant did not know his act was wrong; and, third, the defendant could not prevent himself from committing the act. The first two tests come from the *M'Naghten* case, 10 Clark & F.200, 8 Eng. Rep. 718 (1843). The third test - "irresistible impulse" - was added as a result of the 1954 case, State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

It is not enough, however, that the defendant can prove the existence of one of these three states of mind. It must most importantly be shown that the mental condition of the defendant is a result of a long-standing mental disorder. While no court has undertaken to give a definitive definition of mental disease or mental illness it is clear what is not included within this concept. It does not include a personality disorder or "an abnormality manifested only by repeated unlawful or antisocial conduct." American Law Institute, Model Penal Code, Section 4.01. (See for example Indiana Pattern Jury Instructions, Criminal, Section 10.11, and Oregon Instructions for Criminal Cases, Instruction 403.02.)

The New Mexico Supreme Court added its own exclusion in State v. White, supra, when it stated:

The insanity of which we speak does not comprehend an insanity which occurs at a crisis and dissipates thereafter. The insanity of which we speak is a true disease of the mind, normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances.

Id. at 330, 270 P.2d at 730 (emphasis added).

In other words, there must be a causal connection between the actual long-standing mental disease and the alleged criminal acts of the defendant. It would be possible for a jury to find that a defendant was guilty of a criminal offense, even though he was in fact suffering from a long-standing mental disease, if he did know what he was doing, that it was wrong, and he was able to control his impulses. (See commentary to 14-5103, Determination of mentally ill.)

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. State v. James, 85 N.M. 230, 511 P.2d 556 (Ct. App. 1973).

Since the courts have never stated how long a disease must be present in order to be "long-standing" this is a decision that must be made by the jury after considering all the evidence presented by both sides relevant to the defendant's mental condition. A person could have a long-standing mental disease which laid dormant until certain conditions arose causing the disease to manifest itself in an uncontrollable act. In this

case, as long as the act was a result of the disease, the defendant could be found insane.

Presumption/Burden of proof.

"Sanity is the normal condition of man and insanity an abnormal state. In the absence of anything to the contrary, the presumption is that the defendant is sane and is criminally responsible for his act." State v. Roy, 40 N.M. 397, 403, 60 P.2d 646 (1936). This presumption remains viable throughout the entire criminal proceeding, and the state is entitled to present no evidence concerning sanity if it so chooses. Even at a risk of losing the case, the state could choose not to rebut the defendant's evidence of insanity. State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973). As far back as 1892, the case law in New Mexico puts an affirmative burden on the defendant to produce evidence tending to prove insanity. Faulkner v. Territory, 6 N.M. 464, 30 P. 905 (1892).

This statement of the law does not mean, though, that the burden is of such a nature as to necessitate a proof beyond a reasonable doubt, nor necessarily that the proof must be by a preponderance of evidence, . but it means that when the defense of insanity has been set up the burden is on the defendant to submit sufficient evidence to at least produce in the minds of the jury a reasonable doubt of the guilt of the accused, under the instructions, that he must have been insane when he committed the deed.

Id. at N.M. 483.

Even this burden can be removed from the defendant if the state offers any evidence as to the insanity of the defendant. State v. Moore, 42 N.M. 135, 76 P.2d 19 (1938). In a more recent case, the court has held that once the defendant introduces some "competent evidence to support the allegation of insanity" it is then the state's burden to disprove insanity (or prove sanity) beyond a reasonable doubt. State v. Lopez, 91 N.M. 779, 581 P.2d 872 (1978).

Although the United States Supreme Court has held that it is not a violation of due process to put the burden of proving insanity on the defendant, LeLand v. Oregon, 343 U.S. 790 (1952), only 22 states take this view. 9 Wigmore on Evidence § 2501 (1981).

When instruction is to be given.

Common practice indicates that rarely, if ever, will the trial judge refuse to give the insanity instruction if the slightest bit of evidence on the subject has been offered. This is not necessarily the rule, however.

[W]hen all the evidence is in, if there has been adduced competent evidence reasonably tending to support the fact of insanity urged by the defendant as a defensive issue in the case, it is the duty of the court to instruct on the question of insanity. Otherwise, the court may properly refuse such instruction.

State v. Roy, supra at N.M. 404.

In addition to refusing to give the instruction based on insufficient evidence, the judge can refuse on the grounds that the defense was not timely raised, i.e., insanity defense brought up after prosecution had presented case resulted in prejudice to prosecution, and instruction properly refused. State v. Young, 91 N.M. 647, 579 P.2d 179 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d, cert. denied, 439 U.S. 957 (1978).

Rule 5-602 of the Rules of Criminal Procedure mandates that notice of an insanity defense be given at arraignment or within 20 days thereafter, unless the court waives this time for good cause.

ANNOTATIONS

Mental disease includes abnormal condition of mind which substantially affects mental or emotional processes and substantially impairs behavior controls. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

Test for insanity. - The jury 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; or (2) did not know that it was wrong; or (3) was incapable of preventing himself from committing it, and satisfactory proof of the existence of one or more of the three tests is sufficient to bar a guilty verdict. State v. James, 83 N.M. 263, 490 P.2d 1236 (Ct. App. 1971).

Test one of actual willpower. - A requested jury instruction on insanity that the defendant must have been "deprived of the normal governing power of the will" was erroneous, since the test was whether defendant was deprived of his actual willpower, not ordinary or reasonable willpower. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Insanity contemplated normally extends over considerable period of time. - The insanity of which this instruction speaks does not comprehend an insanity which occurs at a crisis and dissipates thereafter; the insanity of which this instruction speaks is a true disease of the mind, normally extending over a considerable period of time, as distinguished from a sort of momentary insanity arising from the pressure of circumstances. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975); State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

The insanity defense does not comprehend an insanity which occurs at a crisis and dissipates thereafter. It is a true disease of the mind, that is, any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls, normally extending over a considerable period of time, rather large in extent or degree, as distinguished from a sort of momentary insanity arising from the pressure of circumstances. State v. Nagel, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Idea of excitement or impulse has no place in instruction. - A requested instruction on insanity that the defendant must have been "so wrought up" as to be deprived of the governing power of the will was erroneous, since the idea of excitement or impulsive action has no place in such an instruction. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Presumption of continuing insanity not raised by evidence of prior insanity. - Any evidence of prior insanity is admissible, but does not give rise to a presumption of continuing insanity and is merely another item for the jury's consideration. State v. Torres, 82 N.M. 422, 483 P.2d 303 (1971), overruled on other grounds State v. Wilson, 85 N.M. 552, 514 P.2d 603 (1973).

Where expert medical testimony established reasonable doubt existed as to defendant's mental illness at the time of the burglary owing to his compulsion to obtain goods with which to finance his drug habit, the defendant was entitled to an instruction on this issue and in refusing to instruct on the defense of insanity, the trial court erred. State v. Flores, 82 N.M. 480, 483 P.2d 1320 (Ct. App. 1971).

14-5103. Determination of mentally ill.

The defendant was mentally ill at the time of the commission of the crime if a substantial disorder of thought, mood or behavior impaired his judgment at the time of the commission of the offense.

If you find beyond a reasonable doubt that the defendant committed the act charged you may find him guilty but mentally ill at the time of the commission of the offense.

USE NOTE

1. This instruction is to be given when Instruction 14-5102 has been given. It may also be given when there is not sufficient evidence to give Instruction 14-5102. It may also be given when Instruction 14-5110 or 14-5111 has been given because of evidence of a mental disease or disorder.

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Statutory reference. - 31-9-3 NMSA 1978.

Committee commentary. - Instruction 14-5103 was prepared subsequent to the enactment of Section 31-9-3 NMSA 1978 which provides for a finding of "guilty but mentally ill." Section 31-9-3 NMSA 1978 provides that a finding of "guilty but mentally ill" may be made only in a case in which the insanity of the defendant is in issue. The committee believed that this instruction should also be given if the jury has been presented an instruction on inability to form a deliberate or specific intent to commit an offense. In either case, the notice requirements of Rule 5-602 of the Rules of Criminal Procedure for the District Courts must have been followed.

ANNOTATIONS

"Guilty but mentally ill" instruction may be given where inability to form specific intent asserted. - Although 31-9-3 NMSA 1978 specifies that the instruction on "guilty but mentally ill" shall be given when the defendant asserts the defense of insanity, the supreme court in approving this instruction broadened the instances wherein such an instruction may be given to include instances where a defendant asserts the defense of an inability to form a specific intent. State v. Page, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984).

Substitution of "offense" for "act". - Instruction which read word for word the same as the uniform instruction, except that the word "offense" was substituted for the word "act" in the second sentence, did not deprive defendant of a fair trial, where she herself through her attorney asked the court to make the word change. State v. Pierce, 109 N.M. 596, 788 P.2d 352 (1990).

14-5104. Determination of present competency.

Evidence has been presented concerning the defendant's competency to stand trial. The defendant has the burden of proving by the greater weight of the evidence that he is mentally incompetent to be tried.

[Before considering whether the defendant committed the crime charged, you must make a determination of his competency to stand trial.] *2* A person is competent to stand trial if he:

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.

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 foreman 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 NOTE

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.

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Prior to 1967, a similar instruction was routinely given to the jury if a defendant has claimed that he was not competent to stand trial. See e.g., State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966); State v. Folk, 56 N.M. 583, 247 P.2d 165 (1952). The basis for the instruction was an 1855 statute which provided for "commitment" of a person "if upon the trial . . . such person shall appear to the jury charged with such indictment to be a lunatic . . .." Code 1915, § 4448. See Territory v. Kennedy, 15 N.M. 556, 110 P. 854 (1910).

The 1855 statute was repealed in 1967 by N.M. Laws 1967, ch. 231, § 1, compiled as § 41-13-3.1. Article II, Section 12 of the New Mexico Constitution and Rule 5-602 of the Rules of Criminal Procedure require the issue of competency to stand trial be submitted to the jury if the trial judge has a reasonable doubt regarding the issue of the defendant's competency. See State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977); State v. Chavez, 88 N.M. 451, 541 P.2d 631 (1975); and the committee commentary to Rule 5-602 of the Rules of Criminal Procedure. Absent an abuse of discretion, the trial judge's determination that there is not a reasonable doubt will not be overturned. See State v. Noble, supra at p. 363.

The defendant has the burden of proving by a preponderance or greater weight of the evidence that he is not competent to stand trial. State v. Ortega, supra, at p. 19. See also UJI Civil Instruction 13-304.

It is only necessary for ten members of the jury to decide the issue of competency, as proceedings to ascertain the competency to stand trial are civil proceedings. Article II, Section 12 of the New Mexico Constitution provides that the legislature may provide that verdicts in civil cases may be rendered by less than an unanimous vote of the jury. Section 38-5-17 NMSA 1978 provides for verdicts of ten in civil cases.

Although the New Mexico appellate decisions on competency to stand trial have all involved incompetency because of some mental illness or disease, Instruction 14-5104 is not limited to incompetency by reason of mental illness. It is clear that a mentally retarded (developmentally disabled) deaf mute who can neither read nor write and who is unable to communicate with his attorney may be incompetent to stand trial even though not suffering from any mental disease. See Jackson v. Indiana, 406 U.S. 715 (1972).

In the federal courts and New Mexico the test of present competency to stand trial is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S.

402 (1960). It is a violation of due process to try a person who does not have these capabilities.

ANNOTATIONS

Compiler's note. - 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.

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, 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, 110 N.M. 272, 794 P.2d 1201 (Ct. App. 1990).

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, 91 N.M. 721, 580 P.2d 489 (Ct. App. 1978).

Evidence not sufficient to raise reasonable doubt as to competency. - See State v. Coates, 103 N.M. 353, 707 P.2d 1163 (1985).

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, 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. Voluntary intoxication.1

Evidence has been presented that the defendant was intoxicated from use of [alcohol] [drugs]. An act committed by a person while voluntarily intoxicated is no less criminal because of his condition. If the evidence shows that the defendant was voluntarily intoxicated when allegedly he committed the crime[s] of ......, that fact is not a defense.

USE NOTE

1. No instruction on this subject shall be given. (See Instructions 14-5110 and 14-5111 for special instructions for specific intent crimes.)

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Under New Mexico law, the defense of voluntary intoxication depends upon whether the crime is characterized as a general intent crime or one characterized as a specific intent crime. If the crime is a specific intent crime, the defense is available to negate the so-called specific intent. See generally reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

The UJI instructions cover the defense for the specific intent crimes. Instruction 14-5110 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. For nonhomicide crimes, Instruction 14-5111 is used where intoxication can negate the element of intent to do a further act or achieve a further consequence.

Prior to the adoption of these instructions, it was a common practice to advise the jury that intoxication was not a defense to a general intent crime. The committee believed that the better practice would be to not give an instruction for those crimes. In the event that one of the crimes being considered by the jury is a specific intent crime, Instruction 14-5110 or 14-5111 will limit the defense to that crime. If there is no specific intent crime, and evidence of voluntary intoxication is admitted on some issue other than intent, the committee believed the instruction would be misleading.

ANNOTATIONS

Voluntary drug intoxication falls in same classification as voluntary alcohol intoxication. State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

Voluntary drunkenness instruction error for specific intent offense. - An instruction that voluntary drunkenness is no excuse or justification for a crime was erroneous in a trial for aggravated battery, a specific intent offense. State v. Crespin, 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

Diminished capacity instruction properly refused. - Although the defendant had been drinking and taking barbiturates, it was not error to refuse an instruction on diminished capacity when the effect of intoxication on the defendant's state of mind was covered in another instruction. State v. Rushing, 85 N.M. 540, 514 P.2d 297 (1973).

Evidence insufficient to raise drug intoxication question. - Evidence that the defendant used an unspecified amount of demerol on the evening that a conspiracy to commit burglary was formed, along with descriptions of the defendant as "stoned" or "high" (explained in that he could not walk or communicate "too good and had to lay down and take it easy"), along with testimony that he took some other unspecified drugs the next morning and was "high" when he left the house en route to the burglary, that he drove the car on one errand prior to the burglary and climbed a pipe to the roof of the burglarized store with the intention of warning his comrades about the presence of the police, was too vague and insufficient to raise a jury question as to drug intoxication in connection with either crime. State v. Watkins, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Where the jury believed that defendant had necessary felonious intent, this denies an appellate court the right, as a court of review, to grant relief, because the court does not sit as a second jury, and whether a defendant was so intoxicated as to be unable to form the necessary intent is a matter for the jury. State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 44, 107.

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 §§ 65 to 68, 70, 72.

14-5106. Involuntary intoxication.

Evidence has been presented that the defendant was intoxicated but that the intoxication was involuntary.

Intoxication is involuntary if: *1*

[a person is forced to become intoxicated against his will]

[a person becomes intoxicated by using (alcohol) *2* (drugs) without knowing the intoxicating character of the (alcohol) *2* (drugs) and without willingly assuming the risk of possible intoxication].

If the defendant was involuntarily intoxicated and as a result of such intoxication he: *3*

[did not know what he was doing or understand the consequences of his act] [or]

[did not know that his act was wrong] [or]

[could not prevent himself from committing the act]

then you must find him not guilty.

The burden is on the state to prove beyond a reasonable doubt that this defense of involuntary intoxication as just explained does not apply.

USE NOTE

1. Use only the applicable bracketed provision.

2. Use only the applicable source of the intoxication.

3. Use only the applicable insanity alternatives.

*** * * * * * * * * * * * * * * * * * ***

The committee found no reported New Mexico decisions involving the defense of involuntary intoxication. Some commentators have suggested that the defense is nonexistent. However, intoxication can result from the mistaken use of a liquor or narcotic substance. See generally Perkins, Criminal Law 894 (2d ed. 1969). In that instance, it is as if the defendant was rendered mentally ill by an act over which he had no control. Consequently, this instruction includes the elements of mental illness, the test of insanity similar to that in Instruction 14-5101. See Perkins, supra, at 898.

ANNOTATIONS

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.1

Evidence has been presented that the defendant was [intoxicated from use of (alcohol) (drugs)]*2* [suffering from a mental disease or disorder]. You must determine whether or not the defendant was ..... and if so, what effect this had on the defendant's ability to form the deliberate intention to take away the life of another.

If the defendant was not capable of forming a deliberate intention to take the life of another, you must find him not guilty of a first degree murder by deliberate killing. [The deliberate intention to take away the life of another required for a first degree murder by deliberate killing is not an element of ..... If you find the defendant not guilty of first degree murder by deliberate killing, you must proceed to determine whether or not he
is guilty of
.....]*4*

USE NOTE

1. This instruction may be given only for a willful and deliberate murder and should immediately follow Instruction 14-201 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 Instruction 14-5101.

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.

4. Where the defendant can be found guilty of another first degree murder, second degree murder or manslaughter, i.e., any unlawful killing other than a first degree murder by deliberate killing, these bracketed sentences must be given and the name of the crime or crimes inserted in the blanks.

****

The willful and deliberate first degree murder is the only homicide requiring a so-called "specific intent" under New Mexico law. State v. Tapia, 81 N.M. 274, 276, 466 P.2d 551, 553 (1970); State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972). The intent required is "express malice," i.e., the deliberate intention unlawfully to take away the life of a fellow creature. State v. Smith, 26 N.M. 482, 488, 194 P. 869 (1921). Voluntary alcoholic and drug intoxication, State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971), and mental disorders, State v. Padilla, 66 N.M. 289, 347 P.2d 312, 78 A.L.R.2d 908 (1959), may negate this intent. The defense of inability to form a "specific intent" is analogous to the defense of insanity. State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

State v. Smith, supra, states that a willful and deliberate murder requires specific intent. See commentary to Instruction 14-201. The same case also indicates that if the facts conclusively show that the murder was perpetrated by means of lying in wait, torture or poison, the means supply specific intent. In addition, both felony murder and the so-called depraved mind murder do not require a specific intent, since intent is implied as a matter of law. See commentaries to Instructions 14-202 and 14-203.

The extent of the defense in drug use situations is unclear. If limited to narcotic drugs as defined in the Controlled Substances Act, the defense will have a limited application. See §§ 30-31-2P and 30-31-6 & 30-31-7 NMSA 1978. For example, marijuana is no longer defined as a narcotic drug under the statute, although its use and possession are still prohibited.

Two transition problems occur with the use of this instruction. The supreme court has made it clear that the defense is not available for second degree murder. State v. Chambers, supra; State v. Tapia, supra. See also State v. Lunn, 88 N.M. 64, 537 P.2d 672 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976). Because the committee recognized that the jury may have difficulty making the distinction between a deliberate intention to take the life of another and an intent to kill or do great bodily harm, the bracketed sentences are included so that the jury is told to consider other homicide offenses not requiring specific intent.

When the defense involves a mental disease or disorder, the defendant probably will have attempted to show insanity as a complete defense. See State v. Padilla, supra. The jury will undoubtedly have trouble with the distinction between insanity and inability to form specific intent. The use note therefore provides that the insanity instruction be given first. The insanity instruction contains an optional paragraph which must be given when the inability-to-form-specific-intent instruction follows.

ANNOTATIONS

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, 94 N.M. 232, 608 P.2d 1114 (1980).

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, 104 N.M. 79, 717 P.2d 55 (1986).

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. - 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

Evidence has been presented that 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 ..... and, if so, what effect this had on the defendant's ability to form the intent to .....

If the defendant was not capable of forming such intent to ..... you must find him not guilty of .....*5*.

[Intent to ..... is not an element of the crime of ..... If you find the defendant not guilty of ..... you must proceed to determine whether or not he is guilty of the crime of .....*6*.]

USE NOTE

1. This instruction is used for the intoxication or mental disease defense for a crime which 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 Instruction 14-5110. 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 Instruction 14-5511. Otherwise, the instruction should follow the elements instruction for the crime or crimes with the intent element.

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 intent to do a further act or achieve a further consequence from the essential elements instruction of the crime.

5. Name the crime charged or lesser included offense which contains an intent to do a further act or achieve a further consequence.

6. 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction embodies the defense of involuntary intoxication or mental disease short of "complete insanity" which will negate a specific intent in a nonhomicide crime. See, e.g., State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968). This instruction may be used only for nonhomicide crimes containing an element of intent to do a further act or achieve a further consequence. See also the reporter's addendum to commentary to Instruction 14-141, "The Lazy Lawyer's Guide to Criminal Intent in New Mexico," following these instructions.

ANNOTATIONS

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

But intoxication may be shown in all cases of crimes requiring specific intent, to negate the existence of such an intent. State v. Rayos, 77 N.M. 204, 420 P.2d 314 (1967).

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, 77 N.M. 204, 420 P.2d 314 (1967).

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, 93 N.M. 773, 606 P.2d 183 (1980).

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, 110 N.M. 146, 793 P.2d 276 (Ct. App. 1990).

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), rev'd in part on other grounds, 90 N.M. 191, 561 P.2d 464 (1977).

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.

Evidence has been presented that the defendant believed that ..... If the defendant [acted]*2* [omitted to act] under an honest and reasonable belief in the existence of those facts, you must find him not guilty.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. Describe the facts constituting a mistake of fact.

2. Use only the applicable bracketed language depending on whether the defendant is relying on a commission or omission.

****

The language of this instruction was derived from California Jury Instructions Criminal, 4.35. The committee found no reported New Mexico decisions on this issue. See generally LaFave & Scott, Criminal Law 356 (1972), and Perkins, Criminal Law 939 (2d ed. 1969).

ANNOTATIONS

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, 99 N.M. 734, 663 P.2d 710 (Ct. App.), 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, 101 N.M. 377, 683 P.2d 59 (Ct. App. 1984).

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, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

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, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

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, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

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, 99 N.M. 734, 663 P.2d 710 (Ct. App.), 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, 91 N.M. 554, 577 P.2d 452 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

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, N.M. , 861 P.2d 965 (1993).

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.

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 14-141. For the exceptions to the general rule that ignorance of the law is no defense, see generally Perkins, supra, at 925.

ANNOTATIONS

Effect of failure to tender instruction unsupported by evidence. - A defendant is not denied effective assistance of counsel by counsel's failure to request an instruction on mistake of fact. State v. Haddenham, 110 N.M. 149, 793 P.2d 279 (Ct. App. 1990).

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.

Evidence has been presented that the defendant was forced to .....[2]under threats. If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, 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.

USE NOTE

1. For use when duress is a defense to any crime except homicide, a crime requiring an intent to kill and escape from a penitentiary.

2. Describe acts of defendant constituting the offense.

****

Instruction 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 Instruction 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, 83 N.M. 18, 487 P.2d 1088 (1971) was covered by the requirement that the duress must be present, imminent and impending. See Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978).

Instruction 14-5130 applies to all crimes, other than homicide, a crime requiring an intent to kill or escape from a penitentiary. 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).

ANNOTATIONS

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, 91 N.M. 498, 576 P.2d 1129 (1978).

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, 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967); Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978).

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, 111 N.M. 354, 805 P.2d 621 (1991).

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, 112 N.M. 766, 819 P.2d 1324 (1991).

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, 112 N.M. 766, 819 P.2d 1324 (1991).

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, 113 N.M. 637, 830 P.2d 554 (Ct. App. 1990).

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, 112 N.M. 766, 819 P.2d 1324 (1991).

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, 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967); Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978).

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, 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967).

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, 99 N.M. 345, 657 P.2d 1194 (Ct. App. 1983).

What constitutes present, imminent and impending compulsion depends on circumstances of each case. Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978); State v. Norush, 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982).

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, 91 N.M. 498, 576 P.2d 1129 (1978).

The character of the coercer is not an element of the defense of duress. State v. Duncan, 111 N.M. 354, 805 P.2d 621 (1991).

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, 112 N.M. 766, 819 P.2d 1324 (1991).

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, 115 N.M. 536, 854 P.2d 363 (Ct. App. 1993).

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.

22 C.J.S. Criminal Law § 44.

14-5131. Duress; no defense to homicide of innocent person.1

```
 Evidence has been presented that the defendant [killed  .......
(name of victim) [intended tokill  ....... (name of victim)
under a threat of death or
great bodily harm from
..................................................... . (name of
third person) Thefact that the defendant may have acted under a
threat from another is no defense to an [intentional killing
```

of]*2* [attempted killing of] [assault with intent to kill] an innocent person.

USE NOTE

1. This instruction may be used for an attempted homicide or assault with intent to kill.

2. Use only the applicable bracketed provisions.

3. May be used for either attempted murder or assault with intent to kill.

****

There are apparently no reported New Mexico decisions where duress has been raised in a homicide or other case involving an assault with intent to kill. Cf. State v. Lee, 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967). See generally Annot., 40 A.L.R.2d 908 (1955); LaFave & Scott, Criminal Law 374 (1972); Perkins, Criminal Law 951 (2d ed. 1969).

The authorities generally indicate that the defense of duress is not available in a prosecution for an intentional killing or other crime requiring an intent to kill. Under New Mexico law, voluntary manslaughter is an intentional killing prompted by some provocation. See Instruction 14-220 and commentary. An involuntary manslaughter by an act not amounting to a felony does not require an intent to kill, and conceivably a person might be coerced into doing an act which results in the death of a person. See Instructions 14-231 and 14-5140 and commentaries. An intent to kill is an element of some aggravated assaults. See § 30-3-3 NMSA 1978.

ANNOTATIONS

Duress defense traditionally refused for homicide. - State v. Finnell, 101 N.M. 732, 688 P.2d 769, cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

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. Duress; escape from jail or penitentiary.1

Evidence has been presented that it was necessary for the defendant to escape from [jail] [the penitentiary] to avoid great bodily harm. You must find the defendant not guilty of the crime of escape from [jail] [the penitentiary] if you find all of the following conditions existed:

1. The defendant feared [great bodily harm to (himself)

(.....)] (name of other person) [hewould be sexually assaulted]*2* if he did not escape;

2. [The defendant did not have time to complain to the authorities;] [OR]
[Under the circumstances it would have been futile for the defendant to complain to the authorities;]*2*

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] [reported]*2* immediately to the proper authorities when he attained a position of safety from the immediate threat; and

5. A reasonable person would have acted in the same way under the circumstances.

USE NOTE

1. For use when necessity is defense to crimes of escape or attempted escape from jail (UJI 14-2221) or escape or attempted escape from the penitentiary (UJI 14-2222).

2. Use only applicable alternatives.

****

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

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, 97 N.M. 660, 642 P.2d 1119 (Ct. App. 1982).

PART F
ACCIDENT AND MISFORTUNE

14-5140. Excusable homicide.1

Evidence has been presented that the killing of ..... (name of victim) by defendant occurred byaccident 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 NOTE

1. No instruction on this subject shall be given.

****

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

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.

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

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, 110 N.M. 304, 795 P.2d 996 (1990).

No duty upon court, sua sponte, to instruct on alibi. - Absent the tender of a requested instruction, there is no duty upon the trial court to instruct specifically upon the subject of alibi. State v. Ramirez, 79 N.M. 475, 444 P.2d 986 (1968).

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.

Evidence has been presented that the defendant was induced to commit the crime by law enforcement officers or their agents. For you to find the defendant guilty, the state must prove to your satisfaction beyond a reasonable doubt that the defendant was already willing to commit the crime and that the law enforcement officials or their agents merely gave him the opportunity.

USE NOTE

1. No other instruction on entrapment shall be given.

*** * * * * * * * * * * * * * * * * * ***

This instruction follows the so-called subjective test for entrapment focusing on the intent or predisposition of the defendant to commit the crime. State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976), overruling State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (Ct. App. 1972). United States v. Russell, 411 U.S. 423, 429, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), rev'g 459 F.2d 671 (9th Cir. 1972). Sherman v. United States, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958).

The defense of entrapment may only be invoked when the defendant admits the commission of at least some of the elements of the crime. It is not available to one who simply denies commission of the crime. State v. Garcia, 79 N.M. 367, 443 P.2d 860 (1968); State v. Wright, 84 N.M. 3, 498 P.2d 695 (Ct. App. 1972). Once the defendant has sufficiently raised the question of entrapment, the burden is upon the state to prove beyond a reasonable doubt that the defendant was predisposed to commit the crime and that the law officers or agents merely gave him the opportunity. State v. Carrillo, 80 N.M. 697, 460 P.2d 62 (Ct. App.), cert. denied, 80 N.M. 708, 460 P.2d 73 (1969), cert. denied, 397 U.S. 1079, 90 S. Ct. 1532, 25 L. Ed. 2d 815 (1970).

ANNOTATIONS

Entrapment is a valid defense to a criminal prosecution. State v. Romero, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

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, 89 N.M. 74, 547 P.2d 557 (1976).

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, 89 N.M. 74, 547 P.2d 557 (1976).

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, 89 N.M. 74, 547 P.2d 557 (1976).

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, 79 N.M. 367, 443 P.2d 860 (1968).

No entrapment exists when the accused himself initiates the unlawful act. State v. Romero, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

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, 83 N.M. 208, 490 P.2d 466 (Ct. App. 1971).

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, 89 N.M. 74, 547 P.2d 557 (1976).

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, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

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, 65 N.M. 342, 337 P.2d 406 (1959).

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, 106 N.M. 338, 742 P.2d 1043 (1987).

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, 223 N.M. 324, 825 P.2d 614 (Ct. App. 1991).

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, 79 N.M. 367, 443 P.2d 860 (1968).

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, 111 N.M. 90, 801 P.2d 672 (Ct. App. 1990).

Ordinarily question of entrapment is one for jury to decide under proper instruction. State v. Sainz, 84 N.M. 259, 501 P.2d 1247 (Ct. App. 1972), overruled on other grounds State v. Fiechter, 89 N.M. 74, 547 P.2d 557 (1976).

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.

PART I
JUSTIFIABLE HOMICIDE

14-5170. Justifiable homicide; defense of habitation.

Evidence has been presented that the defendant killed .....(name of victim) whileattempting to prevent a ..... in his .....

A killing in defense of ..... is justified if:

1. The ..... was being used as the defendant's dwelling; and

2. It appeared to the defendant that the commission of ..... was immediately at hand and that it was necessary to kill the intruder to prevent the commission of ..... and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. Describe the felony being committed or attempted.

2. Identify the place where the killing occurred.

*** * * * * * * * * * * * * * * * * * ***

Section 30-2-7A NMSA 1978 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 given the statute a broad interpretation. See also commentary to Instruction 14-5171. 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. McCracken, 22 N.M. 588, 166 P. 1174 (1917); State v. Martinez, 34 N.M. 112, 278 P. 210 (1929); State v. Couch, 52 N.M. 127, 193 P.2d 405 (1946). 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, 49 N.M. 399, 165 P.2d 122 (1946); Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961). 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 felony is sufficient. State v. Couch, supra; 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 Instruction 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, Instruction 14-5171 (Justifiable homicide; self-defense) must be given.

ANNOTATIONS

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

Evidence has been presented that the defendant killed ..... (name of victim) while defending himself.

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 ..... and 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.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

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.

2. The definition of great bodily harm, Instruction 14-131, 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.

****

This instruction is a combination of the elements of self-defense contained in Subsections A and B of Section 30-2-7 NMSA 1978. The elements of the defenses originated in the Kearny Code, Crimes and Punishments, Art. 2, Sec. 1. The source of the more specific language of Subsection A of Section 30-2-7 NMSA 1978 is derived from Laws 1907, ch. 36, § 11, and the language of Subsection B of Section 30-2-7 NMSA 1978 is derived from Laws 1853-54, p. 86. The present statute was adopted in 1963, but as indicated in the report of the Criminal Law Study Committee (N.M. Legislature 1961-62), the policy was to retain the provisions of existing criminal laws wherever possible.

Although numerous New Mexico decisions deal with the principles of self-defense, few of the cases discuss the principles in terms of the statutory language. In the context of another justifiable homicide statute, Sections 40-24-12 and 40-24-13 NMSA 1953 (repealed by Laws 1963, Chapter 303, Section 30-1) the defense of a police officer to a killing of a fleeing felon, the supreme court has said that these statutes are merely a legislative recognition of the common law. See Alaniz v. Funk, 69 N.M. 164, 364 P.2d

1033 (1961). In addition, the supreme court has indicated that there is no requirement that the jury be instructed in the precise language of the statutes. State v. Maestas, 63 N.M. 67, 313 P.2d 337 (1957).

The New Mexico courts have not had occasion to catalog the unlawful actions which will allow a person to respond with a deadly force. For example, the type of felony which will allow a killing in self-defense has not been limited. See e.g., State v. Beal, 55 N.M. 382, 387, 234 P.2d 331 (1951). Cf. Alaniz v. Funk, supra. The supreme court has said that the phrase "great personal injury" means something more than a mere battery not amounting to a felony. Territory v. Baker, 4 N.M. (Gild.) 236, 264-66, 13 P. 30 (1887). There has been no attempt to define the "unlawful act" which will allow the use of deadly force, although in a related context it has been said that the use of deadly force to prevent an unlawful act not amounting to a felony is unreasonable as a matter of law. Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961). (The court in *Brown* indicates that the rules of law governing the use of justifiable force apply to both civil and criminal cases.)

In view of the decisions requiring reasonableness and fear or apprehension of death or great bodily harm, the absence of specific definitions of unlawful act, felony or act creating a great personal injury does not appear to be crucial. Regardless of how the act is characterized or identified, it must be of such a quality as to create a fear of death or great bodily harm. Thus it would appear that Subsections A and B of Section 30-2-7, supra, are redundant.

Under New Mexico law, the danger to the defendant need not be real but need only be apparent under the circumstances. State v. Chesher, 22 N.M. 319, 161 P. 1108 (1916); State v. Roybal, 33 N.M. 187, 262 P. 929 (1928); State v. Vansickel, 20 N.M. 190, 147 P. 457 (1915). The danger under the circumstances must be such as would excite the fears of a reasonable person. State v. Chesher, supra; State v. Vansickel, supra; State v. Dickens, 23 N.M. 26, 165 P. 850 (1917). The apparent danger must be imminent. Territory v. Baker, supra; State v. Vansickel, supra. The danger must arouse a fear of death or great bodily harm or a fear of peril to life or limb. State v. Chesher, supra; State v. Vansickel, supra. The defendant must in fact entertain such a fear of death or great bodily harm or a fear of peril to life or limb. State v. Chesher, supra; State v. Vansickel, supra. The defendant must act solely upon that fear. State v. Parks, 25 N.M. 395, 183 P. 433 (1919).

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, 39 N.M. 518, 50 P.2d 968 (1935). See generally, Annot., 55 A.L.R.3d 620 (1974).

The elements of this instruction contain some general principles of self-defense which are often given as separate instructions. For example, the principle of apparent

necessity. See California Jury Instructions Criminal, 5.51. In addition, the 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. Garcia, 83 N.M. 51, 54, 487 P.2d 1356, 1359 (Ct. App. 1971). See also, California Jury Instructions Criminal, 5.52 and 5.53.

Self-defense is not available to an aggressor unless he first tries to stop the fight he started or unless it is necessary to defend himself against an unreasonable force. See State v. Padilla, 90 N.M. 481, 565 P.2d 352, cert. denied, 91 N.M. 3, 569 P.2d 413 (1977) and UJI Criminal 14-5191.

The committee found no New Mexico cases specifically holding that the state had the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. See generally, Annot., 43 A.L.R.3d 221 (1972). In State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970), a manslaughter case, the court held that the defendant was only required to produce evidence which would raise a reasonable doubt in the minds of the jurors and that the general reasonable doubt instruction was sufficient to place the burden on the state to prove its case. Cf. State v. Parker, 34 N.M. 486, 285 P. 490 (1930). Because these instructions do not require the jury to find the killing was unlawful as one of the elements, a sentence was inserted in this and similar defenses telling the jury that the burden was on the state to prove beyond a reasonable doubt that the defendant did not kill in self-defense. See also, Mullaney v. Wilbur, 421 U.S. 684 (1975).

Since *Mullaney* was decided, the Supreme Court of the United States upheld a jury instruction in a manslaughter case which placed the burden upon the defendant of proving his affirmative defense by a preponderance of the evidence, stating:

We thus decline to adopt as a constitutional imperative, operative countrywide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in the previous cases holding that the due process clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here.

Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).

Instruction 14-5171 (Justifiable homicide; self-defense) must be given if the defendant kills another while defending his property, other than his habitation, if there is evidence that the victim's interference with the defendant's property was accompanied by a threat of death or great bodily harm.

ANNOTATIONS

Compiler's note. - 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.

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, 101 N.M. 498, 684 P.2d 1163 (Ct. App. 1984); State v. Gallegos, 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986).

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, 99 N.M. 609, 661 P.2d 887 (1983).

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, 99 N.M. 609, 661 P.2d 887 (1983).

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, 99 N.M. 609, 661 P.2d 887 (1983).

No instruction where no evidence of killing out of fear. - An instruction on self-defense should not be given when there is no evidence that the defendant killed out of fear. State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

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, 94 N.M. 193, 608 P.2d 169 (Ct. App. 1980).

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, 104 N.M. 247, 719 P.2d 1268 (Ct. App. 1986).

Jury instruction proper. - See State v. Gibbins, 110 N.M. 408, 796 P.2d 1104 (Ct. App. 1990).

Evidence sufficient to raise reasonable doubt as to self-defense. - See State v. Montano, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980).

No conflict with instruction limiting self-defense. - The instruction limiting self-defense when the defendant is the aggressor (UJI Crim. 14-5191) does not conflict with this instruction or the instruction on absence of need of an assailed person to retreat (UJI Crim. 14-5190). State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

Evidence insufficient to raise issue of self-defense. - 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, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Jury instruction on self-defense adequate. - See State v. Vigil, 110 N.M. 254, 794 P.2d 728 (1990).

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.

41 C.J.S. Homicide §§ 113 to 138.

14-5172. Justifiable homicide; defense of another.1

Evidence has been presented that the defendant killed .....(name of victim) whiledefending another.

The killing was in defense of another if:

1. There was an appearance of immediate danger of death or great bodily harm[4] to ..... as a result of ..... and

2. The defendant believed that ..... 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 ..... would have caused a reasonable person in the same circumstances to act as the defendant did.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use when the defense theory is based upon: 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.

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 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.

4. The definition of great bodily harm, Instruction 14-131, must be given if not already given.

****

This instruction is a combination of the defense of spouse or family against any unlawful action, Subsection A of Section 30-2-7 NMSA 1978 and the defense of another against a felony or act which would result in some great personal injury to the other person, Subsection B of Section 30-2-7 NMSA 1978. See e.g., State v. Beal, 55 N.M. 382, 234 P.2d 331 (1951). For a discussion of the history of these statutes and the general rules which apply to defense of another, see the commentary to Instruction 14-5171.

Under Subsection A of Section 30-2-7 NMSA 1978 the defense of another against any unlawful action is limited to defending one's wife or family. On the assumption that the equal rights amendment guarantees that a wife is also entitled to this defense, the instruction is designed to be used for defense of any member of the family. See generally, Daniels, The Impact of the Equal Rights Amendment on the New Mexico Criminal Code, 3 N.M.L. Rev. 106, 109 (1973).

The prior versions of Subsection B of Section 30-2-7 NMSA 1978 specifically listed the persons who could be defended by deadly force. For example, in State v. Brooks, 59 N.M. 130, 279 P.2d 1048 (1955), the court held that the term "mistress," one of the persons entitled to be defended, was not a partner in an illicit relationship but was the feminine of master. By eliminating the shopping list of persons who could be defended, it would appear that the legislature clearly intended to broaden the scope of this defense. See generally, Perkins, Criminal Law 1019 (2d ed. 1969).

Some authorities have said that the person using deadly force in defense of another stands in the shoes of, and is bound by the intent of, the person defended. In State v. Maestas, 63 N.M. 67, 313 P.2d 337 (1957), the supreme court declined to decide if New Mexico would follow that authority. The supreme court held that the district court had instructed the jury that the defendant was to be judged on the basis of his own perception of the danger under the circumstances and, therefore, the defendant had no complaint. Because the statute uses the term "reasonable grounds to believe a design exists, etc.," it appears that New Mexico law does not require the person intervening to know the actual facts, but only to act as a reasonable person under the circumstances. See generally, Perkins, supra, at 1020-21. LaFave & Scott 397 (1972). The defendant in defense of another must entertain a reasonable belief that the person attacked is in danger. Territory v. Baker, 4 N.M. (Gild.) 236, 264-66, 13 P. 30 (1887).

The 1981 amendments to UJI 14-5172 are intended only to clarify the essential elements of justifiable homicide in the defense of another.

ANNOTATIONS

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, 96 N.M. 61, 628 P.2d 306 (1981).

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, 96 N.M. 61, 628 P.2d 306 (1981).

And such a belief may rest upon apparent danger and need not be supported by actual danger. State v. Venegas, 96 N.M. 61, 628 P.2d 306 (1981).

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

Evidence has been presented that the defendant killed ..... (name of victim) while*2*

[overcoming the actual resistance of ..... (name of victim) to the execution of .....

[overcoming the actual resistance of ..... (name of victim) to the discharge of .....

[retaking (..... (name of victim) (a person), who committed ..... and who had(been rescued)*5* (escaped)]

[arresting (..... (name of victim) (a person), who committed ..... and was fleeingfrom justice]

[attempting to prevent the escape from ..... by (..... (name) (a person) whocommitted .....

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use when the defense is based on Section 30-2-6, Part One, NMSA 1978.

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Use only the applicable parenthetical alternative.

6. Insert name of felony.

7. Describe circumstances and place of lawful custody or confinement.

****

The elements of this instruction are based upon Section 30-2-6 NMSA 1978. The court in Alaniz v. Funk, 69 N.M. 164, 364 P.2d 1033 (1961), said that the statute is a legislative recognition of the common law. The limitation on the use of force in the statute is that the homicide is "necessarily committed." The courts have restated this by saying that it must be reasonably necessary for the officer to kill in order to carry out his duty. State v. Vargas, 42 N.M. 1, 7, 74 P.2d 62 (1937); Alaniz v. Funk, supra. In the event that there is a question of fact as to the right of the defendant to claim this defense, usually limited to police, prison or court officials, a special paragraph must be drafted and inserted in this instruction.

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 applies 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.

ANNOTATIONS

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

Evidence has been presented that the defendant killed .....(name of victim) while acting atthe command of and in the aid and assistance of .....

A killing while aiding a public official is justifiable if the defendant was acting at the command of and assisting a public official and the killing was reasonably necessary to:*3*

[overcome the actual resistance of ..... (victim) to the execution of .....

[overcome the actual resistance of ....., (victim) to the discharge of .....

[retake (..... (victim) (a person), who committed ..... and who had(been rescued)*6* (escaped)]

[arrest (..... (victim) (a person) who committed ..... and was fleeing fromjustice]

[prevent the escape from .....*8* of (..... (victim) (a person), who committed .....

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use when the defense is based on Section 30-2-6, Part Two, NMSA 1978.

2. Insert the name and official capacity of the person aided.

3. Use only applicable bracketed phrase.

4. Insert description of legal process being executed.

5. Insert description of legal duty.

6. Use only applicable parenthetical words.

7. Insert name of felony.

8. Describe circumstances and place of lawful custody or confinement.

****

The elements of this instruction are similar to the instruction for a killing by the public officer. See commentary to Instruction 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 Instruction 14-5172. For the reasons for omitting the defense of "acting in obedience to a judgment of the court," see commentary to Instruction 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

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, 96 N.M. 61, 628 P.2d 306 (1981).

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.

Evidence has been presented that the defendant acted while defending property.

The defendant acted in defense of property if:

1. The ..... was property [of the defendant]*3* [in his lawful possession*4*];

2. It appeared to the defendant that ..... (name of victim) was about to ..... (describe act) andthat it was necessary to .....(describe defendant's action and name victim) in order to stop him;

3. The defendant used an amount of force which he 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*

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use when defense is based on defense of property against either felony act or nonfelony act. Instruction 14-5170 is used for justifiable homicide; defense of habitation. Instruction 14-5171 (Justifiable homicide; self-defense) is used if unlawful interference with property is accompanied by threat of death or great bodily harm.

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," Instruction 14-131, must also be given if not already given.

*** * * * * * * * * * * * * * * * * ***

In State v. Couch, 52 N.M. 127, 137, 193 P.2d 405 (1946), 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. See also Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961). A person may use reasonable force to protect his property from unlawful interference by another, however, no force is reasonable if a request to cease the unlawful interference would have been sufficient. See LaFave & Scott, Criminal Law 399 (1972).

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 & Scott, supra.

ANNOTATIONS

Exercise of legal right, no matter how offensive, is not adequate provocation to reduce homicide from murder to manslaughter. State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

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, 100 N.M. 479, 672 P.2d 652 (1983).

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

Evidence has been presented that the defendant acted while defending himself.

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 ..... and

2. The defendant was in fact put in fear, by the apparent danger, of immediate bodily harm and ..... because of that fear; and

3. The defendant used an amount of force which he 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.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use in nonhomicide cases when the self-defense theory is based upon: 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.

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, Instruction 14-131, must be given if not already given.

****

Subsections A and B of Section 30-2-7 NMSA 1978 provide that a person may act in self-defense if necessarily or reasonably defending himself against any unlawful action, felony or great personal injury. 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 against an attack which creates a substantial risk of death or great bodily harm. See commentary to Instruction 14-5171 and LaFave & Scott, Criminal Law 392 (1972).

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 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).

Sections 30-3-2 (Aggravated assault) and 30-3-4 (Battery) NMSA 1978 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, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974). The words "without excuse or justification" have been held to be "clearly equivalent to the word unlawful." Territory v. Gonzales, 14 N.M. 31, 89 P. 250 (1907). Cf. State v. Woods, 82 N.M. 449, 483 P.2d 504 (Ct. App. 1971). 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. Section 30-2-8 NMSA 1978.

The committee took the position that unlawfulness was generally present in an assault or a battery if the other elements were proved. 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, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970). 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, 93 N.M. 236, 599 P.2d 389 (Ct. App.), writ quashed, 93 N.M. 172, 598 P.2d 215, cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1979), where the defendant is charged with a nondeadly assault. Further modification of this instruction is still necessary if the victim is a law enforcement officer. See State v. Kraul, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

ANNOTATIONS

Construed with Rule 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, 110 N.M. 507, 797 P.2d 296 (Ct. App. 1990).

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, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993).

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, 91 N.M. 320, 573 P.2d 675 (Ct. App. 1977), 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, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

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, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

Exercise of legal right, no matter how offensive, is not adequate provocation to reduce homicide from murder to manslaughter. State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

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, 94 N.M. 17, 606 P.2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

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.

6A C.J.S. Assault and Battery § 128.

14-5182. Defense of another; nondeadly force by defendant.1

Evidence has been presented that 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 ..... as a result of ..... and

2. The defendant believed that ..... was in immediate danger of bodily harm from ..... (name of victim) and ..... to prevent the bodily harm; and

3. The defendant used an amount of force which he 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 ..... would have caused a reasonable person in the same circumstances to act as defendant did.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use in nonhomicide cases when the defense theory is based upon: a reasonable ground to believe a design exists to commit an unlawful act; a reasonable ground to believe a design exists to do bodily harm; or a defense of spouse, or other member of the family, a necessary defense against any unlawful action.

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, Instruction 14-131, must be given if not already given.

*** * * * * * * * * * * * * * * * * * ***

Subsection A of Section 30-2-7 NMSA 1978 provides that a person may necessarily defend a member of his family against any unlawful action. Subsection B of Section 30-2-7, supra, 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 he reasonably believes the other person to be in danger of death or great bodily harm. See commentary to Instruction 14-5172.

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 Instruction 14-5172 were made to clarify this instruction and to make this instruction consistent with other instructions on self-defense.

ANNOTATIONS

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

Evidence has been presented that the defendant acted while defending himself.

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 ..... and

2. The defendant was in fact put in fear, by the apparent danger, of immediate death or great bodily harm and ..... 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.

In considering this defense, and after considering all the evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use in nonhomicide cases when the self-defense theory is based upon: 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.

2. The definition of "great bodily harm," Instruction 14-131, 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."

14-5184. Defense of another; deadly force by defendant.1

Evidence has been presented that 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 ..... as a result of ..... and

2. The defendant believed that .....was in immediate danger of death or great bodily harm from ..... (name of victim) and ..... to prevent the death or great bodily harm; and

3. The apparent danger to ..... would have caused a reasonable person in the same circumstances to act as the defendant did.

In considering this defense, and after considering all the

evidence in the case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

USE NOTE

1. For use in nonhomicide cases when the defense theory is based upon: 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.

2. The definition of great bodily harm, Instruction 14-131, 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."

ANNOTATIONS

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.

PART K
SELF-DEFENSE

14-5190. Self-defense; assailed person need not retreat.

A person who is threatened with an attack need not retreat. In the exercise of his right of self-defense, he may stand his ground and defend himself.

*** * * * * * * * * * * * * * * * * ***

When acting in self-defense, a person may use no more force than is reasonably necessary to avoid the threatened harm. See Instructions 14-5171 and 14-5181. A person need not, however, retreat even though he could do so safely. See State v. Horton, 57 N.M. 257, 258 P.2d 371 (1953), where it was held 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).

ANNOTATIONS

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, 58 N.M. 446, 272 P.2d 660 (1954).

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, 95 N.M. 233, 620 P.2d 887 (Ct. App. 1980); State v. Martinez, 95 N.M. 421, 622 P.2d 1041 (1981).

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, 58 N.M. 446, 272 P.2d 660 (1954).

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, 95 N.M. 421, 622 P.2d 1041 (1981).

No conflict with instruction limiting self-defense. - The instruction limiting self-defense when the defendant is the aggressor (UJI Crim. 14-5191) does not conflict with the instruction on justifiable homicide (UJI Crim. 14-5171) or this instruction. State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

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, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

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, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

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.

Self-defense is not available to the defendant if he [started the fight] [or] [agreed to fight]*1* unless:

[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];
[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) became the aggressor.]

USE NOTE

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

Committee commentary. - In State v. Pruett, 24 N.M. 68, 172 P. 1044 (1918), the court stated that an instruction on this subject, or at least some part of it, is habitually given in New Mexico with instructions on self-defense. The committee believed that the use of this instruction, as with all instructions, is limited to cases where the matter has been put in issue by the evidence. See Annot., 55 A.L.R.3d 1000 (1974); LaFave & Scott, Criminal Law 395 (1972).

This instruction is not to be given if the defendant knew that there was no further danger from his opponent. See LaFave & Scott, Criminal Law 395 (1972). See also State v. Garcia, 83 N.M. 51, 487 P.2d 1356 (1971), where it was held erroneous to instruct the jury that the defendant could not pursue the aggressor after the aggressor was no longer able to continue the conflict or present a danger to the defendant.

ANNOTATIONS

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, 95 N.M. 421, 622 P.2d 1041 (1981).

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, 95 N.M. 421, 622 P.2d 1041 (1981).

No conflict with other instructions - This instruction does not conflict with the instructions on justifiable homicide (UJI Crim. 14-5171) or on absence of need of an assailed person to retreat (UJI Crim. 14-5190). State v. Velasquez, 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

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, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

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, 99 N.M. 109, 654 P.2d 562 (Ct. App.), cert. denied, 99 N.M. 148, 655 P.2d 160 (1982).

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, 115 N.M. 93, 847 P.2d 327 (Ct. App. 1993).

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.

CHAPTERS 52 TO 59

(RESERVED)

CHAPTER 60
CONCLUDING INSTRUCTIONS

PART A
GENERAL EXPLANATION

14-6001. Duty to follow instructions.1

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 and disregard others.

USE NOTE

1. This is a proper instruction to be given in all cases.

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This instruction was derived from and is identical with UJI Civil 13-2002.

ANNOTATIONS

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, 96 N.M. 347, 630 P.2d 299 (Ct. App. 1981), overruled on other grounds Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

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, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971).

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. Necessarily included offense.1

If you should have a reasonable doubt as to whether the defendant committed the crime of ..... (greater offense) you must proceed to determine whether the defendant committed the included offense of .....

USE NOTE

1. This instruction should be given immediately preceding the instruction containing the elements of a lesser included offense. Repeat the instruction as necessary if there is more than one included offense. This instruction is not to be used where the offense charged is murder or manslaughter; Instruction 14-250 should be given in those cases.

2. Identify the greater offense by the name used in the elements instruction.

3. Identify the lesser included offense by the name used in the elements instruction.

****

Under New Mexico decisions, a party has a right to have the jury instructed on a necessarily included offense if there is evidence to establish such offense. 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 instruction on a necessarily included offense need not be given if the evidence would justify only a conviction for the higher offense or an acquittal. State v. Chavez, supra; State v. James, 76 N.M. 376, 415 P.2d 350 (1966); State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955).

Under Rule 5-608 of the Rules of Criminal Procedure, if the jury is so instructed, the defendant may be convicted of "an offense necessarily included in the offense charged or of an attempt." For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). See also State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969). In certain property crimes, and in arson, this rule would be applied where the crime is divided into degrees depending on the amount of property stolen, etc. See, e.g., State v. Schrager, 74 Wash. 2d 75, 442 P.2d 1004 (1968).

The conviction of a lesser included offense constitutes an acquittal of the higher crime or degree of the crime. State v. Medina, supra. Cf. State v. White, 61 N.M. 109, 295 P.2d 1019 (1956), petition to correct mandate and commitment denied, 71 N.M. 342, 378 P.2d 379 (1962). An acquittal of the lesser included offense also bars prosecution for the greater offense. Ex parte Williams, 58 N.M. 37, 265 P.2d 359 (1954).

ANNOTATIONS

Instruction given where evidence on lesser offense. - The defendant is entitled to an instruction on a lesser included offense if there is some evidence tending to establish the lesser offense. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

The right to instructions on lesser included offenses depends on there being some evidence tending to establish the lesser offenses. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

And denied where no evidence. - Where there was no evidence in the state's case tending to reduce the offense, the instruction on the lesser included offense was properly denied. State v. Vigil, 86 N.M. 388, 524 P.2d 1004 (Ct. App.), cert. denied, 86 N.M. 372, 524 P.2d 988 (1974), cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

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, 84 N.M. 191, 500 P.2d 1314 (Ct. App. 1972).

Failure to give instruction not error absent prejudice to defendant. - While 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, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

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, 90 N.M. 608, 566 P.2d 1146 (1977).

Either acquittal or conviction of lesser included offense bars further prosecution for the greater offense. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75B Am. Jur. 2d Trial §§ 1245, 1250, 1283, 1381, 1393, 1428 to 1434.

Conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged, 47 A.L.R.2d 887.

Lesser-related state offense instructions: modern status, 50 A.L.R.4th 1081.

Propriety of lesser-included-offense charge to jury in federal criminal case - general principles, 100 A.L.R. Fed. 481.

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 NOTE

1. This instruction is not appropriate for a conspiracy trial.

*** * * * * * * * * * * * * * * * * * ***

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 NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

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 NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

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 NOTE

1. This is a proper instruction to be given in all cases.

*** * * * * * * * * * * * * * * * * * ***

This instruction was derived from and is identical to UJI Civil 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, 101 N.M. 151, 679 P.2d 821 (1984).

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 NOTE

1. This is a proper instruction to be given in every case. 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.

*** * * * * * * * * * * * * * * * * * ***

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, 84 N.M. 309, 502 P.2d 999 (1972). 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, 31 N.M. 436, 246 P. 897 (1926). 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.

ANNOTATIONS

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, 85 N.M. 47, 508 P.2d 1344 (Ct. App. 1973).

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, 84 N.M. 491, 505 P.2d 436 (1973).

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, 85 N.M. 47, 508 P.2d 1344 (Ct. App. 1973).

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, 101 N.M. 595, 686 P.2d 937 (1984).

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, 105 N.M. 339, 732 P.2d 866 (1987), aff'd, 107 N.M. 369, 758 P.2d 783 (1988).

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, 101 N.M. 151, 679 P.2d 821 (1984).

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 NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 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, 93 N.M. 708, 604 P.2d 1242 (1980).

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, 112 N.M. 723, 819 P.2d 673 (1991).

Jury instruction proper. - See State v. Vigil, 110 N.M. 254, 794 P.2d 728 (1990).

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 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.

****

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

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.

In this case, there are three possible verdicts [as to the defendant[s] ..... (name)]*1*
[for each crime charged]:

(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]. If you have agreed upon one verdict [as to a particular charge], that form of verdict is the only form to be signed [as to that charge]. The other forms are to be left unsigned.

USE NOTE

1. Use this bracketed phrase if there are multiple defendants, but the defense of not guilty by reason of insanity is not applicable to all defendants.

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See committee commentary under Instruction 14-6010.

ANNOTATIONS

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 ..... [contained in Count ..... there are three possible verdicts [as to each defendant] [as to the defendant[s] ..... (name)]

(1) guilty of *2*;

(2) guilty of *3*;

(3) not guilty;

Only one of the possible verdicts may be signed by you [as to each defendant] [as to the defendant[s] ..... (name)

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 will then consider whether [the] [a] defendant is guilty of the crime of .... *2*. If you find him guilty of that crime, then that is the only form of verdict which is to be signed. If you have a reasonable doubt as to his guilt of that crime, you will go on to a consideration of the crime of ... *3*. If you find him guilty of that crime, then that is the only form of verdict which should be signed. But if you have a reasonable doubt as to his guilt of the crime of ..... *3*, then you should

find him not guilty and sign only the not guilty form.

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 he is not guilty of that crime. If you find him not guilty of all of these crimes, [in Count ...] you must return a verdict of not guilty [as to this Count].

USE NOTE

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. This instruction should not be given for homicide charges or if insanity is an issue. For such charges, Instruction 14-250 or Instruction 14-5101 is to be given.

2. Insert name of greater offense.

3. Insert name of lesser included offense.

****

See committee commentary under Instruction 14-6010.

ANNOTATIONS

Either acquittal or conviction of lesser included offense bars further prosecution for the greater offense. State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977).

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, 90 N.M. 608, 566 P.2d 1146 (1977).

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

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 NOTE

1. Use the applicable bracketed alternative.

2. Use the bracketed phrase if more than one crime committed.

****

Statutory reference. - Sections 31-18-16 and 31-18-16.1 NMSA 1978.

Committee commentary. - This instruction, together with the special interrogatory, Instruction 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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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, 90 N.M. 236, 561 P.2d 935 (Ct. App.), aff'd in part, rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977).

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 [.....] *2* (name) GUILTY OF ..... *3* [ascharged in Count ..... *4* (number)].

.....

.....*FOREMAN*

(style of case)

We find the defendant [.....] *2* (name) NOT GUILTY OF ..... *3* [ascharged in Count ..... *4* (number)].

.....

.....*FOREMAN*

(style of case)

We find the defendant [.....] *2* (name) NOT GUILTY.*5*

.....

.....*FOREMAN*

(style of case)

We find the defendant [.....] *2* (name) NOT GUILTY BY REASON OF INSANITY.

.....

.....*FOREMAN*

(style of case)

We find the defendant [.....] *2* (name) GUILTY, BUT MENTALLY ILL.*6*

.....

.....*FOREMAN*

(style of case)

Do you find that a firearm was used in the commission of .....*3* [as chargedin Count .....]? ..... (Yes or No)

.....

.....*FOREMAN*

(style of case)

Do you find that .....*3* was committed against a person sixty years of age orolder, and that person was intentionally injured [as charged in Count .....]?

..... (Yes or No)

.....

.....*FOREMAN*

(style of case)

Do you find that the defendant [...] *2* (name) is competent to stand trial?

..... (Yes or No)

.....*FOREMAN*

USE NOTE

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 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 Instruction 14-6012.

6. 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.

ANNOTATIONS

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, 77 N.M. 361, 423 P.2d 45 (1967).

14-6015. Verdicts; single or multiple defendants; larceny and receiving by acquiring; insanity.

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 NOTE

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 Instruction 14-6011; but Instruction 14-6011 may be used with this instruction if counts are submitted other than larceny and receiving by acquiring. Instruction 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, Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

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 Instruction 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). Instruction 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 §§ 174, 176; 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 §§ 21, 22; 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.

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 NOTE

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 Instruction 14-6011; but Instruction 14-6011 may be used with this instruction if counts are submitted other than burglary and receiving by acquiring. Instruction 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, Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. See commentary to Instruction 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 §§ 21, 22; 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.

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 NOTE

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 Instruction 14-6011; but Instruction 14-6011 may be used with this instruction if counts are submitted other than burglary, larceny and receiving by acquiring. Instruction 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, Instruction 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction is designed to avoid inconsistent verdicts in receiving stolen goods cases. See commentary to Instruction 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 §§ 174, 176; 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.

PART C
FINAL INSTRUCTION

14-6020. Final instruction.

You will now retire to the jury room and select one of you to act as foreman. That person will preside over your deliberations and will speak for the jury here in court.

Forms of verdict have been prepared for your convenience.*2*

You will take these forms to the jury room; when you have reached unanimous agreement as to your verdict, the foreman will sign the forms which express your verdict. You will then return all forms of verdict, these instructions and any exhibits to the courtroom.

USE NOTE

1. This instruction must be given in every case.

2. 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction was derived from Devitt & Blackmar, Federal Jury Practice and Instructions, Section 17.09.

ANNOTATIONS

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, 10 A.L.R. Fed. 185.

Haste or shortness of time in which jury reached verdict, 91 A.L.R.2d 1238.

Taking and use of trial notes by jury, 14 A.L.R.3d 831.

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.

23A C.J.S. Criminal Law § 1391; 88 C.J.S. Trial §§ 297, 324, 343; 89 C.J.S. Trial §§ 468, 494.

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 NOTE

1. No instruction on this subject shall be given.

*** * * * * * * * * * * * * * * * * * ***

The language of this instruction was derived from and is identical with UJI Civil, 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 Instruction 14-6008.

ANNOTATIONS

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, 79 N.M. 307, 442 P.2d 797 (Ct. App. 1968).

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, 72 N.M. 377, 384 P.2d 252 (1963).

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, 58 N.M. 324, 270 P.2d 727 (1954).

And coercive conduct requires reversal. - An inquiry as to numerical division followed by the shotgun instruction was found to be coercive conduct requiring reversal. See State v. Aragon, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976); State v. Rickerson, 95 N.M. 666, 625 P.2d 1183 (1981)But see, cert. denied, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 132 (1981).

Actual deliberation time is one of various factors trial court must weigh in determining whether to give the shotgun instruction. State v. Romero, 86 N.M. 674, 526 P.2d 816 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

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, 88 N.M. 441, 541 P.2d 430 (1975).

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, 93 N.M. 708, 604 P.2d 1242 (1980).

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.

CHAPTERS 61 TO 69

(RESERVED)

CHAPTER 70
SENTENCING PROCEEDINGS

General Use Note

The instructions found in Chapter 70 may only be used in habitual criminal and death penalty sentencing proceedings. Instructions 14-7001 through 14-7007 are for use only in habitual criminal sentencing proceedings and 14-7010 through 14-7033 are for use only in death penalty sentencing proceedings. Instructions 14-7040 through 14-7043 are general instructions which are to be used in both habitual criminal and death penalty sentencing proceedings. Other UJI Criminal Instructions may be used when appropriate. Modifications of other UJI Instructions may have to be made prior to their use.

In charging a person as a habitual criminal, the district attorney should assign a separate number to each prior conviction charged. The instructions in Chapter 70 assume this practice will be followed.

PART A
HABITUAL CRIMINAL

14-7001 to 14-7007. Withdrawn.

*** * * * * * * * * * * * * * * * * * ***

The habitual criminal instructions were drafted under prior law. Section 31-18-20 NMSA 1978 was amended by Laws 1983, Chapter 127, Section 2 to provide for a determination by the court, rather than a jury, if the defendant is the same person who was convicted of the previous crime or crimes alleged to have been committed by the defendant.

ANNOTATIONS

Compiler's note. - 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
DEATH PENALTY

14-7010. Explanation of death penalty sentencing proceeding; single aggravating circumstance.1

LADIES AND GENTLEMEN:

I will outline the procedure for you to follow in deciding the defendant's sentence. The law provides that if you find the aggravating circumstance charged by the state is present you shall decide whether he will be sentenced to life imprisonment or death.

The state has charged that the following aggravating circumstance was present: *2*

[the murder was of a peace officer who was performing his duties];

[the murder was committed during (the commission of) *3* (an attempt to commit) kidnapping];

[the murder was committed during (the commission of) *3* (an attempt to commit) criminal sexual contact of a minor];

[the murder was committed during (the commission of) *3* (an attempt to commit) criminal sexual penetration];

[the murder was committed while attempting to escape from a penal institution];

[the murder was of an inmate of a penal institution];

[the murder was of a person lawfully on the premises of a penal institution];

[the murder was of an employee of the corrections department];

[the murder was for hire];

[the murder was of a witness to a crime];

[the murder was of a person likely to become a witness to a crime];

[the murder was in retaliation for a person having testified in a criminal proceeding].

You will first decide whether this aggravating circumstance was present. If you unanimously agree beyond a reasonable doubt that this aggravating circumstance was present, you must then weigh this aggravating circumstance against any mitigating circumstances.

In determining the sentence you must not consider anything you may have read or heard about the case outside the courtroom.

You may give testimony of any witness whatever weight you believe it deserves. It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful.

You are not permitted to take notes. You must rely upon your individual memories of the evidence.

If an exhibit is admitted in evidence, you should examine it by yourself. Do not talk about the exhibit with other jurors until you retire to deliberate.

Ordinarily the attorneys representing the parties will develop all the evidence relative to sentencing. It is the exception rather than the rule that an individual juror will have a question after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to the court. Your name as juror should appear below the question. The court must first pass upon the propriety of the question before it can be asked in open court. The question will be asked if the court deems the question to be proper.

No statement, ruling, remark or comment which I make during the course of the proceeding is intended to indicate my opinion as to how you should decide the issue 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.

Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter 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 any biases or prejudices that you may have.

The prosecuting attorney will now make an opening statement if he desires. The defendant's attorney may make an opening statement if he desires.

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

USE NOTE

1. 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. It is to be given 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 Criminal 14-7011. If more than one aggravating circumstance is charged for the same murder, use UJI Criminal 14-7011.

2. Use only the applicable bracketed alternative.

3. Use only the applicable alternative.

*** * * * * * * * * * * * * * * * * * ***

This instruction may only be used in death penalty sentencing proceedings where the state has charged a single aggravating circumstance is present. It is to be used instead of using UJI Criminal 14-101.

At the court's discretion and in accordance with Rules 11-401 and 11-402 of the Rules of Evidence, evidence admitted during the trial in which the defendant was found guilty of murder may be admitted during the sentencing proceeding.

ANNOTATIONS

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, 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 death penalty sentencing proceeding; multiple aggravating circumstances.1

LADIES AND GENTLEMEN:

I will outline the procedure for you to follow in deciding the defendant's sentence. The law provides that if you find one or more of the aggravating circumstances charged by the state are present you shall decide whether he will be sentenced to life imprisonment or death.

The state has charged that the following aggravating circumstances were present: *2*

[with respect to the murder of ....., (name of deceased) the murder was of a peace officer who was performing his duties];

[AND]

[with respect to the murder of ....., (name of deceased) the murder was committed during (the commission of)*3* (an attempt to commit) kidnapping];

[AND]

[with respect to the murder of ....., (name of deceased) the murder was committed during (the commission of)*3* (an attempt to commit) criminal sexual contact of a minor];

[AND]

[with respect to the murder of ....., (name of deceased) the murder was committed during (the commission of)*3* (an attempt to commit) criminal sexual penetration];

[AND]

[with respect to the murder of ....., (name of deceased) the murder was committed while attempting to escape from a penal institution];

[AND]

[with respect to the murder of ....., (name of deceased) the murder was of an inmate ofa penal institution];

[AND]

[with respect to the murder of ....., (name of deceased) the murder was of a person lawfully on the premises of

a penal institution];
[AND]

[with respect to the murder of .....], (name of deceased) the murder was of an employee of the corrections department];
[AND]

[with respect to the murder of .....], (name of deceased) the murder was for hire];
[AND]

[with respect to the murder of .....], (name of deceased) the murder was of a witness to acrime];
[AND]

[with respect to the murder of .....], (name of deceased) the murder was of a person likely to become a witness to a crime];
[AND]

[with respect to the murder of .....], (name of deceased) the murder was in retaliation for his having testified in a criminal proceeding].

You will first decide whether one or more of the aggravating circumstances were present. If you unanimously agree beyond a reasonable doubt that one or more of these aggravating circumstances were present, you must then weigh such aggravating circumstances against any mitigating circumstances.

In determining the sentence you must not consider anything you may have read or heard about the case outside the courtroom.

You may give the testimony of any witness whatever weight you believe it deserves. It is for you to decide whether the witnesses know what they are talking about and whether they are being truthful.

You are not permitted to take notes. You must rely upon your individual memories of the evidence.

If an exhibit is admitted in evidence, you should examine it by yourself. Do not talk about the exhibit with other jurors until you retire to deliberate.

Ordinarily the attorneys representing the parties will develop all the evidence relative to sentencing. It is the exception rather than the rule that an individual juror will have a question after the testimony is presented. However, should this occur, you may write out the question and ask the bailiff to hand it to the court. Your name as juror should appear below the question. The court must first pass upon the

propriety of the question before it can be asked in open court. The question will be asked if the court deems the question to be proper.

No statement, ruling, remark or comment which I make during the course of the proceeding is intended to indicate my opinion as to how you should decide the issue 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.

Until you retire to deliberate the sentence, you must not discuss this matter or the evidence with anyone, even with each other. It is important that you keep an open mind and not decide the sentence to be imposed until the entire matter 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 any biases or prejudices that you may have.

The prosecuting attorney will now make an opening statement if he desires. The defendant's attorney may make an opening statement if he desires.

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

USE NOTE

1. This instruction may only be used in death penalty sentencing proceedings where the defendant has been convicted of multiple murders or where the state has charged that multiple aggravating circumstances were present during a single murder. It is to be given before opening statements. This instruction does not go to the jury room.

2. Use only the applicable bracketed alternatives.

3. Use only the applicable alternative.

****

This instruction is to be used only in death penalty sentencing proceedings where the state has charged multiple aggravating circumstances are present. It is to be used instead of using UJI Criminal 14-101.

At the court's discretion and in accordance with Rules 11-401 and 11-402 of the Rules of Evidence, evidence admitted during the trial in which the defendant was found guilty of murder may be admitted during the sentencing proceeding.

ANNOTATIONS

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, 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. Death penalty sentencing proceeding; issue of guilt.1

LADIES AND GENTLEMEN:

You have heard all of the evidence that is to be presented for this sentencing proceeding. In deciding the sentence you must consider all of the evidence admitted during the trial [and all of the evidence admitted during this sentencing proceeding.] *2*

Now the lawyers will address you. What is said 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 NOTE

1. This instruction must be given in every death penalty sentencing proceeding after all the evidence has been completed.

2. Use bracketed phrase if additional evidence was admitted during the sentencing proceeding.

*** * * * * * * * * * * * * * * * * * ***

This instruction has been included to advise the jury that the defendant's innocence or guilt is not to be considered during this sentencing proceeding. The issue of defendant's guilt has already been decided, and, if the jury is not the same as that which found the defendant guilty of murder, the jury may, while considering the evidence from the previous trial, reconsider this issue.

14-7013. Death penalty sentencing proceeding; aggravating circumstances.1

The state has charged that the murder of ..... (name of deceased) was committed underthe following aggravating circumstance(s): *2*

[the murder was of a peace officer who was performing his duties;]
[AND] *3*

[the murder was committed during (the commission of) *4* (an attempt to commit) kidnapping;]
[AND]

[the murder was committed during (the commission of) *4* (an attempt to commit) criminal sexual contact of a minor;]
[AND]

[the murder was committed during (the commission of) *4* (an attempt to commit) criminal sexual penetration;]
[AND]

[the murder was committed while attempting to escape from a penal institution;]
[AND]

[the murder was of an inmate of a penal institution;]
[AND]

[the murder was of a person lawfully on the premises of a penal institution;]
[AND]

[the murder was of an employee of the corrections department;]
[AND]

[the murder was for hire;]
[AND]

[the murder was of a witness to a crime;]
[AND]

[the murder was of a person likely to become a witness to a crime;]
[AND]

[the murder was in retaliation for a person having testified in a criminal proceeding].
[A separate instruction will now be given to you explaining the elements of each of these aggravating circumstances.] *5*

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding after all the evidence has been completed. The specific aggravating circumstance instruction(s) for which there is sufficient evidence must be given after this instruction. A separate

instruction must be given for each murder committed. See UJI Criminal 14-7013 through 14-7025.

2. Use only the applicable bracketed phrase(s).

3. Use only if more than one aggravating circumstance is charged.

4. Use only the applicable alternative(s).

5. Use the bracketed material only if there are multiple aggravating circumstances.

****

Section 31-20A-5 NMSA 1978 sets forth aggravating circumstances to be considered by a judge in a proceeding in which a jury trial is waived or by the jury in a capital felony case prior to deciding whether the defendant should be punished by a penalty of death or life imprisonment. Some of the aggravating circumstances set forth in Section 31-20A-5 NMSA 1978 are actually specific types of felony murder. The jury therefore may have already considered most of the elements of an aggravating circumstance during its deliberations of a verdict charging felony murder. The jury must unanimously find beyond a reasonable doubt one or more of the aggravating circumstances set forth in Section 31-20A-5, supra.

The committee was of the opinion that 31-20A-5 NMSA 1978 is open to interpretation, and since there is no prior case law in New Mexico on the death penalty as currently drafted, these instructions have been drafted as interpreted by the committee. Also, certain situations are not covered by these instructions, such as transferred intent, and modification may be necessary. Where the defendant was convicted as an accessory to murder, it is for the jury to decide whether or not he should be sentenced to death. For this reason, the committee has not included this situation in the instructions.

The committee felt that there was an ambiguity in 31-20A-5 NMSA 1978 regarding intent, such as whose intent is necessary and whether transferred intent is possible. It was felt that the legislature intended that the death penalty should not be imposed in certain types of felony murder, and thus, it must be proven that the defendant had the intent to kill as required by UJI Criminal 14-201, first degree murder.

14-7014. Death penalty sentencing proceeding; aggravating circumstances; murder of a peace officer; essential elements.1

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 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; and

2. was performing his duties as a peace officer.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

****

Statutory reference. - Section 31-20A-5A NMSA 1978.

Committee commentary. - "Peace officer" is defined in Section 30-1-12 NMSA 1978. 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, 94 N.M. 168, 608 P.2d 164 (1980). The question of whether the peace officer was lawfully discharging his duties is also normally a question of law to be decided by the court. See committee commentary to UJI Criminal 14-2201 and Reporter's Addendum Number 2. In the event that there is a question of fact as to whether the victim is in fact a peace officer or in the lawful discharge of his duties, a special instruction should be drafted.

The committee anticipates the defense of a peace officer not being in the lawful discharge of his duties 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, 92 N.M. 100, 583 P.2d 464 (1978) for a discussion of "lawful discharge of duties."

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.

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.

See also committee commentary to UJI Criminal 14-7013.

ANNOTATIONS

Compiler's note. - Addendum 2, "Reporter's Addendum to Chapter 22, Custody; Confinement; Arrest," referred to in the next-to-last sentence in the first paragraph of the committee commentary, is located following these instructions.

14-7015. Death penalty sentencing proceeding; aggravating circumstances; murder in the commission of kidnapping; essential elements.1

Before you may find the aggravating circumstance of murder in [the commission of] *2* [an attempt to commit] 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] *2* [an attempt to commit] kidnapping was committed;

2. ..... (name of victim) was murdered while defendant was [committing] *2* [or] [attemptingto commit] kidnapping; and

3. The murder was committed with the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by Instruction 14-140, Underlying felony offense; sample instruction. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

****

Statutory reference. - Section 31-20A-5B NMSA 1978.

Committee commentary. - The penalty of death 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 sentencing jury has not previously been instructed pursuant to UJI Criminal 14-404, Kidnapping and UJI Criminal 14-2801, Attempt to Commit a Felony; UJI Criminal 14-921 to 14-936, Criminal Sexual Contact of a Minor; or UJI Criminal 14-941 to 14-961, Criminal Sexual Penetration, the appropriate instruction must be given.

See also committee commentary to UJI Criminal 14-7013 and 14-7014.

14-7016. Death penalty sentencing proceeding; aggravating circumstances; murder in the commission of criminal sexual contact of a minor; essential elements.1

Before you may find the aggravating circumstance of murder in [the commission of] *2* [an attempt to commit] 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] *2* [an attempt to commit] criminal sexual contact of a minor was committed;

2. ..... (name of victim) was murdered while defendant was [committing] *2* [or] [attemptingto commit] criminal sexual contact of a minor; and

3. The murder was committed with the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by Instruction 14-140, Underlying felony offense; sample instruction. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

ANNOTATIONS

Statutory reference. - Section 31-20A-5B NMSA 1978.

14-7017. Death penalty sentencing proceeding; aggravating circumstances; murder in the commission of criminal sexual penetration; essential elements.1

Before you find the aggravating circumstance of murder in [the commission of] *2* [an attempt to commit] 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] *2* [an attempt to commit] criminal sexual penetration was committed;

2. ..... (name of victim) was murdered while defendant was [committing] *2* [or] [attemptingto commit] criminal sexual penetration; and

3. The murder was committed with the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use applicable alternative.

3. The court shall give the applicable essential elements instruction modified in the manner illustrated by Instruction 14-140, Underlying felony offense; sample instruction. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

ANNOTATIONS

Statutory reference. - Section 31-20A-5B NMSA 1978.

14-7018. Death penalty sentencing proceeding; aggravating circumstances; murder during attempt to escape from penal institution; essential elements.1

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 defendantmurdered ..... ; *2* (name of victim) and

2. The murder was committed with the intent to kill by the defendant.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. The court shall give the applicable essential elements instruction modified in the manner illustrated by Instruction 14-140, Underlying felony offense; sample instructions. Instructions required to be given with the essential elements instruction, including definitions, must also be given.

****

Statutory reference. - Section 31-20A-5C NMSA 1978.

Committee commentary. - Subsection C of Section 31-20A-5 NMSA 1978 provides that it is an aggravating circumstance if the defendant committed the murder while attempting to escape from a penal institution. A penal institution includes penitentiary or jail. 31-18-9 NMSA 1978 (repealed by Laws 1977, Chapter 216, Section 17). The jury may have been instructed previously pursuant to UJI Criminal 14-2222, Escape From the Penitentiary, UJI Criminal 14-2221, Escape From Jail or UJI Criminal 14-202, 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 Criminal 14-2221 and 14-2222 and Reporter's Addendum Number 2.

Escape from the penitentiary includes escape from other facilities under the department of corrections. See committee commentary to UJI Criminal 14-2222. This aggravating circumstance requires that the defendant must have intended to kill the victim.

See also committee commentary to UJI Criminal 14-7013 and 14-7016.

14-7019. Death penalty sentencing proceeding; aggravating circumstances; murder of inmate while incarcerated in penal institution; essential elements.1

Before you may find the aggravating circumstance of murder of an inmate of a penal institution, 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 murdered ....., (name of victim) defendant was incarcerated in ..... ; *3* (name of penal institution)

2. At the time ..... (name of victim) was murdered, ... (name of victim) was incarceratedin .....; *3* (name of penal institution) and

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Insert the name of the penal institution. "Penal institution" includes facilities under the jurisdiction of the corrections department and county and municipal jails.

ANNOTATIONS

Statutory reference. - Section 31-20A-5D NMSA 1978.

14-7020. Death penalty sentencing proceeding; aggravating circumstances; murder of person at penal institution while incarcerated in penal institution; essential elements.1

Before you may find the aggravating circumstance of murder of a person lawfully on the premises of a penal institution, 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 murdered ....., (name of victim) defendant was incarcerated in ..... ; *2* (name of penal institution)

2. At the time ..... (name of victim) was murdered, ... (name of victim) was lawfully on the premises of ..... ; *2* (name of penal institution)

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Insert the name of the penal institution. "Penal institution" includes facilities under the jurisdiction of the corrections department and county and municipal jails.

14-7021. Death penalty sentencing proceeding; aggravating circumstances; murder of employee of corrections department; essential elements.1

Before you may find the aggravating circumstance of murder of an employee of the corrections department, 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 murdered ....., (name of victim) defendant was incarcerated in ..... (name of penal institution)

2. At the time ..... (name of victim) was

murdered, ... (name of victim) was an employee of the correc-tions department; and

3. The defendant had the intent to kill.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

****

Statutory reference. - Section 31-20A-5E NMSA 1978.

Committee commentary. - Subsection E of Section 31-20A-5 NMSA 1978 provides that it is an aggravating circumstance if the victim of the murder was an employee of the corrections department. The jury may have already been instructed pursuant to UJI Criminal 14-2250 through 14-2254, Assault by a Prisoner or Possession of a Deadly Weapon by a Prisoner, and pursuant to UJI Criminal 14-202, Felony Murder. If not, the appropriate instruction must be given.

The defendant must personally have the intent to kill. 31-20A-5E NMSA 1978.

See also committee commentary to UJI Criminal 14-7013 and 14-7014.

14-7022. Death penalty sentencing proceeding; aggravating circumstances; murder for hire; essential elements.1

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 the murder of ..... (name of victim) was committed for hire.

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

****

Statutory reference. - Section 31-20A-5F NMSA 1978.

Committee commentary. - The phrase "murder for hire" are words of common knowledge and require no separate definition in the essential elements instruction.

See also committee commentary to UJI Criminal 14-7013 and 14-7014.

14-7023. Death penalty sentencing proceeding; aggravating circumstances; murder of a witness; essential elements.1

Before you may find the aggravating circumstance of murder of a witness to a crime, 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 to a crime; and

2. ..... (name of victim) was murdered to prevent ..... (name of victim) from (reporting the crime) *2*
(testifying in a criminal proceeding).*3*

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use only the applicable alternative.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 31-20A-5G NMSA 1978.

Committee commentary. - Subsection G of Section 31-20A-5 NMSA 1978 has been broken into two alternatives: murder of a witness to prevent the report of a crime or 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, 78 N.M. 317, 431 P.2d 50 (1967).

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.

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. As there is no essential elements instruction on intimidation of a witness, it will be necessary to draft an appropriate instruction. See 30-24-3 NMSA 1978 for the essential elements. If the jury was instructed on this subject previously, it is not necessary to give such an instruction during this sentencing proceeding.

See also committee commentary to UJI Criminal 14-7013 and 14-7014.

14-7024. Death penalty sentencing proceeding; aggravating circumstances; murder of a person likely to be a witness; essential elements.1

Before you may find the aggravating circumstance of murder of a person likely to become a witness to a crime, 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 likely to become a witness to a crime; and

2. ..... (name of victim) was murdered to prevent ..... (name of victim) from [reporting the crime]*2*
[testifying in a criminal proceeding].

USE NOTE

1. This instruction is to be used only in a death penalty sentencing proceeding.

2. Use only the applicable alternative.

ANNOTATIONS

Statutory reference. - Section 31-20A-5G NMSA 1978.

14-7025. Death penalty sentencing proceeding; aggravating circumstances; murder of a person in retaliation for his having testified in a criminal proceeding; essential elements.1

Before you may find the aggravating circumstance of murder of a person in retaliation for his having testified in a criminal proceeding, you must find that the state has proved to your satisfaction beyond a reasonable doubt that the murder of ..... (name of victim) was commit-ted in retaliation for ..... (name of victim) having testified in a criminal proceeding.

1. This instruction is to be used only in a death penalty sentencing proceeding.

ANNOTATIONS

Statutory reference. - Section 31-20A-5G NMSA 1978.

14-7026. Death penalty sentencing proceeding; reasonable doubt; burden of proof.1

The burden is always on the state to prove beyond a reasonable doubt that one or more of the aggravating circumstances was present.

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 NOTE

1. This instruction must be given in all death penalty sentencing proceedings.

*** * * * * * * * * * * * * * * * * ***

This instruction must be given in death penalty sentencing proceedings instead of UJI Criminal 14-5060.

The aggravating circumstances are required to be proved by the state beyond a reasonable doubt. 31-20A-3 NMSA 1978. In Gregg v. Georgia, 428 U.S. 153 (1976), the court approved instructions to the jury which required the jury to find beyond a reasonable doubt that the aggravating circumstances were present.

ANNOTATIONS

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, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

14-7027. Death penalty sentencing proceeding; jury procedure for consideration of single 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. You cannot consider the penalty to be imposed until you have found that the aggravating circumstance has been proven beyond a reasonable doubt.

A special form has been prepared for you for the aggravating circumstance charged. If you 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 foreman sign this part. You will then consider the penalty to be imposed.

If you find the state has not proved the aggravating circumstance was present, you shall complete the form indicating whether:

(1) you unanimously find that the aggravating circumstance was not present; or

(2) you are unable to reach a unanimous agreement either way. The foreman shall sign this part of the finding form. You will then return to the courtroom.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding in which a single aggravating circumstance is charged. It is to be given with Instructions 14-7032 and 14-7033, sample forms of findings.

****

At least one aggravating circumstance must be proved beyond a reasonable doubt to impose the death penalty. Gregg v. Georgia, 428 U.S. 153 (1976). 31-20A-3 NMSA 1978.

This instruction provides the procedure for finding an aggravating circumstance and for completing the form in UJI Criminal 14-7032 as to the presence of one or more aggravating circumstances.

ANNOTATIONS

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, 101 N.M. 282, 681 P.2d 708 (1983), 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, 101 N.M. 732, 688 P.2d 769 (1984), cert. denied, 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

14-7028. Death penalty sentencing proceeding; jury procedure for consideration of multiple aggravating circumstances.

You must first consider whether one or more of the aggravating circumstances charged was present in this case. You must decide separately as to each of the aggravating circumstances.

In order for you to find an aggravating circumstance, you must agree unanimously. You cannot consider the penalty to be imposed until you have found that one or more of the specified aggravating circumstances has been proven beyond a reasonable doubt.

A special form has been prepared for you for each of the aggravating circumstances charged. In this case, as to each of the aggravating circumstances, 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 complete the form for each aggravating circumstance.

If you unanimously find the state has proved beyond a reasonable doubt that one or more of the aggravating circumstances was present, you shall complete the form for each aggravating circumstance you find, indicating your finding, and have the foreman sign this part.

If you are unable to agree unanimously as to any aggravating circumstance or if you unanimously find that any aggravating circumstance was not present, you shall

complete the form for that aggravating circumstance, indicating your finding, and have the foreman sign this part. You will then consider the penalty to be imposed.

If you find the state has not proven that one or more of the aggravating circumstances was present you shall complete the form for each aggravating circumstance. You shall indicate whether:

(1) you are unable to agree unanimously that the aggravating circumstance was present; or

(2) you unanimously find that the aggravating circumstance was not present. The foreman shall sign this part of each finding form. You will then return to the courtroom.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding in which multiple aggravating circumstances are charged. It is to be given with Instructions 14-7032 and 14-7033, sample forms of findings.

ANNOTATIONS

Consideration of defendant's character in death penalty decision. - Once the jury has determined that a statutory aggravating circumstance exists, and that the statutory aggravating circumstance(s) outweigh mitigating factors, the jury is free to consider all relevant aspects of the defendant's character, as well as the crime itself, in making its final decision of whether or not to impose the penalty of death. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990).

Effect of unanimity instruction. - Unanimity instruction could not be construed to improperly encourage individual jurors to abandon a decision to impose a life sentence in favor of a sentence of death for the sole purpose of simply maintaining unanimity. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291, 107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990).

14-7029. Death penalty sentencing proceeding; mitigating circumstances.

If you find an aggravating circumstance, you must consider all mitigating circumstances. A mitigating circumstance is any conduct, circumstance or thing which would lead you to decide not to impose the death penalty. You must consider all of the following mitigating circumstances: *2*

[the defendant did not have any significant history of prior criminal activity;]

[the defendant acted under duress or under the domination of another person;]

[the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired;]

[the defendant was under the influence of mental or emotional disturbance;]

[the victim was a willing participant in the defendant's conduct;]

[the defendant acted under circumstances which tended to justify, excuse or reduce the crime;]

[the defendant is likely to be rehabilitated;]

[cooperation by the defendant with authorities;]

[the defendant's age;]

the circumstances of the offense which are mitigating; and anything else which would lead you to believe that the death penalty should not be imposed.

[You must also consider the (character,) *2* (emotional history) (and) (family history) of the defendant which are mitigating.] *3*

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use the bracketed mitigating circumstances for which there is evidence, but do not add other specific circumstances.

3. Use bracketed phrase and applicable word(s) or phrase(s) set forth in parentheses if requested by defendant.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 32-20A-6 NMSA 1978.

Committee commentary. - Section 31-20A-2 NMSA 1978 requires the trier of fact to determine if mitigating circumstances exist and to weigh them against the aggravating circumstances. The weight to be given to the mitigating and aggravating circumstances and the burden of proof for each are not provided in the statute. Aggravating circumstances must be proven beyond a reasonable doubt and it is assumed that mitigating circumstances must be proven only by a preponderance of evidence. It is not necessary for the aggravating circumstances to outweigh the mitigating circumstances. The only requirement in the statute regarding this weighing process is that the death

penalty must not be imposed if the mitigating circumstances outweigh the aggravating circumstances.

It also requires the trier of fact to consider the defendant and the crime. A consideration of the defendant would include his character and background. These considerations would be in addition to the specific mitigating circumstances identified in 31-20A-6 NMSA 1978. The jury's consideration of the crime is assumed to mean a consideration of the circumstances of the defendant's crime.

The committee concluded that the jury may select a new foreman even though the jury hearing the sentencing proceeding was the same jury which heard the main case or if the same jury, it may select the same person as foreman again.

ANNOTATIONS

Instruction construed. - The instruction does not encourage the jury to impose the death penalty (a unanimous verdict) as opposed to a life sentence (non-unanimous verdict) nor can it be construed as improperly encouraging the jury or any single juror to abandon a life decision in favor of a death decision for the sole purpose of simply maintaining unanimity. The instruction merely encourages the jurors to try to unanimously agree on the existence of an aggravating circumstance and the appropriate penalty. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

14-7030. Death penalty sentencing proceeding; weighing the aggravating circumstances against the mitigating circumstances.1

If you find any aggravating circumstance(s) that [was] [were] charged you must weigh [that] [those] aggravating circumstance(s) against any mitigating circumstances, [one or more aggravating circumstances] *2* you have found in this case. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment. The aggravating circumstance(s) must outweigh the mitigating circumstances before the death penalty can be imposed.

However, even if the aggravating circumstance(s) outweigh the mitigating circumstances, you may still set the penalty at life imprisonment.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding.

ANNOTATIONS

Instruction does not allow consideration of nonstatutory aggravating circumstances. - This instruction is not the instruction that specifies for the jury what alleged aggravating circumstances are relied upon by the state, and use of this instruction does not allow the consideration of nonstatutory aggravating circumstances. State v. Guzman, 100 N.M. 756, 676 P.2d 1321, cert. denied, 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984).

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, 101 N.M. 282, 681 P.2d 708 (1983), cert. denied, 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984).

14-7031. Death penalty sentencing proceeding; jury deliberation procedure.1

You shall now retire to the jury room [and select one of you to act as foreman] *2*. [The foreman from the trial portion shall continue as foreman.] 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 foreman on the forms that will be provided, and then you shall return with them to this courtroom.

USE NOTE

1. This instruction must be given in every death penalty sentencing proceeding.

2. Use first bracketed phrase only when a new jury is hearing the sentencing proceeding. Use second bracketed phrase if the original jury is hearing the sentencing proceeding.

14-7032. Death penalty sentencing proceeding; sample forms of findings; aggravating circumstance findings.1

(style of case)

Sign only one of the following findings as to the aggravating circumstanceof ..... (insert the aggravating circumstance) If you sign finding number 1, continue to deliberate asinstructed. If you sign finding number 2 or 3, return to the courtroom.

Finding Number 1. We unanimously find beyond a reasonable

doubt the aggravatingcircumstance of ..... (set forth the aggravating circumstance)

..... FOREMAN

Finding Number 2. We unanimously find the aggravating circumstance of ..... (set forth the aggravating circumstance) is not present.

..... FOREMAN

Finding Number 3. We are unable to reach an agreement as to the aggravatingcircumstance of ..... (set forth the aggravating circumstance)

..... FOREMAN

USE NOTE

1. This instruction is for use only in death penalty sentencing 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. The jury is to be given both this instruction and UJI 14-7033 when they retire to deliberate.

****

Section 31-20A-2 NMSA 1978 establishes the procedure to be followed by the jury in determining the sentence to be imposed. This instruction is the form to be used by the jury to indicate whether an aggravating circumstance charged was found, and if so, whether the defendant should be sentenced to death or life imprisonment.

If an aggravating circumstance is not found, it is not necessary for the foreman to complete the verdict portion of the form since there would be no decision to be made as to whether or not to impose the death penalty.

The warning on the form is to prevent any jury from imposing the death penalty without finding an aggravating circumstance.

14-7033. Death penalty sentencing proceeding; sample forms of findings; death penalty findings.1

(style of case)

We unanimously agree that the defendant, ..., (name of defendant) should be sentencedto death.

DO NOT SIGN ON THIS LINE UNLESS
THE JURY HAS FOUND AN AGGRAVAT-
ING CIRCUMSTANCE.

.....
.....

FOREMAN

OR

We DO NOT unanimously agree that the defendant, ..., (name of defendant) should besentenced to death.

.....
.....

FOREMAN

USE NOTE

1. This instruction is for use only in death penalty sentencing proceedings. The jury is to be given both this instruction and UJI 14-7032 when they retire to deliberate.
[As amended, effective August 1, 1989.]

ANNOTATIONS

The 1989 amendment, effective for cases filed in the district courts on or after August 1, 1989, deleted the former first item under "style of case", relating to unanimous agreement that the defendant should be sentenced to life imprisonment and added the present last item relating to lack of unanimous agreement that the defendant should be sentenced to death.

PART C
GENERAL EXPLANATORY MATTERS

14-7040. Sentencing proceeding; credibility of witnesses.1

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 his truthfulness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case.

USE NOTE

1. This is a basic instruction and may be given in all habitual criminal and death penalty sentencing proceedings.

*** * * * * * * * * * * * * * * * * * ***

This instruction was taken from UJI Criminal 14-5020. See committee commentary to UJI Criminal 14-5020. This instruction may be used in either a habitual criminal or death penalty sentencing proceeding.

ANNOTATIONS

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.1

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 NOTE

1. 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.

*** * * * * * * * * * * * * * * * * * ***

This instruction is almost identical to UJI Criminal 14-5031. See committee commentary to UJI Criminal 14-5031.

14-7042. Sentencing proceeding; duty to follow instructions.1

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 NOTE

1. This is a proper instruction to be given in all habitual criminal and death penalty sentencing proceedings.

*** * * * * * * * * * * * * * * * * * ***

This instruction is the same as UJI Criminal 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. Sentencing proceeding; duty to consult.1

Your findings must represent the considered judgment of each juror. In order to return a finding, it is necessary that each juror agrees. Your finding 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 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.

You are judges - judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

USE NOTE

1. This instruction must be given in every habitual criminal and death penalty proceeding. After the jury has retired for deliberation neither this instruction nor any "shotgun" instruction shall be given.

*** * * * * * * * * * * * * * * * * * ***

This instruction is almost identical to UJI Criminal 14-5008. It has been modified for use in habitual criminal and death penalty sentencing proceedings.

ANNOTATIONS

Instruction construed. - The instruction does not encourage the jury to impose the death penalty (a unanimous verdict) as opposed to a life sentence (non-unanimous verdict) nor can it be construed as improperly encouraging the jury or any single juror to abandon a life decision in favor of a death decision for the sole purpose of simply maintaining unanimity. The instruction merely encourages the jurors to try to unanimously agree on the existence of an aggravating circumstance and the appropriate penalty. State v. Compton, 104 N.M. 683, 726 P.2d 837, cert. denied, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986).

Effect of unanimity instruction. - Unanimity instruction could not be construed to improperly encourage individual jurors to abandon a decision to impose a life sentence in favor of a sentence of death for the sole purpose of simply maintaining unanimity. State v. Clark, 108 N.M. 288, 772 P.2d 322, cert. denied, 493 U.S. 923, 110 S. Ct. 291,

107 L. Ed. 2d 271 (1989), overruled on other grounds, State v. Henderson, 109 N.M. 655, 789 P.2d 603 (1990).

CHAPTERS 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 ..... An order by the court filed on the .... day of ....., 19 .., convened this grand jury. You have qualified as members of such grand jury and it is my duty as judge to instruct you as to your duties, authority and the special responsibilities you now have as members of the grand jury.

I will guide you to assure that your actions are within the authority conferred upon you by law. Any grand juror may at any time, with propriety, 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. In addition to this matter, you shall also consider the conditions of the jails or prisons in this county.

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.

In the course of your investigation and the presentation of charges by the prosecutor, you shall consider the oral testimony of witnesses under oath and any documentary or other physical evidence exhibited to the grand jury.

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 during these proceedings. It is for you to decide whether the evidence presented is true or false. You may give the evidence whatever weight you believe it merits. 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.

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. 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.

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 presented 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 may be present during your deliberations or upon your taking of a vote.

The district attorney or his assistants shall assist you, examine witnesses, prepare indictments and reports at your request, and provide your foreman with a form of oath to be administered by the foreman 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. You must carefully consider these elements prior to returning an indictment. The district attorney will answer, on the record, any questions you may have.

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 your further 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 request 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 such person that you cannot discuss with him any matter pertaining to your duties as a grand juror, obtain his 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 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.

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.

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 his oath as a grand juror is guilty of a misdemeanor.

Although all proceedings in the grand jury room will be reported verbatim, your deliberations will not be reported.

Any violations of the orders of the court by any 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.

Foreman of Grand Jury.

The foreman of the grand jury shall convene the grand jury during the regular hours of this court. The foreman 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, and the foreman 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 foreman who shall preside over the sessions of the grand jury. The foreman may recess the sessions of the grand jury and reconvene them. The foreman, 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.

The law governing these proceedings is contained in instructions given to you by the court, 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 and disregard others.

The clerk will now administer the oath to you and give you a copy of these opening instructions.4

....

(District Judge)

USE NOTE

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.

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.

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, Instruction 14-8002 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 CONVENINGOF 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 ....., 19 ..., to consider .....

IT IS FURTHER ORDERED that the names of ..... (state number) potential jurorsbe 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 ....., 19 ....

..... (District Judge)

*** * * * * * * * * * * * * * * * * * ***

Committee commentary.
Convening the grand jury.

A grand jury is convened upon order of a judge empowered to try capital, felony and infamous crimes, or convened by such judge upon petition of 200 or five percent of resident taxpayers of the county, whichever is less. N.M. Const., art. 2, § 14 prohibits a person to be held 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 district judge convening a grand jury is required to charge it to inquire into:

a. any public offense against the state committed and triable in the county which is not barred from prosecution by the statute of limitations and upon which no valid indictment or information has previously been filed;

b. the condition of every person imprisoned in the county not lawfully committed by a court and not indicted or informed against; and

c. the condition and management of every public jail or prison within the county. 31-6-9 NMSA 1978.

The district judge is also required to direct the grand jury as to any special inquiry into violations of law which he wishes them to make. 31-6-9 NMSA 1978. 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. Offenses known to individual grand jurors may be brought before the grand jury but only in conformance with established procedures. Clinton v. Superior Court in and for Los Angeles County, 73 P.2d 252 (Cal. App. 1937).

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 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 through 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.

Territorial jurisdiction.

The grand jury is restricted to the investigation of criminal offenses committed or triable within the county in which the panel is sitting or within the jurisdiction of the court to which it is attached. The National Association of Attorneys General, Committee on the Office of Attorney General, Statewide Grand Juries at p. 16; 31-6-9 NMSA 1978. At least six states have enacted statutes permitting empaneling of statewide grand juries. N.J. Rev. Stat. § 2A:73A-1 et seq.; Col. Rev. Stat. § 13-73-101 et seq.; Fla. Stat., § 905.31 et seq.; Wyo. Stat. Ann. § 7-5-301 et seq., R.I. Gen. Laws § 12-11.1-1 et seq.; Ariz. Rev. Stat. Ann. § 21-421 et seq. However, it has been held that the grand jury may inquire into occurrences outside the county in order to determine if a crime has been committed within the county wherein the grand jury is sitting. People v. Conzo, 23 N.E.2d 210 (Ill. App. 1939). Unless a statute provides for removal of an indictment by a grand jury outside the county where the crime occurred to the county wherein the crime occurred, it will be quashed. State v. Mitchen, 163 S.E. 581 (N.C. 1932).

The grand jury has no authority to act in civil matters. 120 A.L.R. 437.

Selection of the grand jury.

Section 38-5-3 NMSA 1978 provides that the clerk select five percent of the number of voters' names contained in the poll books (but not less than 150 names) as potential jurors to serve during the following two-year period. This is the master jury wheel. From this master jury wheel the clerk selects the number of jurors required. Section 38-5-9 NMSA 1978. The judge then selects and qualifies as a panel for the grand jury the number he deems necessary. Section 31-6-1 NMSA 1978.

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. State v. Raulie, 35 N.M. 135, 290 P. 789 (1930); Section 31-6-1 NMSA 1978. Moreover, the court may discharge the grand jury at any time even before it has completed its business. United States v. Smyth, 104 F. Supp. 283, 292 (D.C.N.D. Cal. 1952).

Function of the court.

It is the function of the court to charge the grand jury before it begins its duties as to its obligations and powers, and the jury may properly request the court, at any time thereafter, for further instructions to assist it to intelligently pursue its investigation. Attorney General v. Pelletier, 134 N.E. 407 (Mass. 1922). Technically, however, the jury may be considered charged when it is sworn. State v. Lawlar, 267 N.W. 65 (Wis. 1936). Failure of the court to charge the grand jury as required by statute does not vitiate the proceeding or constitute grounds for reversal of a conviction under an indictment found by a grand jury where the failure did not prejudice the defendant. Porterfield v. Commonwealth, 22 S.E. 352 (Va. 1895). See also Buzbee v. Donnelly, 96 N.M. 692, 634 P.2d 1244 (1981).

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. If requested by the court, the attorney general is also available for assistance. Sections 31-6-4 and 31-6-7 NMSA 1978.

The duty of the district attorney is to attend the grand jury, examine witnesses and prepare indictments, reports and other undertakings of the grand jury. Section 31-6-7 NMSA 1978. The district attorney should also advise the grand jury, on the record, of the essential elements of any offense which is considered by the grand jury. It is recommended that this be done by using Uniform Jury Instructions Criminal, where available, and the criminal statutes if no instruction is available. The district attorney will answer, on the record, any questions which the grand jury may have. The district attorney will not, however, guide or otherwise influence the grand jury. If requested by the grand jury, the district 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 competent direct evidence available that may explain away or disprove a charge or accusation or that would make an indictment unjustified. 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. Section 31-6-11 NMSA 1978; Buzbee v. Donnelly, supra; State v. Chance, 29 N.M. 34, 221 P. 183 (1923). The grand jury may subpoena witnesses and records or other evidence relevant to its inquiry. Section 31-6-12 NMSA 1978.

Exculpatory evidence.

In *Buzbee,* supra, the New Mexico Supreme Court overruled the holding in several court of appeals decisions dealing with the concepts of 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 due process question 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. See also Note, "Grand Jury; A Prosecutor Need Not Present Exculpatory Evidence," 38 Wash. & Lee L. Rev. 110, 123 (1981).

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 a prosecutor under Section 31-6-11 NMSA 1978 is required to present direct exculpatory evidence, but need not present circumstantial exculpatory evidence. The court further 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 Section 31-6-7 NMSA 1978, to conduct himself in a fair and impartial manner. The fact that *Gonzales* and *Harge,* supra, were overruled is instructive in this area. Those cases held that the prosecutor did not violate due process and upheld the indictments. The supreme court in *Buzbee* seems to be saying that even in those cases the court of appeals was not presented with a claim that would have justified the inquiry into a due process violation.

Buzbee explains what is meant by "evidence that directly negates the guilt." 31-6-11B NMSA 1978. Such evidence must be admissible at trial. Thus the prosecutor properly excluded self-serving declarations of innocence by the targets. The court held that the legislature intended only evidence which directly negates guilt, evidence not requiring the aid of inferences or presumptions to suggest the innocence of the targets.

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.

Buzbee did not overrule Davis v. Traub, 90 N.M. 498, 565 P.2d 1015 (1977) which held that the prosecutor "must abide by the letter and spirit of the laws." It is the opinion of the committee that although the court did not find that the facts in *Buzbee* required remedial action, a prosecutor in like circumstances is well advised to be diligent in presenting direct exculpatory evidence to the grand jury. As a practical matter, when the evidence for the defense is substantial, a no-bill by the grand jury alleviates embarrassing acquittals later.

Target witnesses.

A target witness shall be notified of his target status unless the prosecutor determines that notification may result in flight, may endanger other persons or may obstruct justice or unless the prosecutor is unable, with reasonable diligence, to notify the witness. A showing of reasonable diligence is not required unless the witness establishes actual and substantial prejudice due to a failure to be notified. 31-6-11 NMSA 1978.

Reports.

The law, generally, prohibits the grand jury from making reports, except those specifically provided by statute, to recommend removal if permitted by statute or to indict for crime. 63 A.L.R.3d 586. In the absence of statute, reports critizing individuals are prohibited. Meyer, "Grand Jury Reports: An Examination of the Law in Texas and Other Jurisdictions," 7 St. Mary's L.J. 374 (1975). It has been held that where a statute grants authority to the grand jury to examine the books, records and accounts of all officers of the county and to make reports thereon, including the needs of county officers and the desirability of abolishing or creating county offices and determining the adequacy of the existing methods used in operating the offices, the grand jury is under the control of the court, is a judicial body and even without statutory authority, it is implicit that the court has authority to refuse to file grand jury reports which exceed the grand jury's statutory authority. People v. Superior Court, 531 P.2d 761 (Ca. 1975). See dissent in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973) for discussion on court's authority.

ANNOTATIONS

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.

14-8002. Grand jury proceedings; oath to grand jurors.1

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 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 countyof .....

You shall select one of your number as foreman as your first order of business. After you have selected your foreman, notify the court of your selection.

Your term as members of the grand jury expires ..... 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 enter upon your duties as grand jurors.

USE NOTE

1. This oath or affirmation or any other oath or affirmation which generally complies with Section 31-6-6 NMSA 1978 and Rule 11-603 of the Rules of Evidence 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.

****

Statutory reference. - Section 31-6-6 NMSA 1978.

Committee commentary. - Section 31-6-6 NMSA 1978 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 Criminal 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.

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 NOTE

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.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 31-6-6 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-8002.

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 NOTE

This oath may be administered to each witness prior to his testimony before the grand jury.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 31-6-6 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-8002.

14-8005. Grand jury proceedings; sample instruction.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 to believe each of the following elements of the crime:

1. The accused entered ..... *2* (identify structure)

without authorization or permission; [theleast intrusion constitutes an entry;] *3*

2. When the accused entered the ....., (name of structure) intended to commit [a theft] [or] .....] *4* (name of felony) when he got inside;

3. This happened in New Mexico on or about the .... day of .....,19 .....

"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 NOTE

1. This instruction and any other instruction which is applicable may be given.

2. If the charge is burglary of a dwelling house, 14-1631 should be given with this instruction.

3. Use bracketed phrase if entry is in issue.

4. 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.

****

Applicable uniform jury instructions giving the essential elements of an offense should be prepared by the district attorney when the offense is being considered by the grand jury. Any other instructions, such as definitions, which are to be given with the essential elements instruction, should also be prepared for the grand jury.

If no essential elements instruction is available for an offense, the applicable statute should be given 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. Instruction 14-8005 is a sample of such a modification.

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 indictmentagainst ..... *1* (person accused)

.....

.....FOREMAN

USE NOTE

1. 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 and shall be filed with the district court clerk. If probable cause is found for one or more offenses, the district attorney will complete Criminal Form 9-204 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.

*** * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 31-6-5 and 31-6-10 NMSA 1978.

Committee commentary. - An indictment is a written accusation or charge of crime against one or more persons, presented upon oath by a grand jury. A presentment . . . is the notice taken by a grand jury of any offense, from their own knowledge or observation, without any bill of indictment being laid before them . . . speaking generally, however, the words 'presentment' and 'indictment' have come to be used as substantially interchangeable terms, and it has been said that this seems to have been the interpretation given to the Fifth Amendment to the Federal Constitution.

41 Am. Jur. 2d Indictment and Informations § 1.

The grand jury must find sufficient facts to support the following allegations in the indictment:

1. the designated offense of which the defendant is accused;

2. the identity of the county wherein the offense charged was committed;

3. the date or period of time when the offense was committed; and

4. a factual statement to support every element of the offense charged so as to apprise the defendant of the conduct which is the subject of the accusation.

B.J. George, Criminal Procedure Sourcebook, Vol. 1, p. 588 (1976).

In returning an indictment, if the grand jury is comprised of twelve members, eight members must concur. If there are more than twelve members, concurrence shall be as provided by law but not less than a majority. 31-6-10 NMSA 1978; N.M. Const., art. 2, § 14.

The indictment must be signed by the foreman of the grand jury. 31-6-2 NMSA 1978.

Instructions 14-8020 and 14-8021, if used, are not to be included in the district court file. They have been included as an aid to the district attorney in his duty of assisting the grand jury.

Once the grand jury has made its presentment or indictment, the court is without power to review the evidence before the grand jury to determine whether it is lawful or sufficient to support the indictment. State v. Chance, 29 N.M. 34 (1923); State v. Ergenbright, 84 N.M. 662 (1973); State v. Elam, 86 N.M. 595 (Ct. App. 1974); State v. Herrera, 90 N.M. 306 (Ct. App. 1977); Maldonado v. State, supra. The court in *Maldonado* indicated, citing Davis v. Traub, 90 N.M. 498 (1977), that it would look behind the indictment if the law was not followed by the grand jury in its proceedings. In *Maldonado* the issue was evidence presented which would not have been admissible at trial; in *Davis,* unauthorized persons present during the proceedings was the issue raised. An indictment shall be dismissed if exculpatory evidence is not presented to the grand jury by the prosecutor. State v. Sanchez, 95 N.M. 27, 618 P.2d 371 (Ct. App. 1980).

The grand jury is prohibited from naming persons as unindicted coconspirators in indictments, 31-6-5 NMSA 1978, and the court may expunge such unauthorized action from the indictment. U.S. v. Briggs, 514 F.2d 794 (5th Cir. 1975).

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, supra. The court may also expunge unauthorized grand jury action.

ANNOTATIONS

Compiler's note. - 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, 96 N.M. 692, 634 P.2d 1244 (1981).

14-8021. Grand jury proceedings; findings.

I hereby certify that the members of the grand jury have found that there is

USE NOTE

1. 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 with the district court clerk. If this instruction is used, it is not to be included in the district court file.

*** * * * * * * * * * * * * * * * * * ***

Statutory reference. - Section 31-6-5 NMSA 1978.

Committee commentary. - See committee commentary under Instruction 14-8010.

CHAPTERS 81 TO 89

(RESERVED)

CHAPTER 90
CHILDREN'S COURTS

PART A

MISCELLANEOUS PROVISIONS

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 .....(name of child) has committed adelinquent 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. It is presumed that he didnot commit the act charged in the petition. It is the state's burden to prove beyond areasonable 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. Then the evidence will be presented to you. 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 will be admitted for your consideration. The evidence will be the testimony of witnesses, exhibits and any facts agreed to by the lawyers.

It is the duty of a lawyer to object to evidence which the lawyer believes may not be proper, and you must not be prejudiced against the state or the respondent because of such objections. I will sustain objections if I conclude that it would be legally improper for you to consider such 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. 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. You must rely upon your individual memories of the evidence in the case.

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. If you have any question during the trial, write out the question, sign it and ask the bailiff to give it to me.

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 desires. The child's attorney may make an opening statement if he 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 expects the evidence to show.

USE NOTE

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

[As amended, effective August 1, 1989.]

ANNOTATIONS

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 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 act:

1. The child entered ..... *2* (identify structure) without authorization or permission; [the least intrusion constitutes an entry;] *3*

2. When the child entered the ....., (name of structure) he intended to commit [a theft] [or][.....] *4* (name of felony) when he got inside;

3. This happened in New Mexico on or about the ... day of ....., 19 ...

USE NOTE

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

2. If the charge is burglary of a dwelling house, 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.

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*]. (number)

.....

FOREMAN

(style of case)

We find the child [.....] *2* (name) DID NOT COMMIT the act of ..... *3* (name of act) [as charged in Count ..... *4*]. (number)

.....

FOREMAN

(style of case)

We find the child [.....] *2* (name) DID NOT COMMIT any delinquent act.*5*

.....

FOREMAN

(style of case)

We find the child [.....] *2* (name) BY REASON OF INSANITY DID NOT COMMIT any delinquent act.
.....
...15 FOREMAN

(style of case)

Do you find that the child [.....] *2* (name) is competent to
stand trial?
.....(Yes or No)

.....

FOREMAN

1. A form of verdict must be submitted to the jury for each delinquent act, and each form must be typed on a separate page.

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.

ADDENDUM 1

THE LAZY LAWYER'S GUIDE TO CRIMINAL

INTENT IN NEW MEXICO..

Addendum 1, THE LAZY LAWYER'S GUIDE TO CRIMINAL INTENT IN NEW MEXICO (1986 Repl.)

I. GENERAL PRINCIPLES

A. *Criminal Intent in General.*

The concept of intent is deeply rooted in criminal jurisprudence.*1* Control of behavior to protect society is the primary purpose of the criminal law,*2* and punishment, or the threat of punishment, is the major device for accomplishing that control.*3* Three broad categories of crimes can be defined in terms of the intent of the actor: nonintent crimes, crimes of general intent and crimes of specific intent.

Nonintent crimes are of two types: negligent crimes and strict liability crimes. Negligent crimes are those in which the actor intended no criminal consequences but instead acted carelessly and caused harm.*4* Negligent act involuntary manslaughter is an example of a negligent crime.*5*

Strict liability crimes are those in which the action is potentially so harmful to society that the mere action itself is sufficient to support conviction without any showing of intent. Examples of strict liability crimes are pure food and drug law violations, traffic violations and violations of other laws designed to protect the public safety and welfare.*6* Although not labeling them as "strict liability" crimes, the New Mexico Court of Appeals has held that unlawful branding,*7* contributing to the delinquency of a minor *8* and abuse of a child *8a* do not require a criminal intent.

The most widely accepted description of general intent is the intent to do the criminal act itself; the mens rea necessary to perform the actus reus.*9* Crimes of general intent are categorized by the court of appeals as those requiring only a conscious wrongdoing.*10*

The court of appeals has said that except where the legislature clearly eliminates the requirement of criminal intent, all statutory crimes, construed in the light of the common

law, require criminal intent.*11* However, even in those statutes where the legislature has apparently eliminated criminal intent, the crime must be analyzed to determine if it is one which the legislature can constitutionally declare to be criminal without criminal intent.*12* A compilation of statutes construed as general intent crimes is contained in Appendix A.

The New Mexico Supreme Court has held that where the jury is instructed on specific intent, no instruction on general intent is necessary because "a person is presumed to intend the logical consequences of his actions." *13* However, under UJI Criminal the specific intent element is treated simply as another element of the crime, and the general intent instruction, Instruction 1.50 [14-141], must be given for all crimes requiring criminal intent.

B. *Identifying Crimes of Specific Intent.*

The Supreme Court of California has articulated the following general rule as a way of distinguishing general from specific intent:

When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a further consequence, we ask whether the defendant intended to do the prescribed act. This intention is deemed to be general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.*14*

By the adoption of the Uniform Jury Instructions, the New Mexico Supreme Court has in effect adopted this test for determining if a crime includes a specific intent. With the exception of homicide crimes, this test will be used throughout this paper in analyzing specific intent in the New Mexico Criminal Code [Chapter 30 NMSA 1978].

The decisions of the court of appeals, however, include crimes under the heading of specific intent crimes which do not meet this test, although the court of appeals is not of one mind on the subject. Judge Hernandez and Judge Hendley have apparently accepted a test similar to that of the California court.*15* Judge Sutin has twice said that a crime may be identified as one of specific intent if the statute has the words "with intent." *16* However, he also seems to indicate, for example, that battery is a specific intent crime because the statute defines the crime as an "intentional touching." *17* More importantly, in a specially concurring opinion, Judge Sutin adopted the following definition of specific intent:

A person who knowingly does an act which the law forbids or who knowingly fails to do an act which the law commands, purposely intending to violate the law or recklessly disregarding the law acts with specific intent.*18*

In State v. Crespin,*19* Judge Sutin, writing for the majority, paraphrased and applied his definition to the crime of aggravated battery. However, as will be shown below, aggravated battery is also a specific intent crime under the California test.

In State v. Gonzales,*20* the court, relying on Judge Sutin's definition, held that the crime of intentionally trafficking a controlled substance requires a specific intent. Trafficking can be perpetrated by either the distribution of a controlled substance or by possession with intent to distribute.*21* Under the California test, possession with intent to distribute is clearly a crime of specific intent, but distribution is not a specific intent crime since it only involves "the description of a particular act, without reference to intent to do a further act." *22* By treating distribution as a specific intent crime, the court of appeals has apparently accepted a definition of specific intent which would include any act done intentionally.

Compounding the problem is the fact that neither the California definition adopted by UJI Criminal nor the New Mexico Court of Appeals definition can be relied upon as the exclusive test for identifying specific intent crimes. As will be shown in the discussion under Part II below, some crimes have a specific intent element even though the statute does not include the words "with intent to" or "intentionally." In addition, Appendix B includes a catalog of statutes which have not been interpreted by the New Mexico appellate courts but which appear to require specific intent.

C. *Proof of the Specific Intent Element.*

A specific intent is merely one of the elements of the crime. The burden is on the state to prove the specific intent beyond a reasonable doubt.*23* If the prosecution fails to prove that element, the defendant can only be convicted of a lesser included offense or, in the absence of a lesser included offense, acquitted.*24* While intent is seldom susceptible of direct proof, it may be inferred from surrounding facts and circumstances.*25*

In some statutes the legislature apparently hoped to solve the problem of proof of intent by providing for a presumption of intent when certain facts are established. For example, a person found outside a store with concealed merchandise is presumed to have concealed it with the intention of converting it without paying for it; *26* if the maker or drawer of a check has no account in the bank upon which a check is drawn, it is prima facie evidence of an intent to defraud; *27* if a person uses obscene language over a telephone, it is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy or offend.*28* Unless these presumptions are interpreted as statutory inferences and the jury instructed on inferences rather than presumptions, they arguably violate the due process clause of the United States Constitution.*29* In any event, these statutory presumptions may be surplusage since the jury may always find the requisite intent from the facts and circumstances.

Finally, specific intent may be proven by evidence of other crimes, wrongs or acts under an exception to the general rule that such evidence is not admissible to prove that the defendant committed the crime charged.*30*

D. *Defenses to the Specific Intent Element.*

As already indicated, the element of specific intent must be proven by the state beyond a reasonable doubt. It may not be quite correct to speak of a defense to the specific intent element unless that only means that the defendant creates a reasonable doubt in the mind of the juror. It is possible for the defendant not to introduce any evidence and for the evidence of the state to include matters which allow the jury to be instructed on an inability to form a specific intent. That inability may be caused by intoxication or a mental disease or defect. As to the effect of expert testimony, inability to form specific intent is treated like the defense of insanity.*31*

Intoxication includes both alcoholic and narcotic intoxication.*32* The latter includes intoxication caused by amphetamines and marijuana.*33* Although the mental element in a general intent crime is not "legally" disturbed by intoxication, intoxication will make impossible the formation of a specific intent.*34* Consequently, the defendant might be convicted of a lesser included offense that does not require specific intent.*35*

New Mexico is one of the jurisdictions which recognizes that a mental disease or defect, apparently something less than complete insanity, is a defense to the specific intent element.*36* The principles discussed above also apply where the defendant claims inability to form specific intent because of mental illness.

II. SPECIFIC INTENT IN THE NEW MEXICO CRIMINAL CODE

A. *First Degree Murder.*

1. Introduction.

The New Mexico statute includes seven types of first degree murder: *37* (1) willful, deliberate and premeditated killing; (2) murder by means of poison; (3) murder by means of lying in wait; (4) murder by means of torture; (5) murder in the commission of or attempt to commit any felony; (6) murder by any act which is greatly dangerous to the lives of others and which indicates a depraved mind without regard for human life; (7) murder resulting from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being. The New Mexico courts often say that first degree murder requires specific intent.*38* However, it appears that only one type - the willful, deliberate and premeditated killing - includes a specific intent.

2. The willful, deliberate and premeditated murder.

The landmark decision analyzing the intent required for first degree murder is State v. Smith,*39* decided in 1921. The narrow holding of *Smith* was that a conviction of second

degree murder could be sustained under a charge of murder by lying in wait. The court held that the jury could disbelieve the evidence of lying in wait, a murder in the first degree, and find that the defendant had committed only a premeditated or second degree murder.

The court reached the narrow holding by analyzing the elements of first and second degree murder. The court interpreted a willful, deliberate and premeditated killing, admittedly not the charge against the defendant, as one requiring "intensified" or "express" malice.*40* "Express malice" is defined in the statute as "the deliberate intention, unlawfully to take away the life of a fellow creature .. " *41* The court said that express malice is a specific intent,*42* something more than ordinary malice aforethought, the intent required for all murder.*43* Subsequent decisions rely on *Smith* for the proposition that first degree murder is a specific intent crime and that second degree murder is a general intent crime.*44*

The court in *Smith* did an admirable job of giving some meaning to the complex New Mexico statutory scheme. However, it is generally agreed that "malice aforethought" means only intent to kill or do great bodily harm thought out beforehand or premeditated.*45* Consequently, it may be argued that the decision to make a willful, deliberate and premeditated killing a specific intent crime rests on policy rather than legal analysis.*46* The distinction between first and second degree murder cannot be articulated with real certainty. The courts are content to state that second degree murder involves premeditation but not deliberation.*47* Unfortunately, the dictionary definitions of those two words cast some doubt on the validity of that distinction.*47a*

3. Murder by poison, torture or lying in wait.

In further dicta, the court in *Smith* answered the question of what type of intent is an element of first degree murder by certain means or methods:

> [T]here must always be express malice in first degree murder, except in those cases specified where the act is done in a certain way or by certain means, as, for example, by means of poison. In the latter case the specific intent is not so material, provided the accused intended to kill unlawfully .. *48*

This statement could be read as indicating that no specific intent is required for a murder by poison (and presumably torture or lying in wait). The defendant need only commit a second degree murder, but use certain means, and the legislature has determined that the murder is considered first degree murder. On the other hand, the court might also mean that the

means used supply the specific intent. This appears to be the view expressed (also in dicta) in State v. Kappel,*49* where the court said that:

> [u]nless we have a case where the very means employed in committing a homicide, as by torture, poison, or lying in wait supply proof of the deliberation, the intensified malice, necessary to raise the grade of the offense to first degree as a matter of law . it is always necessary to submit second degree and thus permit the jury to say whether it is the one or the other .. *50*

Since *Smith* had already held that the jury could disbelieve the evidence of lying in wait and convict for second degree murder, the statement in *Kappel* that it is not necessary to submit second degree murder to the jury in a lying-in-wait case appears to be in error. If *Smith* is read as saying that lying in wait is second degree murder which is declared first degree murder by the legislature because of the means, then the opinion is analytically sound in concluding that the jury should be instructed on second degree murder.

In pure theory, these three types of murder - by poison, lying in wait and torture - should not be separate types at all. They would seem to simply be three kinds of willful, deliberate and premeditated murder. The means should be only evidence from which the jury could infer specific intent.*51*

There does not appear to be a New Mexico decision holding that a defendant in a case of murder by poison, torture or lying in wait is entitled to a jury instruction on inability to form specific intent. Without such a decision, one can really only speculate on whether these types of murder require specific intent. In State v. Reed,*52* a clear case of murder by torture, the defendants argued on appeal that their intoxication prevented the formation of specific intent. The court, "[p]assing the question whether this doctrine is applicable to murder by torture ..... declined to rule on this point because it had not been presented to the trial court.*53*

4. Felony murder.

At common law, conviction of felony murder required no proof of malice aforethought; it was imputed by a legal fiction or presumed as a matter of law.*54* The New Mexico statute appears to require malice aforethought.*55* However, in State v. Welch,*56* the New Mexico Supreme Court interpreted the legislation as providing for punishment of "homicide" (unlawful killing) when committed during the commission of or attempt to commit a felony. The state need not, therefore, prove malice aforethought to convict for felony murder. In addition, the statute makes the crime first degree murder, as if the circumstances of the killing implied that deliberation was also present.*57*

With both malice and deliberation implied, it seems safe to assume that there is no specific intent element to the killing involved in a felony murder. However, the felony, including an attempt to commit a felony,*58* forming the basis for the murder might be a specific intent crime. Since the state must prove the elements of the felony, felony murder may be considered a specific intent crime without reference to the specific intent of first degree murder. Consequently, intoxication or mental disease or defect short of insanity could render the defendant unable to form specific intent and allow the jury to find him not guilty of felony murder.*59* For a crime with a lesser included misdemeanor offense, he could be convicted of involuntary manslaughter.*60*

5. Depraved mind and deliberate design murder.

There are no New Mexico decisions on depraved mind murder,*61* known as depraved heart murder at common law. The common-law judges treated it as similar to felony murder and implied malice.*62* Consequently, it is believed that this would not be a specific intent crime.

The seventh and final "type" of murder, the deliberate and premeditated design unlawfully and maliciously to effect the death of any human being,*63* is probably not a separate type at all. Analytically, it is simply a willful and deliberate murder where the intent is "transferred" to the victim.*64* Although this type has not been interpreted by the New Mexico courts, but, the specific intent issue should be treated no differently from any other willful, deliberate and premeditated killing.

B. *Simple Assault.*

Simple assault is defined in the New Mexico statutes as: (1) an attempt to commit a battery; (2) an act, etc., which puts a person in apprehension of receiving a battery; or, (3) the use of insulting language impugning another's honor, etc.*65* The first type is common-law criminal assault; the second and third types are tort concepts made criminal by legislative action.*66*

Assault by attempt to commit a battery includes an intent to commit the battery or to injure the person.*67* In State v. Saiz,*68* the defendant, charged with attempted robbery, submitted an instruction on the "lesser included offense" of assault. His sole defense, according to the court of appeals, was that he was too intoxicated to form the "requisite criminal intent" for the conviction of the offense charged. The court of appeals reasoned that since intoxication would have been a defense to assault as well as attempted robbery, it was not error to refuse the instruction on assault.

The court in *Saiz* never defines the "requisite criminal intent" for either attempted robbery or assault. Nor did it explain why intoxication would be a defense to assault. The defendant attempted to grab the victim and tie him up. We can only speculate that the appellate court viewed the assault as an attempt to commit a battery, requiring an intent to commit a battery, negated by intoxication. As established by a later decision, if

the assault had been merely putting the victim in apprehension of receiving a battery, there would have been no specific intent which would be negated by intoxication.*69*

Some doubt may have been cast on this conclusion by the recent decision in State v. Mascarenas.*70* The defendant's conviction for aggravated assault was reversed due to the failure of the district court to instruct the jury on criminal intent. The jury was merely read the statutes on assault by a deadly weapon, simple assault (all three types) and simple battery. The narrow holding of the case is that aggravated assault is a crime requiring criminal intent and that none of the statutes read to the jury contain language which sets forth the requisite intent. Without reciting the facts of the assault, the court held that an instruction on conscious wrongdoing, i.e., general criminal intent, should have been given. However, if the assault were an attempt to commit a battery, a proper instruction on that theory would have been sufficient under existing precedents, since that instruction would have included a specific intent.*71* Under UJI Criminal, both a proper instruction on the elements of the assault and the criminal intent instruction are required.

C. *Assault on a Jail.*

Certainly one of the more exotic statutes in the New Mexico Criminal Code [Chapter 30 NMSA 1978] is assault on a jail.*72* This statute makes it a crime to assault or attack any jail, prison or other public building or place where prisoners are held in lawful custody or confinement. From a reading of the statute, the elements of the crime are not clear. There are no New Mexico opinions interpreting the statute in a direct appeal from a conviction of assault on a jail.

The recent, well publicized use of this statute was in the prosecution of Reis Lopez Tijerina for the Tierra Amarilla courthouse raid of June 5, 1967. Tijerina was found not guilty of assault on a jail but was later convicted of assault with intent to commit a violent felony.*73* On appeal from the conviction, Tijerina argued that the second prosecution violated the double jeopardy clause of the Fifth Amendment. The New Mexico Supreme Court held that the elements of the two crimes are different and upheld the conviction. The court noted that an assault on a jail is an assault on an inanimate and insensate object, whereas assault with intent to commit a violent felony is an assault against a person.*74* The court quotes extensively from the jury instructions in the prior case. One such instruction describes the essential elements of assault on a jail as an act done with the purpose and intent of procuring the escape of prisoners. To the extent that *Tijerina* can be read as approving the jury instructions in the first prosecution, an element of the crime of assault on a jail is the specific intent to procure the escape of prisoners.

D. *Aggravated Assault.*

The New Mexico Criminal Code [Chapter 30 NMSA 1978] includes five types of aggravated assault which require an assault plus an intent to commit another crime, and all should be considered as specific intent crimes.*75* One, assault with intent to murder,

has been the subject of several appellate decisions. In one decision, the court said that an essential element of assault with intent to commit murder was the specific intent to take human life.*76*

A popular form of aggravated assault is assault with a deadly weapon.*77* Although presumably the assault element could include any of the three statutory types of simple assault discussed above, the crime is usually committed when the victim is threatened by the person with the weapon. That type of assault should fall into the category of an act or conduct "which causes another person to reasonably believe that he is in danger of receiving an immediate battery." *78* Some courts hold that assault with a deadly weapon includes the specific intent to do physical harm or bodily injury.*79* The New Mexico Court of Appeals has rejected this line of authority and has held that an assault by threat with a deadly weapon, causing the person to reasonably believe he is in danger of receiving a battery, is a general intent crime.*80*

E. *Aggravated Battery.*

Aggravated battery is defined by statute as "the unlawful touching or application of force to the person of another with intent to injure that person or another." *81* The New Mexico decisions have correctly held that the crime includes a specific intent to injure.*82* There are two separate aggravated battery crimes, a misdemeanor and a third degree felony.*83* Both require the specific intent to injure. In addition, there is a special statute for aggravated battery upon a peace officer. There are two degrees of this crime (fourth degree felony and third degree felony), each of which has an element of specific intent to injure.*84*

F. *Kidnapping.*

In New Mexico, kidnapping involves taking, restraining or confining a person by force or deception. The taking, etc., may be done with any one of three purposes: (1) the intent that the victim be held for ransom, (2) the intent that the victim be restrained as a hostage confined against his will or (3) the intent that the victim be held to service against his will.*85* The New Mexico courts have in effect treated these as "specific intents" by holding that a taking, restraining or confining a person by force or deception without the intent constitutes only false imprisonment.*86*

G. *Sex Crimes.*

While both the supreme court and court of appeals have made it clear that there is no specific intent element in the crime of rape,*87* they have caused confusion concerning the intent required for sexual assault.*88* In State v. Rayos,*89* the district court instructed the jury that it "must believe beyond a reasonable doubt that the defendant knowingly and indecently handled the prosecutrix." The court further instructed the jury that the crime of sexual assault included the element of "specific intent" to indecently handle or touch the victim. The defendant introduced evidence of intoxication, but the court refused a requested instruction which would have told the jury it should acquit if it found

that the defendant did not have the intent to commit the indecent handling. On appeal, the New Mexico Supreme Court held that the district court had made specific intent the law of the case, and therefore, the lower court erred in refusing the requested instruction relating to inability to form specific intent.

In State v. Estrada,*90* the district court had instructed the jury that it could consider the defendant's intoxication in determining whether he had the specific intent required for sexual assault. The jury convicted the defendant; therefore, the court of appeals assumed that "specific intent is an essential element" and held that it was for the jury to decide if intoxication prevented him from forming specific intent.

The statute on sexual assault is for the protection of females under sixteen (16). There is no language in the statute which indicates that the legislature added an element of specific intent. Not all crimes with specific intent can be identified as such by merely reading the statute. However, there is no "common-law" basis for treating sexual assault as a specific intent crime. Absent a more definitive appellate decision, sexual assault should be treated as a general intent crime.

H. *Larceny.*

The New Mexico statute defining larceny contains no language which would indicate that the crime is one of specific intent.*91* However, the court of appeals has correctly held that the criminal intent of larceny is the intent to permanently deprive the owner of his property.*92* Earlier cases, without identifying it as such, have treated this criminal intent as a specific intent.*93*

A complete discussion of the intent required for larceny is found in two opinions dealing with other property crimes. In State v. Eckles,*94* the defendant contended that the two crimes charged, unlawful taking of a motor vehicle *95* and armed robbery,*96* arose out of the same transaction and were inspired by the same criminal intent. The court concluded that larceny was necessarily included in robbery but was not included in the crime of unlawful taking of a motor vehicle. In State v. Puga,*97* the court of appeals described robbery as an aggravated form of larceny, requiring "the intent to permanently deprive the owner of his property." Dicta in the opinion raise the possibility of a person being so intoxicated that the intent could not be formed.*98* These decisions appear to clearly establish the intent to permanently deprive an owner of his property as a specific intent.

I. *Robbery.*

The New Mexico statute does not indicate that robbery has a specific intent element.*99* The appellate decisions say that the "gist" of the offense of robbery is the use of force or intimidation.*100* However, as discussed above, robbery includes both force or violence and the specific intent to permanently deprive the owner of his property.*101*

J. *Burglary.*

The burglary statute defines the crime as an unauthorized entry "with intent to commit any felony or theft therein." *102* The New Mexico Supreme Court has held that this is a specific intent.*103*

K. *Possession of Burglary Tools.*

In New Mexico, possession of burglary tools is a crime only if done "under circumstances evincing an intent to use the same in the commission of burglary." *104* There is no appellate decision expressly stating that this is a specific intent element. In State v. Lawson,*105* the defendant argued that the prior statute was unconstitutional because it did not require proof of criminal intent. The prior statute provided that possession must be "under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of a crime." The court concluded that the "structure and purpose of the statute demand the inclusion of intent as an element of the crime." *106* In addition, the court obliquely approved an instruction telling the jury that "specific criminal intent is an element of the crime which must be proved beyond a reasonable doubt." This opinion lends support to the argument that possession of burglary tools is a specific intent crime.

L. *Embezzlement.*

Embezzlement consists of "embezzling" or converting anything of value "with fraudulent intent to deprive the owner thereof." *107* There is no New Mexico decision holding that this is a specific intent. However, the New Mexico Supreme Court has held that the fraudulent intent to deprive the owner of his property is one of the essential elements of the crime of embezzlement.*108* A recent court of appeals decision holds that fraudulent intent to deprive is not the same as the intent to *permanently* deprive, the specific intent of larceny.*109* Because the crime requires an act (conversion) with the intent to achieve a further consequence (depriving the owner of the property), embezzlement is a specific intent crime under the California test.

M. *Fraud.*

Under the New Mexico statute, fraud requires an "intentional" misappropriation or taking by means of fraudulent conduct.*110* The New Mexico Court of Appeals has now held that because fraud requires fraudulent intent, fraud is a specific intent crime.*111* A prior New Mexico decision holds that there must be proof of a "fraudulent intent" to sustain a conviction for fraud.*112* The words fraudulent intent and fraudulently are frequently defined as meaning "with intent to defraud" or "with intent to deceive or cheat." *113* U.J.I. Criminal 16.30 [14-1640] uses "intent to deceive or cheat" as the words indicating the specific intent in fraud.

N. *Forgery.*

The New Mexico statute requires that the forgery or transfer of a forged writing be done with intent to injure or defraud.*114* Although not identifying the crime as one of specific

intent, the court of appeals has treated proof of the intent in forgery as if it were a specific intent element.*115* That same decision also indicates that the intent to injure or defraud is not limited to an "economic" harm. In most cases the intent is probably the same as the intent to deceive or cheat, the element of fraud.*116*

O. *Arson.*

New Mexico has four types of arson: (1) a willful or malicious burning, etc., with the purpose of destroying or damaging; *117* (2) a willful or malicious burning, etc., with the purpose of destroying or damaging to collect insurance; *118* (3) a reckless use of fire or explosives which directly causes death, bodily injury or damage or destruction *119* and (4) a willful or malicious burning, etc., which causes great bodily harm.*120*

The first two types were enacted in 1970, partly in response to a decision of the court of appeals declaring the previous statute unconstitutional.*121* In that decision, the court held that the statutory language "intentional damaging" made arson a crime without requiring criminal intent as an element. The court suggested that the legislature use the words "willful and malicious," found in common-law arson and in the aggravated arson statute. Interestingly, other jurisdictions have interpreted "willful and malicious" to mean only "intentional" or "deliberate." *122* The new Pennsylvania and New York penal codes use the word "intentionally." *123* According to a California court, the words "willful and malicious" require only a general criminal intent.*124*

By the addition of the words "with the purpose of " to the first type of arson, the legislature apparently added a specific intent element. The phrase was taken from the Model Penal Code,*125* which in turn was based on a New York statute, later repealed.*126* The New York Court of Appeals had identified the provision as a specific intent element and strictly construed the statute as being in derogation of common-law arson.*127* Although identified as a specific intent, to act with the purpose of destroying or damaging does not carry the same connotation as, for example, to act with intent to kill or with intent to commit a theft. Therefore, it is probably more correct to say that arson in New Mexico is a general intent crime with an intent to achieve a further consequence which itself is not necessarily criminal. The Model Penal Code commentary says that the specific intent language ("with the purpose of destroying") makes it clear that a burning with some limited purpose or intent is not regular arson, although it may be negligent arson.*128* Under the New Mexico version, the burning could be malicious, i.e., intentional, but would not be culpable if done without any intent to destroy.

The second type of arson, for the purpose of collecting insurance, is an addition to common-law arson.*129* It is usually described in statutes as a burning, etc., "with intent to injure or defraud the insurer." *130* Consequently it is treated as similar to a crime of fraud. The intent to defraud, a specific intent element, is the essence of the crime.*131* New Mexico has adopted the language of the Model Penal Code, i.e., "with the purpose of destroying [or damaging] any property, whether [the person's] own or another's, to collect insurance for such loss." *132* The commentary to the code makes it clear that the

draftsmen were attempting to restate the "intent to defraud" concept.*133* Thus New Mexico has the specific intent to defraud element by the adoption, with slight modification, of the Model Penal Code. Unlike the specific intent in regular arson, this intent involves a criminal wrong.

The third and fourth types of arson apparently do not require a specific intent. In fact, the third type, negligent arson, may not require any criminal intent.*134* The fourth type, aggravated arson, merely requires a "willful and malicious" act, generally interpreted as general criminal intent.*135* New Mexico, therefore, has an anomalous position, similar to that of New York prior to its recent criminal code revision, because aggravated arson requires only general intent, whereas the lesser crime requires a specific intent as an additional element.*136*

P. *Attempts.*

An attempt to commit a felony consists of an overt act done "with intent to commit a felony" but which fails to complete the felony.*137* The court of appeals, in a case involving attempted sodomy, has now recognized that an attempt to commit a felony requires a specific intent.*138* Three earlier decisions of the supreme court, without meeting the question head on, lend support to this decision.*139*

In a prior court of appeals case, State v. Saiz,*140* the defendant argued that, as a matter of law, he had been too intoxicated to form the "requisite criminal intent" for attempted robbery. Treating attempted robbery as a specific intent crime, the district court instructed the jury that it must acquit the defendant if it found that he was so intoxicated at the time of the offense as to be unable to form the requisite intent. On appeal, the court of appeals held that the intoxication issue was for the jury and that there was substantial evidence to support the guilty verdict.

Q. *Accessories.*

Under the New Mexico statute an accessory is one who "procures, counsels, aids or abets" in the commission of a crime.*141* Although it is clear that one who aids or abets must share the criminal intent of the principal,*142* must he have some additional criminal intent? In other words, must he act "with intent to aid or abet another in the commission of a crime?" That question has arguably been answered in the affirmative by the New Mexico Supreme Court.*142a* A hypothetical case which most clearly poses the problem would be one in which the aider and abettor is intoxicated, but the principal commits a crime which only requires a general intent and, therefore, intoxication is not relevant.*143*

The Model Penal Code expresses the intent issue more clearly by requiring that the accessory aid another with the purpose of promoting or facilitating the commission of the offense.*144* However, the comments to the code do not explain the thinking of the draftsmen on the intent issue.*145* As another example, the Illinois statute uses the

phrase "with intent to promote" *146* and has been interpreted as requiring a specific intent.*147*

A most influential decision in this area of law is one written by Learned Hand.*148* Followed by the United States Supreme Court and many circuits,*149* his interpretation of aiding and abetting does not include the term "specific intent," but it can be read to include some special mental element. At least one circuit reads his "purposive attitude" element of aiding or abetting as a specific intent.*150*

Absent a definitive opinion by a New Mexico court, one can only speculate on the proper interpretation of the New Mexico statute. Analytically, aiding or abetting would seem to require a special or specific intent on the part of the person who merely assists in the completion of a crime. It is, therefore, suggested that the better view is to classify the crime as one requiring specific intent.

R. *Crimes Under the Controlled Substances Act.*

The court of appeals, in dictum, has correctly acknowledged that possession of a controlled substance with intent to distribute is a specific intent crime.*151* The defendant in the case was charged with actual distribution, not possession with intent to distribute.*152* Unfortunately, the narrow holding in the case is that the crime "to intentionally distribute" is also a specific intent crime. This holding, by implication, overrules a prior holding that intentional distribution requires only a general intent.*153* It is also inconsistent with the approach of UJI Criminal.

It is a crime for any person "intentionally" to possess a controlled substance.*154* Under a prior statute prohibiting possession of anhalonium (peyote), the court held that intentional possession was required although the word "intentional" is not found in the statute.*155* The court simply did not believe that the legislature intended to make criminal the unintentional possession of the substance. By "unintentional," the court seems to mean something like "mistaken," "negligent" or "ignorant" possession. It does not say that the crime is one of general intent, but it does rely on its "landmark" case on general intent in the discussion of what criminal intent is required for possession.*156* Since the "definition of the crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a further consequence," *157* the crime is properly a general intent crime.

The crime of trafficking a controlled substance includes manufacturing, distribution and possession with intent to distribute.*158* The court of appeals has held that trafficking requires a specific intent.*159* However, under the definition adopted by UJI Criminal, only trafficking committed by possession with intent to distribute is a specific intent crime. The possession of a large quantity of the controlled substance as one of the surrounding facts and circumstances will give rise to an inference that the defendant had an intent to distribute the substance.*160*

III. CONCLUSION

With the adoption of UJI Criminal, the general criminal intent instruction, Instruction 1.50 [now see 14-141], must be given for all crimes except certain homicides and those which require no criminal intent whatsoever. For those specific intent crimes not yet included in UJI, the lawyers and courts must also include the specific intent element in the essential elements instruction. The specific intent element should be identified in advance of trial in order to determine if evidence of the defendant's intoxication, etc., at the time of the alleged crime is relevant or if a defense instruction should be given. Nothing in the law can be absolutely certain, but it is believed that the courts and lawyers may find the task of identifying these crimes much easier if they follow the definition of specific intent adopted by UJI Criminal.

ANNOTATIONS

FOOTNOTES

1. Perkins, Criminal Law 739 (2d ed. 1969).

2. Id. at 4; LaFave & Scott, Criminal Law 9 (1972).

3. LaFave & Scott, supra note 2, at 9.

4. Perkins, supra note 1, at 753. But see J. Hippard, Sr., "The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea," 10 Houston L. Rev. 1039 (1973); see also LaFave & Scott, supra note 2, at 201.

5. See Section 30-2-3 NMSA 1978 defining involuntary manslaughter in part as "the unlawful killing of a human being without malice . committed . in the commission of a lawful act which might produce death . *without due caution and circumspection*" (emphasis added).

6. Perkins, supra note 1, at 802.

7. State v. Vickery, 85 N.M. 389, 512 P.2d 962 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

8. 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).

8A. State v. Lucero, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

9. Perkins, supra note 1, at 744-45; LaFave & Scott, supra note 2, at 201-02.

10. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

11. See, e.g., State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct. App. 1969), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969). (Interestingly, the crime charged in *Davis* may have actually been a "strict liability" crime.)

12. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

13. State v. Gunzelman, 85 N.M. 295, 301, 512 P.2d 55, 61 (1973).

14. People v. Hood, 1 Cal. 3d 444, 456-57, 82 Cal. Rptr. 618, 626, 462 P.2d 370, 378 (1969).

15. State v. Tucker, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974) (dissenting opinion); State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

16. State v. Viscarra, 84 N.M. 217, 501 P.2d 261 (Ct. App. 1972); State v. Ramirez, 84 N.M. 166, 500 P.2d 451 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972) (concurring opinion).

17. State v. Ramirez, supra note 16, at 168.

18. Id. at 167.

19. 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

20. 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974).

21. Section 30-31-20 NMSA 1978.

22. Note 14, supra, and accompanying text.

23. Griffin v. State, 276 So. 2d 842 (Fla. App. 1973); State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968); State v. Lawson, 59 N.M. 482, 286 P.2d 1076 (1955); Simpson v. State, 81 Fla. 292, 87 So. 920 (1921).

24. Cf. State v. Saiz, 84 N.M. 191, 500 P.2d 1314 (Ct. App. 1972).

25. State v. Valles, 84 N.M. 1, 498 P.2d 693 (Ct. App. 1972); State v. Madrid, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972); State v. Lujan, 82 N.M. 95, 475 P.2d 65 (Ct. App. 1970); State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968); State v. Serrano, 74 N.M. 412, 394 P.2d 262 (1964); State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960). Some of these decisions indicate that the jury may not have trouble convicting even the "drunk" defendant under this circumstantial evidence test.

26. Section 30-16-22 NMSA 1978.

27. Section 30-36-7 NMSA 1978.

28. Section 30-20-12 B NMSA 1978.

29. See United States v. Gainey, 380 U.S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

30. Rule 404(b) [11-404B], N.M.R.Evid. See also Committee Commentary, N.M.U.J.I. Crim. 40.28 [14-4828].

31. State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973). Unfortunately, the court persists in discussing "diminished responsibility" in this opinion although that "concept" was rejected in State v. Padilla, 66 N.M. 289, 347 P.2d 312, 78 A.L.R.2d 908 (1959).

32. State v. Nelson, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

33. State v. Nelson, supra note 32. State v. Padilla, supra note 31.

34. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972); State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970); People v. Wilson, 261 Cal. App. 2d 12, 67 Cal. Rptr. 678 (1968); State v. Brigance, 31 N.M. 436, 246 P. 897 (1926); State v. Cooley, 19 N.M. 91, 140 P. 1111, 52 L.R.A. (n.s.) 230 (1914). See generally Annot. 8 A.L.R.3d 1236, 1246 (1966).

35. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972); State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970). See also Weihofen, Mental Disorder as a Criminal Defense, 179 (1954).

36. State v. Padilla, supra note 31. See generally Weihofen, supra note 35, at 179; Weihofen and Overholser, "Mental Disorder Affecting the Degree of a Crime," 56 Yale L.J. 959 (1947).

37. Section 30-2-1 NMSA 1978.

38. See, e.g., State v. Fuentes, 85 N.M. 274, 276, 511 P.2d 760, 762 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973) (separate opinion).

39. 26 N.M. 482, 194 P. 869 (1921).

40. 26 N.M. at 489-92.

41. Section 30-2-2 A NMSA 1978.

42. 26 N.M. at 488.

43. 26 N.M. at 491.

44. See, e.g., State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970).

45. LaFave & Scott, supra note 2, at 528-29.

46. People v. Rodriguez, 272 Cal. App. 2d 80, 76 Cal. Rptr. 818 (1969); People v. Hoxie, 252 Cal. App. 2d 901, 61 Cal. Rptr. 37 (1967). See also People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972), and 13 Santa Clara Law. 349, 352 (1972). But see People v. Mosher, 1 Cal. 3d 379, 82 Cal. Rptr. 379, 461 P.2d 659 (1969).

47. See, e.g., State v. Aragon, 85 N.M. 401, 512 P.2d 974 (Ct. App. 1973).

47A. See Cardozo, Law and Literature, 96-101 (1931).

48. 26 N.M. at 492.

49. 53 N.M. 181, 204 P.2d 443 (1949).

50. 53 N.M. at 186. If the court is saying that the means supply specific intent, it is supported by at least one eminent scholar. See Weihofen, supra note 35, at 189. See also State v. Bentford, 39 N.M. 293, 46 P.2d 658 (1935).

51. Cf. Perkins, supra note 1, at 89.

52. 39 N.M. 44, 39 P.2d 1005, 102 A.L.R. 995 (1934).

53. 39 N.M. at 48. The court in *Reed* also sounded the call for abolition of the degrees of murder and a return to common-law murder. 39 N.M. at 51-52. The narrow decision in the case was a reversal of a conviction for second degree murder and the discharge of the defendants. The court held that it was error to allow the jury on this evidence to find a second degree murder if it found that the killing was not the result of a deliberate and premeditated design. The holding was overruled by the legislature by a statute saying that no one could complain if convicted of a lesser degree of murder than that established by the evidence. N.M. Laws 1937, ch. 199, § 1. The statute is no longer in the annotated statutes but has not been repealed.

54. LaFave & Scott, supra note 2, at 529; Perkins, "A Re-examination of Malice Aforethought," 43 Yale L.J. 537, 547 (1934).

55. Section 30-2-1 A(3) NMSA 1978.

56. 37 N.M. 549, 558, 25 P.2d 211 (1933).

57. See State v. Kappel, supra note 49, 53 N.M. at 186.

58. Section 30-28-1 NMSA 1978. See State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971).

59. See People v. Mosher, 1 Cal. 3d 379, 82 Cal. Rptr. 379, 461 P.2d 659 (1969), where a conviction for felony murder was reversed because of the failure of the court to instruct on a "diminished capacity" affecting defendant's ability to commit three possible specific intent felonies.

60. Section 30-2-3 B NMSA 1978. Cf. State v. Welch, supra note 56, 37 N.M. at 559.

61. Section 30-2-1 A(4) NMSA 1978.

62. LaFave & Scott, supra note 2, at 529.

63. Section 30-2-1 A(5) NMSA 1978.

64. See 1 Warren, Homicide § 73 (2d ed. 1939).

65. Section 30-3-1 NMSA 1978.

66. See generally Perkins, supra note 1, at 114-21, 132-33.

67. Perkins, supra note 1, at 116. In the first edition of this work, Professor Perkins called this a "specific intent." Perkins, Criminal Law 89 (1957).

68. 84 N.M. 191, 500 P.2d 1314 (Ct. App. 1972).

69. Cf. State v. Cruz, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974); United States v. Boone, 347 F. Supp. 1031 (D.N.M. 1972).

70. 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974).

71. State v. Gunzelman, supra note 13.

72. Section 30-22-19 NMSA 1978.

73. Section 30-3-3 NMSA 1978.

74. State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956 (1974).

75. Aggravated assaults, Section 30-3-2 C and 30-3-3 NMSA 1978; Assaults by prisoners or by persons against law enforcement officials, etc., Section 30-22-22(3), 30-22-23 & 30-22-24 NMSA 1978.

76. State v. Rogers, 31 N.M. 485, 247 P. 828 (1926). See also State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

77. Section 30-3-2 A NMSA 1978.

78. See, e.g., State v. Anaya, 79 N.M. 43, 439 P.2d 561 (Ct. App. 1968).

79. See generally Annot., 92 A.L.R.2d 635 (1963).

80. State v. Cruz, supra note 69. See also United States v. Boone, supra note 69.

81. Section 30-3-5 A NMSA 1978.

82. State v. Valles, 84 N.M. 1, 498 P.2d 693 (Ct. App. 1972); State v. Vasquez, 83 N.M. 388, 492 P.2d 1005 (Ct. App. 1971); State v. Mora, 81 N.M. 631, 471 P.2d 201 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970); State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970); State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

83. Section 30-3-5 B and 30-3-5 C NMSA 1978.

84. Section 30-22-25 NMSA 1978.

85. Section 30-4-1 NMSA 1978. These have been identified as separate and distinct types of intent. State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971).

86. State v. Clark, 80 N.M. 340, 343, 455 P.2d 844, 847 (1969). This case was prosecuted under the old kidnapping statute, but the same elements of intent are found in the new statute.

87. State v. Ramirez, 84 N.M. 166, 500 P.2d 451 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972); State v. Scarborough, 55 N.M. 201, 230 P.2d 235 (1951).

88. [Now repealed].

89. 77 N.M. 204, 420 P.2d 314 (1967).

90. 86 N.M. 286, 523 P.2d 21 (Ct. App. 1974).

91. Section 30-16-1 NMSA 1978.

92. State v. Rhea, 86 N.M. 291, 523 P.2d 26 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974). See also State v. Paris, 76 N.M. 291, 414 P.2d 512 (1966). See generally Perkins, supra, note 1, at 265.

93. State v. Lucero, 70 N.M. 268, 372 P.2d 837 (1962); State v. Roybal, 66 N.M. 416, 349 P.2d 332 (1960).

94. 79 N.M. 138, 441 P.2d 36 (1968).

95. Section 66-3-504 A NMSA 1978.

96. Section 30-16-2 NMSA 1978.

97. 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

98. 85 N.M. at 206.

99. Section 30-16-2 NMSA 1978.

100. State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969); State v. Sanchez, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967).

101. State v. Puga, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

102. Section 30-16-3 NMSA 1978.

103. State v. Gunzelman, 85 N.M. 295, 512 P.2d 55 (1973).

104. Section 30-16-5 NMSA 1978.

105. 59 N.M. 482, 286 P.2d 1076 (1955).

106. 59 N.M. at 485. The court relied on Dennis v. United States, 341 U.S. 494 (1951), as authority. The opinion in *Dennis* (there was no "majority" opinion) says that the Smith Act (now codified as 18 U.S.C. § 2385) requires a specific intent to cause the overthrow or destruction of any government in the United States.

107. Section 30-16-8 NMSA 1978.

108. State v. Prince, 52 N.M. 15, 18, 189 P.2d 993 (1948).

109. State v. Moss, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

110. Section 30-16-6 NMSA 1978.

111. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975). See also Weathers v. Sullivan, 184 Colo. 39, 518 P.2d 842 (1974) (interpreting New Mexico law).

112. State v. Gregg, 83 N.M. 397, 492 P.2d 1260 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

113. Clark v. State, 287 A.2d 660 (Del. Sup. 1972); Roderick v. State, 9 Md. App. 120, 262 A.2d 783 (1970); People v. Leach, 168 Cal. App. 2d 463, 336 P.2d 573 (1959); State v. Harris, 313 S.W.2d 664 (Mo. 1958); State v. Probert, 19 N.M. 13, 140 P. 1108 (1914). See also Perkins, supra note 1, at 297.

114. Section 30-16-10 NMSA 1978.

115. State v. Nation, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

116. See, e.g., People v. Leach, supra note 113.

117. Section 30-17-5 A NMSA 1978.

118. Id.

119. Section 30-17-5 B NMSA 1978.

120. Section 30-17-6 NMSA 1978.

121. State v. Dennis, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

122. See, e.g., People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972); Commonwealth v. Lamothe, 343 Mass. 417, 179 N.E.2d 245 (1961); Crow v. State, 136 Tenn. 333, 189 S.W. 687 (1916).

123. Pa. Cons. Stat. Ann. tit. 18, § 3301(a); N.Y. Penal Code § 150.15.

124. People v. Nance, supra note 122. Cf. State v. True, 190 N.W.2d 405 (Iowa 1971).

125. Model Penal Code § 220.1 (Proposed Official Draft 1962).

126. Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960).

127. People v. Fanshawe, 137 N.Y. 68, 32 N.E. 1102 (1893).

128. Model Penal Code, supra note 126.

129. See generally 2 Wharton, Criminal Law & Procedure § 402 (Anderson ed. 1957).

130. See, e.g., Calif. Penal Code § 450a.

131. People v. Rose, 38 Cal. App. 493, 176 P. 694 (1918). Cf. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

132. Model Penal Code § 220.1 (Proposed Official Draft 1962).

133. Model Penal Code § 220.1, Commentary (Tent. Draft No. 11, 1960).

134. The crime probably includes the element of "criminal negligence." See State v. Grubbs, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

135. Note 124, supra, and accompanying text.

136. See Practice Commentary to N.Y. Penal Code § 150.

137. Section 30-28-1 NMSA 1978.

138. State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

139. State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971); State v. Serrano, 74 N.M. 412, 394 P.2d 262 (1964); State v. Grayson, 50 N.M. 147, 172 P.2d 1019 (1946).

140. 84 N.M. 191, 500 P.2d 1314 (Ct. App. 1972).

141. Section 30-1-13 NMSA 1978.

142. See, e.g., State v. Martinez, 85 N.M. 198, 510 P.2d 916 (Ct. App. 1973).

142A. State v. Wilson, 39 N.M. 284, 289, 46 P.2d 57 (1935).

143. In People v. Vasquez, 29 Cal. App. 3d 81, 105 Cal. Rptr. 181 (1972), the defendant's conviction for aiding and abetting the commission of an assault with intent to kill was reversed for failure of the trial court to instruct the jury on inability to form specific intent due to voluntary intoxication. At first blush the court appears to rely exclusively on the obvious conclusion that assault with intent to kill is a specific intent crime. However, the court may also be saying that aiding and abetting requires a separate specific intent which may be negated by intoxication.

144. Model Penal Code § 2.06(3)(a)(ii) (Proposed Official Draft 1962).

145. Model Penal Code § 2.04(3)(a)(2), Commentary (Tent. Draft No. 1, 1953). [The numbering system was changed in the Proposed Official Draft.]

146. Ill. Ann. Stat. ch. 38, § 5-2.

147. See, e.g., People v. Ramirez, 93 Ill. App. 2d 404, 236 N.E.2d 284 (1968).

148. United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

149. See generally Model Penal Code § 2.04(3)(a)(2), Commentary (Tent. Draft No. 1, 1953). See, e.g., United States v. Tijerina, 446 F.2d 675 (10th Cir. 1971).

150. United States v. Kelton, 446 F.2d 669 (8th Cir. 1971).

151. State v. Tucker, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974). See also State v. Foster, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

152. Both crimes are included within the same section. See Section 30-31-22 NMSA 1978. The court says only that the defendant was convicted of unlawful distribution.

153. State v. Fuentes, 85 N.M. 274, 511 P.2d 760 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973).

154. Section 30-31-23 NMSA 1978.

155. State v. Pedro, 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971).

156. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

157. Note 14, supra.

158. Section 30-31-20 NMSA 1978.

159. State v. Gonzales, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974).

160. State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974).

APPENDIX A

STATUTES INTERPRETED AS REQUIRING ONLY
GENERAL CRIMINAL INTENT

NMSA 1978 Section No.	Common Name	Authority
30-2-1 B	Second Degree Murder	State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970).
30-2-3 A	Voluntary Manslaughter	State v. Tapia, supra. (by implication).
66-8-101	Homicide by Vehicle	State v. Jordan, 83 N.M. 571, 494 P.2d 984 (Ct. App. 1972).
40A-9-2 [Now repealed]	Rape	State v. Ramirez, 84 N.M. 166,

500 P.2d 451		(Ct. App.),
cert.		denied, 84
N.M. 180, 500		P.2d 1303
(1972).		
30-16-11	Receiving Stolen Property	State v.
Viscarra, 84		N.M. 217,
501 P.2d 261		(Ct. App.
1972).		
66-3-504 A	Auto Theft	State v.
Austin, 80 N.M.		748, 461
P.2d 230 (Ct.		App. 1969).
30-31-22 A	Distribution of Controlled Substance	State v.
Fuentes, 85		N.M. 274,
511 P.2d 760		(Ct. App.),
cert.		denied, 85
N.M. 265, 511		P.2d 751
(1973) (By		implication,
but see		text
discussion!).		
30-31-23	Possession of a Controlled Substance	State v.
Pedro, 83 N.M.		212, 490
P.2d 470 (Ct.		App. 1971)
(By		interpretati
on, but see		text
discussion!).		
30-3-2	Assault with a deadly weapon (by a threat, etc., causing one to believe he is in	

	danger of receiving an immediate battery)	State v. Cruz, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974).
30-22-22 A(1)	Assault on a police officer with a deadly weapon	State v. Cutnose, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974) (But see qualificatio ns discussed in text under simple assault!).

APPENDIX B

STATUTES NOT DISCUSSED IN TEXT BUT WHICH INCLUDE A SPECIFIC INTENT UNDER UJI CRIMINAL

NMSA 1978 Statute Section No.	Act with Intent Required by
30-36-4	Issuing a worthless check with intent to defraud
30-37-2	Possessing sexually oriented material with intent to distribute it to a minor
30-3-2C	Assault with intent to commit any felony
30-3-3	Assault with intent to kill or commit any murder, mayhem, rape, robbery or burglary
30-7-5	Using explosives with the intent to injure,

	intimidate or terrify another, or with intent to damage another's property
30-7-7C [now repealed]	Making, buying, transporting or transferring any explosive with intent to use such explosive to commit a crime
30-9-3A	Entering or remaining in a house of prostitution with intent to engage in sexual intercourse with a prostitute
30-9-4G	Procuring transportation, etc., of a person with the intention of promoting that person's engaging in prostitution
30-15-3	Damaging insured property with intent to defraud the insurance company
30-16-9	Communication of a threat, etc., with intent . to wrongfully obtain anything of value, etc.
30-16-12	Representing [one's] self as incapacitated for the purpose of obtaining money or other thing of value
30-16-13	Cheating a machine, etc., with intent to defraud
30-16-16	Falsely obtaining services, etc., with intent to cheat or defraud the owners or persons supplying such services
30-16-18	Improper sale, etc., of encumbered property with intent to defraud
30-16-20A(1)	Taking possession of merchandise with the intention of converting it without paying for it
30-16-20A(2)	Concealing any merchandise with the intention of converting it without paying for it
30-16-20A(3)	Altering a price tag, etc., with the intention of depriving the merchant of all or some part

of the value	
	of the merchandise
30-16-20A(4)	Switching containers with the intention of depriving
	the merchant of all or some part of the value of the
	merchandise
30-16-24	Stealing or embezzling a trade secret with intent to
	deprive or withhold it from the owner or with an intent
	to appropriate it to [the actor's] own use
30-16-26	Taking a credit card with the intent to use it or sell
	it, etc.
30-16-28	Transferring a credit card with intent to defraud
30-16-29	Obtaining or transferring a credit card with intent to
	defraud
30-16-33	Use of a credit card with intent to defraud
30-16-34	Furnishing or allowing to be furnished with intent to
	defraud, services or anything of value upon presentation of a fraudulent credit card
30-16-35A	Possession of an incomplete credit card with intent to
	defraud
30-16-35B	Possession of machinery to reproduce credit cards with
	intent to defraud
30-16-40	Refusing to return a leased vehicle with intent to
	defraud the lessor
30-19-2B	Entering or remaining in a gambling place with intent
	to make a bet
30-19-2D	Possessing facilities with intent to conduct a lottery
30-19-3C	Possessing facilities with intent to receive, record or
	forward bets or offers to bet
30-19-3E	Possessing commercial facilities with intent to conduct
	a lottery

30-19-5	Manufacturing, etc., certain gambling devices with intent to transfer commercially
40A-20-5C [now repealed]	Loitering upon any public street or in a place where intoxicating liquors are sold with intent to commit prostitution
30-20-12A	Using obscene, lewd or profane language, etc., over a telephone with intent to terrify, intimidate, threaten, harass, annoy or offend
30-21-1	Destroying property with reasonable grounds to believe that it will delay or interfere with the prosecution or defense of a war by the United States
30-22-3	Concealing one's true name or identity or disguising oneself with intent to intimidate, hinder or interrupt any public officer
30-22-4	Aiding a nonrelative felon with the intent that he escape or avoid arrest, trial, conviction or punishment
30-22-5	Tampering with evidence with intent to prevent the apprehension, prosecution or conviction of any person or with intent to throw suspicion of the commission of crime upon another
30-22-12B	Giving a person a disguise, instrument, tool or other useful thing with intent to assist him to escape from custody
30-22-17C	Confining or restraining an officer or employee of any penal institution or visitor therein with intent to use such person as a hostage
30-22-22A(3)	Assaulting a peace officer with intent to commit any

	felony
30-22-23	Assaulting a peace officer with intent to kill him
30-22-25	Touching or applying force to a peace officer with intent to injure
33-23-3	Making a false public voucher or invoice with intent that the voucher or invoice be relied upon for the expenditure of public money
30-24-1	Giving anything of value to a public officer or public employee with intent to induce or influence such public officer or public employee to [favor the briber in a number of ways specified in the statute]
30-24-2	Solicitation or acceptance by a public officer or public employee of anything of value with intent to have his decision influenced thereby
30-27-3	Instigating, etc., any suit in any court with the intent to distress or harass the defendant

Addendum 2, REPORTER'S ADDENDUM TO CHAPTER 22, CUSTODY; CONFINEMENT; ARREST

TABLE OF CONTENTS (1986 Repl.)
ADDENDUM 2
REPORTER'S ADDENDUM TO CHAPTER 22,
CUSTODY; CONFINEMENT; ARREST

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TABLE OF CONTENTS (1986 Repl.)

I. LAWFUL CUSTODY, CONFINEMENT OR ARREST

The lawfulness of the arrest, custody, confinement or commitment is an essential element of the following offenses: Sections 30-22-7 NMSA 1978 (unlawful rescue); 30-22-8 NMSA 1978 (escape from jail); 30-22-9 NMSA 1978 (escape from penitentiary); 30-22-10 NMSA 1978 (escape from custody of a peace officer); 30-22-11 NMSA 1978 (assisting escape); 30-22-12 NMSA 1978 (furnishing articles for prisoner's escape); 30-22-19 NMSA 1978 (unlawful assault on any jail) or 33-2-46 NMSA 1978 (escape from inmate release program).

The definition of the phrase "lawful custody or confinement," as used in the Criminal Code [Chapter 30 NMSA 1978], is found in Section 30-1-12H NMSA 1978 as follows:

> "Lawful custody or confinement" means the holding of any person pursuant to lawful authority, including, without limitation, actual or constructive custody of prisoners temporarily outside a penal institution, reformatory, jail, prison farm or ranch.

This statutory definition is a restatement of the common law. The terms "custody" and "confinement" are used throughout the Criminal Code synonymously.

In determining what is "lawful custody or confinement" the courts have apparently weighed the right of an unlawfully confined citizen to gain his liberty by whatever means available as against the difficulties of prison administration if each prisoner were allowed to determine whether he is lawfully confined without regard to accepted procedural channels. See Annot., 70 A.L.R.2d 1430 (1960), and Perkins, Criminal Law 502-08 (2d ed. 1969). With modern procedural safeguards, the greater weight of authority and New Mexico authority severely limit the right of a prisoner to escape from custody or confinement. The rule followed by a majority of jurisdictions as well as New Mexico, is stated in 3 Wharton, Criminal Law § 1374, p. 63, 1976, Supp. as follows:

> In sum, where the imprisonment is under color of law, the prisoner is not entitled to resort to self-help, but must apply for his release through regular channels, even though he might be able to show such defects in the procedure by which he was arrested, tried, committed, or imprisoned, as to justify or require his release on appeal or habeas corpus.

In State v. Bloom, 90 N.M. 226, 561 P.2d 925 (Ct. App.

1976), case remanded with directions to affirm, 90 N.M. 192, 561 P.2d 465 (1977), an arrest based on an unlawful search and seizure was held to be a lawful arrest for purposes of a conviction of escape from custody of a peace officer in violation of Section 30-22-10 NMSA 1978. See also 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), State v. Lopez, 79 N.M. 235, 441 P.2d 764 (1968), State v. Martinez, 79 N.M. 232, 441 P.2d 761 (1968). Compare United States v. Allen, 432 F.2d 939 (10th Cir. 1970), and United States v. McKim, 509 F.2d 769, rehearing denied en banc, 517 F.2d 480 (5th Cir. 1975).

Although the courts are unanimously of the view that the lawfulness of the arrest, custody or confinement is an essential element of the crimes broadly categorized as escape or assisting escape, an instruction allowing the jury to determine whether the custody is lawful is to be given only if the circumstances of the arrest, custody or confinement raise questions of fact concerning the lawfulness of the arrest or confinement. This should seldom occur. To the extent the circumstances of the case raise questions of law, as in Fourth Amendment search and seizure exclusionary rule cases, they are questions for the trial court to determine and no instruction is necessary. See United States v. McKim, supra. Compare State v. Bloom, supra.

II. CONSTRUCTIVE CUSTODY

A person may be in "lawful custody or confinement" even though he is not confined within the four walls of the institution to which he has been committed.

In State v. Weaver, 83 N.M. 362, 492 P.2d 144 (Ct. App. 1971), the court of appeals apparently overlooked Section 30-1-12H NMSA 1978 when it held that it was not necessary for it to adopt a rule of constructive confinement. However, the court of appeals in *Weaver* sets forth what constitutes constructive confinement as follows:

> The constructive confinement rule is defined in State v. Reardon, 221 Ind. 154, 46 NE2d 605 (1943), as the court said:
>
> When a person is ordered confined to a given prison that order of confinement does not mean that person is confined for restraint upon his freedom by the authorities of that institution, and if the proper authorities determine that he may leave the four walls of the institution for the purpose of performing some duty or accomplishing some task given him, and while outside the institution walls he escapes, he is guilty of escape from the correctional institution to which he was

committed ..

In *Weaver,* the defendant disappeared from a kitchen located downstairs from the county jail cells. The court found that this was an escape from the jail.

In State v. Lopez, 79 N.M. 235, 441 P.2d 764 (1968), the court held that a defendant who returned to the city jail from an alcoholic anonymous meeting five hours late was guilty of escape from jail in violation of Section 30-22-8 NMSA 1978. This is another example of "constructive custody" as defined by Section 30-1-12H NMSA 1978.

ADDENDUM 3

A Reporter's Addendum to Uniform Jury

Instructions - Criminal

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(The views expressed herein are those of the author and not necessarily of the University of New Mexico School of Law.)

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I. DOUBLE JEOPARDY

Both the fifth amendment to the United States Constitution, made applicable to the separate states through the fourteenth amendment, Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), and the New Mexico Constitution, Article II, § 15, prohibit putting a person in jeopardy twice for the same offense. The double jeopardy clause embodies three constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Additionally, the New Mexico Criminal Code contains a statutory provision that prohibits double jeopardy, and provides that the defense of double jeopardy may not be waived, "and may be raised at any stage of a criminal prosecution. . .." Section 30-1-10 NMSA 1978.

In order to determine whether a prosecution or punishment violates one of these three constitutional protections or the statutory provision, it is necessary to determine the meaning of the words "same offense." Collateral estoppel, lesser included offenses, the same evidence test and merger are concepts used to determine when an offense is the "same offense" as another, and to assure that the constitutional and statutory protections against double jeopardy are not violated. Collateral estoppel and lesser included offenses are primarily concerned with subsequent prosecutions. The same evidence test is concerned both with subsequent prosecutions and multiple charges brought in a single prosecution. Merger is primarily concerned with multiple punishments. These concepts are not completely separable, however; they contain many of the same elements and at times have been used almost interchangeably.

II. COLLATERAL ESTOPPEL

Collateral estoppel is concerned with preventing a second determination of the same issue after an acquittal. "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." State v. Tijerina, 86 N.M. 31, 33, 519 P.2d 127 (1973). Collateral estoppel may be raised by a defendant only "in a second trial after an acquittal in the first trial on the same issue." State v. Tanton, 88 N.M. 333, 335, 540 P.2d 813 (1975). When there has been no previous acquittal of the defendant, collateral estoppel does not apply. Id.

There is no precise test to apply in order to determine whether an issue was actually determined in a previous trial. The court in State v. Tijerina stated that in order to determine when an issue of fact has been previously decided, the test is to look "to all relevant matters of the trial, . . . to determine whether or not the jury, in reaching its verdict in the first trial, necessarily or actually determined the same issues which the state attempts to raise in the second trial." 86 N.M. at 33. For example, in State v. Nagel the New Mexico Court of Appeals held that collateral estoppel barred the defendant's conviction on two counts of false imprisonment and one count of aggravated assault, after he had been acquitted by reason of insanity of a charge of aggravated assault in an incident that occurred 16 hours after the alleged false imprisonment. 87 N.M. 434, 535 P.2d 641 (Ct. App. 1975). The court in *Nagel* stated that "[t]he issue of defendant's sanity was an issue of fact in the first trial. It was actually litigated. It was absolutely necessary to a decision in that trial." Id. at 436. The court then determined that, in the second trial, the sanity of the defendant was "[t]he identical issue of fact . . . between the same parties," and could not be relitigated. Id. (For an example of a situation where collateral estoppel did not apply, see State v. Tijerina, supra.)

III. LESSER INCLUDED OFFENSES

The concept of lesser included offenses is used to assure that a defendant is not prosecuted a second time following a conviction or an acquittal for the same offense. It may also be used to assure that a defendant is not subjected to multiple punishments for the same offense. A lesser included offense is "[o]ne composed of some, but not all of the elements of the greater crime, and which does not have any element not included in the greater offense." Black's Law Dictionary. A lesser offense is necessarily included in the greater offense when the greater offense cannot be committed without also committing the lesser offense. State v. James, 94 N.M. 7, 9, 606 P.2d 1101 (Ct. App.), rev'd on other grounds, 93 N.M. 605, 603 P.2d 715 (1979). "In determining whether an offense is necessarily included . . . [the court will] look to the offense charged in the indictment." State v. Sandoval, 90 N.M. 260, 262, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977). Some examples of offenses necessarily included in greater offenses are: driving under the influence of intoxicating liquor - necessarily included in homicide by vehicle while driving under the influence of intoxicating liquor, State v. James, supra; battery on a police officer - necessarily included in offense of aggravated battery on a police officer, State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977); possession of marijuana - necessarily included in offense of distribution of marijuana, State v. Medina, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

A defendant who has been convicted or acquitted of a necessarily included lesser offense cannot subsequently be prosecuted for the greater offense. State v. Sandoval, 90 N.M. at 262. A subsequent prosecution when the defendant has previously been convicted or acquitted of a lesser offense necessarily included violates the double jeopardy prohibitions against a second prosecution after an acquittal, or a second prosecution after a conviction.

The prohibition against a second prosecution for a greater offense subsequent to a conviction or acquittal for a lesser offense necessarily included does not apply, however, when the court trying the lesser offense was without jurisdiction to try the greater offense. State v. James, 93 N.M. 605, 603 P.2d 715 (1979), State v. Goodson, 54 N.M. 184, 217 P.2d 262. Thus, a defendant who had been convicted in municipal court for violation of city reckless driving and driving while intoxicated ordinances could subsequently be tried in district court on state charges of homicide by vehicle for driving while intoxicated or driving recklessly, or both, although the city charges were necessarily included in the state charges. State v. James, supra.

The New Mexico Supreme Court's decision in State v. James is not contrary to the United States Supreme Court's decision in Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 434 (1970). The court's narrowly limited decision in *Waller* held that a person who has been tried in municipal court may not be charged with "the identical offense" in state court. 397 U.S. at 395. The court recognized that there may be circumstances where both municipal and state court trials may not violate double jeopardy protections. Id., n.6. In his concurring opinion in Ashe v. Swenson, 397 U.S. 436, 453, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), Mr. Justice Brennan stated that one "exception would be necessary if no single court had jurisdiction of all the alleged crimes." Id. at 453, n.7. The New Mexico Supreme Court has construed these opinions to mean that a defendant may be tried in state district court for a greater offense, subsequent to a conviction or acquittal in municipal court for a lesser necessarily included offense, if the municipal court had no jurisdiction to try the greater offense.

When a jury is unable to reach a verdict in a case involving lesser included offenses, a second trial may violate a defendant's constitutional rights. The New Mexico Supreme Court discussed the issue of a second trial when a jury cannot reach a verdict in the first trial in State v. Castrillo, 90 N.M. 608, 566 P.2d 1146 (1977). In that case, the court stated that "[i]f charges are presented to a jury as separate or alternative counts rather than included offenses, Rule 44(c) of the Rules of Criminal Procedure [Rule 5-611] . . . allows retrial only for counts on which the jury cannot agree." Id. at 611. The court then ruled that when lesser included offenses are submitted for a jury's consideration "the same result should also obtain if a jury has voted unanimously for acquittal on any of several included offenses." Id. Any of the offenses that the jury has unanimously agreed to acquit cannot be retried; there can only be a retrial on the offenses upon which the jury cannot agree. Thus, when a defendant is tried on a charge of first-degree murder, and the jury is also instructed on second-degree murder and manslaughter, if the jury is unable to reach a verdict and a mistrial is declared, the defendant may only be retried for the offenses on which the jury is unable to agree. *Castrillo,* supra. The court in *Castrillo* stated that the procedure, when charges are presented as lesser included offenses rather than separate alternative counts, is to

not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible. Jeopardy should then attach to those offenses upon which the jury has unanimously agreed to acquit, even if it is unable to reach a final verdict as to any lesser included offenses.

90 N.M. at 611.

IV. SAME EVIDENCE TEST

The "same evidence test" may be used to determine whether a second prosecution involves the "same offense" as a prior prosecution, or whether multiple charges brought in a single prosecution involve the "same offense." The New Mexico Supreme Court approved this test in State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975). The court in *Tanton* stated the test as "whether the facts offered in support of one offense, would sustain a conviction in the other." Id. at 335. In State v. Sandoval, supra, the court of appeals restated the test as whether "either information requires the proof of facts to support a conviction which the other does not . . . [if so] the offenses are not the same and a plea of double jeopardy is unavailing." 90 N.M. at 262. In State v. Sandoval the court used the same evidence test to determine whether a charge of aggravated battery involved the same offense as a charge of armed robbery. The defendant argued "that the aggravated battery . . . was the force which the State was required to prove in order to obtain a conviction for the charge of armed robbery." Id. The court of appeals rejected this argument, since under the armed robbery charge "[t]aking the purse was a fact required to be proved . . .; the taking was not required to be proved under the aggravated battery charge." Id. at 263. Under the charge of aggravated battery "[a]pplication of force was a fact required to be proved . . .; threatened use of force would be acceptable proof under the armed robbery charge." Id. "Because the facts required to be proved for the two offenses differ . . ." the offenses are not the same under the same evidence test. Id.

V. MERGER

Collateral estoppel and lesser included offenses are most frequently discussed in the context of subsequent prosecutions. The same evidence test is discussed both in the context of subsequent prosecutions and multiple charges in a single prosecution. When multiple charges, or multiple counts of the same charge are brought in a single prosecution, and the defendant is convicted on more than one of the charges, merger is used to determine whether or not multiple punishments are constitutionally permissible. State v. Martinez, 95 N.M. 421, 662 P.2d 1041 (1981); State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979).

The New Mexico Supreme Court has stated that there is "nothing in the double jeopardy clause, the New Mexico statutes, or prior case law which would prohibit the State from charging and trying . . . [a defendant] for violations of every criminal statute which the State has sufficient grounds to believe he has violated." State v. Ellenberger, 96 N.M. 287, 290, 629 P.2d 1216 (1981). Once the defendant has been convicted of the offenses, however, they may merge into a single offense for sentencing, or the double jeopardy clause may mandate that the sentences for the two offenses run concurrently, rather than consecutively. In discussing multiple punishments, the court in *Ellenberger* stated "that this question is primarily one of legislative intent. Multiple punishments run

afoul of the double jeopardy clause only where the Legislature has not authorized multiple punishments." Id. at 290.

The New Mexico Supreme Court in State v. Martinez, supra, stated the following test to determine whether multiple offenses merge:

The test of whether one criminal offense has merged in another is whether one criminal offense "necessarily involves" the other. In determining whether one offense "necessarily involves" another offense so that merger applies, courts have looked to the definitions of crimes to see whether the elements are the same.

95 N.M. at 425 (citations omitted). As the court of appeals pointed out in State v. Sandoval, supra, "[t]his approach is similar to the approach used in determining whether an offense is an included offense . . ." and "the merger concept also has aspects of the same evidence test." 90 N.M. at 260.

A defendant may be charged in an indictment with an offense, and a lesser offense necessarily included in the greater offense. If the jury finds the defendant guilty of both the lesser and greater offenses, however, the lesser offense merges into the greater offense. In this case, a conviction may be entered for, and the defendant sentenced for, only the greater offense. State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978). This issue can be avoided entirely by not charging a defendant for both a greater offense and a lesser included offense, and using UJI Criminal 50.01 [14-6002] (instruction on Necessarily included offense).

The problem of double jeopardy may also be avoided by charging a defendant in the alternative, rather than bringing him to trial for multiple charges. "A person may by one act violate more than one statute or commit more than one offense." State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977). Alternative charges do not offend the constitutional protections against double jeopardy "[w]hen alternative charging is to the effect of a crime being committed in various ways and the various ways are pursuant to a statute .. " Id.

Merger may also apply in cases where a defendant has been charged with, and found guilty of multiple counts of the same statutory violation. When the multiple counts arise from the same criminal action, multiple sentences may violate the constitutional protection against multiple punishment for the same offense. In order to determine whether a criminal action is only one offense, or whether multiple counts are constitutionally permissible, the New Mexico Supreme Court in State v. Smith used the "same evidence test." 94 N.M. 397, 610 P.2d 1208 (1980). *Smith* involved the defendant's conviction of four counts of drug trafficking, arising from a single drug sale to an agent. The court, in applying the test, stated that "[t]he facts offered in support of one of the counts here would sustain a conviction of all the other counts, except that each of the counts charged Smith with trafficking in a *different* drug." Id. at 380 (emphasis original).

The court in *Smith* discussed the court of appeals case of State v. Boeglin, 90 N.M. 93, 559 P.2d 1220 (1977), where the court held that a defendant who had stolen five pistols from the same owner at the same time could only be convicted for one larceny. The court in *Boeglin* recognized that "the multiple larceny convictions in this case are not barred by the prohibition against double jeopardy," but overruled the lower court convictions on grounds of judicial policy. Id. at 96. The court in *Smith* affirmed the "overriding state interest in the efficient and economic prosecution of crimes," but held that "the public interest and the intent of our drug laws militate against this court permitting here the merger of the four counts of trafficking in the four separate drugs." 94 N.M. at 381. The court stated that when there is no violation of the double jeopardy prohibitions, the court can "consider whether public policy demands that the charges be merged or prosecuted separately." Id.

VI. CONCLUSION

The concepts of collateral estoppel and lesser included offenses are usually used to assure that the constitutional protections against a second prosecution for the same offense after a conviction or acquittal are not violated. They establish the criteria for determining whether or not a second prosecution involves the "same offense." The same evidence test may be used to determine whether a second prosecution involves the "same offense" as a previous prosecution, or whether multiple charges in a single trial are for the "same offense."

Merger is applied to determine whether the "same offense" was committed for the purpose of avoiding multiple punishment. The problems of multiple punishments could be avoided by instructing the jury on lesser included offenses, rather than charging the defendant with both the greater offense and the lesser included offense. Other problems may be avoided by charging the defendant with different statutory offenses in the alternative. When a defendant has been convicted of two separate statutory offenses, the "same evidence test" is used to determine whether the sentences should merge.

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. V

No person shall be held to answer for a capitol [capital], or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

N.M. Const., art. II, § 15

No person shall be compelled to testify against himself in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense; and when the indictment, information or affadavit [affidavit] upon which any person is convicted charges different offenses or different degrees of the same offense and a new trial is granted the accused, he may not again be tried for an offense or degree of the offense greater than the one of which he was convicted.

N.M. Stat. Ann. 30-1-10 (1978)

No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.