CHAPTER 30
Criminal Offenses

ARTICLE 1
General Provisions

30-1-1. Name and effective date of code.

This act is called and may be cited as the "Criminal Code". It shall become effective on July 1, 1963.

History: 1953 Comp., § 40A-1-1, enacted by Laws 1963, ch. 303, § 1-1.

ANNOTATIONS

Meaning of "this act". — The words "this act" refer to Laws 1963, ch. 303, which enacted the original Criminal Code. Most of the provisions of Laws 1963, ch. 303, that have not been repealed are compiled in arts. 1 to 28 of this chapter, but some are compiled in Chapter 31. See the Table of Disposition of Acts. In addition, the Criminal Code includes later acts in which the legislature specifically stated its intention to add to the Criminal Code.

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961)

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For comment, "Survey of New Mexico Law: Criminal Law," see 15 N.M.L. Rev. 231 (1985).

For article, "Coopting the Journalist's Privilege: Of Sources and Spray Paint," see 23 N.M.L. Rev. 435 (1993).

For note and comment, "Criminal Procedure — A Criminal Defendant is Entitled to a Specific Jury Instruction When Supporting Evidence Exists: State v. Arias," see 24 N.M.L. Rev. 485 (1994).

For article, "The Cultural Defense and the Problem of Cultural Preemption: A Framework for Analysis," see 27 N.M.L. Rev. 101 (1997).

For note, "Criminal Procedure — New Mexico Court of Appeals Defines the Scope of a Lawful Inventory Search of a Detainee Under the New Mexico Detoxification Act — State v. Johnson," see 28 N.M.L. Rev. 115 (1998).

For note, "Criminal Law — Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico — State v. Fellhauer," see 28 N.M.L. Rev. 519 (1998).

For note and comment, "State v. Urioste: A Prosecutor's Dream and Defendant's Nightmare," see 34 N.M.L. Rev. 517 (2004).

For article, "Criminal Justice and the 2003-2004 United States Supreme Court Term", see 35 N.M.L. Rev. 123 (2005).

For article, "Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness and Perversity of the Court's Doctrine", see 35 N.M.L. Rev. 161 (2005).

For note and comment, "Immigration Consequences of Guilty Pleas: What State v. Paredez Means to New Mexico Criminal Defendants and Defense Attorneys," see 36 N.M.L. Rev. 603 (2006).

For article, "Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions," see 39 N.M.L. Rev, 407 (2009).

30-1-2. Application of code.

The Criminal Code has no application to crimes committed prior to its effective date.

A crime is committed prior to the effective date of the Criminal Code if any of the essential elements of the crime occurred before that date.

Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed.

History: 1953 Comp., § 40A-1-2, enacted by Laws 1963, ch. 303, § 1-2.

ANNOTATIONS

Indian country. — Where a state road, which was built on land owned by the federal government and administered by the United States forest service pursuant to an easement granted to the state by the forest service, served as the border between two pueblos, but was not within either pueblo and where there has been no explicit

congressional or executive action recognizing the property as Indian country or transferring the property for the use of Indians or to the bureau of Indian affairs, the road was not located in Indian country for purposes of criminal jurisdiction. *State v. Quintana*, 2008-NMSC-012, 143 N.M. 535, 178 P.3d 820, *aff'g* 2008-NMCA-025, 143 N.M. 538, 178 P.3d 823.

A person need not be enrolled in a tribe to be recognized as an Indian for purposes of criminal jurisdiction. — Where the state filed a petition to revoke defendant's probation, alleging that he violated a condition of his probation by committing two new offenses, battery on a household member and criminal damage to property, and that the charged offenses occurred on the Mescalero Apache reservation and that the offenses involved two non-tribal members, but where defendant presented additional facts by proffer that he is 7/32 Mescalero by blood, that he is an affiliate of the tribe, that he attended school on the reservation, and that he receives services on the reservation, the district court erred in denying defendant's motion to dismiss for lack of jurisdiction because enrollment as a member of a recognized tribe or pueblo is not a mandatory prerequisite for Indian status. A court must consider other factors to determine whether tribal or federal recognition as an Indian is satisfied. *State v. Salazar*, 2020-NMCA-021.

This section was enacted as a transitional rule prior to the enactment of the Criminal Code. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

Application of savings clause of this section. — Based upon the savings clause of the Criminal Code, found in this section, and N.M. Const., art. IV, § 33, providing that no person shall be exempt from prosecution for any crime by reason of repeal of the law in question, the court correctly applied former 41-16-1, 1953 Comp., the Habitual Criminal Act (now Section 31-18-17 NMSA 1978), when sentence was imposed on defendant. *State v. Tipton*, 1967-NMSC-270, 78 N.M. 600, 435 P.2d 430.

Section conflict with Section 12-2A-16 NMSA 1978. — To the extent 12-2A-16 NMSA 1978, enacted in 1997, and this section, enacted in 1963, conflict, the latter enactment supercedes the prior. *State v. Shay*, 2004-NMCA-077, 136 N.M. 8, 94 P.3d 8, cert. quashed, 2005-NMCERT-002, 137 N.M. 266, 110 P.3d 74.

30-1-3. Construction of Criminal Code.

In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern.

History: 1953 Comp., § 40A-1-3, enacted by Laws 1963, ch. 303, § 1-3.

ANNOTATIONS

I. GENERAL CONSIDERATION.

Cross references. — For provision making the common law the rule of practice and decision, *see* 38-1-3 NMSA 1978.

II. COMMON-LAW CRIMES.

A. IN GENERAL.

Common-law crimes recognized. — Common-law crimes were recognized and enforced by virtue of Laws 1851, p. 144 (41-11-1, 1953 Comp.). *Musgrave v. McManus*, 1918-NMSC-075, 24 N.M. 227, 173 P. 196; *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47.

Common-law crimes recognized only where applicable to state. — Only so much of the common law was adopted as was applicable to New Mexico's conditions and circumstances. *Blake v. Hoover Motor Co*., 1923-NMSC-005, 28 N.M. 371, 212 P. 738; *Childers v. Talbott*, 1888-NMSC-003, 4 N.M. (Gild.) 336, 16 P. 275; *Bent v. Thompson*, 1890-NMSC-005, 5 N.M. 408, 23 P. 234, *aff'd*, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891); *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47; *Gurule v. Duran*, 1915-NMSC-043, 20 N.M. 348, 149 P. 302, L.R.A. 1915F. 648 (1915).

Common-law crimes recognized when not in conflict with constitution or laws. — The territorial legislature adopted the common law, as the rule of practice and decision in criminal cases, thereby incorporating into the body of our law the common law, lex non scripta, of England, and such British statutes of a general nature not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which were applicable to our condition and circumstances, and which were in force at the time of the revolution. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231; *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47.

Application of common law. — The common law of crimes applies except where the common law has been changed by statute. *State v. Willis*, 1982-NMCA-151, 98 N.M. 771, 652 P.2d 1222 (specially concurring opinion).

Strict construction of statutes. — The common-law rule for strict construction of criminal statutes was in force in *New Mexico. Territory v. Davenport*, 1912-NMSC-023, 17 N.M. 214, 124 P. 795.

Common-law year-and-a-day rule abolished. — The common-law year-and-a-day rule, under which, if a person injured by an assailant survived beyond a year and a day after receiving the injuries, the defendant was excused from criminal culpability for the death, should no longer be recognized in this jurisdiction. Due to modern advances in medical and criminal science and technology, the rationale behind the rule no longer exists. *State v. Gabehart*, 1992-NMCA-074, 114 N.M. 183, 836 P.2d 102.

B. PARTICULAR OFFENSES.

Perjury. — At common law, perjury was committed when a lawful oath was administered in some judicial proceeding to a person who swore willfully, absolutely and falsely in matters material to the issue, and it was perjury to take a false oath in justifying bail in any of the courts or before any person acting as a court, justice or tribunal, having power to hold such proceedings. Hence, a surety on an appeal bond from a justice of the peace (now magistrate) who swore falsely regarding his property was guilty of perjury even where the statute did not require an oath from him. *Territory v. Weller*, 1883-NMSC-004, 2 N.M. 470.

Prison breach. — Prison breach, a common-law practice, was punishable in New Mexico under laws 1851, p. 144 (41-11-1, 1953 Comp.). *Ex parte De Vore*, 1913-NMSC-072, 18 N.M. 246, 136 P. 47 (decided under prior law).

Offense against public decency. — The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality or obstruct or pervert public justice or the administration of government; and it is the common law of this commonwealth that whatever openly outrages decency and is injurious to public morals is a misdemeanor and punishable at law. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231.

Indecent treatment of dead body. — The offense, which was and is punishable at common law, is that of indecency in the treatment or handling of a dead human body. That which outrages or shocks the public sense of decency and morals, or that which contravenes the established and known public standards of decency and morals, relative to the care, treatment or disposition of a dead human body, is punishable as an act of indecency. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231.

The length of time the body was kept, the manner and places in which it was kept, the obvious facts of changes in and decomposition of the body, and the concealment of the body from the police officers, all evidence failure to conform to the acceptable standards of decency and morals of our society in the treatment or handling of a dead human body. *State v. Hartzler*, 1967-NMCA-022, 78 N.M. 514, 433 P.2d 231.

Act relating to embezzlement not part of state's common law. — The act of parliament passed in 1799 (39 Geo. III), relating to embezzlement and the decisions construing it, was not part of the common law of New Mexico. *Territory v. Maxwell*, 1882-NMSC-010, 2 N.M. 250.

III. CRIMINAL INTENT.

Existence of criminal intent essential. — Generally speaking, when an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as

essential, although the terms of the statute do not require it. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230.

Instruction on intent jurisdictional absent legislative indication to contrary. — Except where the legislature clearly indicates a desire to eliminate the requirement of criminal intent, criminal statutes will be construed in the light of the common law and criminal intent will be required, and failure to instruct on this required element will be considered jurisdictional. *State v. Fuentes*, 1973-NMCA-069, 85 N.M. 274, 511 P.2d 760, cert. denied, 85 N.M. 265, 511 P.2d 751.

Legislative indication must clearly appear. — The legislature may forbid the doing of an act and make its commission criminal, without regard to the intent with which such act is done; but in such case it must clearly appear from the act, from its language or clear inference, that such was the legislative intent. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230.

Whether criminal intent is essential is matter of construction. *State v. Craig*, 1962-NMSC-072, 70 N.M. 176, 372 P.2d 128.

IV. INDICTMENT, TRIAL AND JUDGMENT.

Constitutional provisions for presentments, indictments and information were self-executing. *State v. Rogers*, 1926-NMSC-028, 31 N.M. 485, 247 P. 828.

Indictment for murder. — The common-law procedure being in force in New Mexico, where the statutes have adopted the common-law definition of murder, an indictment may omit a direct charge of a purpose or intent to kill as an overt act. *Territory v. Montoya*, 1912-NMSC-015, 17 N.M. 122, 125 P. 622.

Charging assault with intent to murder. — In indictment for assault with intent to commit murder, the means or instrument of committing the assault should be stated, the common law being made, by statute, the rule of decision and practice, where not specifically changed. *Territory v. Carrera*, 1892-NMSC-023, 6 N.M. 594, 30 P. 872 (decided under prior law, now Rule 5-205 NMRA).

Raising defense of former jeopardy. — Common law required defense of former jeopardy to be specially pleaded. It could not be raised by motion for instructed verdict at conclusion of state's case. *Territory v. Lobato*, 1913-NMSC-030, 17 N.M. 666, 134 P. 222, *aff'd*, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916) (decided under prior law, now Section 30-1-10 NMSA 1978).

Trial by jury. — The constitution preserves the right of trial by jury already existing, which means as it existed in the territory prior to adoption of constitution. *Guiterrez v. Gober*, 1939-NMSC-008, 43 N.M. 146, 87 P.2d 437.

Common-law presumption relating to spouses. — The presumption of the common law that a married woman committing a crime in presence of her husband was under coercion was rebuttable. *State v. Asper*, 1930-NMSC-098, 35 N.M. 203, 292 P. 225.

Opportunity for defendant to speak before judgment. — On failure of trial court to ask defendant before judgment was passed whether he had anything to say why judgment should not be pronounced upon him, or to have the record affirmatively show that fact, the cause must be remanded upon that ground alone. *Territory v. Herrera*, 1901-NMSC-018, 11 N.M. 129, 66 P. 523 (decided under prior law).

Discretion in sentencing. — The common law gives trial courts the discretion to make sentences consecutive or concurrent. *State v. Crouch*, 1965-NMSC-131, 75 N.M. 533, 407 P.2d 671.

Assessment of costs in criminal cases was unknown at common law and therefore requires statutory authority. *State v. Valley Villa Nursing Ctr., Inc*., 1981-NMCA-133, 97 N.M. 161, 637 P.2d 843.

Review of judgments. — The common law, vested the supreme court with jurisdiction to review judgments in criminal cases by writ of error. *Borrego v. Territory*, 1896-NMSC-011, 8 N.M. 446, 46 P. 349, cert. denied, 8 N.M. 655, 46 P. 211, *aff'd* sub nom. Gonzales v. Cunningham, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

Law reviews. — For article, "Disclosure of Medical Information - Criminal Prosecution of Medicaid Fraud in New Mexico," see 9 N.M.L. Rev. 321 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 7, 9.

Modern status of test of criminal responsibility - state cases, 9 A.L.R.4th 526.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

22 C.J.S. Criminal Law § 24.

30-1-4. Crime defined.

A crime is an act or omission forbidden by law and for which, upon conviction, a sentence of either death, imprisonment or a fine is authorized.

History: 1953 Comp., § 40A-1-4, enacted by Laws 1963, ch. 303, § 1-4.

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Nature of criminal intent. — Criminal intent is more than intentional taking. It is a mental state of conscious wrongdoing. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230.

Crime as public offense. — A crime is a public offense, and all public offenses are expressly defined to be crimes in New Mexico. 1959 Op. Att'y Gen. No. 59-154 (opinion rendered under 40-1-2 to 40-1-4, 1953 Comp.).

Violation of public law. — A "public offense" is the same as a "crime," and may include a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights. It is an act committed or omitted in violation of public law. 1959 Op. Att'y Gen. No. 59-154 (opinion rendered under 40-1-2 to 40-1-4, 1953 Comp.).

30-1-5. Classification of crimes.

Crimes are classified as felonies, misdemeanors and petty misdemeanors.

History: 1953 Comp., § 40A-1-5, enacted by Laws 1963, ch. 303, § 1-5.

ANNOTATIONS

Meaning of "crime" in Detoxification Act. — The Criminal Code makes it clear that the prohibition in the Detoxification Act (Section 43-2-16 NMSA 1978) against charging an individual held in protective custody with any "crime" includes misdemeanors and petty misdemeanors. 1973 Op. Att'y Gen. No. 73-52.

30-1-6. Classified crimes defined.

A. A crime is a felony if it is so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized.

B. A crime is a misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment in excess of six months but less than one year is authorized.

C. A crime is a petty misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment for six months or less is authorized.

History: 1953 Comp., § 40A-1-6, enacted by Laws 1963, ch. 303, § 1-6.

ANNOTATIONS

Police officer may make warrantless arrest for misdemeanor if he has probable cause to believe the offense occurred in his presence. *Tanberg v. Shlotis*, 401 F.3d 1151 (10th Cir. 2005).

Special statute controls over general. — This section and Section 31-19-1 NMSA 1978 refer generally to the sentence for misdemeanors; former 64-10-1, 1953 Comp., relating to fraudulent applications in motor vehicle registration and the like, provides a

specific sentence for that misdemeanor. If the general statute, standing alone, would include the same matter as the special statute and thus conflict with the special statute, the special statute controls since it is considered an exception to the general statute. *State v. Sawyers*, 1968-NMCA-051, 79 N.M. 557, 445 P.2d 978.

Classification of criminal contempt in discretion of courts. — Where the sole punishment of the criminal contemnor is a fine the New Mexico courts are free to make their own determination as to what is a "petty" and what is a "serious" offense, guided by the standards of District of Columbia v. Clawans, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937) and other federal cases. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, 84 N.M. 789, 508 P.2d 1276.

Penalty imposed as indication of nature of offense. — Under the rule in Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L. Ed. 2d 629 (1966), when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, the court is to look to the penalty actually imposed as the best evidence of the seriousness of the offense. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, 84 N.M. 789, 508 P.2d 1276; *In re D'Angelo*, 1986-NMSC-052, 105 N.M. 391, 733 P.2d 360.

Falsely obtaining unemployment benefits is petty misdemeanor. — When Subsection C is read together with Section 51-1-38 NMSA 1978, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is one year under Section 30-1-8F NMSA 1978. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720 (decided under prior law, now Section 30-1-8 NMSA 1978).

Violation of municipal ordinance constitutes petty misdemeanor because imprisonment may not exceed 90 days. *State v. Luna*, 1980-NMSC-009, 93 N.M. 773, 606 P.2d 183 (decided under prior law, now Section 3-17-11 NMSA 1978).

Effect of altering classification of crime. — Statute under which the placing of poison in food for dogs would be a misdemeanor (Laws 1912, ch. 38, § 2, 40-4-1, 1953 Comp.) was impliedly repealed by subsequent statute (Laws 1919, ch. 82, § 1, 40-4-2, 1953 Comp.) making such offense a felony, under rule that if the same offense, identified by name or otherwise, is altered in degree or incidents, or if a felony is changed to a misdemeanor, or vice versa, the statute making such changes has the effect of repealing the former act. *State v. Anderson*, 1936-NMSC-016, 40 N.M. 173, 56 P.2d 1134.

Federal right to jury trial for contempt. — So long as the fine for criminal contempt which is, or may be, imposed is not more than $1000, there is no federal constitutional right to jury trial as the crime is a petty offense, nor need prosecution be by information. *Seven Rivers Farm, Inc. v. Reynolds*, 1973-NMSC-039, 84 N.M. 789, 508 P.2d 1276.

Jury trial of misdemeanor. — Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of N.M. Const., art. II, § 12. 1964 Op. Att'y Gen. No. 64-37.

Jury trial of misdemeanor. — Persons charged with offenses classified as misdemeanors under the Motor Vehicle Code may under Rule 23, N.M.R. Crim. P. (Magis. Cts.) (*now see* Rule 6-602) demand a jury trial but are not afforded one as a matter of right. 1979 Op. Att'y Gen. No. 79-17.

Law reviews. — For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 19, 28 to 30.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender, 19 A.L.R.2d 227.

22 C.J.S. Criminal Law §§ 9 to 12.

30-1-7. Degrees of felonies.

Felonies under the Criminal Code are classified as follows:

A. capital felonies;

B. first degree felonies;

C. second degree felonies;

D. third degree felonies; and

E. fourth degree felonies.

A felony is a capital, first, second, third or fourth degree felony when it is so designated under the Criminal Code. A crime declared to be a felony, without specification of degree, is a felony of the fourth degree.

History: 1953 Comp., § 40A-1-7, enacted by Laws 1963, ch. 303, § 1-7.

ANNOTATIONS

Law reviews. — For article, "The Proposed New Mexico Criminal Code", see 1 Nat. Resources J. 122 (1961).

30-1-8. Time limitations for commencing prosecution.

A person shall not be prosecuted, tried or punished in any court of this state unless the indictment is found or information or complaint is filed within the time as provided:

A. for a second degree felony, within six years from the time the crime was committed;

B. for a third or fourth degree felony, within five years from the time the crime was committed;

C. for a misdemeanor, within two years from the time the crime was committed;

D. for a petty misdemeanor, within one year from the time the crime was committed;

E. for any crime against or violation of Section 51-1-38 NMSA 1978, within three years from the time the crime was committed;

F. for a felony pursuant to Section 7-1-71.3, 7-1-72 or 7-1-73 NMSA 1978, within five years from the time the crime was committed; provided that for a series of crimes involving multiple filing periods within one calendar year, the limitation shall begin to run on December 31 of the year in which the crimes occurred;

G. for an identity theft crime pursuant to Section 30-16-24.1 NMSA 1978, within five years from the time the crime was discovered;

H. for any crime not contained in the Criminal Code [30-1-1 NMSA 1978] or where a limitation is not otherwise provided for, within three years from the time the crime was committed; and

I. for a capital felony, a first degree violent felony or second degree murder pursuant to Subsection B of Section 30-2-1 NMSA 1978, no limitation period shall exist and prosecution for these crimes may commence at any time after the occurrence of the crime.

History: 1953 Comp., § 40A-1-8, enacted by Laws 1963, ch. 303, § 1-8; 1979, ch. 5, § 1; 1980, ch. 50, § 1; 1997, ch. 157, § 1; 2005, ch. 108, § 7; 2009, ch. 95, § 2; 2022, ch. 56, § 23.

ANNOTATIONS

Cross references. — For limitation on prosecutions for violations of municipal ordinances, *see* 35-15-5 NMSA 1978.

For raising pre-trial motions, defenses and objections, *see* Rule 5-601 NMRA.

For time limits for arraignment and commencement of trial, *see* Rule 5-604 NMRA.

The 2022 amendment, effective May 18, 2022, eliminated the statute of limitations for second degree murder; and in Subsection I, after "first degree violent felony", added "or second degree murder pursuant to Subsection B of Section 30-2-1 NMSA 1978".

The 2009 amendment, effective July 1, 2009, in Subsection F, added Section 7-1-71.3 NMSA 1978, and after "NMSA 1978", deleted "or Section 4 of this 2005 act"; and added Subsection G.

The 2005 amendment, effective June 17, 2005, added Subsection F to a five year limitation for commencing a felony prosecution pursuant to Sections 7-1-72 or 7-1-73 NMSA 1978 from the time the crime was committed or if the prosecution is for a series of crimes involving multiple filing periods within one calendar year, from December 31 of the year in which the crimes occurred.

The 1997 amendment, effective July 1, 1997, deleted former Subsections A and B providing for 15 year limitations for capital murder and first degree murder, added Subsection G, and redesignated the remaining subsections accordingly.

Application of 1997 amendment. — The 1997 amendment, which abolished the fifteen year statute of limitations for all capital felonies and first degree violent felonies, applies to unexpired criminal conduct committed before the amendment's effective date of July 1, 1997. *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24, *rev'g* 2008-NMCA-155, 145 N.M. 259, 196 P.3d 490.

Where defendant was charged with aggravated criminal sexual penetration of a child less that thirteen years of age, a first degree felony, based on conduct that occurred between January 1, 1978 and December 30, 1985, the crimes committed by defendant after July 1, 1982 were not time barred as of July 1, 1997 and the 1997 amendment, which abolished the fifteen year statute of limitations for all capital felonies and first degree violent felonies applied to the crimes committed by defendant. *State v. Morales*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24, *rev'g* 2008-NMCA-155, 145 N.M. 259, 196 P.3d 490.

The 1997 amendment, which eliminated the statute of limitations on the prosecution of first degree felonies, applies prospectively. *State v. Morales*, 2008-NMCA-155, 145 N.M. 269, 196 P.3d 490, cert. granted, 2008-NMCERT-011, *rev'd*, 2010-NMSC-026, 148 N.M. 305, 236 P.3d 24.

Waiver. — The statute of limitations is a substantive right that may only be waived by a defendant after consultation with counsel, and only if the waiver is knowing, intelligent and voluntary. *State v. Kerby*, 2007-NMSC-014, 141 N.M. 413, 156 P.3d 704.

Waiver of statute of limitations. — Where defendant pleaded no contest to two second-degree felonies, attempted first-degree murder and aggravated burglary with a

deadly weapon, for acts that were committed in 2010, and where, following the district court's denial of defendant's motion to dismiss which asserted that the statute of limitations had run on those counts before the state filed an indictment that named him as a defendant, defendant and the state entered into an unconditional plea agreement in which defendant agreed to plead no contest to attempted first-degree murder and aggravated burglary with a deadly weapon, defendant's no contest plea waived his statute of limitations defense, and where defendant was advised of the statute of limitations, the factual and legal basis for asserting the defense, and the range of outcomes that could result from its assertion or waiver, the waiver was knowing, intelligent and voluntary. *State v. Hansen*, 2021-NMCA-048, cert. denied.

Where state alleges that defendant committed criminal sexual penetration of minor under 13 between September and December of 1988 and in January of 1989, the applicable statute of limitations at the time defendant allegedly committed the crime is 15 years. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

Limitation "not otherwise provided for". — A limitation is "otherwise provided for" for purposes of Subsection H (now F), based on Subsection F (now D), which limits the prosecution of petty misdemeanors, if the punishment for the crime is such as to make it a petty misdemeanor under Section 30-1-6 NMSA 1978, even if the statute under which the defendant was charged does not expressly state the degree of the crime. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720.

Period begins running when crime completed. — Where the final "taking" under a fraudulent loan occurred on July 17, 1973, the crimes of fraud and conspiracy to defraud were completed on that date, and the limitation period began to run. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

Limitations against prosecution for conspiracy run from time last overt act in furtherance of the conspiracy was committed. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

Time of filing superseding indictment or information not controlling. — Although a felony charge may be initiated by the filing of a complaint, the felony must be prosecuted by indictment or information, so that at some point the complaint is superseded by an indictment or information. This section, however, does not distinguish among complaint, indictment or information, and by providing for a complaint charging a felony within the time limitation, the legislature intended that the time of filing a superseding indictment or information should not control the limitation question. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Charges initiated by complaint continued by later indictment. — Since upon being advised that a defendant has been indicted prior to a preliminary examination, a

magistrate takes no further action in the case, charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and for purposes of this section the prosecution should be considered as commenced by the filing of the complaint. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

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

New prosecution potentially barred after dismissal for failure to prosecute. — If there is a dismissal of a charge for failure to prosecute, a new prosecution would be barred if initiated after the limitation period expires. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Filing complaint within period tolls statute. — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony may be timely because the limitation period was tolled by the filing of the complaint within the three-year period. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

The statute of limitations prescribe time limits within which the state must commence a prosecution by filing the initial charging documents in a case, not time limits within which a defendant must be brought to trial. *State v. Collier*, 2013-NMSC-015, 301 P.3d 370.

Statute did not bar retrial of lesser-included offense. — Where, on February 13, 2006, defendant injured a horse causing the horse's death; on August 31, 2006, less than seven months after the horse's death, the grand jury returned an indictment charging defendant with felony extreme cruelty to animals; defendant's first trial in March 2008 resulted in a mistrial due to jury deadlock; at defendant's second trial in January 2009, after the statute of limitations period for misdemeanors had run, the district court, at the state's request and without objection from defendant, instructed the jury on the lesser included offense of misdemeanor cruelty to animals; the jury acquitted defendant of the felony charge; and the district court declared a mistrial on the misdemeanor charge due to jury deadlock, the statute of limitations did not bar retrial of the misdemeanor charge because the state commenced the prosecution by timely filing the indictment on the felony charge, which necessarily included the lesser-included misdemeanor charge, within the two-year statute of limitations period for the misdemeanor charge. *State v. Collier*, 2013-NMSC-015, 301 P.3d 370.

Time limitation instruction. — Generally, the time limitation instruction is a necessary part of the instructions; however, where the uncontradicted evidence shows the offenses were committed within the time limitation, the instruction stating the time

limitation is not a required instruction, but giving it is not error. *State v. Salazar*, 1974-NMCA-026, 86 N.M. 172, 521 P.2d 134.

Error not prejudicial. — Although the offense of unlawfully drawing or discharging a firearm in a settlement was barred by the statute of limitations, which defense was timely raised in the district court, so that the trial court erred in not dismissing this count, nevertheless, no sentence was imposed for this offense, and furthermore, the elements of the offense were embraced in the crime of assault with intent to kill, for which defendant was properly convicted, so that the error was without prejudice to him. *State v. Shawan*, 1967-NMSC-013, 77 N.M. 354, 423 P.2d 39.

Falsely obtaining unemployment benefits is petty misdemeanor. — When Section 30-1-6C NMSA 1978 is read together with Section 51-1-38 NMSA 1978, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is one year under Subsection F. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720(decided under prior law, now Section 30-1-8 NMSA 1978).

Contributions payable under Section 51-1-19 NMSA 1978 are not "revenues" within meaning of Subsection G. *Robinson v. Short*, 1979-NMSC-099, 93 N.M. 610, 603 P.2d 720 (decided under prior law).

Prosecution for sale of property of another not barred. — Under former law, prosecution for unlawful sale of one head of neat cattle, the property of another, was not barred where commenced within three years from time of alleged offense. *State v. Stone*, 1937-NMSC-050, 41 N.M. 547, 72 P.2d 9.

Prosecution of misdemeanor. — Under former 41-9-1, 1953 Comp., as well as this section, the maximum time for commencing prosecution for a misdemeanor was within two years from the time the offense was committed. 1957 Op. Att'y Gen. No. 57-74.

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 223 to 233.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Right to require bail or recognizance where, at time of filing, prosecution of principal is barred by statute of limitations, 75 A.L.R.2d 1431.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Waivability of bar of limitations against criminal prosecution, 78 A.L.R.4th 693.

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS §§ 1961-1968, 89 A.L.R. Fed. 887.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

22 C.J.S. Criminal Law §§ 196 to 207.

30-1-9. Tolling of time limitation for prosecution for crimes.

A. If after any crime has been committed the defendant shall conceal himself, or shall flee from or go out of the state, the prosecution for such crime may be commenced within the time prescribed in Section 1-8 [30-1-8 NMSA 1978], after the defendant ceases to conceal himself or returns to the state. No period shall be included in the time of limitation when the party charged with any crime is not usually and publicly a resident within the state.

B. When

(1) an indictment, information or complaint is lost, mislaid or destroyed;

(2) the judgment is arrested;

(3) the indictment, information or complaint is quashed, for any defect or reason; or

(4) the prosecution is dismissed because of variance between the allegations of the indictment, information or complaint and the evidence; and a new indictment, information or complaint is thereafter presented, the time elapsing between the preferring of the first indictment, information or complaint and the subsequent indictment, information or complaint shall not be included in computing the period limited for the prosecution of the crime last charged; provided that the crime last charged is based upon and grows out of the same transaction upon which the original indictment, information or complaint was founded, and the subsequent indictment, information or complaint is brought within five years from the date of the alleged commission of the original crime.

History: 1953 Comp., § 40A-1-9, enacted by Laws 1963, ch. 303, § 1-9.

ANNOTATIONS

Cross references. — For defects, errors and omissions in a complaint, indictment or information, and variances between the allegations therein and the evidence, *see* Rule 5-204 NMRA.

This section is a tolling statute, not a statute of limitations, and does not independently limit the period within which prosecution must commence. *State v. Hill*, 2008-NMCA-117, 144 N.M. 775, 192 P.3d 770, cert. quashed, 2009-NMCERT-009, 147 N.M. 423, 224 P.3d 650.

Constitutionality. — The application of the tolling provision did not violate either defendant's right to travel or his constitutional guarantee of equal protection of the laws. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

Statute not exclusive. — Although this section does show a legislative intent that the limitation period is not to be utilized to bar a prosecution delayed by procedural problems, it does not evince an intent to bar prosecutions not beset with procedural problems. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Indictment timely because complaint had tolled statute. — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony is timely because the limitation period was tolled by the filing of the complaint within the three-year period. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Period between dismissed complaint and refiled charges was not tolled. — Where defendant was charged in Santa Fe county with embezzlement and computer access with intent to defraud or embezzle on June 28, 2018, and where defendant filed an objection to the venue on November 29, 2018, and where the district court granted defendant's motion to dismiss both counts with prejudice for improper venue, and where, almost two months later, on August 1, 2019, a grand jury indicted defendant on the same charges in Sandoval county for conduct that occurred between December 19, 2011 and January 22, 2013, and where defendant moved to dismiss both charges, claiming that the statute of limitations had expired, the district court erred in denying defendant's motion to dismiss, because this section did not exclude the period between the timely filed but dismissed complaint and the refiled charges or toll any time from the six-year statutory limitation period, and no nonstatutory tolling otherwise extended the time for the state to pursue charges in the present case. *State v. Padilla*, 2023-NMCA-047, cert. granted.

Evidence of absence from state insufficient. — Where there was no evidence tending to show defendant's whereabouts from the time of his escape from prison on September 17, 1956 until his apprehension in Oklahoma on January 24, 1960, defendant's plea of not guilty put the statute of limitations in issue, and his motion for a directed verdict on the grounds that the three-year statute of limitations was a bar to prosecution should have been granted. *State v. Oliver*, 1963-NMSC-015, 71 N.M. 317, 378 P.2d 135.

Evidence negating residence insufficient. — There being no substantial evidence in record that defendant was not usually and publicly a resident of state, after commission

of crime for sufficient time to toll statute of limitations, he was entitled to instructed verdict in his favor. *State v. Mersfelder*, 1927-NMSC-049, 34 N.M. 465, 284 P. 113.

"Concealing oneself" construed. — The plain language of 30-1-9(A) NMSA 1978 suggests that a court will look to the actions of an offender after the crime was committed, and will necessarily undertake a fact-specific analysis of whether the offender's actions constituted an affirmative attempt to conceal his or her identity, and therefore, absent any evidence that the offender took affirmative steps to hide his or her identity, it is unlikely that the offender could be considered to have "concealed" himself or herself. Where a victim has submitted to a sexual assault evidence kit, the victim does not know the offender, and the offender has not been identified and the sexual assault evidence kit DNA has not been matched to an individual suspect, and therefore it is unlikely that a court would consider the offender to be concealing himself, because under these circumstances, there is no evidence that the offender took affirmative steps to hide his or her identity. *Retroactive Application of Criminal Statute* (4/27/17), Att'y Gen. Adv. Ltr. 2017-04.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 227, 228, 231, 233.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Imprisonment as tolling the statute of limitations, 76 A.L.R.3d 743.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

22 C.J.S. Criminal Law §§ 202 to 204.

30-1-9.1. Offenses against children; tolling of statute of limitations.

The applicable time period for commencing prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.

History: Laws 1987, ch. 117, § 1.

ANNOTATIONS

Applicability. — Laws 1987, ch. 117, § 2 provided that the provisions of Laws 1987, ch. 117, § 1 apply only to crimes committed on or after June 19, 1987.

Report of a violation to a law enforcement agency. — The statute of limitations to commence a prosecution for a violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 is triggered only for the specific violation that was reported to a law enforcement agency and does not commence to run until the facts that form the basis for the violation that is being prosecuted were reported to a law enforcement agency. *State v. Whittington*, 2008-NMCA-063, 144 N.M. 85, 183 P.3d 97.

30-1-9.2. Criminal sexual penetration; tolling of statute of limitations.

A. When DNA evidence is available and a suspect has not been identified, the applicable time period for commencing a prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-9-11 NMSA 1978 until a DNA profile is matched with a suspect.

B. As used in this section, "DNA" means deoxyribonucleic acid."

History: Laws 2003, ch. 257, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 257, § 3 made the act effective on July 1, 2003.

Applicability. — Laws 2003, ch. 257, § 2 provided that the provisions of Laws 2003, ch. 257, § 1 apply to an alleged violation of Section 30-9-11 NMSA 1978 for which the applicable time period for commencing a prosecution as provided in Section 30-1-8 NMSA 1978 had not expired as of July 1, 2003.

Section does not apply retroactively. — Generally, a statute is applied prospectively unless the legislature has made clear its intention to apply it retroactively. This section does not indicate whether the legislature intended the statute to apply to crimes committed before its effective date, and therefore it may be presumed that the legislature intended this section to operate prospectively. This intent is reflected in the express language of the applicability provision which states that the provisions of this act are applicable to an alleged violation of 30-9-11 NMSA 1978, for which the applicable time period for commencing a prosecution, as provided in 30-1-8 NMSA 1978, had not expired as of July 1, 2003. *Retroactive Application of Criminal Statute* (4/27/17), Att'y Gen. Adv. Ltr. 2017-04.

30-1-10. Double jeopardy.

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.

History: 1953 Comp., § 40A-1-10, enacted by Laws 1963, ch. 303, § 1-10.

ANNOTATIONS

Cross references. — For constitutional provision on former jeopardy, *see* N.M. Const., art. II, § 15.

I. GENERAL CONSIDERATION.

Waiver of rights. — Double jeopardy rights may not be waived and may be raised by the accused at any stage of a criminal prosecution either before or after judgment. Defendant may raise the issue of violation of double jeopardy even though he expressly waived the issue during a plea hearing. *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772.

Finality of decision. — The trial court's oral and written statements during the proceedings did not constitute acquittals and therefore there was no violation of double jeopardy protections when the court subsequently found the defendant guilty in the same proceedings. *State v. Vaughn*, 2005-NMCA-076, 137 N.M. 674, 114 P.3d 354, cert. denied, 2005-NMCERT-006, 137 N.M. 766, 115 P.3d 229.

Removal of child from the custody of the child's parents pending an investigation of child abuse is not a punishment. — Where the children, youth and families department investigated defendants for child abuse and found the allegations to be unsubstantiated; a tribal court held a custody hearing on the same allegations and ultimately returned the child to defendants; the defendant who was the primary caretaker agreed to temporary guardianship of the child during the investigation and tribal court proceeding; and the removal of the child from the custody of defendants for fourteen months during the child abuse investigation by the department and the custody proceeding in tribal court was not intended to punish defendants, the state's prosecution of defendants for criminal child abuse did not violate double jeopardy. *State v. Diggs*, 2009-NMCA-099, 147 N.M. 122, 217 P.3d 608, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Identical counts and jury instructions. — Where multiple counts of criminal sexual penetration of a minor in the indictment and the counts in the jury instructions were carbon-copy counts of each other and where the child's testimony distinguished facts for each count and the defendant admitted to having sexual intercourse with the child on several occasions, there was sufficient evidence from which a jury could find separate incidents of criminal sexual penetration and there was no violation of double jeopardy. *State v. Martinez*, 2007-NMCA-160, 143 N.M. 96, 173 P.3d 18, cert. denied, 2007-NMCERT-011, 143 N.M. 155, 173 P.3d 762.

Constitutional provision. — This section provides the same protections as N.M. Const., art. II, § 15, although those protections are more clearly stated in the statute. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

Reinstatement of convictions. — Where one of two otherwise valid convictions must be vacated to avoid violation of double jeopardy protections, the conviction carrying the shorter sentence must be vacated. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the conviction for voluntary manslaughter should be vacated and the conviction for shooting into a motor vehicle upheld because the conviction for shooting into a motor vehicle carried a more severe potential sentence. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

State protections broader than those of federal constitution. — The differences between N.M. Const., art. II, § 15, and this section suggest that the legislature was attempting to articulate the protections of the state constitution as being broader than those of the federal constitution. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

When section applied. — The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense, or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

This section precludes retrial of a greater offense only after an acquittal of that offense and does not address the situation in which the state prosecutes various crimes or degrees of crimes and the jury returns a verdict on less than all of the crimes charged. *State v. Martinez*, 1995-NMSC-064, 120 N.M. 677, 905 P.2d 715.

The New Mexico supreme court's statement in *State v. Martinez*, 1995-NMSC-064, 120 N.M. 677, 905 P.2d 715, that this section precludes a retrial of a greater offense only after an acquittal of that offense, was not intended to introduce a new principle of law into its double jeopardy jurisprudence, but rather was a summary of existing case law. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

This section precludes a retrial of a greater offense only after an (implied or explicit) acquittal of that offense, provided that the greater offense was charged in the first trial. *State v. Lynch*, 2003-NMSC-020, 134 N.M. 139, 74 P.3d 73.

Section applies to children's court proceedings involving delinquent child. *State v. Doe*, 1977-NMCA-058, 90 N.M. 536, 565 P.2d 1053.

Acquittal of accused protects against second prosecution for same crime. *Borrego v. Territory*, 1896-NMSC-011, 8 N.M. 446, 46 P. 349, *aff'd* sub nom. Gonzales v. Cunningham, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

No jeopardy if information fails to state offense. — Where information failed to state an offense at time of arraignment and entry of plea of not guilty, defendant was not placed in jeopardy. *State v. Ardovino*, 1951-NMSC-018, 55 N.M. 161, 228 P.2d 947.

No jeopardy if court lacks jurisdiction. — Since marijuana is not defined as a narcotic drug under the relevant statutes, a charge of violating Section 30-31-20 NMSA 1978 (trafficking) in the first proceeding brought against defendant for selling marijuana did not charge defendant with a public offense. Hence, as the court lacked jurisdiction in the first proceeding, there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. *State v. Mabrey*, 1975-NMCA-098, 88 N.M. 227, 539 P.2d 617.

No jeopardy on retrial after appeal. — The former jeopardy clause does not preclude retrial of defendant whose sentence is set aside because of error in the proceedings leading to sentence or conviction. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768; *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Constitutional protection against double jeopardy does not prevent a second trial for the same offense where the defendant himself, by an appeal, has invoked the action which resulted in the second trial. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768.

No jeopardy after collateral attack. — Where a conviction is overturned on collateral rather than direct attack, retrial is not precluded on double jeopardy grounds. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Waiver of defense by plea agreement. — The defendant waived his double jeopardy defense by entering a plea agreement which provided that the state could pursue additional habitual offender proceedings to enhance the defendant's sentence in the event his probation was revoked or he otherwise failed to fulfill his obligations under the agreement, and the provision precluding waiver of a double jeopardy defense did not apply to prevent waiver in such case. *Montoya v. New Mexico*, 55 F.3d 1496 (10th Cir. 1995).

Charging in alternative. — The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative; nor were the concepts of included offenses, same evidence or merger. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Trial de novo on alternative means of committing offense did not violate double jeopardy. — When a defendant is convicted based on one of two alternative means of committing a single crime, there is not an implied acquittal of the other alternative unless the conviction logically excludes guilt of the other alternative; if there is no implied acquittal, there is no constitutional prohibition against retrial of both alternatives after a conviction is set aside. *State v. Ben*, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

Where defendant was charged in magistrate court with multiple means of committing DWI, per se DWI and impaired to the slightest degree, and was convicted on the per se theory of DWI, defendant's double jeopardy rights were not violated when he was retried de novo on the impaired theory in the district court, because his conviction on the per se theory of DWI was not logically inconsistent with a finding of impaired DWI. *State v. Ben*, 2015-NMCA-118, cert. denied, 2015-NMCERT-011.

Prosecution and forfeiture generally. — *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264, does not stand for the proposition that a criminal prosecution may never advance independently of a forfeiture proceeding. Rather, *Nunez* appears to mandate only proper initiation of the dual penalty proceeding, meaning that the criminal charges and the forfeiture proceeding must be merged or consolidated prior to the occurrence of any event that signals the attachment of jeopardy. *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761.

Civil penalty and criminal prosecution under the Voter Action Act. — The civil penalty authorized under Section 1-19A-17 NMSA 1978 is remedial and does not constitute punishment for double jeopardy purposes. The imposition of a civil penalty does not bar a subsequent criminal prosecution under the Voter Action Act for the same conduct for which the secretary of state assessed the civil penalty. *State v. Block*, 2011-NMCA-101, 150 N.M. 598, 263 P.3d 940.

Where the secretary of state assessed civil penalties against defendant for violations of the Voter Action Act and the attorney general subsequently filed criminal charges against defendant for the same violations of the act, the assessment of the civil penalties and the subsequent criminal prosecution did not violate double jeopardy. *State v. Block*, 2011-NMCA-101, 150 N.M. 598, 263 P.3d 940.

Civil forfeiture under Controlled Substances Act. — Because civil forfeiture under the Controlled Substances Act is punishment for double-jeopardy purposes under the New Mexico constitution, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264.

The legislature is not prevented from assessing both civil and criminal penalties for violations of the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978. *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761.

Civil penalties and criminal prosecution under Securities Act. — Criminal prosecutions under the Securities Act, Sections 58-13B-1 to 58-13B-57 NMSA 1978 (now Sections 58-13C-101 to 58-13C-701 NMSA 1978), following administratively imposed civil penalties under that Act, do not place defendants in double jeopardy under N.M. Const., art. II, § 15, or under this section. *State v. Kirby*, 2003-NMCA-074, 133 N.M. 782, 70 P.3d 772, cert. denied, 133 N.M. 771, 70 P.3d 761.

City ordinance. — The clear intent and purpose of the city ordinance is to establish a remedial measure to protect the public from those drivers who persist in driving after license revocation and from multiple driving while intoxicated offenses; therefore, civil forfeiture proceedings are not punitive, and the drivers are not subjected to double jeopardy. *City of Albuquerque ex rel. Albuquerque Police Dep't v. One (1) 1984 White Chevy UT*., 2002-NMSC-014, 132 N.M. 187, 46 P.3d 94.

Trial de novo after magistrate court conviction. — In a trial de novo resulting from a defendant's appeal of a magistrate court conviction, the district court has jurisdiction as well as a constitutional and statutory obligation to consider the defendant's pretrial double jeopardy claim. *State v. Foster*, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Greater sentence after trial de novo. — The greater sentence imposed by the district court for violation of certain municipal ordinances after a trial de novo did not deprive defendant of due process, nor did it amount to double jeopardy. *City of Farmington v. Sandoval*, 1977-NMCA-022, 90 N.M. 246, 561 P.2d 945.

Double jeopardy was not violated by amendment of defendant's sentence. — Where the district court initially determined that defendant's 1972 uncounseled misdemeanor DWI conviction could not be used to enhance defendant's sentence for a 2009 aggravated DWI; the state asked the court to reconsider its ruling as a legal error six days after the court entered the sentence; the state did not present any new or supplemental evidence; the court determined that it had erred as a matter of law because defendant had not been sentenced to jail for the 1972 conviction; and the court amended defendant's sentence based on the legal error regarding the 1972 conviction, defendant did not have a reasonable expectation of finality in the original sentence because the state moved for reconsideration of the court's ruling on the validity of the 1972 sentence within the thirty days of the court's entry of the sentence and double jeopardy did not preclude the modification of defendant's sentence based on the legal error. *State v. Redhouse*, 2011-NMCA-118, 269 P.3d 8, cert. denied, 2011-NMCERT-011.

Larceny of cattle distinct from disposition of hides. — Larceny of cattle, completed on one day by driving the cattle away or killing them with intent to steal, was a distinct offense from that of killing cattle and failing to keep the hides and an acquittal of former was no bar to prosecution for latter. *State v. Knight*, 1929-NMSC-049, 34 N.M. 217, 279 P. 947.

Conspiracy and completed offense are separate offenses and conviction of both does not amount to double jeopardy. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses, and a conviction for the conspiracy may be had though the substantive offense was completed. The plea of double jeopardy is not a defense to conviction for both offenses. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 1975-NMCA-126, 88 N.M. 561, 543 P.2d 1189, cert. denied, 89 N.M. 6, 546 P.2d 71.

Double use of prior felony. — It is not legally permissible for the state to present evidence of the same prior felony to prove an essential element of the crime of felon in possession of a firearm, and to rely upon this same evidence for purposes of enhancing the defendants' sentences under the habitual offender criminal statute. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 72, 792 P.2d 49, and 110 N.M. 183, 793 P.2d 865.

II. TESTS.

A. LESSER INCLUDED OFFENSE.

Effect of conviction or acquittal of lesser included offense. — Conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Meaning of included offense. — For an offense to be included within another offense, the offense must be necessarily included in the offense charged in the indictment, and for an offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Indictment source for determining lesser offense. — For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser, and in determining whether an offense is necessarily included, the court will look to the offense charged in the indictment. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Exception to rule. — Conviction of a lesser included offense bars prosecution of a greater offense, subject to one exception: if the court does not have jurisdiction to try the crime, double jeopardy cannot attach, since double jeopardy requires that a court have sufficient jurisdiction to try the charge. Where the magistrate court had no jurisdiction to try the charge of vehicular homicide while driving while intoxicated or recklessly driving, double jeopardy should not bar the vehicular homicide by driving while intoxicated charge. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Armed robbery and aggravated battery. — The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Aggravated burglary involving battery and aggravated battery involving deadly weapon. — Where defendant entered the victims' home with intent to commit theft and stabbed and beat the victims, defendant’s convictions of aggravated burglary involving battery and aggravated burglary involving a deadly weapon did not violate double jeopardy. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, cert. granted, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.

Driving under the influence and homicide by vehicle. — Where the indictment against defendant was phrased in the alternative charging him with homicide by vehicle (former Section 64-22-1, 1953 Comp.) while violating either Section 64-22-2, 1953 Comp.(former driving under the influence) or Section 64-22-3, 1953 Comp. (former reckless driving), the prosecution was not barred by a conviction in municipal court for driving under the influence since the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Possession and distribution. — Possession of marijuana was a lesser offense necessarily included in the greater offense of distribution, arising out of the same events, and since defendant was convicted of the lesser offense, double jeopardy barred his prosecution for the greater. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

Criminal sexual contact of minor and attempted criminal sexual penetration. — The offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser included and greater inclusive crimes because they each contain different elements and stand independently in

relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

B. SAME EVIDENCE.

Nature of test. — The test for determining whether two offenses are the same so as to bring into operation the prohibition against double jeopardy is the "same evidence" test which asks whether the facts offered in support of one offense would sustain a conviction of the other. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813; *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

Same evidence test. — The "same evidence" test is whether the facts offered in support of one offense would sustain a conviction of the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Unitary test. — Where a defendant convicted of multiple offenses claims double jeopardy, a reviewing court first determines whether defendant's conduct was unitary in nature so that the same acts were used to prove both offenses; where the conduct is unitary, the court must then examine the statutes in question to determine whether the legislature intended that multiple punishments could be imposed for different criminal offenses resulting from the same conduct. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Proof of different facts. — If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486; *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

If test met, section does not bar consecutive sentencing. — Under the "same evidence" test, where different elements are required to be proved in order to sustain each of three convictions, and different evidence is admitted to prove the different elements, it appears that the three convictions are based in part on separate evidence and the prohibition against double jeopardy does not bar consecutive sentencing under the circumstances of the case. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Harassment and stalking. — Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of

harassment is subsumed into the offense of misdemeanor stalking. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds by State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Felony murder and armed robbery are separate offenses, although they may arise out of the same transaction. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

Armed robbery and aggravated battery. — Since taking the victim's purse was a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force was a fact required to be proved under the aggravated battery charge, while threatened use of force would be acceptable proof under the armed robbery charge, the elements of the two crimes were not the same, and the "same evidence" test did not apply. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Armed robbery and aggravated battery with a deadly weapon. — Where defendant was convicted of armed robbery, conspiracy to commit armed robbery, false imprisonment, possession of a firearm by a felon, aggravated battery with a deadly weapon, and two counts of aggravated assault with a deadly weapon, based on evidence that defendant, armed with a firearm, robbed a restaurant in Alamogordo, New Mexico, defendant's right to be free from double jeopardy was violated where the evidence established that the force elements for both armed robbery and aggravated battery with a deadly weapon were satisfied simultaneously and the jury was instructed that it could rely on the same conduct to satisfy the force elements of both armed robbery and aggravated battery with a deadly weapon. Defendant's conviction for aggravated battery was therefore subsumed by his armed robbery conviction. *State v. Reed*, 2022-NMCA-025, cert. denied.

Armed robbery and aggravated assault with a deadly weapon. — Where defendant was convicted of armed robbery, conspiracy to commit armed robbery, false imprisonment, possession of a firearm by a felon, aggravated battery with a deadly weapon, and two counts of aggravated assault with a deadly weapon, based on evidence that defendant, armed with a firearm, robbed a restaurant in Alamogordo, New Mexico, defendant's right to be free from double jeopardy was violated where the use of force against the victim for the aggravated assault with a deadly weapon conviction was the same use of force as that relied upon for the armed robbery conviction, and the actions needed to effectuate aggravated assault with a deadly weapon, as charged in this case, did not require anything more of defendant than the actions necessary to effectuate armed robbery. Defendant's conviction for aggravated assault with a deadly weapon was subsumed by his armed robbery conviction. *State v. Reed*, 2022-NMCA-025, cert. denied.

Armed robbery and false imprisonment. — Where defendant was convicted of armed robbery, conspiracy to commit armed robbery, false imprisonment, possession of a

firearm by a felon, aggravated battery with a deadly weapon, and two counts of aggravated assault with a deadly weapon, based on evidence that defendant, armed with a firearm, robbed a restaurant in Alamogordo, New Mexico, defendant's right to be free from double jeopardy was violated where the State argued before the jury that it could rely on pointing a gun at the victim or pressing a gun to her throat as the basis for the "force or violence or threatened force or violence" necessary for armed robbery and "the force or intimidation" necessary for the false imprisonment, and where the elements of false imprisonment were subsumed by the elements of armed robbery because nothing more was required of defendant to complete false imprisonment than was required for his commission of armed robbery. *State v. Reed*, 2022-NMCA-025, cert. denied.

Drunk driving and homicide by vehicle. — Where the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court, under the "same evidence" test there was no double jeopardy when the state sought to prosecute the defendant for homicide by vehicle. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

C. MERGER, COLLATERAL ESTOPPEL AND SAME TRANSACTION.

Definition of merger. — Merger is the name applied to the concept of multiple punishment when multiple charges are brought in a single trial; it is an aspect of double jeopardy, concerned with whether more than one offense has occurred and is applied to prevent a person from being punished twice for the same offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Nature of test. — The test of whether one criminal offense has merged in another is not whether two criminal acts are successive steps in the same transaction (the rejected "same transaction" test), but whether one offense necessarily involves the other. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Factors considered. — In determining whether the defendant's acts constituted a single offense or multiple offenses for purposes of double jeopardy, factors considered include the time between the acts, the location of the victim at the time of each act, the existence of any intervening event, distinctions in the manner of committing the acts, the defendant's intent, and the number of victims. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

Merger concept has aspects of "same evidence" test because merger and the "same evidence" test are both concerned with whether more than one offense has been committed. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Merger has aspects of included offense concept. — The merger concept has aspects of the included offense concept, and in determining whether one offense necessarily involves another offense so that merger applies, the decisions have looked to the definitions of the crimes to see whether the elements are the same; this approach is similar to the approach used in determining whether an offense is an included offense (a determination of whether the greater offense can be committed without also committing the lesser). *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Offense of aggravated battery did not merge with armed robbery. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Homicide. — Homicide resulting from great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the murder charge on which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

Assault. — An assault arising from a series of three successive shots fired at a single victim, not separated by a significant amount of time, and arising from a single, continuous intent constituted one offense, and conviction of the defendant on two counts of assault violated his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

Definition of collateral estoppel. — Collateral estoppel 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. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

Under the rule of collateral estoppel any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose or subject matter of the two suits is the same or not. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

Part of constitutional guarantee. — The principle of collateral estoppel is embodied in the U.S. Const., amend. V guaranty against double jeopardy and is fully applicable to states by force of U.S. Const., amend. XIV. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

When constitutionally required. — The principle of collateral estoppel is only constitutionally required after a previous acquittal on issues raised in a second prosecution, and bars relitigation between the same parties of issues actually

determined at the previous trial. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Double use of conditional discharge. — Use of the defendant's prior conditional discharge to prove that he was a felon in order to convict him of the crime of felon in possession of a firearm and to enhance his sentence for underlying assault convictions did not violate his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

Sanity during commission of different crimes. — Where defendant's sanity was raised as an affirmative defense in a first trial, was actually litigated and was absolutely necessary to a decision in that trial, the sanity of the defendant in a second trial for offenses committed some 16 hours prior to the crime which was the subject of the first trial was the same issue of fact as the question of his insanity at the first trial and having been decided there in his favor collateral estoppel was a bar to the second trial. *State v. Nagel*, 1975-NMCA-026, 87 N.M. 434, 535 P.2d 641, cert. denied, 87 N.M. 450, 535 P.2d 657.

Traffic violations and homicide by vehicle. — Where defendant was convicted in municipal court of violation of certain traffic ordinances, he had no acquittal to raise in his defense in district court on charges of homicide by vehicle, and application of the principle of collateral estoppel was therefore inappropriate. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Same transaction test rejected. — The "same transaction" test, which is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent, has not been imposed by the United States supreme court on the states in double jeopardy cases, and its use is not mandated by N.M. Const., art. II, § 15. It is rejected and disapproved. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

III. MISTRIAL.

Manifest necessity. — Where a mistrial is granted not at the behest of defendant, a second trial is precluded by the double jeopardy clause of the U.S. Const., amend. V unless it can be said that there was a "manifest necessity" or " compelling reason" for the granting of a mistrial. Upon appellate review, the question to be decided is whether the trial court exercised sound judicial discretion to ascertain that there was a manifest necessity for the declaration of the mistrial. *State v. Sedillo*, 1975-NMCA-089, 88 N.M. 240, 539 P.2d 630.

Basis of manifest necessity. — The court of appeals would decline to hold there was a manifest necessity for a mistrial based on the state's supposedly prejudiced right to appeal when no appeal was attempted. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Ends of public justice. — In determining whether a mistrial should be declared, the trial court must consider whether the ends of public justice would be defeated by carrying the first trial to a final verdict; this consideration for the ends of public justice is a concept separate from manifest necessity. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Prejudice to state. — The failure of defendant to file a timely motion to suppress his statement resulted in prejudice to the state, and since in such circumstances it would be contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Need for responsible professional conduct. — In considering whether a mistrial was proper unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process. *State v. Aragon*, 1976-NMCA-018, 89 N.M. 91, 547 P.2d 574, cert. denied, 89 N.M. 206, 549 P.2d 284, *overruled by State v. Rickerson*, 1981-NMSC-036, 95 N.M. 666, 625 P.2d 1183.

Further interests of defendant. — In determining whether a defendant's retrial will place him in double jeopardy after a prior trial has ended with a declaration of a mistrial not at defendant's request include defendant's interest in having his fate determined by the jury first impaneled, which encompasses not only his right to have his trial completed by a particular panel, but also his interest in ending the dispute then and there with an acquittal, which factor would weigh heavily against retrial in all situations where jeopardy has attached, and also the factor of avoiding giving the state a second bite of the apple in order to either strengthen its case or to alter its trial strategy to obtain a conviction. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

Discretion of trial court. — The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; they are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances, which would render it proper to interfere, but the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

Upon appellate review of the declaration of a mistrial the question is whether the trial court exercised a sound discretion to ascertain that there was a manifest necessity for a mistrial. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

Mistrial on abuse of discretion. — Where, after the second day of a trial, when jury instructions had already been settled, one of the jurors was frightened by a telephone call unrelated to the trial, and exploring her possible bias for use on voir dire in a future case, and the record did not show that the juror's fear involved either the state or the defendant, the trial court failed to exercise that sound discretion required of him in determining whether a manifest necessity or proper judicial administration mandated a mistrial. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

Duty of court before declaring mistrial. — Where there is no manifest necessity for declaring a mistrial, the trial court has some duty to inquire as to possible alternatives thereto; affecting the scope of inquiry required are the factors of magnitude of prejudice and the point at which the proceedings are terminated, and as the magnitude of possible prejudice increases, less effort need be expended in seeking alternative resolutions, while conversely, as the length of trial wears on, more effort should be expended. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71.

Failure to oppose mistrial. — Defense counsel's silence after declaration of a mistrial by the trial court, sua sponte, where simultaneously the defense attorney himself had been held in contempt for implicitly challenging a police officer on recross-examination to take a polygraph test, could not, under the circumstances, be construed as an intentional relinquishment of a known right, the right against double jeopardy, or as the mere play of wits of the sharp practitioner. *State v. Sedillo*, 1975-NMCA-089, 88 N.M. 240, 539 P.2d 630.

Retrial after mistrial. — Two considerations must be balanced against the weighty interests of the defendant against retrial after declaration of a mistrial not at his request, namely, whether there was a manifest necessity for the discharge of the first jury, and also whether the ends of public justice would have been defeated by carrying the first trial to final verdict. When the irregularity occurring at trial is of a procedural nature, not rising to the level of jurisdictional error, the necessity to discharge the jury has been held to be not manifest, but where the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury. *State v. C. De Baca*, 1975-NMCA-120, 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71. A retrial after a mistrial is not barred by double jeopardy unless the mistrial was caused by prosecutorial overreaching. *State v. Mazurek*, 1975-NMCA-066, 88 N.M. 56, 537 P.2d 51.

Retrial prohibited for prosecutorial misconduct. — Retrial is barred when improper official conduct is so unfairly prejudicial that it cannot be cured by means short of a mistrial or a motion for a new trial, and the official knows that the conduct is improper and prejudicial and the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal. *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

Prosecutorial misconduct not bar to retrial. — Double jeopardy did not bar reprosecution where a mistrial was declared on motion of defendants for the prosecutor's discovery abuses because the defendants failed to show why any prejudice resulting from the prosecutor's late disclosure could not have been cured by a remedy short of a mistrial. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823.

To bar a retrial on double jeopardy grounds, the misconduct must be extraordinary. — Where defendant was charged with multiple crimes following a two-vehicle collision, including homicide by vehicle, great bodily harm by vehicle, driving under the influence of intoxicating liquor or drugs, and reckless driving, and where, prior to trial, the district court judge specifically excluded by motion in limine hearsay testimony that defendant had confessed to another officer about being behind the wheel at the time of the accident, and where, at trial, the officer failed to adhere to the court's admonishment, double jeopardy did not bar a retrial where it was the state's witness, not the prosecutor, that injected the precluded testimony into the trial, and where there was no evidence that the prosecutor intentionally elicited testimony about the purported confession that had been suppressed. *State v. Hernandez*, 2017-NMCA-020, cert. denied.

Mistrial on one of two separate charges. — Since the defendant was charged with attempted murder and aggravated battery and was convicted of aggravated battery, and since the two offenses were in separate counts and the jury was not instructed that it could convict on only one offense, its inability to return a verdict on the attempted murder charge was not an implicit acquittal and the state was not barred from pursuing an attempted murder charge on remand. *State v. Martinez*, 1995-NMSC-064, 120 N.M. 677, 905 P.2d 715.

Reprosecution after unnecessary mistrial. — Defense counsel's implicit challenge to a police officer to take a polygraph test, absent repeated misconduct, was not a type of misconduct that would go to the very vitals of the trial itself, and hence, where the trial judge sua sponte declared a mistrial, having made no effort to cure the error or to assure that there was manifest necessity for such a step, reprosecution of the defendant would violate his right under the U.S. Const., amend. V not to be put in jeopardy twice for the same offense. *State v. Sedillo*, 1975-NMCA-089, 88 N.M. 240, 539 P.2d 630.

IV. RAISING THE DEFENSE.

Estoppel. — An accused is estopped at a second trial to plead the bar of a prior conviction, judgment and sentence of which have been reversed on appeal. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768.

Factual basis must appear in record in order to support a double jeopardy defense. *State v. Wood*, 1994-NMCA-060, 117 N.M. 682, 875 P.2d 1113, cert. denied, 117 N.M. 744, 877 P.2d 44.

Defendants could raise their state-based double jeopardy claim for the first time on appeal, provided the factual basis for the state constitutional argument could be found in the record of proceedings below. *State v. Lucero*, 1999-NMCA-102, 127 N.M. 672, 986 P.2d 468, cert. denied, 128 N.M. 149, 990 P.2d 823.

Raising issue on appeal despite failure to object below. — Even though defendant made no objection at second trial (held after remand of initial trial which had resulted in verdict of first degree murder with recommendation of clemency) to instruction that the jury could find defendant guilty of murder in the first degree and might or might not recommend clemency, the question of whether this constituted double jeopardy could nevertheless be raised on appeal. *State v. Sneed*, 1967-NMSC-272, 78 N.M. 615, 435 P.2d 768.

Defendant's argument that the state split one criminal defense into five separate prosecutions and that his convictions were not authorized by the legislature under the statute prohibiting the unauthorized practice of law amounted to a defense of double jeopardy which the defendant could raise for the first time on appeal. *State v. Edwards*, 1984-NMCA-070, 102 N.M. 413, 696 P.2d 1006, cert. quashed, 102 N.M. 412, 696 P.2d 1005 (1985).

The defense of double jeopardy may be raised on appeal even though the defendant failed to argue that issue in the court below. *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656; *State v. Jensen*, 1998-NMCA-034, 124 N.M. 726, 955 P.2d 195.

Defendant may raise a double jeopardy challenge on appeal regardless of preservation. *State v. Rodriguez*, 2004-NMCA-125, 136 N.M. 494, 100 P.3d 200, cert. granted, 2004-NMCERT-010, 136 N.M. 542, 101 P.3d 808, *rev'd*, 2006-NMSC-018, 139 N.M. 450, 134 P.3d 737.

Guilty plea not bar to raising issue on appeal. — The defendant was not barred by pleading guilty to two counts in a three count indictment, which contained identical language for all three counts including the name of the victim, from raising the double jeopardy claim on appeal. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

Law of case doctrine not bar. — When a trial court's decision that double jeopardy barred reprosecution of defendant was reversed by the court of appeals, the law of the case doctrine did not bar consideration of the double jeopardy issue on appeal of the defendant's conviction at the second trial. *State v. Breit*, 1996-NMSC-067, 122 N.M. 655, 930 P.2d 792.

Waiver of defense. — Plea of former jeopardy must be interposed at the earliest opportunity, otherwise it is waived; it cannot be raised for first time after verdict. *State v. Mares*, 1921-NMSC-048, 27 N.M. 212, 199 P. 111 (decided under prior law).

Law reviews. — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

For note, "Criminal Procedure – Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For student article, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico – State v. Santillanes," see 32 N.M.L. Rev. 313 (2002).

For note and comment, "Adding Charges on Retrial: Double Jeopardy, Interstitialism and State v. Lynch," see 34 N.M.L. Rev. 539 (2004).

For note and comment, "complying With Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy After State v. Esparza," see 34 N.M.L. Rev. 516 (2004).

For article, "Developing a State Constitutional Law Strategy in New Mexico Criminal Prosecutions," see 39 N.M.L. Rev. 407 (2009).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 243 to 320.

Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial, 4 A.L.R. 1266.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Conspiracy: conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Lesser offense: conviction of lesser offense as bar to prosecution for greater on new trial, 61 A.L.R.2d 1141.

Appeal: conviction from which appeal is pending as bar to another prosecution for same offense under rule against double jeopardy, 61 A.L.R.2d 1224.

Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 A.L.R.2d 683.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense, 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy, 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 834.

Increased punishment: propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Larceny: single or separate larceny predicated upon stealing property from different owners at the same time, 37 A.L.R.3d 1407.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 A.L.R.3d 997.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts, 6 A.L.R.4th 802.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction, 15 A.L.R.4th 1127.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 A.L.R.5th 283.

Double jeopardy considerations in federal criminal cases - supreme court cases, 162 A.L.R. Fed. 415.

22 C.J.S. Criminal Law §§ 208 to 276.

30-1-11. Criminal sentence permitted only upon conviction.

No person indicted or charged by information or complaint of any crime shall be sentenced therefor, unless he has been legally convicted of the crime in a court having competent jurisdiction of the cause and of the person. No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court; or upon the defendant's confession of guilt or a plea of nolo contendere, accepted and recorded in open court; or after trial to the court without jury and the finding by the court that such defendant is guilty of the crime for which he is charged.

History: 1953 Comp., § 40A-1-11, enacted by Laws 1963, ch. 303, § 1-11.

ANNOTATIONS

Cross references. — For constitutional right to trial by jury, *see* N.M. Const., art. II, §§ 12 and 14.

For arraignment and plea procedure, *see* Rules 5-303 and 5-304 NMRA.

For right to jury trial, and waiver of same, *see* Rule 5-605 NMRA.

Conviction refers to finding of guilt and does not include imposition of sentence. *State v. Garcia*, 1983-NMCA-017, 99 N.M. 466, 659 P.2d 918.

To justify conviction evidence must establish every essential element of the offense charged, and whatever is essential must affirmatively appear from the record. *State v. Losolla*, 1972-NMCA-085, 84 N.M. 151, 500 P.2d 436.

Guilty pleas authorized. — The power of a court to accept a plea of guilty is traditional and fundamental and specifically authorized by this section. *State v. Daniels*, 1968-NMSC-039, 78 N.M. 768, 438 P.2d 512.

Waiver of jury permissible. — Though charged with a felony, a defendant may waive a trial by jury. *State v. Hernandez*, 1942-NMSC-010, 46 N.M. 134, 123 P.2d 387.

Guilty plea as waiver of rights, defenses. — By pleading guilty the defendant admitted the acts well pleaded in the charge, waived all defenses other than that the indictment or information charges no offense, and waived the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty

plea and right to remain silent. *State v. Daniels*, 1968-NMSC-039, 78 N.M. 768, 438 P.2d 512.

Withdrawal of guilty plea appropriate where defendant was not properly advised of the nature of the charges. — Where the state filed three criminal informations against defendant, each of which charged defendant with fraud and embezzlement against separate victims, and where defendant and the state entered into plea agreements under which defendant agreed to plead guilty to the fraud and embezzlement charges in all three cases, and where, during the change of plea hearing, defendant stated that he understood the charges to which he was pleading and acknowledged that the state had some evidence to prove his guilt of all the charges in all three cases, and where, following the district court's acceptance of the guilty pleas in all three cases and sentencing defendant to twenty-one years imprisonment, defendant moved to withdraw his guilty plea, claiming that he did not understand the basis for his fraud and embezzlement convictions, the trial court erred in denying defendant's motion to withdraw his guilty plea, because defendant did not knowingly and voluntarily plead guilty. The district court accepted defendant's guilty pleas without providing him with any explanation of the charges to which he pleaded guilty, much less an explanation of how his conduct in each case satisfied the essential elements of both fraud and embezzlement, which under the circumstances of this case were mutually exclusive because the same conduct cannot satisfy the essential elements of both fraud and embezzlement. *State v. Yancey*, 2021-NMCA-009, cert. denied.

Judgment and sentence entered pursuant to a plea agreement is void in the absence of an express guilty plea on the record. — Where defendant was charged with three counts of fraud, three counts of embezzlement and two counts of racketeering in three separate criminal complaints, and where defendant made a separate plea agreement in each case, and where at the plea hearing on all three complaints, the district court complied with the prerequisites set forth in Rules 5-303 and 5-304 NMRA, ensuring that the proposed guilty plea was voluntary and intelligent, but where the district court never specifically asked defendant to plead, and defendant never expressly admitted his guilt to anything in open court on the record in the hearing, the district court was without authority to sentence defendant, because in the absence of an express guilty plea on the record, a judgment and sentence that is entered pursuant to the plea agreement is void. *State v. Yancey*, 2017-NMCA-090, cert. granted.

Guilty plea as confession to charge. — Where appellant admittedly incriminated himself by his plea of guilty, he could not be heard to complain since by his plea he confessed the charge contained in the information. *State v. Daniels*, 1968-NMSC-039, 78 N.M. 768, 438 P.2d 512.

Express adjudication of conviction or finding of guilt is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. *State v. Gallegos*, 1978-NMCA-114, 92 N.M. 370, 588 P.2d 1045, cert. denied, 92 N.M. 353, 588 P.2d 554.

Safeguards in admitting confession. — Before a confession may be admitted into evidence it should first be determined by the court, on an inquiry out of the presence of the jury, and as a preliminary matter, that the confession, prima facie at least, possesses all the earmarks of voluntariness. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

State must overcome evidence of excuse or justification in the form of tangible affirmative defensive or factual matter capable of specific disproof included in a confession or admission. *State v. Casaus*, 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

Defendant to be heard on integrity of confession. — Any time a defendant makes it known that he has something to say touching the integrity of a confession claimed to have been made by him, however incredible it may appear to the trial court, the judge must hear him. In declining to do so, the court committed reversible error. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

Plea of nolo contendere with deferred sentence. — Where defendant entered a plea of nolo contendere, which was accepted and defendant's counsel after conferring with defendant made an explanation to the court about defendant feeling sorry for what he had done, there can be no real doubt from what was said and recorded at the arraignment proceedings, from the entry of the "judgment and sentence," and from the entry of the "order of probation" that the court and defendant both understood that defendant's plea had been accepted, that defendant had been adjudged guilty of the charge on the basis of this plea, that his sentence for the offense was being deferred and that he was being placed on probation for two years upon certain expressly recited conditions. *State v. Apodaca*, 1969-NMCA-020, 80 N.M. 155, 452 P.2d 489.

Procedural irregularities not constitutionally significant. — Where defendant's attorney pleaded guilty for the defendant, who was present, after plea bargaining, the fact that the defendant himself did not enter the plea, that the court did not inquire whether the plea was made voluntarily and that the plea was not accepted and recorded in open court, as required by this section, did not deprive defendant of due process or raise any constitutional questions for federal habeas corpus review. *Anaya v. Rodriguez*, 372 F.2d 683 (10th Cir.), cert. denied, 389 U.S. 863, 88 S. Ct. 123, 19 L. Ed. 2d 133 (1967).

Misuse of word in verdict not jurisdictional. — Since the trial court unquestionably had jurisdiction over the person of defendant and over the subject matter of the offense charged, the inadvertent use of the word "information" in the jury's verdict did not raise a jurisdictional question. *State v. Ortega*, 1968-NMCA-097, 79 N.M. 744, 449 P.2d 346.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 525.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

24 C.J.S. Criminal Law §§ 1458, 1480, 1481.

30-1-12. Definitions.

As used in the Criminal Code:

A. "great bodily harm" means an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body;

B. "deadly weapon" means any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted;

C. "peace officer" means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes;

D. "another" or "other" means any other human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

E. "person" means any human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

F. "anything of value" means any conceivable thing of the slightest value, tangible or intangible, movable or immovable, corporeal or incorporeal, public or private. The term is not necessarily synonymous with the traditional legal term "property";

G. "official proceeding" means a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or depositions in any proceeding;

H. "lawful custody or confinement" means the holding of any person pursuant to lawful authority, including, without limitation, actual or conseructive [constructive] custody of prisoners temporarily outside a penal institution, reformatory, jail, prison farm or ranch;

I. "public officer" means any elected or appointed officer of the state or any of its political subdivisions, and whether or not he receives remuneration for his services; and

J. "public employee" means any person receiving remuneration for regular services rendered to the state or any of its political subdivisions.

History: 1953 Comp., § 40A-1-13, enacted by Laws 1963, ch. 303, § 1-13.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Furlough as "lawful custody or confinement". — Where, after defendant began serving a sentence for driving under the influence of intoxicating liquor or drugs, the metropolitan court released defendant on furlough and the furlough order imposed limitations on defendant's movement, required defendant to return to custody at the end of the furlough period, and informed defendant that failure to return would result in a charge of escape, Defendant continued to serve the sentence while on furlough because defendant was in "lawful custody or confinement" while on furlough and defendant was entitled to credit for the time defendant was on furlough. *State v. Padilla*, 2011-NMCA-029, 150 N.M. 344, 258 P.3d 1136.

Great bodily harm: evidence that injury has actually caused death may be used to demonstrate the element of great bodily harm because, consistent with Subsection A of this section, it establishes an injury that creates a high probability of death. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Great bodily harm: death not equated with great bodily harm.— Comparing the voluntary manslaughter statute with the shooting at or from a motor vehicle statute and the statutory definition of great bodily harm in Subsection A of Section 30-1-12 NMSA 1978, it is clear that the legislature does not "equate" death with great bodily harm. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Great bodily harm: construction with other laws. — Section 30-3-8A NMSA 1978, construed with the definition of "great bodily harm" in Subsection A, includes a shooting at a dwelling that results in death. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

Great bodily harm: protracted impairment. — Section 66-8-101B NMSA 1978, which defines great bodily injury by a motor vehicle as "the injuring of a human being, to the extent defined in Section 30-1-12 NMSA 1978, in the unlawful operation of a motor vehicle," is not unconstitutionally vague. The term "protracted impairment" in Section 30-1-12A NMSA 1978 is capable of reasonable application by a jury of common intelligence after consideration of the circumstances involved. *State v. Jim*, 1988-NMCA-092, 107 N.M. 779, 765 P.2d 195, cert. denied, 107 N.M. 720, 764 P.2d 491.

Great bodily harm: serious disfigurement. — Under this section, the word "disfigurement" has no technical meaning and should be considered in the ordinary sense, as should the word "serious." *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

Great bodily harm: high probability of death. — Sheriff's description of being choked by defendant was evidence that the choking created a "high probability of death", which is one part of the definition of great bodily harm. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

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

Great bodily harm: mayhem. — The legislature adopted the definition in Subsection A of Section 30-1-12 NMSA 1978 in an effort to cover, among others, the crime of mayhem, originally enacted in 1853 to 1854 and compiled as former 40-30-1, 1953 Comp. *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

Great bodily harm: establishing. — The conditions in Subsection A of Section 30-1-12 NMSA 1978 are not cumulative, and only one need be shown in order to establish "great bodily harm". *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

Great bodily harm does not require that disfigurement be permanent. *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

Great bodily harm: need not be proved solely by medical experts. — Furthermore, the law does not require that "great bodily harm" be proved exclusively by medical testimony. The jury is entitled to rely upon rational inferences deducible from the evidence. *State v. Bell*, 1977-NMSC-013, 90 N.M. 134, 560 P.2d 925.

Great bodily harm: degree of bodily harm a question of fact. — Where the evidence showed that defendants forcibly tattooed victim with a needle and India ink, which tattoo extended from the back of the victim's neck to the center part of the waist and recited an offensive sentence, it became a question of fact as to whether or not the injuries sustained were sufficiently substantial to come within the statutory definition of "great bodily harm". *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

Great bodily harm: instruction on personal injury. — In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at Section 30-9-10C (now D) NMSA 1978, and also gave the statutory definition of great bodily harm in Subsection A of this section in the instruction on first degree criminal sexual penetration, the lack of additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect, and since he did not do so, he could not complain of the lack of additional definition of the term. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Deadly weapon: knife. — For a knife to be a deadly weapon it must come within the portion of this statute as to any other deadly weapons with which dangerous wounds can be inflicted. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

Deadly weapon: butterfly knife. — Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. There was sufficient evidence that the knife carried by defendant was a switchblade as defined in Section 30-7-8 NMSA 1978. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Deadly weapon: wounds establishing deadliness of knife. — Where no one directly testified the knife was one with which dangerous wounds could be inflicted, but the wounds were described by the physician who treated the victim, and they were sufficiently severe to keep him in a hospital under the doctor's care for a week, and in addition, the scars caused by the knife wounds were shown to the jury, in view of the depth and the length of the wounds the jury was fully justified in finding the knife used was a deadly weapon, although the blade used was only about two inches in length. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

Deadly weapon: other deadly weapons. — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of Section 30-1-12B NMSA 1978, the jury must be instructed: (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

Deadly weapon: tire iron. — Defendant's use of a tire iron to break into a house fell under the definition that defendant was "armed" with a weapon under this section. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286, *rev'd on other grounds*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

Deadly weapon: bullets not deadly weapon. — Defendant’s mere possession of bullets did not constitute possession of a deadly weapon under Subsection B of this section. *State v. Galaz*, 2003-NMCA-076, 133 N.M. 794, 70 P.3d 784.

Deadly weapon: jury to determine character of weapon. — The question of whether a weapon is capable of producing death or great bodily harm or is a weapon with which dangerous wounds can be inflicted is ordinarily for the jury who are to determine the question by considering the character of the instrument and the manner of its use, either by a description thereof (even though the weapon is not in evidence), or by viewing the weapon admitted into evidence (even though it is not described). *State v. Gonzales*, 1973-NMCA-153, 85 N.M. 780, 517 P.2d 1306.

Deadly weapon: factual considerations. — Factors to be considered in determining whether an instrument is a deadly weapon include the nature of the instrument, that is, its size, shape, condition and possible alteration; the circumstances under which it is carried, that is, the time, place and situation in which defendant is found with the instrument; defendant's actions with regard to the instrument; and the place of concealment. *State v. Blea*, 1983-NMCA-089, 100 N.M. 237, 668 P.2d 1114.

Deadly weapon: screwdriver. — Although the screwdriver was not introduced into evidence, the jury could determine the factual question of whether a deadly weapon was used by a description of the weapon and its use. *State v. Candelaria*, 1981-NMCA-122, 97 N.M. 64, 636 P.2d 883.

Deadly weapon: brick wall. — Determination of whether a brick wall is a deadly weapon is a question of fact for the jury or fact finder to determine, given the evidence presented as to the manner and use of the wall. *State v. Montano*, 1999-NMCA-023, 126 N.M. 609, 973 P.2d 861, cert. denied, 126 N.M. 533, 972 P.2d 352, and cert. denied, 127 N.M. 390, 981 P.2d 1208 .

Deadly weapon: baseball bat. — In a prosecution for aggravated battery with a deadly weapon, the question of whether a baseball bat was a deadly weapon should have been left to the jury; however, when such a determination is made by the trial judge, the error is not fundamental and must be preserved for appeal. *State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Deadly weapon: jury to determine existence of weapon. — Whether defendant actually had gun, defined in this section as a deadly weapon, whether loaded or unloaded, in her hand as testified to by robbery victim was for the jury to resolve. *State v. Encee*, 1968-NMCA-012, 79 N.M. 23, 439 P.2d 240.

Deadly weapon: insufficient evidence to show deadly character of weapon. — Evidence that defendant raised an undescribed tire tool over attendant's head "like a threat," without more, was insufficient for a determination that the tire tool was a deadly weapon capable of producing death or great bodily harm or a weapon with which dangerous wounds could be inflicted. *State v. Gonzales*, 1973-NMCA-153, 85 N.M. 780, 517 P.2d 1306.

Deadly weapon: pocketknife. — An ordinary pocketknife is not a per se deadly weapon, without regard to its actual or intended use. *State v. Nick R*., 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868.

Deadly weapon: BB gun. — The defendant's use of a BB gun during a robbery provided a sufficient factual basis to permit a jury to determine that a deadly weapon had been used because the jury could have concluded that the manner and character of use of the weapon satisfied the definition of a deadly weapon. *State v. Fernandez*, 2007-NMCA-091, 142 N.M. 231, 164 P.3d 112.

Deadly weapon: the human mouth is a deadly weapon if the mouth is used in a manner that could cause death or great bodily harm. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

Peace officer: Subsection C inapplicable to capital felony sentencing. — The definition of "peace officer" in Subsection C of this section is not directly applicable to Section 31-20A-5 NMSA 1978 because that definition applies only to the Criminal Code. *State v. Young*, 2004-NMSC-015, 135 N.M. 458, 90 P.3d 477.

Peace officer: legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

Peace officer: juvenile correctional officers were not peace officers within the meaning of this section, where, although they may have had the power to maintain order and make arrests in their particular domain, they were not vested by law with a duty to do so. *State v. Tabaha*, 1986-NMCA-009, 103 N.M. 789, 714 P.2d 1010.

Public officer: officers of state game commission are state officers. *Allen v. McClellan*, 1967-NMSC-114, 77 N.M. 801, 427 P.2d 677, *overruled on other grounds by New Mexico Livestock Bd. v. Dose*, 1980-NMSC-022, 94 N.M. 68, 607 P.2d 606.

Peace officer: CSO. — Community service officers are peace officers. *State v. Ogden*, 1994-NMSC-029, 118 N.M. 234, 880 P.2d 845.

Person: MFA. — The mortgage finance authority, a state agency established to raise funds through the issuance of tax-exempt bonds is a person within the meaning of the victim restitution statute. *State v. Griffin*, 1983-NMCA-072, 100 N.M. 75, 665 P.2d 1166

Person: corporate defendant. — Although a corporate defendant may be charged and convicted of the offense of racketeering, it was error to submit the racketeering charge against the corporate defendant to the jury because the corporate defendant was not specifically charged with commission of such crime in the indictment. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592; cert. denied, 109 N.M. 232, 784 P.2d 419.

Lawful custody: electronic monitor. — The use of a conventional jail to hold the person is not necessary for there to be a "lawful custody or confinement" under the plain language of the statute. A "lawful custody or confinement" simply consists of the holding of any person pursuant to lawful authority", and the actual means used to accomplish holding the person is without limitation. A mandatory sentence or imprisonment may be served under house arrest by an electronic monitor. *State v. Woods*, 2010-NMCA-017, 148 N.M. 89, 230 P.3d 836, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Special deputy. — Absent a limitation of authority a special deputy is a peace officer and is cloaked with all of the powers and duties of such. 1966 Op. Att'y Gen. No. 66-92.

School security force. — Use of the term "peace officer" in describing security officers who were regular employees of the school system organized into a security and patrol force to guard school buildings and property would be improper. 1970 Op. Att'y Gen. No. 70-87 (unofficial opinion issued to superintendent of Albuquerque public schools).

Law reviews. — For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For note and comment, "Criminal Law — Home Alone: Why House Arrest Doesn't Qualify for Presentence Confinement Credit in New Mexico — State v. Fellhauer," see 28 N.M.L. Rev. 519 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

30-1-13. Accessory.

A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code [Chapter 32A NMSA 1978].

History: 1953 Comp., § 40A-1-14, enacted by Laws 1963, ch. 303, § 1-14; 1972, ch. 97, § 66.

ANNOTATIONS

Aiding and abetting and conspiracy are distinct and separate concepts. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Accessory is one who "procures" commission of a crime. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Meaning of terms. — The word "crime," as used in the statute, means the principal offense, as in this case "armed robbery," and the term "as an accessory" is merely describing in different terms one who aids and abets in the commission of the crime, and authorizes such person to be charged with and convicted of the crime. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Abolition of distinction between principal and accessory places defendant on notice that he or she could be charged as a principal and convicted as an accessory or vice versa. *State v. Wall*, 1980-NMSC-034, 94 N.M. 169, 608 P.2d 145.

Aiding and abetting not distinct offense. — There is nothing in this section indicating an intent to make one who aids and abets in the commission of a crime a separate offense distinct and different from the crime committed by the one actually perpetrating it, and the purpose of the legislature to authorize charging and convicting an accessory as a principal is made evident by the fact that no different penalty is provided by law for one who aids and abets. Hence, this section is to be read as though the words "as an accessory" were omitted. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Distinctions abolished. — The distinction between an accessory before the fact and a principal was abolished in this state so that every person concerned in the commission may be prosecuted, tried and punished as a principal. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Earned Meritorious Deductions Act. — Accessory liability is merely a different theory of liability, but is not a distinct offense. Accessories are therefore not convicted of a separate crime, but of the crime itself. Where defendant was convicted for violating Section 30-3-8 NMSA 1978 as an accessory to the crime, his sentence may be a serious violent offense under the Earned Meritorious Deductions Act as enumerated in Section 33-2-34L(4)(j) NMSA 1978. The fact that he pleaded guilty as an accessory and not a principal is irrelevant for purposes of the act. *State v. Flores*, 2005-NMCA-092, 138 N.M. 61, 116 P.3d 852.

Accessory charged as principal. — New Mexico, like many other states, long ago abolished the distinction between conviction as a principal and an accessory, so that the charge as principal includes a corresponding accessory charge. An indictment need only allege the offense, not necessarily charge the defendant as accessory. *Tapia v. Tansy*, 926 F.2d 1554, 1562 (10th Cir. 1991).

Charging accessory as principal. — An accessory may be charged and convicted as a principal. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

Accused may be indicted as principal even though at common law it would have been necessary to charge him as an accessory. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Although charged with disturbing meeting, defendants could be convicted of aiding and abetting that disturbance. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

The contention that defendant could not be charged as a principal and convicted on the basis of being an accomplice is answered by this section. *State v. Smith*, 1976-NMCA-048, 89 N.M. 777, 558 P.2d 46, *rev'd on other grounds*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Effect of rule. — Rule 5(d), N.M.R. Crim. P. (*now see* Paragraph D of Rule 5-201), which requires that the indictment allege "essential facts constituting the offense," does not change the procedure authorized by this section, since "the offense," as used in Rule 5(d), N.M.R. Crim. P., means the principal offense; thus, defendant was not required to be charged as an accessory and indictment was sufficient where the language contained therein informed defendant of the essential facts of the charge of armed robbery. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

Elements of accessory liability. — Accomplice liability requires that the defendant share the criminal intent of the principal. There must be community of purpose, partnership in the unlawful undertaking. Indicia of such criminal intent may be as broad and varied as are the means of communicating thought from one individual to another. Mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 117, 125 S.Ct. 1334, 161 L.Ed.2d 162 (2005)..

Intent. — The accessory must share the criminal intent of the principal. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075; *State v. Montes*, 2007-NMCA-083, 142 N.M. 221, 164 P.3d 102.

Intent of accomplice. — One who solicits an end, or aids or agrees to aid in its achievement, is an accomplice in whatever means may be fairly employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. But when a wholly different crime has been committed, thus involving conduct not within the objectives of the conscious accomplice, the accomplice is not liable for it. *Valdez v. Bravo*, 373 F.3d 1093 (10th Cir. 2004).

Criminal intent and purpose required. — Conviction could stand only if the record supported a conclusion that defendant shared the criminal intent and purpose of the principals, and mere presence without some outward manifestation of approval was insufficient. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62.

In order for an individual to be guilty as an aider and abettor, all that was necessary was that he share the criminal intent of defendant and that a community of purpose and partnership in the unlawful undertaking be present. *State v. Ortega*, 1966-NMSC-185, 77 N.M. 7, 419 P.2d 219; *State v. Luna*, 1979-NMCA-048, 92 N.M. 680, 594 P.2d 340.

Criminal intent a jury question. — The question of whether the alleged aider and abettor did share the principal's criminal intent, and whether he knew the latter acted with criminal intent is one of fact for the jury and may be inferred from circumstances. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

Intent may be inferred. — Where one defendant completed the crime of burglary by an unauthorized entry with the necessary intent and his partner knew this fact and was present and participated, the partner's intent, as an element of the crime, although not susceptible of proof by direct evidence, may be inferred from his acts. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

Specific intent required. — The "natural and probable result" standard does not apply to determine accessory liability; thus, a jury cannot convict a defendant on accessory liability for a crime unless the defendant intended the principal's acts. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Shooting at police car indicative of intent. — Defendant's theory that there is no evidence that he knew of the robbery until after its commission and thus could not have been an aider and abetter is invalid, as evidence of aiding and abetting is as broad and varied as are the means of communicating thought from one individual to another; shooting at the pursuing police car was evidence that defendant approved of the robbery and shared the robber's criminal intent. *State v. O'Dell*, 1973-NMCA-124, 85 N.M. 536, 514 P.2d 55.

While mere presence is insufficient, 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 is charged with care and welfare of child, he stands in position of parent and may be convicted on the basis that he failed to take reasonable steps to prevent the molestation, coupled with his friendship with perpetrator. *State v. Orosco*, 1991-NMCA-084, 113 N.M. 789, 833 P.2d 1155, *aff'd*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Manifestation of approval required. — Neither presence nor presence with mental approbation is sufficient to sustain a conviction as an aider or abettor. Presence must be accompanied by some outward manifestation or expression of approval. *State v.*

Phillips, 1971-NMCA-114, 83 N.M. 5, 487 P.2d 915; *State v. Luna*, 1979-NMCA-048, 92 N.M. 680, 594 P.2d 340.

Defendant's particular role not important. — Where the evidence as to which of the robbers took the change is sparse and conflicting, it does not matter that the evidence fails to establish, with any particularity, that defendant was the one who took the change as the jury was instructed on aiding and abetting and the evidence is substantial that defendant was at least an aider and abettor of the robbery of the change. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Foreseeability of result immaterial. — The fact that defendant did not bargain for the result is not material; the material fact is that he did "procure" another to perform an "unlawful act." *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Means of aiding and abetting varied. — 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 offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval. Mere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62; *State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609; *State v. Luna*, 1979-NMCA-048, 92 N.M. 680, 594 P.2d 340.

Accessory may be convicted regardless of principal's fate. — It was the obvious intent of the legislature to extend the statute then in force so as to permit an accessory to be prosecuted even though the one who directly committed the crime was either not prosecuted, had been acquitted, was a juvenile or had been convicted of a different crime or degree thereof. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Aider and abettor may be tried and convicted even though the actual slayer is never apprehended or has been tried and acquitted. *State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609.

Varying degrees of conviction permissible. — The fact that the accessory was convicted of involuntary manslaughter while the principal was convicted of voluntary manslaughter is a permissible result under the accessory statute. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Instruction on burden of proof. — Where trial court instructed on the presumption of innocence and the state's burden of proof, it was not improper to refuse defendant's proffered instruction that there was no presumption that defendant was an accessory and that he did not have burden of proving that he was not an accessory. *State v. Gunzelman*, 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54.

Evidence. — The evidence shows aiding and abetting if it shows that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known that commission of an offense already undertaken has the aider's support or approval. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

Evidence sufficient to go to jury. — Evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent can be reasonably inferred, was sufficient for the issue of aiding and abetting to be submitted to the jury and was also sufficient to submit the issue of disturbing a lawful assembly. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Jury may find defendant aided and abetted, but did not personally commit, crime. — That the jury could have refused to find that the defendant personally committed the crime in question is not alone a sufficient reasonable hypothesis that he did not aid and abet its commission. *State v. Ballinger*, 1983-NMCA-034, 99 N.M. 707, 663 P.2d 366, *rev'd on other grounds*, 1984-NMSC-003, 100 N.M. 583, 673 P.2d 1316.

Evidence sufficient. — Evidence was sufficient to support defendant's conviction as an accessory to armed robbery, where his confession, found to be voluntary, was corroborated by other evidence at trial. *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991).

Evidence that the defendant's role in the robbery of a store was to remain outside in the car with the engine running in order to facilitate a fast getaway after others committed the robbery was sufficient to support his convictions. *State v. Carrasco*, 1996-NMCA-114, 122 N.M. 554, 928 P.2d 939, *rev'd on other grounds*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Evidence is constitutionally sufficient to support a finding of accessory liability where the testimony viewed in the light most favorable to the prosecution establishes that accused and his companions went to victim’s mobile home with the intention of fighting; accused willingly drove to the mobile home in his own vehicle; accused broke through the front door with his four companions and attacked victim’s friend as he slept in a chair; accused fought victim’s friend outside the back door of the house while his four companions attacked victim; accused then reentered the mobile home and warned the others as the police arrived; and accused’s actions prevented victim’s friend from assisting victim who died from the attack. *Valdez v. Bravo*, 373 F.3d 1093 (10th Cir.), cert. denied, 543 U.S. 1008, 125 S. Ct. 622, 160 L. Ed.2d 473 (2004).

Sufficient evidence of intentional child abuse by torture. — Where a child victim testified that defendant, the child’s foster father, purchased a stun gun and gave it to his son, that the child was stunned by defendant’s son approximately fifteen times, was stunned by defendant’s other son approximately three times, that defendant was present during the assaults by one of the sons and would laugh in response, and where there was corroborating testimony from the child’s sister, a rational jury could have

found defendant guilty beyond a reasonable doubt as an accessory to child abuse inflicted by another. *State v. Vargas*, 2016-NMCA-038.

Evidence insufficient. — Where defendant was involved in an altercation between defendant's friend and the victim; the victim and defendant unexpectedly encountered each other later the same day; defendant went into a rage at seeing the victim and punched the victim who was seated in the victim's truck; the victim then shot defendant several times; defendant fell to the ground; the victim backed the victim's truck down the driveway; one of the victim's passengers started shooting a gun from the victim's truck; defendant's friends arrived at the scene of the shooting and began firing shots at the victim's truck, killing the victim; the jury acquitted defendant of the charge of shooting at a motor vehicle; and there was no evidence that defendant called for help to anyone after defendant was shot, that defendant summoned the defendant's friends who shot at the victim's truck, that defendant made any statement, that defendant took any action that indicated that defendant was aware that defendant's friends were in the vicinity, or that defendant had any communication with defendant's friends who shot at the victim's truck after the earlier altercation with the victim, the evidence was insufficient to support defendant's conviction for aiding and abetting the murder of the victim. *State v. Vigil*, 2010-NMSC-003, 147 N.M. 537, 226 P.3d 636.

Circumstantial evidence which was not incompatible with defendant's innocence nor incapable of explanation upon any reasonable hypothesis of same was insufficient to permit a finding that defendant aided a forger by procuring checks for her; there were too many other explanations to account for her possession of the checks. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

The fact that the defendant accompanied the forger of certain checks at the time that she cashed them was not sufficient to support a finding of aiding and abetting, for mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

Knowledge of the method of the crime and presence when the crime is committed are not required. — There is no legal requirement that an accessory know in advance the exact method by which a crime is to be carried out or even that the accessory be physically present when the crime is committed. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Sufficient evidence. — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; defendant chided a secondary co-conspirator for being nervous and smoked marijuana with co-conspirator to calm the co-conspirator's nerves; defendant did not object when the primary co-conspirator considered killing the victim and burning the victim's car, but defended a secondary co-conspirator against the primary co-conspirator's violence; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist

the victim or call the police; defendant demanded that the primary co-conspirator determine what to do with the victim before defendant's child returned from school; defendant left the residence to take the child to a store where, at the direction of the primary co-conspirator, defendant purchased charcoal lighter fluid; and while defendant remained at the residence with the child, defendant's co-conspirators put the victim in the trunk of the victim's car, drove the car to a school, doused the car with the lighter fluid, and burned the car, there was sufficient evidence to convict defendant of kidnapping, second-degree murder and aggravated arson, as an accessory, beyond a reasonable doubt. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "The Natural and Probable Consequences Doctrine Is Not a Natural Result for New Mexico - State v. Carrasco," see 28 N.M.L. Rev. 505 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 166, 167, 169 to 173.

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.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

22 C.J.S. Criminal Law §§ 132 to 139.

30-1-14. Venue.

All trials of crime shall be had in the county in which they were committed. In the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. In the event death results from the crime, trial may be had in the county in which any material element of the crime was committed, or in any county in which the death occurred. In the event that death occurs in this state as a result of criminal action in another state, trial may be had in the county in which the death occurred. In the event that death occurs in another state as a result of criminal action in this state, trial may be had in the county in which any material element of the crime was committed in this state.

History: 1953 Comp., § 40A-1-15, enacted by Laws 1963, ch. 303, § 1-15.

ANNOTATIONS

Cross references. — For rights of persons accused of crime, *see* N.M. Const., art. II, § 14.

For provisions on change of venue, *see* 38-3-3 to 38-3-7 NMSA 1978.

For venue in prosecution for violation of act regulating motion pictures, *see* 57-5-20 NMSA 1978.

I. GENERAL CONSIDERATION.

This section merely reiterates constitutional right of venue in N.M. Const., art. II, § 14. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

Continuing crime. — For purposes of a continuing crime, venue is proper in any county in which the continuing conduct has occurred. *State v. Roybal*, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

Venue. — Where police officer chased defendant, who was speeding, from Santa Fe county into Rio Arriba county where defendant was placed under arrest for an outstanding warrant and where police officer discovered drugs and drug paraphernalia during an inventory search of defendant's car, Santa Fe county venue was proper because trafficking by possession with intent to distribute is a continuing offense which occurred in each county through which defendant traveled while in possession of the drugs. *State v. Roybal*, 2006-NMCA-043, 139 N.M. 341, 132 P.3d 598, cert. denied, 2006-NMCERT-003, 139 N.M. 353, 132 P.3d 1039.

Meaning of "trial". — In its strict definition, the word "trial" in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict; and the term "trial" does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

"Material element of offense" of contempt. — The act of causing the service of a restraining order to be made in Eddy county constituted a material element of the alleged offense of criminal contempt and under those circumstances the venue properly laid in Eddy county. *Norton v. Reese*, 1966-NMSC-154, 76 N.M. 602, 417 P.2d 205.

Proper venue when elements of offense committed in different counties. — In the event elements of a crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. Interfering with or depriving a custodial parent of their right to custody is an essential element of the crime of custodial interference as are the methods for accomplishing the interference or deprivation. Because deprivation is an element, where the person was deprived of the

right of custody establishes a proper venue for the trial of the offense of custodial interference. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Where defendant violated an order of custody, issued by a Taos county district court, by depriving the father of the child of his right to custody, the father's right to custody exists with him in his county of residence, the county in which he was given custody, and the county in which he was deprived of the custody of his son. Under the custodial interference statute, 30-4-4 NMSA 1978, a person may be charged in the place where the harm sought to be prevented by the statute results, and therefore venue may lie in Taos county district court. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

II. NATURE OF VENUE.

Distinction between jurisdiction and venue. — Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Privilege personal to accused. — Venue provision of the constitution confers a personal privilege of venue upon an accused, and this privilege may be waived. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

Extent of constitutional venue provision. — The framers of the constitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury of the county wherein the crime is alleged to have occurred. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

Assertion of privilege. — A defendant may insist on personal right or privilege of venue, and the correctness of a venue decision is reviewable to determine whether defendant was tried in the proper county. *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

Change of venue effective in overcoming local bias and prejudice. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

III. PROOF.

Venue need not be proven beyond a reasonable doubt. *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

Affirmative proof of venue unnecessary. — It is not necessary in a trial for murder that venue be affirmatively proven. *Territory of N.M. v. Hicks*, 1892-NMSC-024, 6 N.M.

596, 30 P. 872, *overruled on other grounds by Haynes v. United States*, 1899-NMSC-003, 9 N.M. 519, 56 P. 282.

Venue may be proved by circumstantial evidence, and when there is nothing in the record to raise an inference to the contrary, slight circumstances are sufficient to prove venue by a preponderance of the evidence. *State v. Nelson*, 1959-NMSC-023, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115.

Venue, like any other fact in a case, may be proven by circumstantial evidence. *State v. Mares*, 1921-NMSC-048, 27 N.M. 212, 199 P. 111.

Venue proved by incidental evidence. — If evidence incidentally given in connection with facts in case shows that venue was properly laid, it is a sufficient proof of venue. *Territory of N.M. v. Hicks*, 1892-NMSC-024, 6 N.M. 596, 30 P. 872, *overruled on other grounds by Haynes v. United States*, 1899-NMSC-003, 9 N.M. 519, 56 P. 282.

Omission in indictment not fatal. — Trial of one charged with homicide may take place either where the mortal wound was inflicted or where the person died, and where prosecution was in county where the mortal wound was inflicted, an indictment omitting allegation of place of death was not fatally defective. *State v. Montes*, 1917-NMSC-026, 22 N.M. 530, 165 P. 797.

Credibility of venue testimony. — Attacks upon the credibility of the witnesses who testified concerning venue is a matter for the jury to decide. *State v. Garcia*, 1967-NMSC-140, 78 N.M. 136, 429 P.2d 334.

No instruction on venue is required, because so long as the crime occurred in New Mexico, the county of the crime is not necessary for jury determination. *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

Although prior to the adoption of U.J.I. Criminal the practice was to instruct on venue, this practice is discontinued therein, since venue is not jurisdictional, but is a personal right or privilege of the accused which may be waived. *State v. Wise*, 1967-NMSC-140, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

Instruction and finding sufficient. — Where a jury was specifically instructed that it must find, beyond a reasonable doubt, that the fatal blow and the death occurred in the county of the venue and this the jury did so find, any argument that the blow or the cause of death may have occurred elsewhere was of no consequence. *Nelson v. Cox*, 1960-NMSC-005, 66 N.M. 397, 349 P.2d 118; *State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied, 91 N.M. 4, 569 P.2d 414.

IV. WAIVER.

Venue provision confers personal privilege upon accused which may be waived. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

Venue unlike jurisdiction. — Venue does not affect the power of the court and can be waived, but a jurisdictional defect can never be waived because it goes to the very power of the court to entertain the action, and such a defect can be raised at any stage of the proceedings, even sua sponte by the appellate court. *State v. Ramirez*, 1976-NMCA-101, 89 N.M. 635, 556 P.2d 43, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Failure to object. — Right to trial in the county or district in which the offense is alleged to have been committed is waived by failure to make timely objection. *City of Roswell v. Gallegos*, 1966-NMSC-246, 77 N.M. 170, 420 P.2d 438.

Right to be tried in a certain county or district is a right or privilege to a particular venue which may be waived by an accused person in a number of ways, and when defendant goes to trial in another judicial district, without objection on his part, he has waived the privilege, and cannot be heard to say that the court trying him was without jurisdiction. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

Acquiescence in venue change. — Defendant who agreed to a change of venue waived any right he may have had to insist on a continuance of the case. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

Record of affirmative waiver unnecessary. — The record need not affirmatively show that the trial court fully informed defendant of his right of venue and of his privilege to waive this right, or was advised that defendant had been so fully informed, that defendant affirmatively waived this right or that the trial court announced its satisfaction as to the genuineness of this waiver. *State v. Lopez*, 1973-NMSC-041, 84 N.M. 805, 508 P.2d 1292.

V. SPECIFIC SITUATIONS.

Venue proper. — Where defendant signed checks in Bernalillo county to pay the wages of three members of an Indian tribe for performing work on a construction project that was located on Indian land in McKinley county; defendant gave the checks to an employee of defendant's construction company at a meeting place that was located outside McKinley county for delivery to the payees; the checks were delivered to the payees in McKinley county; the payees cashed the checks at a store that was located in McKinley county; and defendant's bank dishonored the checks for insufficient funds, venue was proper in McKinley county. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd on other grounds*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

Venue for violation of municipal ordinance must be laid in the municipality where the violation presumably occurred. *City of Roswell v. Gallegos*, 1966-NMSC-246, 77 N.M. 170, 420 P.2d 438.

Prosecution for embezzlement. — Venue in embezzlement is properly laid in the county where the possession becomes adverse to the owner. *Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583.

Murder trial in county of death. — In a trial for murder, the evidence that the person alleged to have been murdered died in county where venue was laid, is a sufficient proof of venue. *Territory of N.M. v. Hicks*, 1892-NMSC-024, 6 N.M. 596, 30 P. 872, *overruled on other grounds by Haynes v. United States*, 1899-NMSC-003, 9 N.M. 519, 56 P. 282.

Death in Texas after wounding in New Mexico. — Where decedent dies in Texas of wound inflicted in a county in New Mexico, defendant may be prosecuted in that New Mexico county. *Bourguet v. Atchison, Topeka & Santa Fe R.R*., 1958-NMSC-148, 65 N.M. 200, 334 P.2d 1107.

Although the deceased died in Texas, the blow was struck in Quay county, and hence venue was proper in that county. *State v. Justus*, 1959-NMSC-008, 65 N.M. 195, 334 P.2d 1104, cert. denied, 365 U.S. 828, 81 S. Ct. 714, 5 L. Ed. 2d 706 (1961).

Venue proper in New Mexico where theft occurred out of state. — A person who steals property outside New Mexico and brings the stolen property into this state may be prosecuted, convicted, and punished for larceny in New Mexico. *State v. Stephens*, 1990-NMCA-081, 110 N.M. 525, 797 P.2d 314, cert. denied, 110 N.M. 533, 797 P.2d 983.

Venue improper where offenses completed before reaching county. — Where the first six criminal sexual penetration offenses were completed before reaching Bernalillo county, trial in Bernalillo county as to those offenses was improper. *State v. Ramirez*, 1978-NMCA-102, 92 N.M. 206, 585 P.2d 651.

Absent prejudice venue provisions inapplicable to Rule 93 hearing. — Neither constitutional nor statutory provisions on venue apply to a hearing under Rule 93, N.M.R. Civ. P. (considering defendant's motion to vacate judgment and sentence against him, now withdrawn), because such a hearing is neither a criminal trial nor a criminal prosecution, but rather a civil proceeding. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law).

Since defendant had no right to be present at a hearing under Rule 93, N.M.R. Civ. P. (now withdrawn), a fortiori he had no right to be heard in a particular place, absent a showing of prejudice. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law).

Section is consistent with present constitutional and statutory provisions regarding the place of prosecution. 1979 Op. Att'y Gen. No. 79-12.

Right of venue is legal concept separate and distinct from territorial jurisdiction of magistrate, and a statute affecting one does not necessarily affect the other. 1979 Op. Att'y Gen. No. 79-12.

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. — 21 Am. Jur. 2d Criminal Law §§ 361 to 371.

Mail or telegraph, where offense of obtaining money by fraud through use of, is deemed to be committed, 43 A.L.R. 545.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed, 76 A.L.R. 1034.

Desertion: venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child, 44 A.L.R.2d 886.

Criminal conspiracies as to gambling, 91 A.L.R.2d 1148.

Venue: change of venue by state in criminal case, 46 A.L.R.3d 295.

Venue in homicide cases where crime is committed partly in one county and partly in another, 73 A.L.R.3d 907.

Venue: where is embezzlement committed for purposes of territorial jurisdiction or venue, 80 A.L.R.3d 514.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Venue in bribery cases where crime is committed partly in one county and partly in another, 11 A.L.R.4th 704.

Venue for currency reporting offense under Currency and Foreign Transactions Reporting Act (CFTRA) (31 USC § 5311 et seq.), 113 A.L.R. Fed. 639.

22 C.J.S. Criminal Law §§ 177 to 181.

30-1-15. Alleged victims of domestic abuse, stalking or sexual assault; forbearance of costs.

A. An alleged victim of an offense specified in Subsection B of this section is not required to bear the cost of:

(1) the prosecution of a misdemeanor or felony domestic violence offense, including costs associated with filing a criminal charge against an alleged perpetrator of the offense;

(2) the filing, issuance or service of a warrant;

(3) the filing, issuance or service of a witness subpoena; or

(4) the filing, issuance, registration or service of a protection order.

B. The provisions of Subsection A of this section apply to:

(1) alleged victims of domestic abuse as defined in Section 40-13-2 NMSA 1978;

(2) sexual offenses described in Sections 30-9-11 through 30-9-14 and 30-9-14.3 NMSA 1978;

(3) crimes against household members described in Sections 30-3-12 through 30-3-16 NMSA 1978;

(4) harassment, stalking and aggravated stalking described in Sections 30-3A-2 through 30-3A-3.1 NMSA 1978; and

(5) the violation of an order of protection that is issued pursuant to the Family Violence Protection Act [Chapter 40, Article 13 NMSA 1978] or entitled to full faith and credit.

History: Laws 2002, ch. 34, § 1; 2002, ch. 35, § 1; 2008, ch. 40, § 1.

ANNOTATIONS

Cross references. — For costs of criminal processes associated with domestic abuse offenses, *see* 40-13-3.1 NMSA 1978.

The 2008 amendment, effective July 1, 2008, provided for cost-free prosecution of a misdemeanor or felony domestic violence offense, filing of a warrant and a witness subpoena, and the filing and registration of a protection order.

30-1-16. Defense based on victim's gender, gender identity, gender expression or sexual orientation prohibited.

A. It shall not be a defense, justification or excuse in a criminal proceeding that the defendant's conduct was a reaction to the discovery of, knowledge about or potential disclosure of a victim's or witness's actual or perceived:

(1) gender;

(2) gender expression;

(3) gender identity; or

(4) sexual orientation.

B. It shall not be a defense, justification or excuse in a criminal proceeding that the defendant was romantically propositioned in a nonviolent or non-threatening manner by a person of the same gender or a person who is transgender.

C. Nothing in this section shall prevent a defendant from raising other recognized affirmative defense.

D. As used in this section:

(1) "gender expression" means the external appearance of a person's gender identity, often expressed through the person's behavior, physical appearance or voice, which expression may or may not conform to socially defined behaviors and characteristics typically associated with masculinity or femininity;

(2) "gender identity" means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth; and

(3) "sexual orientation" means heterosexuality, homosexuality or bisexuality, whether actual or perceived.

History: Laws 2022, ch. 56, § 52.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 56, § 52 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

ARTICLE 2
Homicide

30-2-1. Murder.

A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:

(1) by any kind of willful, deliberate and premeditated killing;

(2) in the commission of or attempt to commit any felony; or

(3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.

B. Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Murder in the second degree is a lesser included offense of the crime of murder in the first degree.

Whoever commits murder in the second degree is guilty of a second degree felony resulting in the death of a human being.

History: 1953 Comp., § 40A-2-1, enacted by Laws 1963, ch. 303, § 2-1; 1980, ch. 21, § 1; 1994, ch. 23, § 1.

ANNOTATIONS

Cross references. — For attempt to commit a felony, *see* 30-28-1 NMSA 1978.

For homicide by vehicle, *see* 66-8-101 NMSA 1978.

For homicide instructions, *see* UJI 14-201 NMRA et seq.

For instruction on the essential elements of felony murder, *see* UJI 14-202 NMRA.

The 1994 amendment, effective July 1, 1994, added "resulting in the death of a human being" at the end of the last paragraph of Subsection B.

Applicability. — Laws 1994, ch. 23, § 4 provided that the provisions of Laws 1994, ch. 23, § 1 apply only to persons sentenced for crimes committed on or after July 1, 1994.

I. GENERAL CONSIDERATION.

Depraved mind murder. — A number of elements must be considered in appraising whether a defendant has displayed the requisite depraved mind pursuant to Section 30-2-1A(3) NMSA 1978. Conviction requires that more than one person be endangered by the defendant’s act. The defendant’s act must be intentional and of an extremely

reckless character. The defendant must possess subjective knowledge that his act was "greatly dangerous to the lives of others". *State v. Dowling*, 2011-NMSC-016, 150 N.M. 110, 257 P.3d 930.

Courts have distinguished depraved mind murder by the number of persons exposed to danger by a defendant's extremely reckless behavior. In general, depraved mind murder convictions have been limited to acts that are dangerous to more than one person. In addition to the number of people endangered, courts have construed depraved mind murder as requiring proof that the defendant had "subjective knowledge" that his act was greatly dangerous to the lives of others. This requirement of subjective knowledge serves as proof that the accused "acted with 'a depraved mind' or 'wicked or malignant heart' and with utter disregard for human life". To further narrow the class of killings eligible for depraved mind murder, courts have concluded "that the legislature intended the offense of depraved mind murder to encompass an intensified malice or evil intent." In describing that intensified malice, courts have defined the phrase "depraved mind" used in the statute and uniform jury instructions as "[a] corrupt, perverted, or immoral state of mind constituting the highest grade of malice [that equates] with malice in the commonly understood sense of ill will, hatred, spite or evil intent". *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

Double jeopardy. — Felony murder has its own particular double jeopardy analysis. If the predicate felony and felony murder are unitary, then the predicate felony must be dismissed because it is subsumed within the elements of felony murder. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

Convictions of attempted murder and aggravated battery violated double jeopardy. — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant’s conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state’s theory of the case to support both charges was that defendant beat, stabbed, and slashed the victims; and the state offered the same testimony to prove both charges, the aggravated battery elements were subsumed within the attempted murder elements and defendant’s convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev’g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Intent. — "Deliberate intention" is defined as, 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. Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence. *State v. Sosa*, 2000-NMSC-036, 129 N.M. 767, 14 P.3d 32.

Corpus delicti. — In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another. The corpus delicti of a particular offense is established simply by proof that the crime was committed; the identity of the perpetrator is not material. *State v. Sosa*, 2000-NMSC-036, 129 N.M. 767, 14 P.3d 32.

Jury's specification of death penalty is not freakish, capricious, or arbitrary where defendant killed the victim in a particularly brutal fashion by striking her in the head three to five times with a sledgehammer and this occurred after the defendant kidnapped the victim by deception, chased her as she attempted to escape and stabbed her two inches deep in the chest with a knife when she struggled, and completely disrobed the victim in an attempt to rape her. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516 (decided under prior law).

Fair trial. — Where the prosecutor did no more than repeat what the judge had already said to the jury, that is, that the photographs of the victim contained more graphic material than the jurors were allowed to see, and relied on reasonable inferences from the medical investigator's testimony about the graphic nature of the wounds, the prosecutor did not introduce any new information to the jury, and viewing this isolated remark in context with the judge's comments to the jury, with the testimony of the medical investigator, and with the overwhelming evidence of guilt, the remark did not result in a verdict based on passion or prejudice or otherwise deprive defendant of a fair trial. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Constitutionality. — Because the statute and court decisions clearly indicate that the element of deliberation is what distinguishes first degree murder from second degree murder, and the distinction between first and second degree murder has been clearly enunciated by the supreme court, this section and former Section 30-2-2 NMSA 1978, relating to malice (now repealed), are not unconstitutional on the grounds that they make impossible an ascertainable distinction between first and second degree murder. *State v. Valenzuela*, 1976-NMSC-079, 90 N.M. 25, 559 P.2d 402.

New Mexico Const., art. IV, § 18, relating to the amendment of statutes, did not apply to 40-24-4, 1953 Comp., the former felony murder statute, which was enacted prior to adoption of the constitutional provision. *State v. Hines*, 1967-NMSC-237, 78 N.M. 471, 432 P.2d 827.

Open charge of murder gives defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Double jeopardy. — Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015,

128 N.M. 668, 997 P.2d 142, *aff'd in part*, *rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Element of intent is seldom susceptible to direct proof, since it involves the state of mind of the defendant, and it thus may be proved by circumstantial evidence. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

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

Sufficient evidence of depraved mind murder. — Where defendant drove a truck at approximately 80 miles per hour for approximately one mile on a four-lane suburban street during the middle of a weekday, striking and injuring a jogger on the street's raised median, then driving onto a sidewalk and striking and killing a second pedestrian; all the while speeding and weaving in and out of traffic, including into oncoming traffic, almost colliding with other vehicles, until defendant crossed all four lanes of the street and finally crashed into a boulder on the raised median, the evidence was sufficient to support defendant's conviction of depraved mind murder. *State v. Dowling*, 2011-NMSC-016, 150 N.M. 90, 257 P.3d 930.

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

For legislative history of term "human being" in definition of murder, as found throughout homicide statutes. *State v. Willis*, 1982-NMCA-151, 98 N.M. 771, 652 P.2d 1222.

Fair trial. — Defendant's right to fair trial was not violated when, in a prosecution for first degree murder, the state secured an instruction for the lesser included offense of second degree murder and then argued against this lesser included offense at closing, contending that the evidence could only support a first degree murder conviction. *State v. Armendarez*, 1992-NMSC-012, 113 N.M. 335, 825 P.2d 1245.

Cumulative punishment is precluded for shooting at a vehicle and homicide. — New Mexico jurisprudence precludes cumulative punishment for the offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M.

221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the Double Jeopardy Clause protected defendant from being punished both for the homicide of the victim and for shooting into a vehicle causing great bodily harm to the victim where both convictions were premised on the unitary act of shooting the victim. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Legislature intended to provide multiple punishments for the offenses of second degree murder and shooting into or from a vehicle. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

A consideration of second degree murder and shooting from a motor vehicle shows that the sections setting forth these crimes are designed to combat distinct evils, which provides further indicia of legislative intent confirming the presumption that the offenses are separately punishable. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Conviction of lesser offense only if supported by evidence. — No statute which purports to authorize an appellate court to sustain a conviction unsupported by the evidence may be approved, and accordingly Laws 1937, ch. 199, § 1 (not compiled), is invalid to the extent that it authorizes a conviction for a lesser included homicide offense when no evidence was contained in the record to prove the essentials of the elements of the offense of which the defendant stands convicted. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Unsupported conviction unconstitutional. — A conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

"Torture". — Murder by strangling and suffocation was not murder by "torture," which was conclusively made first degree murder by Laws 1907, ch. 36, § 1 (40-24-4, 1953

Comp.). *State v. Bentford*, 1935-NMSC-051, 39 N.M. 293, 46 P.2d 658 (decided under prior law).

Conviction of principal in second degree. — A principal in the second degree was guilty of crime the same as the principal in the first degree, and might be tried and convicted, even though the latter has been acquitted or convicted of a lesser degree of the offense. *State v. Martino*, 1920-NMSC-069, 27 N.M. 1, 192 P. 507.

Double jeopardy. — Defendant's convictions under two theories of first degree murder did not result in contradictory convictions in violation of due process and double jeopardy principles because the two crimes were not inherently or factually contradictory and the jury could have concluded that defendant was guilty under both alternatives, given the evidence. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Guilty verdicts for two alternative theories of first degree murder should be regarded, for sentencing purposes, as a general verdict of first degree murder based on the two theories, thereby avoiding multiple punishments. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Convictions of defendant for both second degree murder and intentional child abuse resulting in death violated his right not to be placed in double jeopardy. *State v. Mann*, 2000-NMCA-088, 129 N.M. 600, 11 P.3d 564, *aff'd*, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

Defendant's conviction for both shooting into an occupied motor vehicle under Section 30-3-8 NMSA 1978 and first degree murder under this section was not double jeopardy because the legislature intended to have separate punishments for similar conduct that can result in a violation of both statutes. *State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023.

There was no double jeopardy violation for convictions for second degree murder and shooting at or from a motor vehicle because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crime. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Conviction for shooting at a motor vehicle under Section 30-3-8B NMSA 1978 did not preclude the state from seeking a further conviction for first or second degree murder under this section. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Homicide charge not merged. — The homicide resulting from the great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

Aggravated burglary and first degree murder not unitary. — First degree murder and aggravated burglary were not unitary acts, and imposition of sentences for both offenses did not violate double jeopardy. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

Merger of lesser offense found. — Where a defendant was charged with numerous counts of child abuse resulting in death or great bodily injury and with murder, but the state did not charge or offer proof that the acts of child abuse arose as separate and distinct episodes, the rule of merger precluded the defendant's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where the defendant was convicted of one or more offenses which were merged into the greater offense, he could be punished for only one. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408 (events occurred prior to 1989 amendment to Section 30-6-1 NMSA 1978).

Bail. — To be admitted to bail on habeas corpus petition, if proof of capital crime is plain and presumption great, court would not weigh it against other, apparently contradictory, facts and circumstances. *Ex parte Wright*, 1929-NMSC-093, 34 N.M. 422, 283 P. 53.

Prosecutor's comments on defendant's story appropriate. — Prosecutor's comments on the veracity of defendant's story did not deprive defendant of a fair trial. If after a case is presented, the evidence is essentially reduced to which of two conflicting stories is true, a party may reasonably infer, and thus argue, that the other side is lying. *State v. Aguilar*, 1994-NMSC-046, 117 N.M. 501, 873 P.2d 247, cert. denied, 513 U.S. 859, 115 S. Ct. 168, 130 L. Ed. 2d 105, and cert. denied, 513 U.S. 865, 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

II. DELIBERATION AND PREMEDITATION.

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

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

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

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

Sufficient evidence of first-degree willful and deliberate murder. — Where defendant was charged with first-degree murder (willful and deliberate), related to the killing of his estranged wife, there was sufficient evidence to support defendant's first-degree murder conviction where, at trial, the state presented testimony establishing that strangulation was a likely cause of death that defendant's training as a police officer familiarized him with chokeholds, that defendant and the victim had an abusive relationship where the victim repeatedly informed friends and family of her fear of defendant and concern that he would hurt her or kill her, and that defendant and the victim were involved in a contentious divorce with much dispute about the custody of their children. *State v. Farrington*, 2020-NMSC-022.

Sufficient evidence of deliberate murder. — Where defendant was playing with a folding pocket knife at a party; a fight broke out between defendant and the victim; the victim ran away bleeding heavily and later died at a hospital; defendant made the statement that "I think I stabbed that fool seven or eight times. I stabbed that fool"; defendant and defendant's friends acted "fine, like nothing, like high-fiving each other"; defendant stabbed the victim thirteen times in the left side of the chest; and the wounds were consistent with a single-edged knife, the evidence was sufficient to support defendant's conviction of willful and deliberate murder. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Where an altercation occurred between defendant and the victim; the victim was kneeling on the ground as defendant stood over the victim pointing a rifle at the victim's head; the victim attempted to push the rifle away from the victim's head twice and defendant repositioned the rifle so the rifle it pointed directly at the victim's face; as defendant pointed the rifle at the victim, the victim was pleading with defendant; a witness testified that defendant fired four close range shots directly at the victim; there were five wounds in the victim's body, four of which had penetrated the victim's body; and within an hour after the shooting, defendant interacted with a witness who testified

that defendant did not appear to be intoxicated and that defendant made a telephone call to tell someone that defendant would not be at work for a week because defendant was in a "heap of trouble", there was sufficient evidence for a jury to find that defendant acted with deliberate intent when defendant killed the victim. *State v. Largo*, 2012-NMSC-015, 278 P.3d 532.

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

Where defendant was embittered by the victim's rejection of defendant and the breakup of the relationship between defendant and the victim; defendant tried to hurt the victim by making scandalous accusations to the victim's ex-wife and the police; defendant made methodical plans for a trip from Nevada to New Mexico in pursuit of the victim; defendant surreptitiously followed the victim to the victim's home town in New Mexico and stalked the victim over a period of days; defendant ascertained that the victim was taking an alcohol server class at a local motel, inquired about the time and place of the class, and ascertained when defendant could get the victim alone during a class recess; defendant deliberately lay in wait for the victim; defendant carried a screwdriver with him to the fatal confrontation with the victim; defendant stabbed the victim twenty-one times with the screwdriver; after the stabbing, defendant immediately and calmly walked away and fled the scene of the murder; defendant tried to deceive and evade the authorities; and defendant attempted to concoct a false alibi, the evidence was sufficient to support the jury's determination that defendant committed the murder with deliberate intent to kill. *State v. Flores*, 2010-NMSC-002, 147 N.M. 542, 226 P.3d 641.

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

Sufficient evidence to prove identity in first-degree murder trial. — In defendant's trial for first-degree murder, where identity was at issue, there was sufficient evidence to support defendant's conviction where the victim's wife and three children witnessed the shooting of victim and testified that defendant was the shooter, where a bystander also

testified that she witnessed defendant shoot the victim while he was sitting in a vehicle, and where the state presented physical evidence including a latent print of defendant's palm on the vehicle in which the victim was murdered. *State v. Ramirez*, 2018-NMSC-003.

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

Where defendant and the victims had been drinking and taking drugs earlier in the day; while defendant and the victims were aimlessly driving around, drinking and taking more drugs, defendant, without any evidence of motive, shot and killed the driver and when the passenger, who was sitting in the front seat, screamed and turned around to look at defendant, defendant shot and wounded the passenger; and although multiple shots were fired in quick succession, each victim was shot only once, there was insufficient evidence of deliberation to support defendant's conviction for attempted first degree murder of the passenger. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

Evidence of condition of mind of accused at time of crime may be introduced, not only for the purpose of proving the inability to deliberate, but also to prove that the conditions were such that defendant did not in fact, at the time of the killing, form a deliberate intent to kill. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

Schizophrenia did not limit defendant's capacity to form deliberate intent to kill. — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration, based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that schizophrenia limited his capacity to form the deliberate intent required to sustain a first-degree murder conviction, evidence that defendant took conscious steps to walk through his house to retrieve a knife, address the victim in a theatrical manner saying that he had a "present" for her, and finally manipulate her neck before stabbing her was

sufficient for a rational jury to find beyond a reasonable doubt the essential facts required for conviction of first-degree, deliberate intent murder. *State v. Martinez*, 2021-NMSC-012.

Exclusion of expert testimony held error. — The trial court committed reversible error when it sua sponte excluded the expert testimony of defendant's sole witness, a neuropsychologist, who was prepared to testify regarding defendant's neurological deficits, which defendant contends were relevant to whether he formed the deliberate intent to kill. *State v. Balderama*, 2004-NMSC-008, 135 N.M. 329, 88 P.3d 845.

Period of deliberation. — Murder in the first degree is a willful, deliberate and premeditated killing, and although a deliberate intention means an intention or decision arrived at after careful thought and after a weighing of the reasons for the commission of the killing, such a decision may be reached in a short period of time. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Burden of proof. — The burden is on the state to prove that a defendant not only had an opportunity to form deliberate intent but did in fact form a deliberate intent to kill. *State v. Motes*, 1994-NMSC-115, 118 N.M. 727, 885 P.2d 648.

Transferred intent to kill. — In a homicide case where A shot at B, and the bullet struck C and killed him, the malice or intent followed the bullet. *State v. Carpio*, 1921-NMSC-063, 27 N.M. 265, 199 P. 1012.

Charge that murder was done willfully, deliberately and premeditatedly and with malice aforethought was sustained by proof that it was committed with a mind imbued with those qualities, though they were directed against a person other than the one killed. *State v. Carpio*, 1921-NMSC-063, 27 N.M. 265, 199 P. 1012.

Transferred intent applicable to murder and attempted murder. — The doctrine of transferred intent applies to both murder and attempted murder. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Period of time to abandon intent. — Just as it requires no period of time to form a deliberate intent to kill, so too, it does not require a certain period of time to abandon a pre-existing depraved mind. Although the initial act of defendant shooting indiscriminately at two people at two different times could have been found by the jury to be a depraved-mind action and one done with a wicked and malignant heart, these actions did not wound or kill the victim or anyone else. It is the criminal intent at the time of the commission of the crime that is determinative. *State v. Hernandez*, 1994-NMSC-045, 117 N.M. 497, 873 P.2d 243.

Question of deliberation and premeditation in murder case was for jury to determine upon a consideration of all the surrounding circumstances tending to show the relation of the parties to each other and the animus of the accused toward the deceased. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146.

Direct or circumstantial evidence. — While deliberation and premeditation are essential elements of murder in the first degree, these, like other elements, may be shown by direct evidence or by circumstances from which their existence may be inferred by the jury. *State v. Montoya*, 1963-NMSC-098, 72 N.M. 178, 381 P.2d 963.

The essential elements of murder in the first degree, including the elements of deliberation and premeditation, may be shown not only by direct evidence but by circumstances from which their existence may be inferred. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146.

Evidence of wounds inflicted in fight was sufficient to support a finding of premeditation, intent to kill and malice. *State v. Garcia*, 1956-NMSC-058, 61 N.M. 291, 299 P.2d 467.

Striking victim with car. — In case where the defendant struck the deceased with his automobile after an argument between the two and after deceased was seen to strike defendant's mother, the facts and surrounding circumstances warranted a finding by the jury that the killing was malicious, deliberate and premeditated. *State v. Montoya*, 1963-NMSC-098, 72 N.M. 178, 381 P.2d 963.

Forcing car off road. — From evidence that in the course of a high speed police chase defendant made a deliberate sharp turn into the police car, forcing it off the road while driving at a speed of 110 m.p.h., the jury could reasonably have inferred that defendant intended to murder the police officers. *State v. Bell*, 1972-NMCA-101, 84 N.M. 133, 500 P.2d 418 (affirming conviction of assault on police officers with intent to commit a violent felony).

Shooting deceased's fleeing wife. — Where defendant's shooting of decedent's wife occurred within a second or so after the shooting of decedent and as she sought to escape, shooting her under the circumstances had real probative value upon the issues of deliberation and intent, and constituted evidence of a preconceived plan to kill her as well as her husband. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Premeditation is a necessary element in proof of second degree murder. *State v. White*, 1956-NMSC-038, 61 N.M. 109, 295 P.2d 1019.

III. FELONY MURDER.

Requirements that a felony must meet before it can be a predicate to felony murder. — There must be a causal relationship between the felony and the homicide, the felony must be independent of or collateral to the homicide, and the felony must be inherently or foreseeably dangerous to human life. *State v. Groves*, 2021-NMSC-003.

The felonious purpose test. — A crime's objective is its felonious purpose, and if that purpose is something other than "to injure or kill," the felony may serve as a predicate felony to felony murder. *State v. Groves*, 2021-NMSC-003.

Aggravated fleeing a law enforcement officer does not violate the collateral felony rule and may serve as a predicate felony for felony murder. — The felonious purpose of the aggravated fleeing statute is to flee from law enforcement to avoid apprehension, not to endanger or harm someone. Aggravated fleeing, therefore, does not violate the collateral felony rule and may serve as a predicate felony for felony murder if the defendant acted with the requisite mens rea. *State v. Groves*, 2021-NMSC-003.

District court erred in concluding that aggravated fleeing may not serve as a predicate felony for felony murder. — Where defendants stole a van from an Albuquerque business, and rather than stopping when they realized that police were in pursuit, they fled, and where, during the pursuit through residential neighborhoods, defendants, driving at speeds of up to 78 mph in a 35 mph zone, ran a stop sign and hit another car resulting in the deaths of two people, the district court erred in concluding that aggravated fleeing a law enforcement officer may not serve as the predicate felony for a felony murder charge. Aggravated fleeing a law enforcement officer may serve as a predicate felony for felony murder because it satisfies the causal requirement, the collateral felony rule, and the requirement that the felony be inherently or foreseeably dangerous to human life. *State v. Groves*, 2021-NMSC-003.

Sufficient evidence. — Where the non-conflicting testimony of witnesses established that while defendant was attending a party, defendant visited the victim's apartment several times to buy marijuana; when the supply of marijuana was exhausted, defendant gestured to a screwdriver in defendant's waistband and said that defendant was going to "jack" the victim; defendant went to the victim's apartment, started punching the victim and held the screwdriver against the victim's neck; when the victim reached for a gun, defendant took a gun away from the victim, put the gun to the victim's head and pulled the trigger; when the gun failed to fire, defendant pulled the trigger a second time and shot and killed the victim; defendant returned to the party with the gun in defendant's hand; and defendant was showing off the gun and stated that defendant had taken the gun from the victim and "blasted" the victim, the evidence was sufficient to support the finding that defendant committed the predicate offense of armed robbery and then intentionally killed the victim during the robbery. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

The felony murder statute expresses a clear legislative intent that a killing during the commission of a felony constitutes unitary conduct in every case and a conviction of both the predicate felony and felony murder violates double jeopardy. *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1.

Where there is only one first degree felony conviction which also serves as the predicate felony for a felony murder conviction, the legislature did not intend to allow a separate conviction for that same felony. *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1.

It is per se fundamental error for aggravated battery to be used as an alternative predicate for felony murder. *Campos v. Bravo*, 2007-NMSC-021, 141 N.M. 801, 161 P.3d 846.

Not all underlying felonies constitute an aggravating circumstance. In fact, the only underlying felonies for felony murder that can serve as an aggravating circumstance for capital sentencing are kidnapping, criminal sexual contact of a minor, and criminal sexual penetration. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

When state proves elements of felony murder, it has proved all of the elements of the capital felony of first degree murder. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Eligibility for death penalty. ---New Mexico requires an aggravating circumstance, in addition to the commission of felony murder, in order to be eligible for the death penalty. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516 (decided under prior law).

Limitations to felony murder doctrine. — While the wording of this section is broad, New Mexico has created five main limitations to the felony murder doctrine. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

All of New Mexico's felony murder limitations work together to ensure that defendants convicted of felony murder have a culpable mental state consistent with the legislature's retributive and punitive goals. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

Accomplices. — A defendant cannot be charged with felony murder based on the lethal acts of another person who is not an accomplice. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

Defendant may not be held liable for depraved mind murder when he or his accomplice did not commit the lethal act that killed an innocent bystander. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

Felony murder statute constitutional. — Constitutional objection that felony murder statute under which petitioner was convicted was so broad and vague as to be unconstitutional was rejected. *Hines v. Baker*, 309 F. Supp. 1017 (D.N.M. 1968), *aff'd*, 422 F.2d 1002 (10th Cir. 1970).

Purpose. — In our felony-murder statute the legislature has permissibly determined that a killing in the commission or attempted commission of a felony is deserving of more serious punishment than other killings in which the killer's mental state might be

similar but the circumstances of the killing are not as grave. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Intent to kill for felony murder need not be a "willful, deliberate and premeditated" intent as contemplated by the definition of first degree murder in Subsection A(1) of this section, nor need the act be "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life", as contemplated by the definition in Subsection (A)(3). *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

An intent to kill in the form of knowledge that the defendant's acts "create a strong probability of death or great bodily harm" to the victim or another, so that the killing would be only second degree murder under Subsection B of this section if no felony were involved, is sufficient to constitute murder in the first degree when a felony is involved - or so the legislature has determined. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

The "malice" required for murder (both first and second degree), as opposed to manslaughter, is an intent to kill or an intent to do an act greatly dangerous to the lives of others or with knowledge that the act creates a strong probability of death or great bodily harm. The same intent should be required to invest with first degree murder status a killing in the commission of or attempt to commit a first degree or other inherently dangerous felony. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

In addition to proof that the defendant caused (or aided and abetted) the killing, there must be proof that the defendant intended to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Felony murder does have a mens rea element, which cannot be presumed simply from the commission or attempted commission of a felony. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Intent requirement. — The felony-murder intent requirement is satisfied if there is proof that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm to the victim or another person, or acted in a manner greatly dangerous to the lives of others. *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

Conclusive presumption disapproved. — To presume conclusively that one who commits any felony has the requisite mens rea to commit first degree murder is a legal fiction which can no longer be supported where the felony is of lesser than first degree. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Murder during commission of first degree felony. — In a felony murder case where the collateral felony is a first degree felony, the res gestae test shall be used. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Murder during commission of dangerous lesser degree felony. — In a felony murder charge, involving a collateral felony, which is not of the first degree, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous to support a felony murder conviction. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Robbery may raise second degree murder to first. — Robbery can be the predicate offense to raise second degree murder to first degree felony murder, under Subsection A(2), where there is a causal relationship between the robbery and the murder, the robbery is independent of or collateral to the murder, and the nature of the robbery is inherently or foreseeably dangerous to human life. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Dangerous lesser degree felony high probability of death. — Of the felonies which are not of the first degree, only those known to have a high probability of death may be utilized for a conviction of first degree murder. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Underlying felony need not be dangerous. — It is irrelevant that, in the abstract, trafficking a controlled substance by possession with intent to distribute is not necessarily a dangerous crime. The standard applied to defendant was, while engaging in that particular felony, and as a consequence of the felony, defendant intended to kill. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

Jury to determine dangerousness. — Both the nature of the felony and the circumstances of its commission may be considered to determine whether it was inherently dangerous to human life; this is for the jury to decide, subject to review by the appellate courts. *State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

It was proper for the jury to determine whether the crime of criminal sexual contact was inherently dangerous for purposes of felony murder. *State v. Mora*, 1997-NMSC-060, 124 N.M. 346, 950 P.2d 789.

Sequence not determinative. — If a homicide occurs within the res gestae of a felony, the felony murder provision of the statute is applicable, and whether the homicide occurred before or after the actual commission of the felony is not determinative of the applicability of the felony murder provision. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178; *Nelson v. Cox*, 1960-NMSC-005, 66 N.M. 397, 349 P.2d 118.

Intent not determinative. — Killing by person engaged in commission of a felony was first degree murder by both the principal and accessory present aiding and abetting,

whether the killing was intentional or accidental. *State v. Smelcer*, 1924-NMSC-059, 30 N.M. 122, 228 P. 183.

Voluntary intoxication no defense to first degree felony murder. — Intoxication is not a defense to second degree murder and, therefore, is also not a defense to first degree felony murder. *State v. Pando*, 1996-NMCA-078, 122 N.M. 167, 921 P.2d 1285.

Felony murder applicable to attempts. — The felony murder provision is clearly applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony, and an attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission of the felony, has been performed or undertaken with intent to commit the felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

Where the evidence clearly supported a reasonable inference that defendant had already formed the intent to take the automobile and was in the process of executing that intent when the shooting occurred and before the death of decedent, an instruction on the felony murder rule was appropriate. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

Crime of attempted felony murder does not exist in New Mexico and the trial court cannot have jurisdiction over such a charge. Since the trial court lacks jurisdiction, there is no basis for a claim of double jeopardy, and on remand, the prosecution may file an alternate, proper charge. *State v. Price*, 1986-NMCA-036, 104 N.M. 703, 726 P.2d 857, cert. quashed, 104 N.M. 702, 726 P.2d 856.

Precise felony to be named in charge. — Before defendant can be convicted of felony murder, he must be given notice of the precise felony with which he is being charged and the name of the felony underlying the charge must be either contained in the information or indictment or furnished to the defendant in sufficient time to enable him to prepare his defense. *State v. Hicks*, 1976-NMSC-069, 89 N.M. 568, 555 P.2d 689.

Attempt subsumed under offense named. — Conviction of first degree murder under the felony murder rule for an attempt to commit a felony when the charge under the indictment alleged the completion of the felony did not infringe fundamental rights of defendant, since the attempt to commit the crime charge is a necessarily included offense. *State v. Turnbow*, 1960-NMSC-081, 67 N.M. 241, 354 P.2d 533.

Felony murder requires absence of independent intervening force. — 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. Adams*, 1979-NMSC-032, 92 N.M. 669, 593 P.2d 1072; *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

Criminal sexual penetration as predicate felony. — Applying the strict-elements test, first degree criminal sexual penetration (CSP) is not a lesser included offense of second

degree murder and, accordingly, first degree CSP could properly serve as a predicate for applying the felony-murder doctrine. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

False imprisonment as predicate felony. — Based on evidence that the victim was forced into the back of a two-door car at gunpoint and was beaten with a gun as he was driven to an isolated location where he was shot, and that defendant and her accomplices were armed and had been drinking throughout the evening, a rational jury could find that defendant committed the crime of false imprisonment "under circumstances or in a manner dangerous to human life" as the predicate felony for felony murder. *State v. Smith*, 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

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

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

Retroactive application of new substantive rule established in *State v. Marquez*. — Where petitioner was convicted of first-degree murder under a general verdict at a trial in which the jury instructions contained two alternative theories for the jury to use as a basis for the first-degree murder conviction: felony murder predicated on shooting at or from a motor vehicle and willful and deliberate murder, and where, on direct appeal, the New Mexico supreme court vacated petitioner's conviction for felony murder, holding that the crime of shooting at or from a motor vehicle may not serve as the predicate felony in support of a felony murder charge, and where, in a petition for habeas corpus, petitioner claimed that the supreme court's holding applies retroactively and that his conviction for willful and deliberate murder must also be vacated, the district court erred in denying petitioner's habeas petition, because a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate, and in this case it is

impossible to determine whether the general verdict was based on the legally invalid theory of felony murder or on willful and deliberate murder. *Rudolfo v. Steward*, 2023-NMSC-013.

Shooting at or from a motor vehicle cannot serve as the underlying felony sustaining a felony murder conviction. — Where defendant was convicted of first-degree felony murder predicated on the underlying felony of shooting at or from a motor vehicle, the New Mexico supreme court vacated defendant's conviction of felony murder because shooting at or from a motor vehicle is an elevated form of aggravated battery, and thus cannot be used as a predicate for felony murder. *State v. Baroz*, 2017-NMSC-030.

Shooting at dwelling as predicate felony. — Applying the strict-elements test, shooting at a dwelling is not a lesser included offense of second degree murder, and the offense could serve as a predicate for applying the felony-murder doctrine. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

Convictions for felony murder and shooting at a dwelling violated defendant's right to be protected from double jeopardy. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

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

Sentences for kidnapping and felony murder not double jeopardy. — Sentences for both kidnapping and felony murder did not violate double jeopardy since the kidnapping was sufficiently separated in time and space from the murder to establish two distinct crimes. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Where the conduct underlying defendant's convictions for aggravated kidnapping and first degree felony murder was not unitary, the district court did not violate double jeopardy by convicting and sentencing defendant for both first degree felony murder and aggravated kidnapping. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

Unitary conduct in commission of murder and robbery. — Since the defendant's conduct in stabbing and robbing a cabdriver was unitary, the elements of armed robbery were subsumed by the elements of felony murder in the course of an armed robbery and conviction and sentencing of the defendant for both felony murder and the underlying felony of armed robbery violated double jeopardy. *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Convictions for felony murder and robbery, because they arise out of unitary conduct, violate the defendant's right to be free from double jeopardy. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Where armed robbery provided the underlying felony for defendant's first degree murder conviction, the elements of the former crime were subsumed within the elements of the murder offense and, therefore, reversal of defendant's conviction and sentence for armed robbery was required. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

Conduct not unitary. — Convictions for both felony murder and armed robbery do not violate double jeopardy principles where the evidence supports an inference that there were two distinct uses of force. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Evidence of holdups inadmissible. — Evidence of two "holdups" perpetrated by defendant just prior to murder for which he is charged, and concerning which there is no evidence of robbery, was inadmissible. *Roper v. Territory*, 1893-NMSC-026, 7 N.M. 255, 33 P. 1014.

Not felony murder of cofelon where killing committed by resisting victim. — A coperpetrator of a felony cannot be charged under this section with the felony murder of a cofelon when the killing is committed by the intended robbery victim while resisting the commission of the offense. *Jackson v. State*, 1979-NMSC-013, 92 N.M. 461, 589 P.2d 1052.

Defendant was not entitled to a manslaughter instruction where there was no evidence that the victim was the source of the provocation. — Where defendant was convicted of felony murder, the trial court's refusal to instruct the jury on voluntary manslaughter was not improper where defendant argued at trial that the source of the provocation was his accomplice, not the victim, and it is settled law that the victim of voluntary manslaughter must be the source of the provocation. A third party, such as an accomplice, cannot properly support a provocation defense under New Mexico law, and thus there was no evidence of provocation that could reduce the charge of murder to manslaughter. *State v. Sloan*, 2019-NMSC-019.

IV. GREATLY DANGEROUS ACTS.

Depraved mind murder requires extremely reckless conduct evidencing indifference for the value of human life. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

Indicators of a depraved mind. — The four indicators of a depraved mind are as follows: (1) more than one person was endangered by the defendant’s act, (2) the defendant’s act was intentional and extremely reckless, (3) the defendant had subjective knowledge that his act was greatly dangerous to the lives of others, and (4)

the defendant's act encompassed an intensified malice or evil intent. *State v. Candelaria*, 2019-NMSC-004.

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

No such crime as attempted "depraved mind" murder. — The crime of attempted "depraved mind" murder does not exist since in order to convict for such an offense, the jury would have to find that the defendant intended to perpetrate an unintentional killing, a logical impossibility. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

Defendant must subjectively know of risks. — The depraved mind provision of this section requires proof that the defendant had subjective knowledge of the risk involved in his actions. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922.

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

Intoxication may be considered. — In a prosecution for depraved mind murder, evidence of intoxication may be considered by the jury when determining the required mens rea of "subjective knowledge," and failure to give the defendant's instruction on intoxication was reversible error. *State v. Brown*, 1996-NMSC-073, 122 N.M. 724, 931 P.2d 69.

Vehicular homicide by reckless conduct is lesser included offense of depraved mind murder by vehicle. *State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102 N.M. 274, 694 P.2d 922, modified by *State v. Cleve*, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23.

V. SECOND DEGREE MURDER.

Second degree murder statute is designed to discourage and punish the unlawful killing of people. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

General-intent crime. — As a "knowledge crime," second degree murder is a general-intent crime. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

Knowledge required of defendant. — Second degree murder requires that the defendant know that his actions create a strong probability of death or great bodily harm. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

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

Sufficient evidence supports retrial after reversal of second-degree murder conviction. — Where defendant's conviction for second-degree murder was reversed on appeal, there was sufficient evidence to support a retrial where it was undisputed that defendant killed his friend with a shotgun and there was sufficient evidence to support a reasonable jury's conclusion that, based on ambiguous evidence regarding who loaded the gun and when it was loaded, and the steps defendant took after the crime to conceal evidence, that defendant knew the gun was loaded and knew that pulling the trigger would cause great bodily harm or death to the victim, and that there was not enough evidence to constitute sufficient provocation to reduce the crime to manslaughter. *State v. Suazo*, 2017-NMSC-011.

Element of deliberation excluded. — The legislature intended to exclude from second degree murder the element of deliberation but not to exclude otherwise intentional killings from that crime; under New Mexico's statutory scheme, murder consists of two categories of intentional killings: those that are willful, deliberate, and premeditated; and those that are committed without such deliberation and premeditation but with knowledge that the killer's acts create a strong probability of death or great bodily harm. *State v. Garcia*, 1992-NMSC-048, 114 N.M. 269, 837 P.2d 862.

Includes intentional murder. — Fact that 1980 amendments require only the elements of a killing in the performance of an act which the defendant knows creates the requisite probability does not mean that second degree murder excludes intentional murders. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

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

Second degree murder, assisted suicide, not same offense. — The second degree murder statute (Subsection B) is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute (Section 30-2-4 NMSA 1978) is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

Suicide pact not exemption from conviction for murder. — The existence of a suicide pact does not exempt someone from a conviction for committing murder. However, that general rule may not apply if the means of attempted suicide used presents the same risk to both of the parties at the same time, such as when a couple drive off a cliff together. Such is not the case when the victim is killed by a rifle, the trigger of which is pulled by the defendant. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

There was enough evidence to support a conviction of second degree murder because there was sufficient evidence to show that the defendant actively participated in a suicide by holding the gun to the victim's head and pulling the trigger. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

Cause of death. — Evidence that defendant orchestrated the beating of the victim, that he used both his fists and a baseball bat to hit the victim, that the victim's condition worsened shortly thereafter, and that the victim died, permitted the jury to make a reasonable inference that the acts of the defendant constituted a significant cause of the victim's death and that there was no other independent event that broke the chain of events from the beating to the victim's death. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

Sufficient evidence of second degree murder. — Where defendant lived with the victim for approximately one and a half months before the victim disappeared; a few weeks later, the victim’s decomposed body was discovered wrapped in a blue air

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

Sufficient evidence of second degree murder. — In defendant's murder trial, where the evidence showed that defendant was in the passenger seat of a truck that drove by the victim's residence, that a witness observed the "muzzle flash" from shots fired from the passenger side window of the truck in which defendant was the passenger, that the shots fired resulted in the victim's death, and where defendant admitted at trial that he knew that shooting in the direction of a group of people in a residential area presented a danger to human life, there was sufficient evidence for a jury to find beyond a reasonable doubt that defendant killed the victim and knew that his acts created a strong probability of death or great bodily harm to the victim or any other human being; the evidence was sufficient to support a conviction of second-degree murder. *State v. Baroz*, 2017-NMSC-030.

There was probable cause to charge second-degree murder where the evidence was sufficient to support a reasonable belief that defendant committed the crime. — Where defendant was charged with second-degree murder and the lesser included offense of voluntary manslaughter, and where the district court judge found that there was no probable cause to bind defendant over for trial on second-degree murder and entered an order binding defendant over for trial on voluntary manslaughter alone, the district court erred in failing to find probable cause where the evidence presented at the preliminary hearing showed that defendant pointed a gun at the victim based on little provocation other than an argument about the charge for cleaning up the vomit in the back seat of defendant's car, that defendant opened his car door to reprimand the victim for slamming the door, got out of his car to pull out his gun, and pointed it at the unarmed victim, who was walking around the car from the rear passenger's side door at the time, that defendant failed to drive away from the victim when defendant had the opportunity to do so, and that although the victim threatened to run defendant over with defendant's own car, defendant, without a verbal warning, opened fire before the victim stepped into the vehicle and before the victim assumed control over the vehicle The undisputed evidence supports a reasonable belief that an ordinary person of average disposition in defendant's position would not have been provoked to the point of utilizing lethal force, but would instead have taken available opportunities to attain a position of safety from an unarmed man in no immediate position to pose a threat to defendant's safety. *State v. Benedict*, 2022-NMCA-030, cert. granted.

VI. MANSLAUGHTER.

Distinction between murder and manslaughter. — To reduce the killing from murder to voluntary manslaughter 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. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Manslaughter is included in charge of murder. *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969); *State v. Lopez*, 1942-NMSC-064, 46 N.M. 463, 131 P.2d 273; *State v. La Boon*, 1960-NMSC-118, 67 N.M. 466, 357 P.2d 54.

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 N.M.U.J.I. Crim. 2.20 (*now see* UJI 14-220) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

One indicted of murder could be found guilty of manslaughter, provided there was sufficient evidence on that issue. *United States v. Densmore*, 1904-NMSC-004, 12 N.M. 99, 75 P. 31.

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

Instruction not appropriate. — In prosecution for first degree murder, where the uncontradicted evidence was that defendant killed her husband with two and possibly three well placed shots into his person, which shots were fired at close range while the victim was lying down on the couch and while defendant stood over him, immediately after a discussion about the victim leaving the defendant, and that the shots came from a pistol purchased by appellant earlier the day of the homicide, no foundation existed for instruction on involuntary manslaughter. *State v. Gardner*, 1973-NMSC-034, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

Voluntary manslaughter instruction refused where no provocation. — Defendant could not create the provocation which would reduce murder to manslaughter, and his requested instruction on attempted voluntary manslaughter was therefore properly refused. *State v. Durante*, 1986-NMCA-024, 104 N.M. 639, 725 P.2d 839.

Defendant in first degree murder prosecution was not entitled to voluntary manslaughter instruction where there was no evidence of provocation on the part of victim. *State v. Brown*, 1998-NMSC-037, 126 N.M. 338, 969 P.2d 313.

Use of too great force as manslaughter. — Defendant's choice of deadly force when confronted with a possible battery of less than deadly force would sustain a conviction of voluntary manslaughter, but not for murder. *State v. McLam*, 1970-NMCA-129, 82 N.M. 242, 478 P.2d 570.

VII. DEFENSES.

General rule as to insanity. — The rule of law applicable to the defense of insanity in criminal cases is that, at the time of committing the act, the accused, as a result of disease of the mind, (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it. *State v. White*, 1954-NMSC-050, 58 N.M. 324, 270 P.2d 727.

The state met its burden of showing that defendant was sane when he murdered the victim. — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration (CSP), based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that the state failed to present sufficient evidence that he was sane at the time the crimes were committed, but where the state presented expert testimony that although defendant suffered from schizophrenia, he could have prevented himself from committing the crimes, the state met its burden by presenting evidence sufficient for a reasonable juror to find that defendant could have stopped himself from killing the victim, despite defendant's schizophrenia diagnosis. *State v. Martinez*, 2021-NMSC-012.

Proof of derangement short of insanity. — In a murder trial, proof of mental derangement short of insanity is admissible, as evidence of lack of deliberation or premeditated design; this contemplates full responsibility, but only for the crime actually committed. *State v. Padilla*, 1959-NMSC-100, 66 N.M. 289, 347 P.2d 312.

Reduction of charge to second degree murder. — The court should have instructed the jury that they might consider mental defects and mental condition in ascertaining whether or not defendant had the power to deliberate the acts charged, so as to reduce the charge from first degree murder to second degree murder. *State v. Padilla*, 1959-NMSC-100, 66 N.M. 289, 347 P.2d 312.

No reduction of charge to manslaughter. — While a disease or defect of the mind may render an accused incapable of cool deliberation and premeditation and may be sufficient to reduce the charge against him from first to second degree murder, it does not follow that such mental condition may reduce the charge to voluntary manslaughter. *State v. Chambers*, 1972-NMSC-069, 84 N.M. 309, 502 P.2d 999.

Use of expert evidence on incapacity. — Nothing compels the trier of the facts to disregard the nonexpert testimony and to accept the opinions of defendant's medical experts as to his probable state of mind and incapacity to control his will at the time of committing a criminal act. The jury is not required to accept these expert opinions and disregard all other evidence bearing on the question of his mental and emotional state, nor is the trial court bound to accept these expert opinions and dismiss the charges of first and second degree murder. *State v. Smith*, 1969-NMCA-016, 80 N.M. 126, 452 P.2d 195.

Voluntary intoxication is no defense to murder in second degree. *State v. Gray*, 1969-NMCA-102, 80 N.M. 751, 461 P.2d 233; *State v. Williams*, 1966-NMSC-145, 76 N.M. 578, 417 P.2d 62.

In this state, no specific intent to kill is required for a conviction for second degree murder; hence, voluntary intoxication is no defense to such a charge. *State v. Tapia*, 1970-NMSC-004, 81 N.M. 274, 466 P.2d 551.

Intoxication may reduce depraved mind murder. — Evidence of intoxication may be considered to reduce first degree depraved mind murder to second degree murder, but it may not be used to reduce second degree murder to voluntary manslaughter or involuntary manslaughter, or to completely excuse the defendant from the consequences of his unlawful act. *State v. Brown*, 1996-NMSC-073, 122 N.M. 724, 931 P.2d 69.

Jury to determine effect of intoxication. — In a homicide case the defendant is entitled to have the jury determine the degree and effect of his intoxication upon his mental capacity and deliberative powers; however, the evidence as to intoxication must be substantial and must relate to defendant's condition as of the time of the commission of the homicide, or be so closely related in time that it can reasonably be inferred that the condition continued to the time of the commission of the homicide. *State v. Williams*, 1966-NMSC-145, 76 N.M. 578, 417 P.2d 62.

Lack of justification not element of homicide. — Every killing of a person by another is presumed to be unlawful, and only when it can be shown to be excusable or justifiable will it be held otherwise; when the evidence permits, excuse of justification may be raised as a defense and decided by the fact finder, but initially, the absence of excuse or justification is not an element of homicide to be proven by the prosecution. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

Defendant to raise reasonable doubt. — Defendant, of course, did not have the burden of proving that he killed in self-defense. All he was required to do was produce evidence which would raise a reasonable doubt in the minds of the jurors. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Issue of self-defense for jury. — The line of demarcation between a homicide which amounts to voluntary manslaughter and one which amounts to justifiable homicide in self-defense is not always clearly defined and depends upon the facts of each case as it arises. Those facts are for the jury, under instructions from the court, laying down the principles of law governing the same, as was done in this case. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Defendant not entitled to self-defense instruction. — In defendant's murder trial, where the evidence demonstrated that defendant provoked the situation when defendant and his father drove to the victim's residence and shouted "southside," and where the victim and others in the yard of the residence approached the truck in which defendant was the passenger, it was not reasonable for defendant to have used deadly force, and because defendant voluntarily entered into the situation, he cannot avail himself of the law of self-defense; the district court did not err in rejecting defendant's self-defense instruction. *State v. Baroz*, 2017-NMSC-030.

Instruction improper. — Defendant in homicide prosecution claiming self-defense was not entitled to instruction on justifiable homicide under belief that deceased was about to have carnal intercourse with defendant's wife. *State v. Greenlee*, 1928-NMSC-020, 33 N.M. 449, 269 P. 331.

Justifiable killing. — Where defendant was violently assaulted by deceased, and then defendant drew his pistol and fired two shots at deceased which killed him instantly, such killing was not cruel and unusual within statutes defining murder, since the killing was justifiable. *Territory v. Fewel*, 1888-NMSC-018, 5 N.M. 34, 17 P. 569.

Defense of chastity. — In murder prosecution, the refusal of an instruction that the defense of one's person included, in the case of a woman, the protection of her chastity and that if, under the circumstances, she had reason to believe that the attack would lead to the sexual abuse of her person, she would be justified in using such force as was necessary, even to the extent of taking the life of her assailant, to protect her honor and chastity and her body from sexual abuse, was erroneous where the defense was that accused killed decedent to protect herself from an attempted rape. *State v. Martinez*, 1924-NMSC-075, 30 N.M. 178, 230 P. 379.

Defense of habitation. — Where defense of habitation was invoked in homicide case, the danger or apparent danger was to be considered from standpoint of prisoner at time shot was fired, and not according to facts as they developed at trial. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Instruction that injury to dwelling to be felonious so as to justify killing must be of a substantial character constituted prejudicial error. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Killing in prevention of crime. — A well-founded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed

crime, and this upon a principle of necessity; but when the necessity ceases, and the supposed felon flees, and thereby abandons his proposed design, a killing in pursuit, however well-grounded the belief may be that he intended to commit a felony, will not extenuate the offense of the pursuer. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Murder while resisting arrest. — Killing of person making authorized arrest is murder but where the arrest is illegal, the offense is reduced to manslaughter, unless the proof shows express malice toward the deceased. If the outrage of an attempted illegal arrest has not excited the passions, a killing will be murder. *Territory v. Lynch*, 1913-NMSC-038, 18 N.M. 15, 133 P. 405, *overruled by State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

Instruction not proper in absence of awareness of arrest. — Where defendant in homicide case was unaware that an attempt to arrest him was to be made, his action in killing the officer was to be viewed as in any other case, and instruction as to illegality of arrest reducing the offense to manslaughter was properly refused. *State v. Middleton*, 1920-NMSC-066, 26 N.M. 353, 192 P. 483.

Murder while resisting search. — Homicide committed in resisting deputy sheriff who was searching defendant's house without a warrant was first degree murder if such resistance constituted a felony, as when the deputy had been engaged in serving any process, rule or order of court, or judicial writ, and instruction leaving jury to determine degree of murder was erroneous. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

VIII. INDICTMENT AND INFORMATION.

Open charge of murder sufficient notice. — A charge of murder in violation of statutes pertaining to first and second degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes, nor is it a charge of distinct and separate offenses; rather, the charge is an open charge of murder, a form of charging approved, under which the jury is to be instructed on the degrees of the unlawful killing for which there is evidence, and it gave defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Allegation of murderous intent not required. — Murder indictment may omit direct charge of purpose or intent to kill, as part of overt act alleged as a crime. *Territory v. Montoya*, 1912-NMSC-015, 17 N.M. 122, 125 P. 622.

Transferred intent need not be charged. — Where the defendant, indicted on an "open" charge of murder, contends that since he was not charged under the specific transferred intent subsection that the instruction on that theory was improper, the defendant misapprehends the nature of this theory. Transferred intent is merely the

doctrine that allows the elements of malice or intent to be demonstrated when an "innocent" nonoriginal victim is killed, and therefore, it is not necessary to charge the defendant with transferred intent because the indictment specifically informed the defendant of the crime and what he must be prepared to meet. *State v. Hamilton*, 1976-NMSC-082, 89 N.M. 746, 557 P.2d 1095.

Aggravating circumstances not alleged. — Death penalty proceedings are not precluded where the indictment does not allege the existence of aggravating circumstances. Since aggravating circumstances are not elements of the crime of murder, an indictment is not deficient for failure to allege them. *State v. Morton*, 1988-NMCA-063, 107 N.M. 478, 760 P.2d 170 (decided under prior law).

Charge sufficiently specific. — The charge, "by shooting him with a gun," gave defendant sufficient particulars of the offense alleged to enable the defendant to prepare a defense. *State v. Smith*, 1966-NMSC-128, 76 N.M. 477, 416 P.2d 146.

Adequate charge on cause of victim's death. — An indictment for first degree murder, in other respects sufficient, which concluded in the following language, "did strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him the said Juan Trujillo, one mortal contusion bruise, fracture and wound, of which said mortal wound, the said Juan Trujillo thence continually languished until . . . he there died" charged that deceased died of the mortal wound alleged to have been inflicted by defendant. *Territory v. Lobato*, 1913-NMSC-030, 17 N.M. 666, 134 P. 222, *aff'd*, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916).

District attorney may obtain indictment for first degree murder following second degree indictment. — Where a defendant is originally indicted for second degree murder, but later the district attorney reviews the case and decides the evidence supports first degree murder, he may seek and obtain a second indictment, this time for first degree murder. *State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d 128.

May not charge first degree murder in information based on second degree bind-over. — A prosecutor is not authorized to charge first degree murder in an information based on a magistrate's bind-over order for trial on second degree murder. *State v. McCrary*, 1982-NMCA-003, 97 N.M. 306, 639 P.2d 593.

Indictment charging first degree murder would support second degree murder conviction. *Territory v. McGinnis*, 1900-NMSC-019, 10 N.M. 269, 61 P. 208, *overruled on other grounds by State v. Deltenre*, 1966-NMSC-187, 77 N.M. 497, 424 P.2d 782, cert. denied, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Waiver of indictment not constitutionally required. — Defendant's rights under the fifth and fourteenth amendments to the United States constitution were not violated when his murder prosecution was based upon an information filed by the district attorney, despite the fact that he never waived his right to be tried by indictment. *State*

v. Vaughn, 1971-NMSC-015, 82 N.M. 310, 481 P.2d 98, cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971).

Information charging murder sufficient. — Information charging that defendant did "murder" a named person was sufficient apprisal of offense charged. *State v. Roy*, 1936-NMSC-048, 40 N.M. 397, 60 P.2d 646.

Information permits submission of felony murder. — Under an information charging murder in the ordinary form, it was not improper to permit introduction of proof that murder was committed in perpetrating a felony. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

Information permits voluntary manslaughter. — Although information charged only first degree murder, submission of voluntary manslaughter was not error. *State v. Burrus*, 1934-NMSC-036, 38 N.M. 462, 35 P.2d 285.

Appropriate crime charged. — The offense of murder and the offense of child abuse resulting in the child's death are not the same, nor is the same proof required for the two offenses, since generally speaking, murder requires an intent, whereas child abuse does not require an intent, and therefore, the indictment properly charged defendant with first degree murder. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

IX. EVIDENCE AND PROOF.

Consistency in the verdict is not necessary. — An alleged inconsistency between a convicted offense and acquitted offenses does not require reversal because it is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. A criminal defendant is sufficiently protected against jury irrationality or error by the independent review of the sufficiency of the evidence as to those counts upon which a defendant is convicted. *State v. Veleta*, 2023-NMSC-024.

Alleged inconsistency in conviction of first-degree murder and acquittal of second-degree murder did not require reversal. — Where defendant was charged with numerous crimes in connection with a dispute over missing drugs during which the victim was shot and killed, and where, at the conclusion of the trial, the jury entered verdict forms convicting defendant of willful and deliberate first-degree murder, felony murder in the first-degree, kidnapping, conspiracy, and tampering with evidence, and also entered verdict forms acquitting defendant of second-degree murder and voluntary manslaughter, and where defendant argued that reversal was warranted because the guilty verdict for first-degree murder was legally inconsistent with his acquittals for second-degree murder and voluntary manslaughter, reversal was not warranted, because when the evidence is sufficient to support the verdict of conviction, an appellate court will not speculate as to why the jury acquitted a defendant of other

charges, even if the conviction and acquittal are allegedly inconsistent, and in this case, it was undisputed, and the record reflects, that the state presented sufficient evidence to support the conviction of willful and deliberate first-degree murder. *State v. Veleta*, 2023-NMSC-024.

Evidence sufficient for conviction. — Where defendant testified that the victim pounded on the door of defendant's house, that the victim stated that the victim would spray defendant's house with bullets, and that as the victim started to drive away, the victim leaned over in a way that made defendant believe that the victim was reaching for a gun; defendant then shot and killed the victim; and there was evidence that the victim had been shot in the back, there was sufficient evidence to permit the jury to determine that defendant was not acting in self-defense or as a result of legally sufficient provocation and to support defendant's conviction of second degree murder. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Sufficient evidence to prove first-degree murder. — Where defendant was charged with first-degree murder, aggravated burglary, unlawful taking of a motor vehicle, larceny of a firearm, and theft of a credit card, and where the state presented evidence that defendant possessed a rifle of the same caliber used to kill the victim, that he threatened someone with the rifle on the same day of the murder and just across the street from the victim's home, that DNA was present on a water bottle found in the victim's home, that, after the murder, defendant drove the victim's truck, that he attempted to sell the victim's jewelry, that he carried a pistol matching the description of the victim's stolen gun, that he recruited accomplices to use the victim's stolen credit cards and checks to commit additional crimes, that he admitted to multiple people that he shot a woman after he broke into her home, and that he instructed his girlfriend where to find more of the victim's stolen property, there was sufficient evidence that a rational jury could find beyond a reasonable doubt that defendant committed the murder. *State v. Stallings*, 2020-NMSC-019.

Aggravating circumstances outweigh mitigating circumstances. — Standard of proof in the weighting process that the jury must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances is neither constitutionally nor statutorily required. *State v. Fry*, 2006-NMSC-001, 138 N.M. 700, 126 P.3d 516.

Admission of unavailable accomplice's tape recorded custodial police interview was not harmless error because it provided key evidence directly inculpating defendant convicted of felony murder, and remaining circumstantial evidence against him, although strong, was disputed. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998.

Defendant entitled to details. — A defendant in a murder case is entitled to know the exact date and the approximate time of day, the exact place where the body was found, and a description and identification details of the means or weapon used. *State v. Mosley*, 1965-NMSC-081, 75 N.M. 348, 404 P.2d 304.

Admissibility of evidence in discretion of court. — The admissibility of evidence is a matter addressed to the sound discretion of the trial court. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

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

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

To prove the corpus delicti in a homicide case, the state must show that the person whose death is alleged is in fact dead and that his death was criminally caused. *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804.

In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

In homicide cases, if it was shown that person whose death was alleged in indictment was in fact dead, and that his death was criminally caused, the corpus delicti was sufficiently proven; circumstantial evidence would be sufficient, and eyewitness testimony was unnecessary. *State v. Chaves*, 1921-NMSC-105, 27 N.M. 504, 202 P. 694.

Proof adequate. — Where it is obvious from the evidence that deceased died as a result of wounds inflicted by someone with some sharp object at the time in question, the corpus delicti has been adequately proven. *State v. Casaus*, 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

Effect of lack of proof of corpus delicti. — Where there was no substantial evidence of corpus delicti in homicide case, verdict finding defendant guilty of second degree

murder would be set aside on appeal. *State v. Woodman*, 1920-NMSC-028, 26 N.M. 55, 188 P. 1101.

"Substantial evidence" of cause of death. — Where the pathologist testified that death ". . . was the direct result of complications from the bullet wounds, the complications being infection . . .," and that the cause of death was gunshot wounds, this is "substantial evidence" as that term has been defined in New Mexico decisions. *State v. Ewing*, 1968-NMCA-071, 79 N.M. 489, 444 P.2d 1000.

Sufficient evidence that defendant was the shooter in attempted murder case. — Where defendant was convicted of two counts of attempted first degree murder with a firearm and two counts of shooting at or from a motor vehicle, and where defendant claimed that the evidence presented at trial was insufficient to prove that he was the shooter, there was sufficient evidence presented to allow the jury to conclude that defendant was the shooter based on testimony from the male victim that he and defendant had been in an altercation a week before the shooting, that during this altercation, defendant stated that he was going to kill the victim, that on the night of the shooting, the male victim and the female victim both observed defendant driving towards them in a brown Oldsmobile Cutlass, that the two victims recognized the Oldsmobile Cutlass as defendant's vehicle that they had seen him drive many times over the course of the thirteen years knowing him, that the female victim had previously seen defendant with a 9 mm firearm, testimony from another witness that on the night of the shooting, defendant showed up at her residence unannounced shortly after 10:00 p.m., and that defendant told her that he had shot at two people, and testimony from officers that 9 mm shell casings were found in defendant's vehicle as well as on street where the shooting occurred, and that forensic examinations determined that all the casings were fired from the same firearm. *State v. Bryant*, 2023-NMCA-016, cert. denied.

Effect of medical treatment of victim on cause of death. — Surgical operation undertaken to save one from the probable fatal effect of a wound did not preclude homicide conviction unless it clearly appeared that maltreatment of the wound, and not the wound itself, was the sole cause of the death. *Territory v. Yee Dan*, 1894-NMSC-004, 7 N.M. 439, 37 P. 1101.

Use of circumstantial evidence. — Circumstantial evidence is sufficient to establish guilt in a prosecution for homicide; those circumstances must point unerringly to the defendant and be incompatible with and exclude every reasonable hypothesis other than guilt. *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804.

Threats made by accused admissible. — Threats made by accused to kill some person not definitely designated were admissible with other explanatory matter on issue of corpus delicti especially when made shortly before commission of crime. *State v. Martinez*, 1919-NMSC-022, 25 N.M. 328, 182 P. 868.

Evidence of motive. — Evidence of facts which could not operate on mind of defendant were inadmissible to show motive. *State v. Allen*, 1920-NMSC-015, 25 N.M. 682, 187 P. 559.

Deceased's reputation and disposition. — Trial court in second degree murder prosecution properly excluded proffered testimony which defense wanted to use to corroborate the testimony of other witnesses which showed the deceased's reputation and disposition for fighting, his violent temper and his conduct as a bully. *State v. Snow*, 1972-NMCA-138, 84 N.M. 399, 503 P.2d 1177, cert. denied, 84 N.M. 390, 503 P.2d 1168.

Escape evidence admitted to show depraved mind. — District court did not abuse its discretion in determining that evidence of defendant's unauthorized departure from a Colorado juvenile detention facility was admissible at his trial for murder, where the court properly could have concluded that defendant's reasons for eluding the police were circumstantial evidence relevant to the jury's determination of whether his acts indicated a depraved mind regardless of human life and whether he had a subjective knowledge of the risk involved in his actions. *State v. Omar-Muhammad*, 1987-NMSC-043, 105 N.M. 788, 737 P.2d 1165.

Polygraph test results. — Polygraph test results may be admitted when qualifications of the polygraph operator establish his expertise, there is testimony to establish the reliability of the testing procedure employed as approved by the authorities in the field and there is evidence to show the validity of the tests made on the particular subject. However, requirements that polygraph tests be stipulated to by both parties and that no objection be made at trial to their introduction are mechanistic, inconsistent with due process and repugnant to the New Mexico rules of evidence. *State v. Dorsey*, 1975-NMSC-040, 88 N.M. 184, 539 P.2d 204 (affirming court of appeals, which had ruled polygraph results offered by defendant admissible to show intent and provocation); *aff'g*, 1975-NMCA-022, 87 N.M. 323, 532 P.2d 912.

Photographs of body. — Question of inflammation and possible prejudice, created by admission into evidence of photographs of body of alleged victim in murder trial, is left to the discretion of the trial judge absent a showing of abuse of that discretion. *State v. Gardner*, 1973-NMSC-034, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040, cert. denied, 99 N.M. 148 655 P.2d 160.

Photographs of the body of the victim were relevant to the issues of the case in that they were used by the doctors to describe the injuries and condition of the body, and served to clarify and illustrate the testimony of witnesses and to corroborate other

evidence. The admission of photographs into evidence rests within the sound discretion of the trial court and absent a showing of an abuse the trial court's discretion will not be disturbed. *State v. Coulter*, 1973-NMCA-019, 84 N.M. 647, 506 P.2d 804.

Admission of hearsay constitutionally impermissible under circumstances. — Admission of extra-judicial statements attributed to children of murder victim was reversible error where the children were not called as witnesses, because defendant was thereby denied his constitutional right of confrontation. *State v. Lunn*, 1971-NMCA-048, 82 N.M. 526, 484 P.2d 368.

Effect of admission of illegal evidence. — In prosecution for first or second degree murder under Laws 1891, ch. 80, §§ 4, 5, 1063, 1064, 1897 C.L., repealed by Laws 1907, ch. 36, § 23, verdict of first degree murder could not stand unless it was apparent that no injury resulted from admission of illegal evidence. *Territory v. Armijo*, 1894-NMSC-003, 7 N.M. 428, 37 P. 1113.

Transcript of taped confession. — Where the state conceded (during closing arguments) that the transcript of defendant's taped confession was erroneous, and the district court, counsel for the prosecution, and the defense counsel urged the jury to rely upon the tapes over the transcript as evidence, any misleading statements in the transcript were adequately corrected so that defendant's due process rights were not violated. *State v. Boeglin*, 1987-NMSC-002, 105 N.M. 247, 731 P.2d 943.

Accomplice testimony sufficient. — Evidence, consisting primarily of accomplice testimony, was sufficient to allow a reasonable jury to find that defendant participated in a conspiracy to commit a murder, and actually participated in the murder, as well as the attempted murder of another victim. *State v. Sarracino*, 1998-NMSC-022, 125 N.M. 511, 964 P.2d 72.

Evidence that defendant and the defendant's accomplice threw victim into the well while he was alive, then covered and finally resealed the well supports an inference that they reached an agreement to kill victim in the course of the robbery, and that both intended his death, supports the jury's verdict of guilty of first degree (felony) murder. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754. *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

Sufficient evidence of first-degree willful, deliberate and premediated murder. — Where defendant was charged with first-degree murder, and where at trial, defendant's first wife testified that defendant brought her to the crime scene to help him locate the shotgun shells used in the murder, that she saw the victim's body lying face down on the floor of the boxcar where the victim lived, that she knew defendant destroyed or concealed the clothes and shoes he wore during the murder, and that she lied to police about defendant's role in the killing because she was afraid of him, and where defendant's second wife testified that defendant told her that he shot the victim because the victim molested defendant's first wife when she was a teenager, and where an expert witness's testimony, that the victim died of being shot in the head with a shotgun

fired at close range, corroborated defendant's ex-wives' testimony, there was sufficient evidence to support defendant's conviction for willful, deliberate and premeditated murder. *State v. Gutierrez*, 2021-NMSC-008.

Evidence sufficient for conviction. — Where defendant admitted that defendant shot toward a house multiple times with two different weapons while a party was in progress; other witnesses testified that defendant opened fire on the house without any one firing back at defendant; and the shots defendant fired at the house killed one victim, there was sufficient evidence to support defendant’s felony murder conviction. *State v. Torrez*, 2013-NMSC-034.

Where, following a fight at a bar between the victim and a conspirator, defendant and a conspirator assaulted the victim at a conspirator’s residence and tied the victim up; defendant guarded the victim with a knife; another conspirator gave the victim an overdose of heroin; defendant and conspirators carried the victim to the victim’s car and drove the car to a church; the victim was still alive; defendant tried three times to snap the victim’s neck, a conspirator tried to suffocate the victim with a plastic bag, and defendant tried to strangle the victim with the victim’s shoelaces; defendant and the conspirators left the church; after consulting with other conspirators, defendant and a conspirator returned to the church and set the victim and the victim’s car on fire; and the victim’s death was caused by the drug overdose and the fire, there was substantial evidence that defendant willfully, deliberately murdered the victim. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

Evidence that on the day deceased was shot, defendant visited the deceased's home on three different occasions, an argument developing between the two during the second visit and that when defendant returned for the third time he shot a witness and the deceased, along with the inferences the jury was entitled to draw from the evidence, was sufficient to sustain conviction of first degree murder. *State v. Riggsbee*, 1973-NMSC-109, 85 N.M. 668, 515 P.2d 964.

Where defendant had armed himself with a rock before entering victim's apartment, admitted striking the victim with the rock when she caught him in the house, and stated that she fell and hit her head against a table, the facts and circumstances unerringly established appellant's guilt of first degree murder beyond any reasonable doubt. *State v. Jimenez*, 1972-NMSC-073, 84 N.M. 335, 503 P.2d 315; *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870; *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829; *State v. Trujillo*, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814.

There was sufficient evidence to support a conviction for second degree murder where there was testimony that the defendant was present at the stabbing scene and argued with the victim, the knife belonged to the defendant, a witness saw the defendant with the knife, observed him open it, and testified that he washed blood off of it and instructed the witness to dispose of it, and where nobody else was involved in the altercation, the medical examiner testified that the fatal stab wound could have been made with the defendant's knife, and the defendant was apprehended fleeing from the

scene shortly after the stabbing occurred. *State v. Gurule*, 2004-NMCA-008, 134 N.M. 804, 82 P.3d 975.

Where defendant was upset and depressed after defendant's girlfriend ended their six-year relationship; defendant made futile attempts to reconcile with defendant's girlfriend; defendant was obsessive about the relationship; defendant's girlfriend began dating the victim; defendant moved to California; while defendant was in California, defendant made statements to a witness in New Mexico that defendant was returning to New Mexico because defendant "didn't take care of things" before defendant left New Mexico and how defendant would "just get everything done"; when defendant returned to New Mexico, defendant broke into defendant's girlfriend's apartment and left a letter stating that defendant wished to reconcile and making threats regarding the victim; on the day of the murder, defendant and the victim began to argue about defendant's girlfriend; defendant went into defendant's apartment and immediately came running out of the apartment yelling "I'll kill you" as defendant began to shoot at the victim; defendant shot first about thirty-eight feet away from the victim and then ran towards the victim and fired four or five more shots; and defendant fired two shots less than four inches from the victim and then shot the victim a final time as the victim was attempting to escape from a car, there was substantial evidence to support the jury's conclusion that defendant killed the victim with deliberate intent. *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Sufficient evidence of first-degree murder. — Where defendant was convicted of two counts of first-degree murder, there was sufficient evidence to support the conviction where cell phone records showed that defendant and one of the shooting victims were in contact on the night of the murders, that text messages from the victim to defendant showed that the victim was upset with defendant, which could support an inference of a conflict between the two, where cell phone tower records indicated that defendant was in the area where the victim was murdered at the approximate time when the murders were believed to have occurred, and where a witness reported seeing defendant with a firearm only a few hours after the approximate time of the murders. *State v. Carrillo*, 2017-NMSC-023.

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

Limitations to felony murder doctrine. — While the wording of this section is broad, New Mexico has created five main limitations to the felony murder doctrine to ensure that defendants convicted of felony murder have a culpable mental state consistent with the legislature's retributive and punitive goals.. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

Accomplices. — A defendant may not be held liable for depraved mind murder when he or his accomplice did not commit the lethal act that killed an innocent bystander. *State v. O'Kelly*, 2004-NMCA-013, 135 N.M. 40, 84 P.3d 88, cert. quashed, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 578.

X. JURY INSTRUCTIONS.

Requisites of instructions. — All that can be required of court's instructions is that they properly give to the jury the essential facts which must be established beyond a reasonable doubt before the defendant can be convicted. *State v. Anaya*, 1969-NMSC-130, 80 N.M. 695, 460 P.2d 60.

Failure to define crime. — An instruction on second degree murder which did not define the offense was insufficient. *Territory v. Gutierrez*, 1905-NMSC-018, 13 N.M. 138, 79 P. 716.

Instruction on motive required. — Where all the evidence is circumstantial and there is no proof of motive, it was incumbent on trial judge to present a properly framed instruction on motive, instructing the jury that absence of evidence thereof should be considered along with all other circumstances in determining guilt or innocence of one accused of murder. *State v. Vigil*, 1975-NMSC-013, 87 N.M. 345, 533 P.2d 578.

Offenses submitted depend on supporting evidence. — Defendant in murder trial had the right to have instructions on lesser included offenses submitted to the jury, but this right depended on there being some evidence tending to establish the lesser included offenses. *State v. Anaya*, 1969-NMSC-130, 80 N.M. 695, 460 P.2d 60.

The court was only required to charge as to such degrees of murder as evidence tended to sustain. It was the duty of the court to charge as to all such degrees, and failure to do so was error. *Territory v. Romero*, 1883-NMSC-006, 2 N.M. 474.

An accused is entitled to an instruction on second degree murder if there is some evidence in the record to support it. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Evidence to support instruction 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 that the intoxicant affected his mental state at or near the time of the homicide. The instruction does not, however, require expert

evidence regarding the effect of intoxication upon defendant's ability to form a deliberate intent to kill. *State v. Privett*, 1986-NMSC-025, 104 N.M. 79, 717 P.2d 55.

Testimony from accomplices that murder defendant had consumed alcohol and methamphetamine on the evening of the murder, and expert testimony about the effect of those substances on the ability to form intent, was sufficient to warrant an instruction on intoxication. *State v. Begay*, 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

Voluntary intoxication instruction was not appropriate for second degree murder. — Where defendant, who had consumed a large quantify of alcohol and who was walking along a ditch with friends, encountered the victim; the friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; and at trial, defendant requested an instruction on voluntary intoxication; and defendant was acquitted of conspiring to commit first degree murder and convicted of being an accessory to second degree murder, the voluntary intoxication instruction was not appropriate in the context of accessory liability for second degree murder, because second degree murder is a general intent crime. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Where defendant, who had consumed a large quantify of alcohol and who was walking along a ditch with friends, encountered the victim; the friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; and at trial, defendant requested an instruction on voluntary intoxication; and defendant was acquitted of conspiring to commit first degree murder and convicted of being an accessory to second degree murder, the voluntary intoxication instruction was not appropriate in the context of accessory liability for second degree murder, because second degree murder is a general intent crime. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Submission of first degree charge required. — As there was evidence to the effect that the killing occurred while the defendant was in the commission of or an attempt to commit robbery, there was evidence from which the jury could have found that the homicide was committed while in the act of perpetrating a felony and the submission of the charge of first degree murder became a statutory mandate. *State v. Torres*, 1971-NMSC-039, 82 N.M. 422, 483 P.2d 303, *overruled on other grounds by State v. Wilson*, 1973-NMSC-093, 85 N.M. 552, 514 P.2d 603. But *see State v. Harrison*, 1977-NMSC-038, 90 N.M. 439, 564 P.2d 1321.

Where the defendant was engaged in committing a felony at time gun was accidentally discharged, trial court did not err in instructing that under the circumstances the accidental discharge did not reduce the homicide below first degree murder. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

Under former law, it was not error for court to charge that there was no evidence to show that the killing of the deceased was justifiable, or that there was any circumstance to bring it within the definition of any degree of murder less than the first where all

evidence showed that the killing took place during a robbery. *Territory v. Romero*, 1883-NMSC-006, 2 N.M. 474.

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

Defendant has burden to introduce evidence for lesser included offense instruction. — The defendant has the burden to come forward with evidence establishing sufficient provocation in order to be entitled to an instruction on voluntary manslaughter as a lesser included offense. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Instruction on lesser degree improper. — Where state established a case which would have sustained conviction of first degree murder, instruction of the court permitting conviction of second degree murder was reversible error. *State v. Reed*, 1934-NMSC-085, 39 N.M. 44, 39 P.2d 1005.

Where evidence on charge of first degree murder did not tend to reduce crime to murder in the second degree, court was not authorized to instruct on second degree murder. *State v. Granado*, 1913-NMSC-017, 17 N.M. 542, 131 P. 497.

Where evidence showed either first degree murder or excusable homicide, it was proper to instruct the jury that in their verdict they must either find defendant guilty of first degree murder or not guilty, and court properly refused to give instructions in the second or third degrees. *Sandoval v. Territory*, 1896-NMSC-020, 8 N.M. 573, 45 P. 1125 (decided under prior law).

In murder prosecution, where evidence showed either murder in the first degree, or nothing, court properly instructed on first degree murder only. *Faulkner v. Territory*, 1892-NMSC-015, 6 N.M. 464, 30 P. 905.

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

Instructions on lesser degree mandatory. — Where there was no eyewitness to killing and death resulted from gunshot wound, and there was no evidence showing the

murder was by poison or torture or lying in wait, or that it was perpetrated in committing, or attempting to commit a felony, failure to instruct jury other than on first degree murder was reversible error. *Territory v. Padilla*, 1896-NMSC-013, 8 N.M. 510, 46 P. 346; *Aguilar v. Territory*, 1896-NMSC-012, 8 N.M. 496, 46 P. 342.

Adequate felony murder instruction described. — A jury instruction which requires the state to prove, beyond a reasonable doubt, a causal relationship between the felony committed and the death of the victim is adequate. *State v. Perrin*, 1979-NMSC-050, 93 N.M. 73, 596 P.2d 516.

Failure to instruct on the defining element of felony murder is fundamental error. - In a felony murder prosecution where the evidence will support a conviction for either second-degree murder or voluntary manslaughter, it is fundamental error for the felony murder essential elements jury instruction to omit the defining requirement that the accused did not act in the heat of passion as a result of the legally adequate provocation that would reduce murder to manslaughter. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury was instructed to consider felony murder based on the felony of shooting at the Expedition; the felony murder essential elements instruction omitted any reference to the concept of legally sufficient provocation that distinguished heat of passion voluntary manslaughter from cold blooded second degree murder; and there was ample evidence that the victim's provocative conduct against defendant and defendant's family occurred before defendant shot into the Expedition, the failure to include the distinction between second degree murder and voluntary manslaughter was fundamental error. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426.

Instruction on intent when intent clear. — Failure to include the essential element of intent in a jury instruction for felony murder did not constitute fundamental error since the evidence was such that there could be no dispute that the defendant possessed the requisite intent. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

Evidence of premeditation. — Evidence that defendant had talked on numerous occasions of committing violent acts, including murder, and had made such statements on the night of the murder, was sufficient to establish premeditation. *State v. Begay*, 1998-NMSC-029, 125 N.M. 541, 964 P.2d 102.

Waiver of instructions on lesser included offenses. — Consistent with the constitutional guarantees of a fair trial, the defendant in a first degree murder prosecution may take his chances with the jury by waiving instructions on lesser included offenses, even against the express advice of counsel, and cannot be heard to complain on appeal if he has gambled and lost. *State v. Boeglin*, 1987-NMSC-002, 105 N.M. 247, 731 P.2d 943.

The district court did not err by failing to give jury instructions on the lesser included offense. — Where defendant was convicted of attempted first degree murder following an incident where defendant fired a gun multiple times at occupants of a vehicle, and where defendant argued that the district court erred by failing to give a jury instruction on aggravated battery as a lesser included offense of attempted first degree murder, the district court did not err by failing to give jury instructions on the lesser included offense, because defendant requested two jury instructions, both of which were given to the jury, but defendant did not argue for or tender a proposed instruction for a lesser included offense. A defendant cannot be heard to complain if the district court instructed the jury as the defendant desired. *State v. Bryant*, 2023-NMCA-016, cert. denied.

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

First and second degree properly submitted. — Where there was evidence presented which tended to indicate that sufficient time elapsed during which the defendant could have weighed his actions and considered their consequences and that the shooting was not in the heat of argument, instructions on first and second degree murder were proper. *State v. Aragon*, 1973-NMCA-102, 85 N.M. 401, 512 P.2d 974.

Absent request for instruction, no fundamental error. — Where the defendant does not request that an instruction be given and, consequently, it is not given, the trial court does not commit a fundamental error. *State v. Stephens*, 1979-NMSC-076, 93 N.M. 458, 601 P.2d 428, *overruled in part on other grounds by State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Submission of second degree generally required, in absence of exceptions. — Except in 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, or unless it be one committed in the perpetration of, or attempt to perpetrate, a felony where by legislative fiat the circumstances under which the killing occurred render conclusive the presence of such deliberation, it is always necessary to submit second degree and thus permit the jury to say whether it is the one or the other - first or second degree. *State v. Ortega*, 1966-NMSC-185, 77 N.M. 7, 419 P.2d 219.

It was necessary to submit second as well as first degree murder to jury to permit them to determine degree of murder except when means employed in perpetrating crime supplied proof of deliberation or when homicide was committed in perpetrating or attempting another felony. *State v. Kappel*, 1949-NMSC-024, 53 N.M. 181, 204 P.2d 443.

Second degree instruction on intent. — In a prosecution for felony murder, giving of an unmodified form of UJI 14-210 on second degree murder, which allows for a verdict of guilt provided that, among other things, the state has proven beyond a reasonable doubt that "[t]he defendant intended the killing to occur or knew that he was helping to create a strong probability of death or great bodily harm" was sufficient without giving a general criminal intent instruction, which requires a higher level of criminal intent. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

Second degree instruction with sudden impulse theory. — Where confession of accused had been admitted and in it he stated that he had killed his wife on sudden impulse, it was error to refuse to instruct on second degree murder. *State v. Wickman*, 1935-NMSC-035, 39 N.M. 198, 43 P.2d 933.

Second degree instruction with self-defense theory. — Where prosecution attempted to prove first degree murder, perpetrated by lying in wait, and defendant pleaded self-defense, the court properly instructed jury on murder in the second degree. *State v. Smith*, 1921-NMSC-014, 26 N.M. 482, 194 P. 869.

Failure to instruct on second degree. — When the defendant was convicted of felony murder and related crimes, the refusal to give an instruction on second degree murder was correct because the state proved a nexus between two felonies and the murder that excluded the possibility the murder was not committed in the commission of a felony. *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150.

Self-defense instruction refused where defendant entered store with weapon, prepared to rob. — Where the defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

Instruction on defense of another. — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim; defendant was tried for first degree murder with the predicate felony of shooting at a dwelling; defendant requested a jury instruction on defense of another on the grounds that shots from the house were fired in the direction of defendant’s vehicle where two of defendant’s friends were waiting; defendant’s friends testified that they were not aware of any bullets reaching the vicinity of the car; defendant testified that defendant shot back at the house because people in the house were shooting at defendant; and there was no evidence that defendant shot to protect anyone other than defendant, the district

court did not err in refusing to instruct on defense of another. *State v. Torrez*, 2013-NMSC-034.

Question as to manner of killing. — Where evidence presented jury question as to manner in which killing occurred, instruction on second degree murder was properly given although state contended that crime constituted first degree murder. *State v. Parks*, 1919-NMSC-041, 25 N.M. 395, 183 P. 433.

It was not error to submit issue of second degree murder, where the accused was convicted of a degree of crime properly within the evidence. *State v. Armstrong*, 1956-NMSC-053, 61 N.M. 258, 298 P.2d 941.

Failure to instruct on lesser included offense of vehicular homicide. — District court committed reversible error in refusing to instruct the jury on the lesser included offense of vehicular homicide, where the evidence of the defendant's use of marijuana the night before and the morning of the killing could have supported a conviction of vehicular homicide while under the influence of drugs. *State v. Omar-Muhammad*, 1987-NMSC-043, 105 N.M. 788, 737 P.2d 1165.

Aggravated battery lesser included offense of attempted murder. — In a prosecution for attempted murder, the trial court properly instructed the jury on aggravated battery as a lesser included offense at the state's request, because the elements of the lesser crime were a subset of the elements of the charged crime and, further, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

Convictions of attempted murder and aggravated battery violated double jeopardy. — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant’s conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state’s theory of the case to support both charges was that defendant beat, stabbed, and slashed the victims; and the state offered the same testimony to prove both charges, the aggravated battery elements were subsumed within the attempted murder elements and defendant’s convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev’g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Failure to instruct on aggravated battery. — The jury found the defendant guilty of attempted first degree murder, in that he had a deliberate intention to take the life of the victim, not that he simply had knowledge that his acts created a strong probability of great bodily harm. The jury having thus failed to find the lesser included offense of

attempted murder in the second degree, the failure to instruct on aggravated battery was harmless. *State v. Escamilla*, 1988-NMSC-066, 107 N.M. 510, 760 P.2d 1276.

When court has no duty to instruct on voluntary manslaughter. — Where neither prosecution nor defense in a murder trial requested an instruction on voluntary manslaughter, and both defendant and counsel stated that they did not desire such an instruction despite the court's explanation that there was sufficient evidence to warrant it, there was no duty for the trial court to instruct on voluntary manslaughter. *State v. Najar*, 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169, cert. denied, 94 N.M. 628, 614 P.2d 545.

No instruction on provocation. — Defendant was not entitled to instructions specifically relating to his theory that a police officer's search of his house was illegal and constituted provocation so as to reduce murder to manslaughter. *State v. Chamberlain*, 1991-NMSC-094, 112 N.M. 723, 819 P.2d 673.

Instruction on manslaughter improper. — It was error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts established 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 was required. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

Where evidence in prosecution for murder made it clear that defendant did not kill deceased "upon a sudden quarrel, or in the heat of passion," or "in the commission of an unlawful act not amounting to a felony," or "of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection," so as to make the act "manslaughter," instruction on manslaughter was not warranted. *Territory v. Archuleta*, 1911-NMSC-028, 16 N.M. 219, 114 P. 285.

Instruction on voluntary manslaughter improper. — Where defendant, who was walking along a ditch with friends, encountered the victim; defendant’s friend began punching and kicking the victim; defendant provided the friend with a knife that the friend used to fatally stab the victim; defendant was convicted of second degree murder; defendant argued that the district court should have instructed the jury on voluntary manslaughter because defendant was provoked by the instigation of the fight by defendant’s friends, defendant perceived the victim to be a member of a rival gang that was responsible for a stabbing attack on defendant’s friend that occurred within the preceding weeks, and the victim’s reaction to the attack provoked defendant’s response, defendant failed to establish sufficient provocation to support a voluntary manslaughter instruction. *State v. Jim*, 2014-NMCA-089, cert. denied, 2014-NMCERT-006.

Various theories submitted. — Where the evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting, such questions were factual ones to be resolved by the jury,

and the trial court properly submitted the issues of second degree murder, voluntary manslaughter and self-defense to the jury. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Overinclusive instruction intolerably confusing. — Defendant convicted of first degree murder for killing the victim by striking her with a cinder block after allegedly raping her was entitled to reversal of conviction, even in absence of objection by defendant at trial, where evidence supported judge's instruction on willful, deliberate or premeditated killing, but did not support instructions on 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 defendant could have been convicted without proof of all necessary elements. *State v. DeSantos*, 1976-NMSC-034, 89 N.M. 458, 553 P.2d 1265.

Overinclusiveness reversible error. — Where defendant was indicted only under Subsection A(3) of this section (for felony murder), it was reversible error to include the willful, deliberate language of Subsection A(1) in the jury instructions. *State v. Trivitt*, 1976-NMSC-004, 89 N.M. 162, 548 P.2d 442.

Confusing instruction on self-defense, critical issue in case, required reversal. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

Confusing instruction raised on appeal. — Giving of a confusing instruction on second degree murder which first included, then excluded, premeditation, was jurisdictional error, and could be first raised on appeal. *State v. Buhr*, 1971-NMCA-017, 82 N.M. 371, 482 P.2d 74.

Objections to form must be preserved. — Where instructions on second degree murder included the elements of the offense, without uncertainty, and were not misleading, they contained neither jurisdictional defect nor fundamental error; asserted inadequacy as to their form, not called to the attention of the trial court, was not preserved for review. *State v. Moraga*, 1971-NMCA-103, 82 N.M. 750, 487 P.2d 178.

Error in instructions harmless. — Although the jury, not the judge or the district attorney, was to determine the sentence imposed for first degree murder, so that the trial court was in error in failing to submit to the jury a form of verdict calling for the death sentence, the error was harmless and could not be prejudicial to the accused. *State v. Sanchez*, 1954-NMSC-010, 58 N.M. 77, 265 P.2d 684.

Failure to instruct on lesser charges upheld. — In the murder trial of a prisoner for killing a guard in which the death penalty was sought but not imposed, there was no fundamental miscarriage of justice because of the failure to instruct on second degree murder and voluntary manslaughter with respect to the officer's death, even though as

an initial matter the evidence might have been sufficient to support such instructions, where the evidence supporting these lesser included offense instructions was not "unequivocally strong." *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.), cert. denied, 484 U.S. 929, 108 S. Ct. 296, 98 L. Ed. 2d 256 (1987) (decided under prior law).

Refusal of cumulative instructions. — 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 defendant's state of mind from intoxication, it was not error in refusing defendant's requested instructions which were merely cumulative of the court's instruction. *State v. Rushing*, 1973-NMSC-092, 85 N.M. 540, 514 P.2d 297.

Trial court was not in error when it refused to give defendant's requested instruction on exculpatory statements contained in his confession, since the court adequately instructed on self-defense, and since defendant's own testimony corresponded to the exculpatory matter contained in the confession. *State v. Casaus*, 1963-NMSC-194, 73 N.M. 152, 386 P.2d 246.

Use of jury instructions. — New Mexico U.J.I. Crim. 2.00 (*now see* UJI 14-201) does not change the necessary elements to be proven for a conviction of first degree murder, and it was not error to use it in advance of the effective date. *State v. Noble*, 1977-NMSC-031, 90 N.M. 360, 563 P.2d 1153.

Answering jury's questions. — Since, under 40-24-10, 1953 Comp., the jury had sole responsibility for fixing the penalty for murder in the first degree, it was not error for the trial court to answer the jury's inquiry for information relating to the possibility of parole or pardon or a verdict of life imprisonment by quoting applicable constitutional and statutory provisions. *State v. Nelson*, 1959-NMSC-023, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959) (decided under prior law).

Review. — On appeal from conviction for second- degree murder, the court must review the evidence as to cause of death in the light most favorable to the state. *State v. Ewing*, 1968-NMCA-071, 79 N.M. 489, 444 P.2d 1000.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "State v. Jackson: A Solution to the Felony-Murder Rule Dilemma," see 9 N.M.L. Rev. 433 (1979).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

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).

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

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

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).

For note, "Whether the Elements of Deliberation and Premeditation Adequately Distinguish First Degree Murder from Second Degree Murder: *State v. Garcia*," see 24 N.M.L. Rev. 437 (1994).

For note, "New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine - State v. Campos," see 28 N.M.L. Rev. 535 (1998).

For note, "The Anomaly of a Murder: Not All First-Degree Murder Mens Rea Standards Are Equal - State v. Brown," see 28 N.M.L. Rev. 553 (1998).

For note and comment, "Death in the Desert: A New Look at the Involuntary Intoxication Defense in New Mexico," see 34 N.M.L. Rev. 243 (2002).

For note and comment, "Adding Charges on Retrial: Double Jeopardy, Interstitialism and State v. Lynch," see 34 N.M.L. Rev. 539 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide, §§ 41 to 53.

Malice: inference of malice or intent where killing is by blow without weapon, 22 A.L.R.2d 854.

Hunting accident: criminal responsibility for injury or death resulting from, 23 A.L.R.2d 1401.

Threats: causing one, by threats or fright, to leap or fall to his death, 25 A.L.R.2d 1186.

Fright or shock, homicide by, 47 A.L.R.2d 1072.

Premeditation: presumption of deliberation or premeditation from the fact of killing, 86 A.L.R.2d 656.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

"Lying in wait," what constitutes, 89 A.L.R.2d 1140.

Medical or surgical attention, failure to provide, 100 A.L.R.2d 483.

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

Insulting words as provocation of homicide or as reducing the degree thereof, 2 A.L.R.3d 1292.

Intoxication: modern status of the rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Automobile: homicide by automobile as murder, 21 A.L.R.3d 116.

Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Intoxicants: criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 A.L.R.3d 589.

Arrest: private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Killing by set gun or similar device on defendant's own property, 47 A.L.R.3d 646.

Unintentional killing or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Felony: homicide in commission of felony where the killing was the act of one not a participant in the felony, 56 A.L.R.3d 239.

Homicide as affected by time elapsing between wound and death, 60 A.L.R.3d 1316.

Withholding food, clothing or shelter, 61 A.L.R.3d 1207.

Intoxication: when deemed involuntary so as to constitute a defense to criminal charge, 73 A.L.R.3d 195.

Torture: what constitutes murder by torture, 83 A.L.R.3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Judicial abrogation of felony-murder doctrine, 13 A.L.R.4th 1226.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction, 16 A.L.R.4th 666.

Modern status of the rules requiring malice "aforethought," "deliberation" or "premeditation," as elements of murder in the first degree, 18 A.L.R.4th 961.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

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

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference," 25 A.L.R.4th 311.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in minutes or hours immediately following unattended birth, to establish culpable homicide, 40 A.L.R.4th 724.

Homicide by causing victim's brain-dead condition, 42 A.L.R.4th 742.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Application of felony-murder doctrine where person killed was co-felon, 89 A.L.R.4th 683.

Validity and construction of "extreme indifference" murder statute, 7 A.L.R.5th 758.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 A.L.R.5th 497.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 A.L.R.5th 871.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Homicide: liability where death immediately results from reatment or mistreatment of injury inflicted by defendant, 50 A.L.R.5th 467.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

Adequacy of defense counsel's representation of criminal client - conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness, 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness, 79 A.L.R.5th 419.

What constitutes "puts in jeopardy" within enhanced penalty provision of federal bank robbery act, 32 A.L.R. Fed. 279.

40 C.J.S. Homicide §§ 29 to 68.

30-2-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1980, ch. 21, § 2, repealed 30-2-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 2-2, relating to malice.

30-2-3. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice.

A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

Whoever commits voluntary manslaughter is guilty of a third degree felony resulting in the death of a human being.

B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

Whoever commits involuntary manslaughter is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-2-3, enacted by Laws 1963, ch. 303, § 2-3; 1994, ch. 23, § 2.

ANNOTATIONS

Cross references. — For homicide by vehicle, *see* 66-8-101 NMSA 1978.

For instruction on voluntary manslaughter, *see* UJI 14-220.

The 1994 amendment, effective July 1, 1994, added "resulting in the death of a human being" at the end of the second paragraph of both Subsections A and B.

Applicability. — Laws 1994, ch. 23, § 4 provided that the provisions of Laws 1994, ch. 23, § 2 apply only to persons sentenced for crimes committed on or after July 1, 1994.

I. GENERAL CONSIDERATION.

Crime and punishment properly separated. — The fact that the former manslaughter statute, 40-24-7, 1953 Comp., merely defined the offense, while 40-24-10, 1953 Comp., provided the penalty, does not mean that the statute was defective or the acts defined not crimes; crime and punishment can be separated and distinguished by the legislature. *State v. McFall*, 1960-NMSC-084, 67 N.M. 260, 354 P.2d 547 (decided under former law).

Applicability to motor vehicle accidents. — This section, the involuntary manslaughter statute, was in no sense repealed by adoption of the negligent homicide statute (64-22-1, 1953 Comp.), but has been in full force and effect at all times; although cases of death resulting from driving while under the influence of intoxicating liquor were taken out from under its operation by adoption of Section 66-8-102 NMSA 1978, which made driving under the influence a felony, because when a death resulted it would not be "in the commission of an unlawful act not amounting to a felony," upon repeal of the negligent homicide statute by Laws 1957, ch. 239, § 7, and reinstatement of the offense

of driving under the influence as a misdemeanor by Laws 1955, ch. 184, § 8, the reapplicability of the involuntary manslaughter statute automatically ensued. *State v. Deming*, 1959-NMSC-074, 66 N.M. 175, 344 P.2d 481 (decided under former law).

Manslaughter is one of the four kinds of homicide, and is included within a charge of murder. State v. La Boon, 1960-NMSC-118, 67 N.M. 466, 357 P.2d 54; *State v. McFall*, 1960-NMSC-084, 67 N.M. 260, 354 P.2d 547.

Manslaughter included in murder. — Manslaughter is included in the charge of murder. *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Manslaughter not "necessarily 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 N.M.U.J.I. Crim. 2.20 (*see* UJI 14-220 NMRA) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

Open charge of murder adequate. — A charge of murder in violation of statutes pertaining to first and second degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes, nor is it a charge of distinct and separate offenses; rather, the charge is an open charge of murder, a form of charging approved, under which the jury is to be instructed on the degrees of the unlawful killing for which there is evidence, and it gave defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds by State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Information sufficiently particular. — Information charging manslaughter, which enumerated the section defining the offense and the section fixing the penalty, did not contravene N.M. Const., art. II, § 14; although defendant was entitled "to demand the nature and cause of the accusation," against him, that remedy was available by way of a bill of particulars. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

Information insufficient. — An information was insufficient which charged that defendants willfully and feloniously killed named person contrary to statute. *State v. Gray*, 1934-NMSC-018, 38 N.M. 203, 30 P.2d 278.

Permissible to convict accessory of lesser offense. — The fact that the accessory was convicted of involuntary manslaughter while the principal was convicted of voluntary manslaughter is a permissible result under the accessory statute. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Suspension of convicted attorney. — Plea of guilty to crime of involuntary manslaughter, resulting from driving under the influence, supported recommendation of suspension of defendant attorney from practice of law. *In re Morris*, 1964-NMSC-235, 74 N.M. 679, 397 P.2d 475.

II. VOLUNTARY MANSLAUGHTER.

Meaning of "unlawful". — Subsection A defines voluntary manslaughter as "the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of passion". From Section 30-2-1 NMSA 1978 it may be inferred that "unlawful" means "without lawful justification or excuse." *State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988.

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

Intent. — Although voluntary manslaughter is a general intent crime, where attempted second degree murder is offered as a greater included offense and sufficient provocation is at issue in the trial, voluntary manslaughter may be a specific intent crime. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

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

Attempted voluntary manslaughter is a lesser included offense of attempted second degree murder where sufficient provocation is at issue in the trial. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

Provocation and disclosure of provocation. — The provocation and the disclosure of the events constituting the provocation may occur at different times. *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303, cert. denied, 113 N.M. 352, 826 P.2d 573.

Nature of sufficient provocation. — To reduce the killing from murder to voluntary manslaughter 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. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

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 ordinary person of average disposition. *State v. Jackson*, 1983-NMCA-007, 99 N.M. 478, 660 P.2d 120, *rev'd on other grounds*, 1983-NMSC-098, 100 N.M. 487, 672 P.2d 660.

Provocation has subjective and objective components. — Provocation is not strictly subjective. Defendant must demonstrate that defendant's extreme emotions would affect the ability to reason in an ordinary person. *State v. Taylor*, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863, cert. quashed, 131 N.M. 64, 33 P.3d 24.

The law does not permit one who intentionally instigates an assault on another to then rely on the victim's reasonable response to that assault as evidence of provocation sufficient to mitigate the subsequent killing of the victim from murder to manslaughter. *State v. Gaitan*, 2002-NMSC-007, 131 N.M. 758, 42 P.3d 1207; *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303, cert. denied, 113 N.M. 352, 826 P.2d 573.

Words insufficient provocation. — No mere words, however opprobrious or indecent, were deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter. *State v. Trujillo*, 1921-NMSC-111, 27 N.M. 594, 203 P. 846. *See State v. Lujan*, 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114, but *see Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Words alone, however scurrilous or insulting, will not furnish adequate provocation to make a homicide voluntary manslaughter. *State v. Castro*, 1982-NMSC-125, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62 (1979), but *see Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Words and push insufficient provocation. — Even if it was true, as the defendant had told a witness, that his stepdaughter had pushed him and threatened that her father would come from California and kill him, this would not be adequate to constitute sufficient provocation and to require a jury charge on voluntary manslaughter. *State v. Stills*, 1998-NMSC-009, 125 N.M. 66, 957 P.2d 51.

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

Discipline of child not provocation. — Parent disciplining the parent's child, even with a slap to the child's face, is insufficient provocation as a matter of law to reduce the charge of second degree murder to voluntary manslaughter. *State v. Taylor*, 2000-NMCA-072, 129 N.M. 376, 8 P.3d 863, cert. quashed, 131 N.M. 64, 33 P.3d 284 (2001).

Sudden quarrel or passion mandatory. — Evidence of a sudden quarrel or heat of passion, tending to show provocation sufficient to negate malice and reduce the degree of felonious homicide from murder to manslaughter, is indispensable to a conviction for voluntary manslaughter. *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39.

To convict of voluntary manslaughter, the jury must have evidence that there was a sudden quarrel or heat of passion at the time of the commission of the crime (in order, under the common-law theory, to show that the killing was the result of provocation sufficient to negate the presumption of malice). *Smith v. State*, 1976-NMSC-085, 89 N.M. 770, 558 P.2d 39. *See State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

It is voluntary manslaughter when the killing is committed upon a sudden quarrel or in the heat of passion. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

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

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

Evidence of passion or quarrel sufficient. — Where there was sufficient evidence, even under the circumstances testified to by the appellant herself, from which the jury could find that the shooting occurred in the heat of passion or as the result of a sudden quarrel, there was sufficient evidence to sustain the manslaughter conviction. *State v. Rose*, 1968-NMSC-091, 79 N.M. 277, 442 P.2d 589, cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Evidence of "sudden quarrel" insufficient. — Evidence which may support an inference of a smoldering desire within the defendant to avenge his former girl friend dating another male by doing away with both of them would not support an inference of a "sudden quarrel"; nor can such facts be held to give rise to that provocation recognized in the law as being adequate and proper to negate the presumption of malice. *State v. Robinson*, 1980-NMSC-049, 94 N.M. 693, 616 P.2d 406.

Passion engendered by fear. — Instruction as to voluntary manslaughter was not error where, from defendant's own testimony, he shot deceased during heat of passion engendered by fear or terror. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

Transference of passion theory unauthorized. — Where there was no evidence that such a condition as a sudden quarrel or the heat of passion existed between defendant and his baby boy, the only evidence of quarrel or heat of passion being between defendant and his wife, there was no evidence tending to establish voluntary

manslaughter, since the weight of authority is against allowing transference of one's passion from the object of the passion to a related bystander. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

To reduce murder to voluntary manslaughter, victim must be source of provocation. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Defendant initiates the 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 case, the circumstances show that he acted with malice aforethought, and the offense is murder. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Acts of peace officer insufficient. — Acts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation. *State v. Martinez*, 1982-NMCA-020, 97 N.M. 540, 641 P.2d 1087, cert. denied, 98 N.M. 50, 644 P.2d 1039; *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Exercise of legal right insufficient. — The exercise of a legal right, no matter how offensive, is not such provocation as lowers the grade of homicide from murder to voluntary manslaughter. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds by Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162; *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

Distinction between manslaughter and self-defense. — The line of demarcation between a homicide which amounts to voluntary manslaughter and one which amounts to justifiable homicide in self-defense is not always clearly defined and depends upon the facts of each case as it arises; those facts are for the jury, under instructions from the court. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382.

Sufficient evidence of voluntary manslaughter. — In defendant’s trial for voluntary manslaughter, where the evidence established that the victim’s actions in repeatedly charging at defendant aroused sufficient fear in defendant, which would affect his ability to reason and cause a temporary loss of self control, but that a reasonable person in the same circumstances would not have used a knife to stab the victim when the victim did not have a weapon, the evidence was sufficient for a jury to find sufficient provocation and that defendant’s actions were not taken in self-defense. *State v. Fox*, 2017-NMCA-029, cert. granted.

Self-defense and provocation. — Self-defense and provocation supporting a conviction for voluntary manslaughter are not mutually incompatible. *State v. Melendez*, 1982-NMSC-039, 97 N.M. 738, 643 P.2d 607.

Conviction for manslaughter on failure of self-defense plea. — When facts are present which give rise to a plea of self-defense, it is not unreasonable that if the plea fails, the accused should be found guilty of voluntary manslaughter. *State v. Harrison*, 1970-NMCA-071, 81 N.M. 623, 471 P.2d 193, cert. denied, 81 N.M. 668, 472 P.2d 382; *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

Whenever the evidence is sufficient to raise a question of self-defense, an instruction on voluntary manslaughter should also be submitted to the jury if the evidence supports sufficient provocation of fear for one's own safety. *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds by State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

Not manslaughter absent supporting evidence. — Where defendant contended he shot deceased solely to protect himself from a threatened attack, and stated that at the time he shot and killed deceased he was calm and cool, being by nature so disposed, the trial court was correct in refusing to submit the issue of voluntary manslaughter to the jury. *State v. Luttrell*, 1923-NMSC-024, 28 N.M. 393, 212 P. 739.

Unnecessary force in defending self. — Defendant's choice of deadly force when confronted with a possible battery of less than deadly force would sustain a conviction of voluntary manslaughter but not for murder. *State v. McLam*, 1970-NMCA-129, 82 N.M. 242, 478 P.2d 570.

Killing of fleeing, would-be felon. — A well-founded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when the necessity ceases, and the supposed felon flees, and thereby abandons his proposed design, a killing in pursuit, however well-grounded the belief may be that he intended to commit a felony, will not extenuate the offense of the pursuer. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Elements distinguished between crimes. — Voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm have distinct elements. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Death not equated with great bodily harm. — Comparing the voluntary manslaughter statute with the shooting at or from a motor vehicle statute and the statutory definition of great bodily harm in Section 30-1-12 NMSA 1978, it is clear that the legislature does not "equate" death with great bodily harm. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Voluntary manslaughter, aggravated battery and kidnapping. — Where defendant shot the victim in the chest in defendant’s vehicle, drove the unconscious victim in the vehicle to an isolated area, and shot the victim twice in the head while the victim was still alive; and defendant used two different types of force to shoot the victim in the chest and to keep the victim’s unconscious body in the vehicle, defendant’s convictions of

voluntary manslaughter for shooting the victim in the chest, aggravated battery for shooting the victim in the head, and kidnapping for keeping the victim in defendant's vehicle and transporting the victim to the isolated area were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

No double jeopardy violation for convictions. — Defendant's convictions of voluntary manslaughter and shooting at or from a motor vehicle do not violate double jeopardy. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Separate punishments intended. — The legislature intended to punish the crimes of voluntary manslaughter and shooting at or from a motor vehicle separately. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Cumulative punishment is precluded for shooting at a vehicle and homicide. — New Mexico jurisprudence precludes cumulative punishment for the offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the Double Jeopardy Clause protected defendant from being punished both for the homicide of the victim and for shooting into a vehicle causing great bodily harm to the victim where both convictions were premised on the unitary act of shooting the victim. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Accidental killing will not support conviction of voluntary manslaughter. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

Diminished responsibility for manslaughter. — The defense of diminished responsibility is analogous to that of insanity, in that expert testimony on the issue of diminished responsibility by reason of mental disease or defect is not conclusive on the fact finder. The jury is free to believe or disbelieve such testimony, and if such testimony

is disbelieved the presumption of full responsibility, which is viewed as included in the presumption of sanity, remains in effect. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Issue of responsibility properly submitted. — Evidence of insanity may be so overwhelming as to require the direction of a verdict of acquittal, as may be evidence of diminished responsibility. Where the evidence was not of such a quality as to require a directed verdict, the issue of defendant's responsibility for the crime of voluntary manslaughter was properly submitted to the jury. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Effect of conviction unsupported by evidence. — 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. *State v. Lopez*, 1968-NMSC-092, 79 N.M. 282, 442 P.2d 594.

No double jeopardy violations for sentence enhancements. — Upon conviction of voluntary manslaughter, with firearm enhancement, imposition of a three-year sentence under this section, plus an additional three-year sentence under 31-18-15 NMSA 1978, and an additional one-year firearm enhancement, did not result in multiple punishments for the same offense in violation of double jeopardy. *State v. Alvarado*, 1997-NMCA-027, 123 N.M. 187, 936 P.2d 869.

Sufficient evidence. — Where the victim was smoking and injecting methamphetamine; the victim’s behavior became increasingly erratic; the victim was playing with two knives; defendant wrestled with the victim, attempting to disarm and restrain the victim; the victim was uncontrollable, violent, and wild; defendant put the victim in a "choke hold" on three occasions, but did not choke the victim to unconsciousness; each time defendant released the victim, the victim continued to violently struggle; even though defendant eventually duct taped the victim, the victim continued to struggle; the victim eventually stopped breathing and could not be revived; and the victim’s death was caused by cervical compression or neck compression with physical restraint and methamphetamine intoxication as contributing causes, there was sufficient evidence to support defendant’s conviction of voluntary manslaughter. *State v. Maples*, 2013-NMCA-052, 300 P.3d 739, cert. granted, 2013-NMCERT-004.

III. INVOLUNTARY MANSLAUGHTER.

A. IN GENERAL.

Involuntary manslaughter statute excludes all cases of intentional killing, and includes only unintentional killings by acts unlawful, but not felonious, or lawful, but done in an unlawful manner, or without due caution and circumspection; the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not

justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds*, *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Involuntary manslaughter was confined to cases where the killing was unintentional. *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840.

Involuntary manslaughter may be committed by both unlawful and lawful acts. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

Distinction between lawful and unlawful acts. — In distinguishing between unlawful and lawful acts, the statute applies the language, defined by the courts to mean criminal negligence, only to the lawful act portion of the statute. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

Criminal negligence is not element of involuntary manslaughter by unlawful act under Subsection B, nor the negligence which is a part of Section 30-7-4 NMSA 1978 (relating to negligent use or handling of a weapon). *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

Criminal negligence required for involuntary manslaughter by lawful act. — A killing by lawful act, to be involuntary manslaughter, depends on whether the lawful act was done in an unlawful manner or without due caution and circumspection. The phrase "without due caution and circumspection" has been held to involve the concept of "criminal negligence," which concept includes conduct which is reckless, wanton or willful. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

Showing of criminal negligence is required for conviction of involuntary manslaughter, whether based on an "unlawful act" or "lawful act". *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209, *aff'd*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131.

Reckless disregard of others. — Merely driving on the wrong side of the road could be inadvertence and not sufficient to convict, but driving on the wrong side of the road coming up a hill, where visibility was obstructed, showed a heedless and reckless disregard of the rights of others. *Garrett v. Howden*, 1963-NMSC-222, 73 N.M. 307, 387 P.2d 874.

Inadvertently allowing an automobile to encroach upon the wrong side of the road while going up an incline so steep cars beyond its crest may not be seen constitutes a reckless, willful and wanton disregard of consequences to others, and will support conviction for manslaughter if one be killed as a result thereof. *State v. Rice*, 1954-NMSC-037, 58 N.M. 205, 269 P.2d 751.

Negligent use of weapon. — A conviction of involuntary manslaughter by negligent use of a weapon requires negligence which is ordinary. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled on other grounds*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

Use of firearm enhancement for negligent use. — Under the facts of this case, the state was required to prove that the defendant negligently used a firearm to commit a noncapital felony and this conduct resulted in the death of a human being. Use of a firearm is the same conduct required to enhance the defendant's sentence under Section 31-18-16A NMSA 1978. Because the state would not be required to prove any additional facts in order to have the defendant's sentence enhanced, the firearm enhancement statute is subsumed within the offense of involuntary manslaughter by negligent use of a firearm. *State v. Franklin*, 1993-NMCA-135, 116 N.M. 565, 865 P.2d 1209.

Defense to involuntary manslaughter. — Defendant charged with involuntary homicide could raise the theory of self-defense and was entitled to a jury instruction on her theory of defense of another. Any anomalies in the evidence will be resolved by the properly instructed jury. *State v. Gallegos*, 2001-NMCA-021, 130 N.M. 221, 22 P.3d 689, cert. denied, 130 N.M. 459, 26 P.3d 103.

Negligent self-defense as involuntary manslaughter. — If 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, defendant inadvertently shot the victim, then his actions could be viewed as a lawful act of self-defense committed in a unlawful manner or without due caution and circumspection, such that an instruction on involuntary manslaughter based on negligent self-defense should have been given. *State v. Arias*, 1993-NMCA-007, 115 N.M. 93, 847 P.2d 327, *overruled on other grounds*, *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds*, *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

If a defendant shoots someone in imperfect self-defense, the charge of murder can only be mitigated to voluntary manslaughter and an instruction on involuntary manslaughter is inappropriate. *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds*, *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

Accidental shooting in process of imperfect self-defense. — While a claim of imperfect self-defense does not give rise to the need for an involuntary manslaughter

instruction, a claim of accidental shooting might; furthermore, it is possible for an accidental shooting to occur in the process of imperfect self-defense. *State v. Abeyta*, 1995-NMSC-052, 120 N.M. 233, 901 P.2d 164, *overruled on other grounds*, *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

Resisting search. — Homicide committed in resisting deputy sheriff who was searching defendant's house without a warrant was involuntary manslaughter if the resistance constituted a misdemeanor, as when the deputy was merely engaged in the "execution of his office," and instruction leaving jury to determine the degree of murder was erroneous. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

Inflicting a beating is unlawful act. *State v. Holden*, 1973-NMCA-092, 85 N.M. 397, 512 P.2d 970, cert. denied, 85 N.M. 380, 512 P.2d 953.

Involuntary manslaughter instruction improper. — Inflicting a 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 at defendant's trial for murder of his baby boy. *State v. Gutierrez*, 1975-NMCA-121, 88 N.M. 448, 541 P.2d 628.

No foundation for involuntary theory. — Where the uncontradicted evidence showed that defendant killed her husband with two and possibly three well-placed shots into his person fired at close range while he lay on the couch and defendant stood over him with a pistol purchased by defendant earlier in the day, and immediately following a discussion about the victim leaving the defendant, no foundation existed for an instruction on involuntary manslaughter, and the trial court properly refused to instruct on this theory of the case. *State v. Gardner*, 1973-NMSC-034, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

Intentional shooting not involuntary manslaughter. — The killing of a person by intentionally shooting him with a rifle, if not justified by the law of self-defense, would constitute at least an assault with a deadly weapon, and would be a felony, and hence not involuntary manslaughter. *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840.

Homicide by vehicle statute preempts manslaughter statute. — The specific homicide by vehicle statute, Section 66-8-101 NMSA 1978, preempts the involuntary manslaughter statute in unintentional vehicular homicide cases. *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209, *aff'd*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131.

Careless driving statute, Section 66-8-114 NMSA 1978, which requires a showing of only civil negligence, cannot be used as the basis for involuntary manslaughter. *State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209, *aff'd*, 1996-NMSC-068, 122 N.M. 596, 930 P.2d 131.

Evidence insufficient to convict. — Evidence that defendant was driving an unfamiliar car over relatively unfamiliar roads, that 800 feet north of where the accident occurred defendant drove over a hill with a 2% grade with a curve at the bottom of it and did not slow down, that defendant had consumed two beers before the accident, and that, unknown to defendant, the tire that blew out was defective, even when considered cumulatively, failed to disclose the state of mind required to be shown for a conviction under this section. *State v. Hayes*, 1966-NMSC-260, 77 N.M. 225, 421 P.2d 439.

B. PROXIMATE CAUSE.

Proximate cause requisite for conviction. — Unlawful act must constitute proximate cause of the homicide to warrant a conviction of involuntary manslaughter. *State v. Seward*, 1942-NMSC-002, 46 N.M. 84, 121 P.2d 145.

Proximate cause not necessarily direct immediate cause. — The act of defendant must be a proximate cause of death but need not be the direct immediate cause; it is sufficient if the direct cause resulted naturally from the act of accused. *State v. Fields*, 1964-NMSC-230, 74 N.M. 559, 395 P.2d 908.

Proximate cause in reckless driving. — Wanton and reckless operation of an automobile which must be shown as proximate cause of a death in order to secure a conviction for involuntary manslaughter is not different from that required to be shown under former guest statute (Section 64-24-1, 1953 Comp.) before one injured may recover against driver host. *State v. Hayes*, 1966-NMSC-260, 77 N.M. 225, 421 P.2d 439; *State v. Clarkson*, 1954-NMSC-007, 58 N.M. 56, 265 P.2d 670.

Heedless or reckless disregard of others. — To establish heedlessness or reckless disregard of the right of others, a particular state of mind that comprehends evidence of an utter irresponsibility on the part of the defendant or of a conscious abandonment of any consideration for the safety of passengers must be established. *State v. Hayes*, 1966-NMSC-260, 77 N.M. 225, 421 P.2d 439.

Criminal negligence in driving while intoxicated. — The act of an intoxicated person in driving an automobile recklessly might be such criminal negligence as would warrant a finding of manslaughter if such operation of the automobile was the proximate cause of death. *State v. Sisneros*, 1938-NMSC-049, 42 N.M. 500, 82 P.2d 274.

Contributory negligence no defense. — Conduct of the driver of car struck by defendant had no application in trial for manslaughter, since it was the criminal negligence of defendant that caused the deaths of the two victims. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

Evidence of reckless driving as proximate cause sufficient. — Evidence that defendant struck vehicle in which decedents were riding on a well-lighted street from the rear, that he was driving at a speed of between 60 to 80 m.p.h. in a 35 m.p.h. zone immediately prior to the collision and that he was intoxicated, established beyond any

reasonable doubt that his conduct in driving was the proximate cause of the accident, and that it was so reckless, wanton and willful as to show an utter disregard for the rights of others. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

Proximate cause not recklessness. — Where statements of defendant and his companion, which were introduced by the state, and not controverted, negatived any wanton or reckless operation of the car, or any high speed, and were corroborated to a great extent by a witness for the state who was a companion of the deceased at the time of the accident, the evidence did not establish that the proximate cause of the fatal striking of deceased was the wanton or reckless operation of the vehicle by the defendant. *State v. Clarkson*, 1954-NMSC-007, 58 N.M. 56, 265 P.2d 670.

Nor unlawfully carrying weapon. — Involuntary manslaughter was not proved by evidence that a loaded revolver fell to the floor at a public dance and discharged, killing another, since unlawful act of carrying the weapon was not proximate cause of death. *State v. Nichols*, 1930-NMSC-032, 34 N.M. 639, 288 P. 407.

Instruction on unlawful act improper absent proximate cause. — Unless it could be said that failure of a defendant to have a driver's license in his possession at time and place of accident was the proximate cause of death, an instruction that defendant was guilty of involuntary manslaughter if it was found he operated the automobile without a license or was under influence of intoxicating liquor would be erroneous. *State v. Seward*, 1942-NMSC-002, 46 N.M. 84, 121 P.2d 145.

IV. EVIDENCE.

Proof beyond reasonable doubt. — The burden of proof on the part of the state to support a charge of manslaughter by automobile beyond a reasonable doubt is clearly established in New Mexico. *State v. Rice*, 1954-NMSC-037, 58 N.M. 205, 269 P.2d 751.

Establishment of corpus delicti. — In homicide cases, proof of the corpus delicti is established when it is shown that the person whose death is alleged in the information is in fact dead, and that the death was criminally caused. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

Proof of corpus delicti was established beyond a reasonable doubt where witness testified that his wife and son were dead at the scene of the accident, that he took the bodies to South Carolina, and was present when they were interred there. *State v. Romero*, 1961-NMSC-139, 69 N.M. 187, 365 P.2d 58.

Proof of victim's identity mandatory. — In this state, proof that the person killed is the same person as the one charged in the indictment to have been killed is part of the corpus delicti; failure so to prove is more than a variance between the charge and the proof, it is a failure to prove that the crime charged has been committed. *State v. Vallo*, 1970-NMCA-002, 81 N.M. 148, 464 P.2d 567 (ordering defendant discharged since the judgment was reversed for failure of proof rather than error in the trial proceedings).

Misrepresentation of polygraph's accuracy. — Verdict of jury finding defendant guilty of voluntary manslaughter was tainted by introduction of testimony calculated to prejudice the jury by implying that polygraph test was the ultimate in tests for truth, which testimony cast doubts upon the truth and veracity of the defendant in a manner not countenanced by the courts; it would not be allowed to stand. *State v. Varos*, 1961-NMSC-099, 69 N.M. 19, 363 P.2d 629, distinguished in, *State v. Chavez*, 1969-NMCA-109, 80 N.M. 786, 461 P.2d 919 (decided under former law).

Unrelated crimes. — Interjection of criminal offenses of narcotics pushing and heroin smuggling in the opening statement and on cross-examination, which offenses were irrelevant to the homicide for which defendant was being tried, constituted reversible error under the circumstances. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

Threat inadmissible. — Threat made by defendant against narcotics agent some 14 months prior to the crime, which did not point with any reasonable certainty to deceased, a police officer, individually or as a member of a class, and about which deceased was not shown to have had any knowledge, was not admissible as bearing on defendant's actions toward deceased or to show why deceased acted as he did. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

Admitting evidence of threats prejudicial error. — Since a basic contention of defense was that defendant acted in self-defense, improper admission of testimony as to a threat made by defendant was prejudicial error. *State v. Garcia*, 1971-NMCA-121, 83 N.M. 51, 487 P.2d 1356.

Photographs of body. — The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 1982-NMCA-158, 99 N.M. 140, 654 P.2d 1040, cert. denied, 99 N.M. 148, 655 P.2d 160.

V. JURY INSTRUCTIONS.

Criminal negligence instruction. — A showing of criminal negligence is required for a conviction of involuntary manslaughter, and it was fundamental error for the trial court to have not so instructed the jury. *State v. Kirby*, 1996-NMSC-069, 122 N.M. 609, 930 P.2d 144.

Where defendant's testimony provided a factual basis for an instruction on the lesser included offense of voluntary manslaughter, the trial court committed reversible error in denying defendant's requested instruction. A trial court must instruct the jury on voluntary manslaughter if the defense requests such an instruction and the instruction is warranted under the facts of the case. *State v. Munoz*, 1992-NMCA-004, 113 N.M. 489, 827 P.2d 1303, cert. denied, 113 N.M. 352, 826 P.2d 573.

Provocation. — Words alone, however scurrilous or insulting, will not furnish adequate provocation to require submission of a voluntary manslaughter instruction. However, if there is evidence to raise the inference that by reason of actions and circumstances the defendant was sufficiently provoked, then the jury should be given the voluntary manslaughter instruction. 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, could amount to provocation. The defendant is entitled to an instruction on voluntary manslaughter as a lesser included offense of murder in the first degree if there is evidence to support, or tending to support, such an instruction. *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Involuntary manslaughter instruction. — Where there is sufficient evidence of both criminal negligence and accident, it is proper to grant an involuntary manslaughter instruction. *State v. Skippings*, 2011-NMSC-021, 150 N.M. 196, 258 P.3d 1008.

The *mens rea* for involuntary manslaughter is criminal negligence. — An involuntary manslaughter jury instruction is proper only when the evidence presented at trial permits the jury to find the defendant had a mental state of criminal negligence when engaging in the act causing the victim's death. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

Evidence of excessive self-defense and accident are not a substitute for evidence of criminal negligence. — The confluence of evidence of imperfect self-defense with evidence of accidental shooting is not a substitute for evidence of the criminal negligence mental state required for an involuntary manslaughter conviction, because if the homicide is accidental, defendant acted without a criminally culpable state of mind in performing a lawful act unintentionally killing the victim, and if the homicide occurred as a result of imperfect self-defense, defendant acted intentionally in self-defense and the use of excessive force rendered the killing lawful, whereas, an involuntary manslaughter instruction is proper only where there is evidence of an unintentional killing and a *mens rea* of criminal negligence. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

Evidence did not support instruction on involuntary manslaughter. — Where the evidence most favorable to defendant showed that defendant was sitting in a car; the victim approached the car and held a gun to defendant's head; defendant grabbed the gun and it discharged; defendant gained control of the gun and fired it at the victim; and defendant then drove away without realizing that the victim had been shot, the evidence failed to establish a mental state of criminal negligence, which is required to support a jury instruction on involuntary manslaughter. *State v. Henley*, 2010-NMSC-039, 148 N.M. 359, 237 P.3d 103.

Evidence supported instruction on involuntary manslaughter. — Where defendant shot and killed an intruder that failed to identify himself while pounding on defendant's front door at 1:30 a.m., an instruction on involuntary manslaughter was warranted because a reasonable jury could have determined that defendant was either criminally

negligent because firing a gun at the door while someone was on the other side of it was a willful disregard of the rights or safety of others and endangered that unknown intruder, that defendant unintentionally killed the intruder based on defendant's theory that he fired a warning shot, or that defendant committed the lawful act of self-defense and unintentionally killed the victim without due caution or circumspection. *State v. Cardenas*, 2016-NMCA-042, cert. denied.

Defendant was entitled to an involuntary manslaughter instruction as a lesser included offense of second-degree murder. — Where defendant was convicted of second-degree murder based on evidence that he shot and killed the victim, a friend of defendant's, while defendant was playing with a gun that he believed to be unloaded, the district court erred in denying defendant's requested jury instruction on involuntary manslaughter as a lesser included offense of second-degree murder, because there was evidence to support both charges and reasonable minds could differ regarding whether defendant committed involuntary manslaughter by negligent use of a firearm or second-degree murder by aggravated assault with a deadly weapon. *State v. Young*, 2021-NMCA-049.

Submission of issue proper. — In prosecution on information charging first degree murder, the submission of voluntary manslaughter was not error. *State v. Burrus*, 1934-NMSC-036, 38 N.M. 462, 35 P.2d 285.

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

Question of degree for jury. — Where the evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting, such questions were factual ones to be resolved by the jury, and the trial court properly submitted the issues of second degree murder, voluntary manslaughter and self-defense to the jury. *State v. King*, 1977-NMCA-042, 90 N.M. 377, 563 P.2d 1170, *overruled on other grounds*, *State v. Reynolds*, 1982-NMSC-091, 98 N.M. 527, 650 P.2d 811.

Defendant entitled to manslaughter instruction. — Any evidence tending to bring homicide within grade of manslaughter entitled defendant to instruction on the law of manslaughter, and it was fatal error to refuse it. *State v. Crosby*, 1920-NMSC-037, 26 N.M. 318, 191 P. 1079.

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

Defendant is entitled to instruction on voluntary manslaughter if there is some evidence to support it. *State v. Maestas*, 1981-NMSC-006, 95 N.M. 335, 622 P.2d 240; *State v. Marquez*, 1981-NMCA-105, 96 N.M. 746, 634 P.2d 1298.

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

When court has no duty to instruct on voluntary manslaughter. — Where neither prosecution nor defense in a murder trial requested an instruction on voluntary manslaughter, and both defendant and counsel stated that they did not desire such an instruction despite the court's explanation that there was sufficient evidence to warrant it, there was no duty for the trial court to instruct on voluntary manslaughter. *State v. Najar*, 1980-NMCA-033, 94 N.M. 193, 608 P.2d 169, cert. denied, 94 N.M. 628, 614 P.2d 545.

Trial court's refusal to instruct the jury on voluntary and involuntary manslaughter was not improper where defendant was guilty of transporting a gun by a convicted felon and of endangering another by handling a firearm in a negligent manner, and where there was evidence that he intentionally fired at the victim's vehicle. *State v. Salazar*, 1997-NMSC-044, 123 N.M. 778, 945 P.2d 996.

Attempted voluntary manslaughter instruction. — Defendant's testimony that he was scared when he believed other party was reaching for a gun provides evidence of sufficient provocation to support an attempted voluntary manslaughter instruction. *State v. Jernigan*, 2006-NMSC-003, 139 N.M. 1, 127 P.3d 537.

Instructions incomplete. — In homicide prosecution where one of defendant's theories was involuntary manslaughter, and record was replete with testimony that defendant was drunk while he rode around in automobile with deceased and witness, holding and handling sawed-off shotgun, court's refusal to instruct the jury that negligent use of a weapon while under the influence of intoxicant was a petty misdemeanor left jury without a guide to determine whether this was a killing while in the commission of a misdemeanor, and was reversible error. *State v. Durham*, 1971-NMCA-168, 83 N.M. 350, 491 P.2d 1161.

Overinclusive instruction erroneous. — Where trial court, at commencement of trial, removed the issue of manslaughter by "commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection" from the case, it was reversible error to reinject this false issue into the case by including it in the definition of involuntary manslaughter given the jury in the instructions, and instructing the jury that in order to find defendant guilty it must find that his conduct was of the kind described in the definition. *State v. Salazar*, 1954-NMSC-062, 58 N.M. 489, 272 P.2d 688.

Sufficiency of the evidence assessed against the elements of the crime charged. — Where defendant was charged with involuntary manslaughter, and where the jury was instructed on the essential elements of involuntary manslaughter, but the jury instruction contained an additional element not contained in UJI 14-231 NMRA, the

additional element did not become an essential element under the statute, because the sufficiency of the evidence is assessed against the elements of the crime charged. Therefore, where the defendant did not dispute that he was properly charged with the statutory elements for involuntary manslaughter, that he was given a meaningful opportunity to defend himself against those charges, or that the evidence was sufficient to convict him of the statutory elements of involuntary manslaughter, defendant was properly convicted of involuntary manslaughter. *State v. Carpenter*, 2016-NMCA-058.

Separate instructions not necessary. — Claim that the trial court should have instructed separately on the law applicable to crime of homicide resulting from driving under the influence and resulting from reckless driving was without merit, where jury was adequately instructed as to the proof required in either circumstance. *State v. Fields*, 1964-NMSC-230, 74 N.M. 559, 395 P.2d 908.

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

It is reversible error to submit, in a murder case, the issue of voluntary manslaughter to the jury where no such issue is involved in the evidence. *State v. Luttrell*, 1923-NMSC-024, 28 N.M. 393, 212 P. 739; *State v. Trujillo*, 1921-NMSC-111, 27 N.M. 594, 203 P. 846; *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840; *State v. Lujan*, 1980-NMSC-036, 94 N.M. 232, 608 P.2d 1114.

Because misleading to jury. — A party is entitled to have the jury instructed on all correct legal theories of his case which are supported by substantial evidence but in this case the court's refusal to give the involuntary manslaughter instruction was correct where to have given the requested instruction, which included acts for which there was no evidentiary support, would have introduced false issues and would have been misleading to the jury. *LaBarge v. Stewart*, 1972-NMCA-119, 84 N.M. 222, 501 P.2d 666, cert. denied, 84 N.M. 219, 501 P.2d 663.

No right to instruction on blood alcohol test refusal. — Nothing in N.M. Const., art. II, §§ 14 or 15, or in statutory or case law, gives defendant in prosecution for manslaughter the legal right to have jury instructed that he had right to refuse to take a blood alcohol test. *State v. Fields*, 1964-NMSC-230, 74 N.M. 559, 395 P.2d 908.

Standing to complain. — Where the appellant was convicted of involuntary manslaughter, he could not complain of error in court's instruction in regard to murder. *State v. Carabajal*, 1920-NMSC-086, 26 N.M. 384, 193 P. 406.

Review of requested instruction. — Since the instruction on voluntary manslaughter was given at defendant's request, the appeals court can refuse to review since the trial

court merely instructed the jury as the defendant requested. *State v. Young*, 1994-NMCA-061, 117 N.M. 688, 875 P.2d 1119, cert. denied, 117 N.M. 773, 877 P.2d 579.

Omission of words "without malice". — Omission of words "without malice" in instruction in prosecution for voluntary manslaughter did not decrease amount of proof required to convict. *Territory v. Trapp*, 1911-NMSC-073, 16 N.M. 700, 120 P. 702, *rev'd on other grounds*, 225 F. 968 (8th Cir. 1915).

Instruction upon manslaughter which did not tell jury that the killing must be without malice was beneficial rather than harmful to defendant, and he could not complain thereof. *State v. Carabajal*, 1920-NMSC-086, 26 N.M. 384, 193 P. 406.

Failure to preserve error in instruction. — Defective instruction which failed to advise the jury that defendant's reckless and wanton operation of his automobile must have been proximate cause of victim's death would not be considered on appeal where not raised in the trial court prior to reading of instruction to jury. *State v. Clarkson*, 1954-NMSC-007, 58 N.M. 56, 265 P.2d 670.

Health and safety violations. — Subsection B of this section is applicable to violations of the New Mexico Occupational Health and Safety Act. 1973 Op. Att'y Gen. No. 73-32.

Willful violation of a state occupational health and safety standard which causes the death of an employee would appear to constitute a violation of Subsection B of this section. 1973 Op. Att'y Gen. No. 73-32.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

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).

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

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

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

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 §§ 54 to 70.

Wanton or reckless use of firearm without express intent to inflict injury, 5 A.L.R. 603, 23 A.L.R. 1554.

Negligent homicide as affected by negligence or other misconduct of the decedent, 67 A.L.R. 922.

Test or criterion of term "culpable negligence," "criminal negligence" or "gross negligence," appearing in statute defining or governing manslaughter, 161 A.L.R. 10.

Sleep or drowsiness of operator of automobile as affecting charge of negligent homicide, 63 A.L.R.2d 983.

Manslaughter, who other than actor is liable for, 95 A.L.R.2d 175.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Criminal liability for injury or death caused by operation of pleasure boat, 8 A.L.R.4th 886.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

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

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

40 C.J.S. Homicide §§ 69 to 92.

30-2-4. Assisting suicide.

A. Assisting suicide consists of deliberately aiding another in the taking of the person's own life, unless the person aiding another in the taking of the person's own life is a person acting in accordance with the provisions of the End-of-Life Options Act [Chapter 24, Article 7C NMSA 1978].

B. A person who commits assisting suicide is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-2-5, enacted by Laws 1963, ch. 303, § 2-5; 2021, ch. 132, § 10.

ANNOTATIONS

The 2021 amendment, effective June 18, 2021, removed criminal liability for aiding another in the taking of another person's life if the person is acting in accordance with the provisions of the End-of-Life Options Act; added new subsection designations "A" and "B"; in Subsection A, after "own life", deleted "Whoever" and added "unless the person aiding another in the taking of the person's own life is a person acting in accordance with the provisions of the End-of-Life Options Act"; and in Subsection B, added "A person who".

Physician aid in dying is prohibited by this section. — The practice of aid in dying involves a physician deliberately prescribing a lethal dose of barbiturates with the understanding that the patient will self-administer the entire dose to end his or her life, should the patient choose to do so, conduct clearly encompassed by the plain language of 30-2-4 NMSA 1978. *Morris v. Brandenburg*, 2016-NMSC-027, *aff'g* 2015-NMCA-100, 356 P.3d 564.

Constitutionality. — Where petitioners, two doctors and their patient, sought declaratory and injunctive relief to the effect that either 30-2-4 NMSA 1978, New Mexico's criminal statute prohibiting assisted suicide, did not apply to the conduct defined by petitioners as physician aid in dying, or even if the statute did apply to physician aid in dying, such an application would be unconstitutional, petitioners failed to establish a fundamental liberty interest protected by the inherent rights clause or the due process clause of the New Mexico constitution, because the inherent rights clause has never been interpreted to be the exclusive source for a fundamental constitutional right, and on its own has always been subject to reasonable regulation, and there is a firm legal rationale behind the interest in protecting the integrity and ethics of the medical profession, the interest in protecting vulnerable groups, including the poor, the elderly, and disabled persons, from abuse, neglect, and mistakes due to the risk of subtle coercion and undue influence in end-of-life situations, and the legitimate concern that recognizing a right to physician aid in dying will lead to voluntary or involuntary euthanasia. *Morris v. Brandenburg*, 2016-NMSC-027, *aff'g* 2015-NMCA-100, 356 P.3d 564.

Constitutionality. — Aid in dying is not a fundamental liberty interest under the New Mexico constitution, and therefore a mentally competent, terminally ill patient's interest in a physician's assistance in dying is not a fundamental liberty interest protected by the due process clause of N.M. Const., Art. II, § 18 and is not entitled to protection under the state constitutional provision protecting inherent individual rights to life, liberty and happiness provided for in N.M. Const. Art. II, § 4. The district court, holding otherwise,

erred in permanently enjoining the state from enforcing 30-2-4 NMSA 1978. *Morris v. Brandenberg*, 2015-NMCA-100, cert. denied, 2015-NMCERT-008.

Aid in dying is prohibited by this section. — A patient's choice to achieve a peaceful end of life through aid in dying, or the practice of a willing physician providing a lethal dose of a prescribed medication at the request of a mentally competent, terminally ill patient, is the taking of one's own life, and thus suicide within the meaning of this section; a physician's conduct of providing a patient a lethal dose of a prescribed medication, and thus the means to take his or her own life, is prohibited by this section. *Morris v. Brandenberg*, 2015-NMCA-100, cert. denied, 2015-NMCERT-008.

Second degree murder, assisted suicide, not same offense. — The second degree murder statute (Section 30-2-1B NMSA 1978) is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

Suicide pact not exemption from conviction for murder. — The existence of a suicide pact does not exempt someone from a conviction for committing murder. However, that general rule may not apply if the means of attempted suicide used presents the same risk to both of the parties at the same time, such as when a couple drive off a cliff together. Such is not the case when the victim is killed by a rifle, the trigger of which is pulled by the defendant. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

Suicide pact not assisting suicide. — There was enough evidence to support a conviction of second degree murder because there was sufficient evidence to show that the defendant actively participated in a suicide by holding the gun to the victim's head and pulling the trigger. "Aiding", in the context of determining whether one is criminally liable for their involvement in the suicide of another, is intended to mean providing the means to commit suicide, not actively performing the act which results in death. *State v. Sexson*, 1994-NMCA-004, 117 N.M. 113, 869 P.2d 301, cert. denied, 117 N.M. 215, 870 P.2d 753.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide § 585.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide, 40 A.L.R.4th 702.

83 C.J.S. Suicide § 4.

30-2-5. Excusable homicide.

Homicide is excusable in the following cases:

A. when committed by accident or misfortune in doing any lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent; or

B. when committed by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, if no undue advantage is taken, nor any dangerous weapon used and the killing is not done in a cruel or unusual manner.

History: 1953 Comp., § 40A-2-6, enacted by Laws 1963, ch. 303, § 2-6.

ANNOTATIONS

Limited instruction erroneous. — Instruction limiting defendant's defense of excusable homicide, by omitting homicide committed in doing a lawful act, by lawful means, and with ordinary caution, constituted reversible error. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 110 to 138.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 A.L.R. 921.

Hunting accident: criminal responsibility for injury or death resulting from, 23 A.L.R.2d 1401.

Druggist's criminal responsibility for death or injury in consequence of mistake, 55 A.L.R.2d 714.

Criminal responsibility for injury or death in operation of mechanically defective motor vehicle, 88 A.L.R.2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Retreat: duty to retreat where assailant and assailed share the same living quarters, 26 A.L.R.3d 1296.

Improper treatment of disease, 45 A.L.R.3d 114.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Homicide: duty to retreat where assailant and assailed share the same living quarters, 67 A.L.R.5th 637.

40 C.J.S. Homicide §§ 101 to 138.

30-2-6. Justifiable homicide by public officer or public employee.

A. Homicide is justifiable when committed by a public officer or public employee or those acting by their command and in their aid and assistance:

(1) in obedience to any judgment of a competent court;

(2) when necessarily committed in overcoming actual resistance to the execution of some legal process or to the discharge of any other legal duty;

(3) when necessarily committed in retaking felons who have been rescued or who have escaped or when necessarily committed in arresting felons fleeing from justice; or

(4) when necessarily committed in order to prevent the escape of a felon from any place of lawful custody or confinement.

B. For the purposes of this section, homicide is necessarily committed when a public officer or public employee has probable cause to believe he or another is threatened with serious harm or deadly force while performing those lawful duties described in this section. Whenever feasible, a public officer or employee should give warning prior to using deadly force.

History: 1953 Comp., § 40A-2-7, enacted by Laws 1963, ch. 303, § 2-7; 1989, ch. 222, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added the present designation for Subsection A, redesignated former Subsections A through D as Paragraphs (1) through (4) of present Subsection A, and added present Subsection B.

Legislative recognition of common law. — This section and Section 30-2-7 NMSA 1978 are in reality a legislative recognition of the common law which empowered officers to perform their duty of apprehending and bringing felons to the bar of justice. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

Arresting officer to use best judgment. — When the state sends an officer to make an arrest for a felony, he must use his best judgment to make the arrest, peaceably if he can, but forcibly if he must. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

Use of necessary force in making arrest. — An officer having the right to arrest an offender may use such force as is necessary to effect his purpose, to the extent of taking life. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

Danger of the suspect. — Under this section the crucial consideration is the conduct and dangerousness of the suspect, not the classification of the crime that he or she has committed or is alleged to have committed. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Use of deadly force. — While this section speaks of justifiable homicide, the appellate court reads it as authorizing the use of deadly force by law enforcement officers whether or not the suspect is ultimately killed. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Reasonableness a jury question. — Generally, the question of the reasonableness of the actions of the officer in using lethal force to apprehend a felon is a question of fact for the jury. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

It is apparent, through the inclusion of "probable cause" in Subsection B, that the reasonableness of an individual police officer's actions is an objective analysis evaluated from his perspective at the time of the incident and is necessarily a factual inquiry. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Self-defense authorized. — A self-defense instruction is required whenever a defendant presents evidence sufficient to allow reasonable minds to differ as to all elements of the defense; this is also the standard that should be applied when determining if the jury should be instructed on justifiable homicide by a police officer in accordance with this section. *State v. Mantelli*, 2002-NMCA-033, 131 N.M. 692, 42 P.3d 272, cert. denied, 131 N.M. 737, 42 P.3d 842.

Although an officer must not kill for an escape where the party is in custody for a misdemeanor, if the party assaults the officer with such violence that he had reasonable ground to believe his life in peril, he may justify killing the party. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

Large rocks, hurled by misdemeanant at deputy sheriff in resisting arrest, were dangerous weapons, justifying resort to extreme measures on part of deputy. *State v. Vargas*, 1937-NMSC-049, 42 N.M. 1, 74 P.2d 62.

Duty not to retreat. — In a wrongful death suit, where the evidence showed that decedent committed at least two felonies in the presence of police officers, the officers' duty, when he fired upon them, was not to retreat but to press forward and place him under physical restraint, and, in so doing, the officers could defend themselves and use deadly force if such were justified by the circumstances. *Cordova v. City of Albuquerque*, 1974-NMCA-101, 86 N.M. 697, 526 P.2d 1290.

Instruction appropriate. — Officer charged with killing one resisting an arrest for felony was entitled to have jury instructed as to what constitutes justifiable homicide. *Territory of New Mexico v. Gutierrez*, 1905-NMSC-018, 13 N.M. 138, 79 P. 716.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 121, 134 to 137.

Misdemeanor, degree of force that may be employed in arresting one charged with, 3 A.L.R. 1170, 42 A.L.R. 1200.

Peace officers' criminal responsibility for killing or wounding one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

40 C.J.S. Homicide §§ 104 to 107.

30-2-7. Justifiable homicide by citizen.

Homicide is justifiable when committed by any person in any of the following cases:

A. when committed in the necessary defense of his life, his family or his property, or in necessarily defending against any unlawful action directed against himself, his wife or family;

B. when committed in the lawful defense of himself or of another and when there is a reasonable ground to believe a design exists to commit a felony or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished; or

C. when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed in his presence, or in lawfully suppressing any riot, or in necessarily and lawfully keeping and preserving the peace.

History: 1953 Comp., § 40A-2-8, enacted by Laws 1963, ch. 303, § 2-8.

ANNOTATIONS

Imperfect self-defense. — Imperfect self-defense, which occurs when a person uses excessive force while otherwise lawfully engaging in self-defense, is not a true affirmative defense for which a defendant is entitled to an instruction. Any issues raised by a defendant's claim of imperfect self-defense are properly addressed when the jury is instructed on voluntary manslaughter. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Recognition of common law. — This section and Section 30-2-6 NMSA 1978 are in reality a legislative recognition of the common law which empowered officers to perform their duty of apprehending and bringing felons to the bar of justice. *Alaniz v. Funk*, 1961-NMSC-140, 69 N.M. 164, 364 P.2d 1033.

Three elements necessary before self-defense instruction can be given are: (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

Multiple attacker. — While a person may act in self-defense against multiple attackers acting in concert, this principle applies only to the extent that each accomplice poses an immediate danger of death or great bodily harm, thereby necessitating an act of self-defense. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Retaliation. — Self-defense is defined by the objectively reasonable necessity of the action and does not extend to a defendant's act of retaliation for another's involvement in a crime against the defendant. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Provocation by defendant. — A defendant who provokes an encounter, as a result of which the defendant finds it necessary to use deadly force in defense, cannot claim defendant was acting in self-defense. *State v. Lucero*, 1998-NMSC-044, 126 N.M. 552, 972 P.2d 1143; *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

Excessive force. — The use of excessive force in self-defense is not reasonable and does not entitle one to a self-defense instruction. *State v. Sutphin*, 2007–NMSC-045, 142 N.M. 191, 164 P.3d 72.

To warrant self-defense instruction evidence must raise reasonable doubt in the minds of the jury as to whether or not a defendant accused of homicide did act in self-defense. *State v. Martinez*, 1981-NMSC-016, 95 N.M. 421, 622 P.2d 1041.

Subjective apprehension of harm necessary. — It was not sufficient to justify the taking of human life that a person had reason to apprehend death or great bodily harm to himself unless he killed his assailant; he must entertain such belief and must be acting upon it. *State v. Parks*, 1919-NMSC-041, 25 N.M. 395, 183 P. 433.

Threat of great personal injury. — Laws 1853-1854, p. 86, (former 40-24-13, 1953 Comp.), defining homicide as justifiable when committed in lawful self-defense on reasonable ground to apprehend some great personal injury meant something more than apprehension, however imminent, of a mere battery, not amounting to a felony, and required an apparent design either to take the life or inflict great personal injury on the person assailed, amounting to a felony, if carried out, and imminent danger of such design being accomplished. *Territory v. Baker*, 1887-NMSC-021, 4 N.M. (Gild.) 236, 13 P. 30.

Defense of chastity. — Woman accused of voluntary manslaughter was entitled, on written request, to special instruction on her claim of defense of her chastity. *State v. Martinez*, 1924-NMSC-075, 30 N.M. 178, 230 P. 379.

Defense of habitation authorized. — The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, gave householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

While no law countenances wanton slaying, the protection and security of life being the most vital interest of society, the law of habitation and the resistance to the commission of a felony thereon gave householder the right to kill the aggressor, if such killing was necessary or apparently necessary to prevent or repel the felonious aggression. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Householder not obliged to retreat. — When one's home was attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants had, was not obliged to retreat but might pursue his adversaries until out of danger. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Substantial injury to dwelling not necessary. — Instruction that injury to a dwelling, to be felonious so as to justify killing, must be of a substantial character constituted a prejudicial error. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Property other than dwelling. — Under former law, trespass upon real estate not the dwelling house of accused did not of itself justify or excuse killing of trespasser. *State v. Martinez*, 1929-NMSC-040, 34 N.M. 112, 278 P. 210.

Apprehension of suspected felon. — Deadly force in the apprehension of suspected felons is justifiable only when the citizen has probable cause to believe he or she is threatened with serious bodily harm or the use of deadly force. *State v. Johnson*, 1998-NMCA-019, 124 N.M. 647, 954 P.2d 79.

Requisites of instructions. — It is not imperative that the charge to the jury use the precise terms of the statute; instructions are sufficient which substantially follow the language of the statute or use equivalent language, adequately covering every phase of the case raised by the evidence on which the defendant is entitled to have the jury instructed. *State v. Maestas*, 1957-NMSC-057, 63 N.M. 67, 313 P.2d 337.

Jury to consider threat of danger from defendant's standpoint. — Where defense of habitation is invoked in homicide case, the danger or apparent danger must be considered from the standpoint of accused, and not according to the actual facts as they developed at the trial. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

The jury was adequately instructed where it was charged that if it reasonably appeared to the defendant that his brother was in imminent danger of death or great bodily injury, then the defendant had a right to use such force as would appear reasonably necessary to repel the attack, and the jury was further instructed to view the matter from defendant's viewpoint, even though it afterward appeared that no injury was intended and no danger existed. *State v. Maestas*, 1957-NMSC-057, 63 N.M. 67, 313 P.2d 337.

Instruction on right to act in view of wife's health. — Refusal of instruction relating to defendant's right to act in view of his wife's condition and effect which repeated assaults upon the habitation had had upon her health was reversible error. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

When self-defense instruction mandatory. — 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 the issues that are warranted by the evidence, even though such defense is supported only by the defendant's own testimony. *State v. Heisler*, 1954-NMSC-032, 58 N.M. 446, 272 P.2d 660.

Evidence held to support theory of self-defense. — The recovery of a spent bullet, after trial, from under the hood of the defendant's car, and evidence regarding its angle of entry and rifling characteristics consistent with its having been fired by a gun of the type and caliber known by police to be owned by the victim, was not merely cumulative evidence, but was a material piece of demonstrative evidence strengthening the defendant's theory of self-defense. *State v. Melendez*, 1981-NMCA-027, 97 N.M. 740, 643 P.2d 609, *rev'd on other grounds*, 1982-NMSC-039, 97 N.M. 738, 643 P.2d 607.

When inappropriate. — If the evidence in the case is insufficient to raise a reasonable doubt as to whether a defendant accused of a homicide did act in self-defense, any instruction on that issue is properly refused. *State v. Heisler*, 1954-NMSC-032, 58 N.M. 446, 272 P.2d 660.

Instructions properly refused. — In prosecution for assault with intent to kill, refusal to instruct that person has a right to defend his property from trespass or larceny, and that jury should acquit defendant if it found he shot at prosecuting witness to stop him from removing defendant's property and that such action was necessary to prevent, it was not error where evidence did not show prosecuting witness was on land leased by defendant at time of assault and in light of instructions given. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 40 Am. Jur. 2d Homicide §§ 110 to 126, 138.

Duty to retreat as affected by illegal character of premises on which homicide occurs, 2 A.L.R. 518.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter, 10 A.L.R. 861.

Killing of third person by shot or blow aimed at another in self-defense, 18 A.L.R. 917.

Duty to retreat when not on one's premises, 18 A.L.R. 1279.

Homicide in defense of habitation or property, 25 A.L.R. 508, 32 A.L.R. 1541, 34 A.L.R. 1488.

Evidence of improper conduct by deceased toward defendant's wife as admissible in support of plea of self-defense, 44 A.L.R. 860.

Retreat: extent of premises which may be defended without retreat under right of self-defense, 52 A.L.R.2d 1458.

Instructions: duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 A.L.R.2d 6.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 A.L.R.3d 933.

Retreat: duty to retreat where assailant and assailed share the same living quarters, 26 A.L.R.3d 1296.

Arrest: private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 A.L.R.3d 584.

Killing by set gun or similar device on defendant's own property, 47 A.L.R.3d 646.

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.

Duty to retreat where assailant is social guest on premises, 100 A.L.R.3d 532.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

Homicide: duty to retreat where assailant and assailed share the same living quarters, 67 A.L.R.5th 637.

40 C.J.S. Homicide §§ 108 to 138.

30-2-8. When homicide is excusable or justifiable defendant to be acquitted.

Whenever any person is prosecuted for a homicide, and upon his trial the killing shall be found to have been excusable or justifiable, the jury shall find such person not guilty and he shall be discharged.

History: 1953 Comp., § 40A-2-9, enacted by Laws 1963, ch. 303, § 2-9.

30-2-9. Murderer may not profit from wrongdoing; public policy.

A. The acquiring, profiting or anticipating of benefits by reason of the commission of murder where the person committing such crime is convicted of either a capital, first or second degree felony, is against the public policy of this state and is prohibited.

B. In all cases involving devises or bequests, or heirships under the laws of descent and distribution, or cotenancies, or future interests, or community estates, or contracts, whether of real, personal or mixed properties, where a person, who, by committing murder and where such person is convicted of either a capital, first or second degree felony, and might receive some benefit therefrom either directly or indirectly, the common-law maxim to the effect that one cannot take advantage of his own wrong, shall control and be applied to the interpretation, construction and application of all statutes or decisions of this state in order to deprive and prevent him from profiting from such wrongful acts.

History: 1953 Comp., § 40A-2-10, enacted by Laws 1963, ch. 303, § 2-10.

ANNOTATIONS

Applicability. — This statute clearly requires a conviction of murder. Where defendant was convicted of vehicular homicide, a third degree felony, the forfeiture provision does not apply. *Aranda v. Camacho*, 1997-NMCA-010, 122 N.M. 763, 931 P.2d 757.

Section distinct from common law. — This section is not merely declaratory of the common law, nor is it a mere extension of or addition to the common-law maxim that a beneficiary may not profit by his own crime. *Rose v. Rose*, 1968-NMSC-115, 79 N.M. 435, 444 P.2d 762.

Nature of prohibition. — If the legislature had intended it as merely declaratory of the common law, it would have been easy to have said that one who is convicted of feloniously causing the death of another shall not benefit therefrom. However, the legislature, by express and unambiguous language, prohibited only those convicted of murder from so profiting. *Rose v. Rose*, 1968-NMSC-115, 79 N.M. 435, 444 P.2d 762.

Matter for legislature. — This is a legislative matter, and where, in 1942, prior to passage of Laws 1955, ch. 61, providing that a murderer could not inherit the estate of his victim, defendant killed his mother, pleading guilty to murder in the second degree for the crime, the court would refuse to amend or set aside the unambiguous statutes of descent and distribution under which the property of the mother descended to the son. *Reagan v. Brown*, 1955-NMSC-064, 59 N.M. 423, 285 P.2d 789.

Criminal proceeding determinative. — The question of whether the insured was murdered by the person to whom the property would ordinarily go is one to be judicially determined, the legislature having seen fit to provide that such determination must be ascertained in a criminal proceeding. *Rose v. Rose*, 1968-NMSC-115, 79 N.M. 435, 444 P.2d 762.

Law reviews. — For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Descent and Distribution §§ 101 to 109, 134; 41 Am. Jur. 2d Husband and Wife § 49; 44 Am. Jur. 2d Insurance § 1715.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, 24 A.L.R.2d 1120.

Insurance: right to proceeds of life insurance, as between estate of murdered insured and alternative beneficiary named in policy, where murderer was made primary beneficiary, 26 A.L.R.2d 987.

Insurance: killing of insured by beneficiary as affecting life insurance or its proceeds, 27 A.L.R.3d 794.

Felonious killing of one cotenant by the other as affecting latter's rights in the property, 42 A.L.R.3d 1116.

Homicide as precluding taking under will or by intestacy, 25 A.L.R.4th 787.

26A C.J.S. Descent and Distribution § 47; 41 C.J.S. Husband and Wife § 32; 46A C.J.S. Insurance § 1429; 94 C.J.S. Wills § 104.

ARTICLE 3
Assault and Battery

30-3-1. Assault.

Assault consists of either:

A. an attempt to commit a battery upon the person of another;

B. any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery; or

C. the use of insulting language toward another impugning his honor, delicacy or reputation.

Whoever commits assault is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-3-1, enacted by Laws 1963, ch. 303, § 3-1.

ANNOTATIONS

Cross references. — For assault and battery upon revenue division employees, *see* 7-1-75 NMSA 1978.

For assault by prisoner, *see* 30-22-17 NMSA 1978.

For assaults upon peace officers, *see* 30-22-21 to 30-22-26 NMSA 1978.

Requisites of assault. — An assault under New Mexico law requires an act, threat or menacing contact, which causes the plaintiff to reasonably believe she is in danger of receiving an immediate battery. *Chavez v. Thomas & Betts, Corp.*, 396 F.3d 1088 (10th Cir. 2005).

Specific intent is not an essential element of aggravated assault. — Where defendant was charged with aggravated assault with a deadly weapon, and where the state presented evidence at trial that the victim of the assault was standing next to the shooting victim when the shooting occurred and that the assault victim reasonably

believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. Specific intent is not an essential element of aggravated assault. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

Sufficient evidence of aggravated assault. — Where defendant was charged with aggravated assault with a deadly weapon, the evidence that the victim of the assault was standing right next to the shooting victim when the shooting occurred, that the assault victim believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant’s conviction for aggravated assault with a deadly weapon. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

Constitutional infirmity in Subsection C may exist insofar as first and fourteenth amendment rights are concerned. *State v. Parrillo*, 1979-NMCA-135, 94 N.M. 98, 607 P.2d 636, cert. denied, 94 N.M. 629, 614 P.2d 546.

Insulting language. — Language that meant "follow the road, don't go" did not, as a matter of law, tend toward impugning the honor, delicacy or reputation of another. *State v. Vasquez*, 1971-NMCA-182, 83 N.M. 388, 492 P.2d 1005.

Requisites of assault. — For there to have been an assault upon a victim, there must have been an act, threat or conduct which caused him to reasonably believe he was in danger of receiving an immediate battery. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

Batteries do not include assault. — While assault and battery are closely related, one may exist without the other. All batteries do not include an assault. For there to be an assault, there must have been an act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery. *Baca v. Velez*, 1992-NMCA-053, 114 N.M. 13, 833 P.2d 1194, cert. denied, 113 N.M. 636, 830 P.2d 553.

Evidence of victim's apprehension. — Where there was no direct evidence of an alleged victim's belief that he was in danger of receiving an immediate battery, the evidence was insufficient to show that any assault had been committed. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

Sufficient evidence of assault by a corrections officer against an inmate. — Where defendant was charged with two counts of assault and attempted battery committed against an inmate, allegedly committed while defendant was employed as a corrections officer, and where evidence was presented at trial that defendant, while escorting the victim out of a courtroom following a hearing, attempted to kiss the victim multiple times, that the victim pushed defendant away each time, but gave defendant her phone number because she was nervous, uncomfortable, and scared that defendant would try

to do more than kiss her, and where defendant claimed that his two convictions for assault were not supported by sufficient evidence because there was no evidence that defendant was angry at the time of either of his attempts to kiss the victim, there was sufficient evidence to support defendant's convictions for assault where evidence established that the victim was under defendant's physical control, restrained by shackles, and isolated within the courthouse when defendant attempted to kiss her. The victim's testimony provided relevant direct and circumstantial evidence from which a reasonable jury could conclude that under these specific circumstances, defendant's attempts to kiss her were done in an offensive or insulting manner. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

Evidence of threats following assault and attempted battery was relevant. — Where defendant was charged with two counts of assault and attempted battery committed against an inmate, allegedly committed while defendant was employed as a corrections officer, and where evidence was presented that defendant, while escorting the victim out of a courtroom following a hearing, attempted to kiss the victim multiple times, that the victim pushed defendant away each time, but gave defendant her phone number because she was nervous, uncomfortable, and scared that defendant would try to do more than kiss her, and that following the victim's release from jail, she received messages on her cell phone from defendant, including a threat from defendant that he would call the victim's "tracker" if she continued to refuse to return his calls, which the victim interpreted as a threat to send her back to jail, the district court did not abuse its discretion by admitting evidence of defendant's voicemail messages because it was not against the logic and effect of the facts and circumstances of the case for the district court to allow testimony about defendant's voicemail message threatening the victim with penal consequences if she continued to refuse his calls. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

Improperly admitted evidence of menacing conduct not unfairly prejudicial. — Where defendant was improperly charged and convicted of aggravated assault with a deadly weapon along with tampering with evidence, and the district court admitted evidence that defendant stated that he robbed the neighborhood in the course of the overall incident at issue, the admission of defendant’s statement was not unfairly prejudicial because although the evidence related to defendant’s menacing conduct, which related solely to the improperly charged, assault-based offense, the testimony about defendant’s statement that he robbed the neighborhood was elicited from the victim, not law enforcement, was offered in the context of other blustering comments from defendant, defendant makes no showing that the state placed emphasis on the statement, there was no indication that the state attempted to relate the statement to the conduct that supported defendant’s conviction for tampering, and there was other sufficient evidence to supporting defendant’s conviction for tampering with evidence. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev’d on other grounds*, 2018-NMSC-028.

Definition mandatory part of instructions. — The definition of assault found in this section contains essential elements of the crime of which defendant was convicted,

assault with intent to commit a violent felony, and hence, failure to instruct on the definition of assault constituted jurisdictional error. *State v. Jones*, 1973-NMCA-107, 85 N.M. 426, 512 P.2d 1262.

Instruction on assault as lesser included offense. — In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the nonenumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 8 to 36.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Motor vehicle: criminal responsibility for assault and battery by operation of mechanically defective motor vehicle, 88 A.L.R.2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Deadly or dangerous weapon, intent to do serious harm as essential to crime of assault with, 92 A.L.R.2d 635.

Unintentional killing of or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute, 89 A.L.R.3d 1026.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Civil liability for insulting or abusive language - modern status, 20 A.L.R.4th 773.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

Liability of hotel or motel operator for injury to guest resulting from assault by third party, 28 A.L.R.4th 80.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Franchisor's tort liability for injuries allegedly caused by assault or other criminal activity on or near franchise premises, 2 A.L.R.5th 369.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Admissibility of threats to defendant made by third parties to support claim of self-defense in criminal prosecution for assault or homicide, 55 A.L.R.5th 449.

Attempt to commit assault as criminal offense, 93 A.L.R.5th 683.

Effect of federal assault statute (18 USCS § 113) on prosecutions under Assimilative Crimes Act (18 USCS § 13) making state criminal laws applicable to acts committed on federal reservations, 57 A.L.R. Fed. 957.

6A C.J.S. Assault and Battery § 64.

30-3-2. Aggravated assault.

Aggravated assault consists of either:

A. unlawfully assaulting or striking at another with a deadly weapon;

B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or

C. wilfully [willfully] and intentionally assaulting another with intent to commit any felony.

Whoever commits aggravated assault is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-3-2, enacted by Laws 1963, ch. 303, § 3-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For aggravated assault upon peace officer, *see* 30-22-22 NMSA 1978.

For instruction on general criminal intent, *see* UJI 14-141 NMRA.

I. GENERAL CONSIDERATION.

Legislative intent for separate punishments. — As each offense includes one statutory element not included in the other, the presumption is that the legislature intended to punish separately the two offenses of aggravated assault and armed robbery. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Multiple victims. — Defendant's convictions for two counts of aggravated assault stemming from defendant's one act of pointing a shotgun at two victims at the same time did not violate the double jeopardy clause, because each victim suffered distinct mental harm protected by the statute. *State v. Roper*, 2001-NMCA-093, 131 N.M. 189, 34 P.3d 133, cert. quashed, 131 N.M. 619, 41 P.3d 345 (2002).

State v. Maes, 1983-NMCA-073, 100 N.M. 78, 665 P.2d 1169 is no longer considered to be controlling authority in determining whether there has been a violation of the prohibition against double jeopardy, because the analysis contained therein predates, and has been replaced by, the two-pronged analysis of *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223. State v. Armijo, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Use of deadly weapon to protect property. — The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable, both civilly and criminally, for the assault. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Resisting arrest with deadly weapon. — Resistance of lawful arrest with deadly weapon was not excused by fact that the officer acted from personal motives. *State v. Nieto*, 1929-NMSC-060, 34 N.M. 232, 280 P. 248.

Intentional shooting. — The killing of a person by intentionally shooting him with a rifle, if not justified by the law of self-defense, would constitute at least an assault with a deadly weapon and would be a felony, and hence not involuntary manslaughter. *State v. Pruett*, 1921-NMSC-110, 27 N.M. 576, 203 P. 840.

Prosecution after acquittal of other charges. — State did not violate guarantee against double jeopardy in prosecuting defendant for assault with intent to commit a violent felony and false imprisonment, after an acquittal on charges of assault on a jail and false imprisonment and kidnapping of another individual, arising out of the same incident, since where the jury in the first trial acquitted defendant they did not necessarily conclude that he was not present at the jail that day and thus did not commit any crimes, but simply that he was not guilty of the crimes alleged. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Statutory language to be used. — An indictment for drawing or handling deadly weapon in threatening manner under Laws 1887, ch. 30, § 2 (former 40-17-3, 1953 Comp.) was required to follow language of statute. *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

Word "unlawfully" was not necessary in indictment if other words were used which conveyed the same meaning. *Ruiz v. Territory*, 1900-NMSC-013, 10 N.M. 120, 61 P. 126.

Allegation that gun was loaded unnecessary. — In prosecution for an assault with a deadly weapon, a gun, it was not necessary to allege that the gun was loaded. *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

Indictment failing to specify appropriate statutory section. — An indictment framed under Laws 1887, ch. 30, prescribing penalties for drawing or handling deadly weapon in threatening manner, assault with a deadly weapon and drawing or discharging firearm in public place was insufficient when the offense charged did not come within scope of any section of that act. *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

Where the state originally charged defendant with assault with intent to commit the violent felony of robbery but later amended the indictment to charge assault with intent to commit the felony of larceny, the fact that the amended indictment continued to contain the statutory references to assault with intent to commit a violent felony was not fatal to the indictment, since misreference to statutory sections is not a sufficient reason to dismiss the indictment. *State v. Gallegos*, 1989-NMCA-066, 109 N.M. 55, 781 P.2d 783, cert. denied, 108 N.M. 771, 779 P.2d 549.

Failing to describe weapon or allege unlawful assault. — An indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former 40-17-6, 1953 Comp.) was insufficient if it did not describe the knife used or failed to charge that it was one with

which dangerous cuts could be given or dangerous thrusts inflicted or that defendant "did unlawfully assault." *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

Defense of citizen's arrest. — When the defendant asserted the defense of citizen's arrest in a prosecution for aggravated assault with a deadly weapon, the issue of notice of his intent to make an arrest and proof that a felony was in fact committed by the arrestee were not elements of the defense. *State v. Johnson*, 1996-NMSC-075, 122 N.M. 696, 930 P.2d 1148.

Where evidence on charge is overwhelming, defendant cannot be prejudiced by the testimony as to the extent of a victim's injuries after the jury is told to disregard that testimony. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

No double jeopardy for sentence enhancement. — Double jeopardy did not prohibit the trial court from enhancing defendant's sentence for aggravated assault with a deadly weapon under the firearm enhancement section, 31-18-16A NMSA 1978, since each section contains an element or elements not included in the other and the phrase "a noncapital felony" means "any noncapital offense". *State v. Charlton*, 1992-NMCA-124, 115 N.M. 35, 846 P.2d 341, cert. denied, 114 N.M. 577, 844 P.2d 827.

Sentence improper. — Sentence of 7 to 15 years for convictions of assault with intent to kill and assault with a deadly weapon were not in accordance with the so-called indeterminate sentence law, former 41-17-1, 1953 Comp., which required a trial judge to sentence a person found guilty of an offense to the minimum and maximum provided by statute for the offense. *State v. Romero*, 1963-NMSC-168, 73 N.M. 109, 385 P.2d 967 (decided under prior law).

II. ELEMENTS OF AGGRAVATED ASSAULT.

Threat of bodily harm. — A defendant could be convicted of aggravated assault by merely threatening the victim with bodily harm. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Aggravated assault and armed robbery distinguished. — Aggravated assault contains an element that armed robbery does not: striking at a victim instead of just threatening him. Armed robbery contains an element that aggravated assault does not: taking victim's property with the intent to permanently deprive victim of the property. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Meaning of "deadly weapon". — Deadly weapons shall be construed to mean any kind or class of pistol or gun, whether loaded or unloaded. *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

Apprehension of danger required. — For there to be an aggravated assault there must first be an assault; for there to be an assault upon a victim, there must have been

an act, threat or conduct which caused him to reasonably believe he was in danger of receiving an immediate battery. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

General criminal intent is necessary element of aggravated assault although the terms of the statute do not require it. Consequently, something done "not with an evil purpose, but for fun, or as a practical joke" is not done with the requisite criminal intent necessary to constitute the crime of aggravated assault. *State v. Cruz*, 1974-NMCA-077, 86 N.M. 455, 525 P.2d 382.

Intent defined as conscious wrongdoing. — Although Subsection A does not refer to intent, intent is required; the intent involved is that of conscious wrongdoing. *State v. Mascarenas*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d 1285.

Intent to harm not requisite. — An intent to do physical or bodily injury is not an element of Subsection A of this section. *State v. Cruz*, 1974-NMCA-077, 86 N.M. 455, 525 P.2d 382.

Specific intent to do bodily harm is not a necessary element of aggravated assault under New Mexico law. Proof of intent under the aggravated assault statute is achieved by showing the defendant intended to commit a simple assault and did so with a deadly weapon. *United States v. Boone*, 347 F. Supp. 1031 (D.N.M. 1972).

Great bodily harm is not element of aggravated assault charge. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

III. EVIDENCE AND PROOF.

State is not required to prove that accused intended to assault victim, but only that he did an unlawful act which caused the victim to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with a general criminal intent. *State v. Manus*, 1979-NMSC-035, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds*, *Sells v. State*, 1982-NMSC-125, 98 N.M. 786, 653 P.2d 162.

Specific intent is not an essential element of aggravated assault. — Where defendant was charged with aggravated assault with a deadly weapon, and where the state presented evidence at trial that the victim of the assault was standing next to the shooting victim when the shooting occurred and that the assault victim reasonably believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. Specific intent is not an essential element of aggravated assault. *State v. Branch*, 2018-NMCA-031, *replacing* 2016-NMCA-071, 387 P.3d 250, cert. denied.

Sufficient evidence of aggravated assault. — Where defendant was charged with aggravated assault with a deadly weapon, the evidence that the victim of the assault was standing right next to the shooting victim when the shooting occurred, that the assault victim believed that she was also going to be shot, and where the jury was properly instructed on general criminal intent, there was sufficient evidence to support defendant's conviction for aggravated assault with a deadly weapon. *State v. Branch*, 2016-NMCA-071, 387 P.3d 250, *replaced by* 2018-NMCA-031, and cert. quashed.

Sufficient evidence of aggravated assault with a deadly weapon. — Where, in defendant's trial for first-degree murder, child abuse and aggravated assault with a deadly weapon, the jury heard evidence that defendant fired a gun at the shooting victim nine times at point-blank range, that the victim was seated in the front passenger seat of his vehicle, and that the victim's wife was seated in the driver's seat of the vehicle, and where the victim's wife testified that when the shooting began, she closed her eyes and believed that she was going to die, there was sufficient evidence for a jury to reasonably infer that when defendant pointed the gun at the victim, he was simultaneously point it in the direction of the victim's wife, and there was sufficient evidence to support the jury's determination that the victim's wife believed she was in danger of receiving an immediate battery and that this belief was reasonable. *State v. Ramirez*, 2018-NMSC-003.

"Use" of a deadly weapon in the context of assault with a deadly weapon construed. — A defendant *uses* a deadly weapon to commit assault where a defendant makes *facilitative use* of the deadly weapon. Facilitative use of a deadly weapon may be found if (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used by the defendant to facilitate the commission of the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

Sufficient evidence of assault on a school employee with a deadly weapon. — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish the BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year old shot you?". There was sufficient evidence to satisfy the essential element that the child *used* the deadly weapon where the evidence supported findings that a deadly weapon was present, that the principal knew or had reason to know from the child's words and actions that the child had a BB gun when the child threatened him, and that the presence of the weapon was intentionally used by the child to facilitate the commission of an assault on the principal. Based on the child's verbal threats that took advantage of the presence of the BB gun, it was reasonable for the jury to determine that the child's conduct caused the principal to reasonably believe that he was in danger of receiving

an immediate battery, and thus the child *used* the deadly weapon to facilitate the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

Sufficient evidence of aggravated assault by "use" of a deadly weapon. — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish or retrieve a BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the school principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year-old shot you?". A reasonable juror could have determined that the child threatened the principal with the BB gun and that the BB gun was instrumental to the child's assault because the child's menacing and threatening questions instilled fear in the principal while the BB gun was bulging from the child's pants and of which the child knew the principal was aware. *State v. Zachariah G.*, 2021-NMCA-036, cert. granted.

Sufficient evidence of aggravated assault. — Where defendant was convicted of three counts of aggravated assault for unlawfully assaulting or striking at another with a deadly weapon, there was sufficient evidence to support the convictions where the evidence presented at trial established that defendant admitted to police that he discharged his firearm twice in the air and twice at a vehicle that he knew to be occupied by multiple people, because the evidence was such that the jury could have concluded that defendant’s act of shooting at the occupied vehicle caused the occupants of the vehicle to believe defendant was about to intrude on their bodily integrity or personal safety. *State v. Candelaria*, 2019-NMSC-004.

Use of circumstantial evidence. — On trial of charge of assault with deadly weapon, whether the weapon was in fact used may be shown by circumstantial evidence. *State v. Conwell*, 1932-NMSC-042, 36 N.M. 253, 13 P.2d 554.

Proof of motive is not indispensable to conviction. — Without contention that defendant did not shoot victim, the state is not required to prove motive. *State v. Brito*, 1969-NMCA-027, 80 N.M. 166, 452 P.2d 694.

Evidence of victim's prior conviction. — Exclusion of bare fact that person threatened with deadly weapon had been convicted of voluntary manslaughter, offered as bearing on self-defense, was within discretion of trial court. *State v. Nieto*, 1929-NMSC-060, 34 N.M. 232, 280 P. 248.

Sufficient evidence of aggravated assault. — Where co-defendant held a knife at the victim’s throat and told the victim that he was going to kill him, the facts were sufficient to support the jury’s finding that a reasonable person in the victim’s position would believe that his bodily integrity was threatened by co-defendant’s use of the knife. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

Evidence sufficient. — Evidence that defendant pulled the loaded gun from his pocket and made threat to kill after argument over girlfriend was substantial evidence of an attempt to apply force in either an insolent or angry manner and therefore sufficient evidence of aggravated assault. *State v. Woods*, 1971-NMCA-026, 82 N.M. 449, 483 P.2d 504.

Evidence that defendant told victim to leave, fired revolver within one foot of and in the direction of victim, and called victim a son of a bitch and told him to get up, supports conviction for aggravated assault. *State v. Brito*, 1969-NMCA-027, 80 N.M. 166, 452 P.2d 694.

The evidence was sufficient to sustain defendant's conviction for offense of aggravated assault when he pointed a gun at victim and asked for money, which was handed over, victim testifying that he was worried because the gun was loaded. *State v. Anaya*, 1968-NMCA-014, 79 N.M. 43, 439 P.2d 561.

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. *State v. Peterson*, 1985-NMCA-109, 103 N.M. 638, 711 P.2d 915, cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

A defendant's acts of specifically pointing a rifle at each of several victims on two or more separate instances, accompanied by verbal threats, constituted evidence from which the jury could properly determine that defendant committed the separate offenses of aggravated assault and false imprisonment against each victim. Moreover, the jury could find that defendant falsely imprisoned his victims at the beginning of the episode and thereafter committed additional independent aggravated assaults for which he could be separately punished. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

Because the aggravated assault statute and the armed robbery statute share common ground in theory, a defendant's conviction could rely on similar, if not identical, evidence. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

IV. DOUBLE JEOPARDY.

Prosecution under Assimilative Crimes Act. — A person may be prosecuted and convicted of the lesser included offense of aggravated assault, in violation of New Mexico law, when congress has enacted a statute (18 U.S.C. § 113) making simple assault and its more aggravated forms federal offenses. *United States v. Johnson*, 967 F.2d 1431 (10th Cir. 1992).

Lesser included offense of aggravated battery. — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

No double jeopardy where facts differ. — If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differ, then there would be no double jeopardy and the burden will be on defendant to prove a factual basis showing double jeopardy. *State v. Woods*, 1973-NMCA-114, 85 N.M. 452, 513 P.2d 189.

Separate criminal acts. — Assault with a deadly weapon, even though committed in connection with a larceny is a separate criminal act, as distinguished from a necessary ingredient of the crime of larceny, and, accordingly, there may be a conviction and punishment for both. *State v. Martinez*, 1967-NMSC-103, 77 N.M. 745, 427 P.2d 260.

Separate punishment for aggravated assault and arson. — The legislature intended separate punishment for the crimes of arson and aggravated assault. While these statutes may be violated together, they are not necessarily violated together. Punishment for a violation of either statute is not enhanced for a violation of the other. The legislature intended separate punishment for unitary conduct violating both statutes. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

Shooting into occupied vehicle. — Separate punishments are intended for the offenses of shooting into an occupied vehicle and aggravated assault with a deadly weapon. *State v. Sosa*, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017 *abrogated by State v. Porter*, 2020-NMSC-020.

Aggravated assault not lesser included offense. — Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. *State v. Patterson*, 1977-NMCA-084, 90 N.M. 735, 568 P.2d 261.

Lesser included offense of federal crime. — The New Mexico offense of aggravated assault is a lesser included offense of the federal crime of assault with a dangerous weapon with specific intent to do bodily harm, 18 U.S.C. § 113(c) (now 18 U.S.C. § 113(a)(3)). *United States v. Abeyta*, 27 F.3d 470 (10th Cir. 1994).

Merger of conviction for aggravated assault into offense of false imprisonment. — Even though a defendant's acts of threatening each of multiple victims with a deadly weapon constituted the means by which his victims were restrained or confined against their will so as to cause the assault to merge into the crime of false imprisonment, the trial court did not err in refusing to merge defendant's convictions of aggravated assault into the offenses of false imprisonment, because there was evidence of multiple acts of aggravated assault committed against each victim. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert denied, 111 N.M. 529, 807 P.2d 227.

V. JURY INSTRUCTIONS.

Jury instructions on aggravated assault as lesser included offense. — In prosecution for assault with a deadly weapon with specific intent to do bodily harm (18 U.S.C. § 113(c)) (now 113(a)(3)), where the record was rife with testimony that alcohol might have affected defendant's ability to appreciate the import of his actions, defendant was entitled to an instruction on the lesser included New Mexico offense of aggravated assault, which has the same action elements but does not include a specific intent to injure. *United States v. Abeyta*, 27 F.3d 470 (10th Cir. 1994).

Instruction's definitions sufficient. — Instruction defining "assault" as an attempt to commit a battery upon the person of another and "unlawful" as means contrary to law and without legal excuse or justification, held not to be error. *State v. Woods*, 1971-NMCA-026, 82 N.M. 449, 483 P.2d 504.

Instructions on intent insufficient. — Conscious wrongdoing is an essential element of Subsection A of this statute, and instructions in the language of the statute were insufficient to inform the jury of the intent required. Hence, defendant's conviction was reversed. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888.

Word "unlawful" insufficient description of intent. — When a statute sets forth the requisite intent, instructions in the language of the statute sufficiently instruct on the required intent. However, where the applicable statute speaks of "unlawfulness," instructions informing the jury that defendant's conduct must have been unlawful does not inform the jury that conscious wrongdoing is an element of the crime of aggravated assault. *State v. Mascarenas*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d 1285.

Use of word "unlawfully" unnecessary. — It was not necessary to use the word "unlawfully" in an instruction, where the jury was informed that the assault must have been committed without excuse or justification, and another instruction defined an assault as an "unlawful attempt." *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

Use of "feloniously" unnecessary. — Although an indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former Section 40-17-4, 1953 Comp.) used the word "feloniously," there was no error in omitting it from the instruction as to elements of crime, as the use of the word in the indictment was unnecessary, and the jury was not required to fix the penalty. *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

Use of phrase "without excuse or justification" proper. — In prosecution for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former Section 40-17-4, 1953 Comp.), it was not error to use the words "without excuse or justification" in an instruction. *Territory v. Gonzales*, 1907-NMSC-007, 14 N.M. 31, 89 P. 250.

Failure to instruct on essential elements. — The trial court committed reversible error when it instructed the jury on the elements of aggravated assault with intent to commit

felony aggravated battery, but then failed to instruct on the essential elements of felony aggravated battery and, instead, instructed on the essential elements of misdemeanor aggravated battery. *State v. Armijo*, 1999-NMCA-087, 127 N.M. 594, 985 P.2d 764.

Breaking-and-entering instruction refused since defendant intended to threaten. — A requested instruction on breaking and entering as a lesser included offense was properly refused, where although the evidence was susceptible to inferences that defendant did not have the requisite intent to commit any batteries or homicides until he got inside, there was no evidence other than he had the intent, when he entered a house, to threaten someone while masked. *State v. Durante*, 1986-NMCA-024, 104 N.M. 639, 725 P.2d 839.

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48 to 55.

Sense of shame, or other disagreeable emotion on part of female, as essential to an aggravated or indecent assault, 27 A.L.R. 859.

Deadly or dangerous weapon, intent to do physical harm as essential element of crime of assault with, 92 A.L.R.2d 635.

Sexual nature of physical contact as aggravating offense, 63 A.L.R.3d 225.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 A.L.R.5th 775.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 A.L.R.5th 823.

6A C.J.S. Assault and Battery §§ 72 to 82.

30-3-3. Assault with intent to commit a violent felony.

Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary.

Whoever commits assault with intent to commit a violent felony is guilty of a third degree felony.

History: 1953 Comp., § 40A-3-3, enacted by Laws 1963, ch. 303, § 3-3; 1977, ch. 193, § 2.

ANNOTATIONS

Cross references. — For offense of murder, *see* 30-2-1 NMSA 1978.

For offense of criminal sexual penetration, *see* 30-9-11 NMSA 1978.

For offenses of robbery and burglary, *see* 30-16-2 and 30-16-3 NMSA 1978.

For assault with intent to commit violent felony upon peace officer, *see* 30-22-23 NMSA 1978.

No double jeopardy bar to punishment. — There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

Essential elements of offense. — Essential elements and ingredients of assault with intent to murder were willfully and unlawfully to assault a person with intent to murder such person, so that intent was an essential ingredient of the crime. *Territory v. Baca*, 1903-NMSC-001, 11 N.M. 559, 71 P. 460.

Aggravated assault not lesser included offense. — Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. *State v. Patterson*, 1977-NMCA-084, 90 N.M. 735, 568 P.2d 261.

No merger with aggravated battery. — The double jeopardy clause does not prohibit sentencing for both assault with intent to commit a violent felony murder and for aggravated battery with a deadly weapon; one offense does not subsume the other and other indicia of legislative intent suggests an intent to punish separately. *State v. Cowden*, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972, cert. denied, 121 N.M. 644, 916 P.2d 844.

No merger with kidnapping conviction. — Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

No merger with shooting at an inhabited dwelling. — This section and Section 30-3-8 NMSA 1978 (shooting at an inhabited dwelling) are two sections directed toward the protection of different social norms and indicate an intention on the part of the legislature to allow for multiple punishment for the same conduct. The legislature was concerned with conduct typically designed to terrorize or intimidate in 30-3-8 NMSA 1978. In contrast, this section is directed toward conduct which is motivated by an intention to effect another's death. *State v. Highfield*, 1992-NMCA-020, 113 N.M. 606, 830 P.2d 158, cert. denied, 113 N.M. 503, 828 P.2d 415.

Double jeopardy not found. — Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Collateral estoppel not applicable to facts. — Acquittal of defendant on charge of assault on a jail did not collaterally estop state from bringing subsequent prosecution against him on charge of assault with intent to commit a violent felony, even where both offenses allegedly occurred at same time and place, since charge of assault with intent to commit a violent felony required a jury to consider facts not required in the first trial. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Justification insufficient. — An attempt to recover property in the absence of a threatened trespass to one's habitation did not justify an attempt to take the life of a trespasser. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

Manner and means of assault to be charged. — Indictment for assault with intent to commit murder must state the manner and means of the assault so far, at least, as to show that the crime would have been murder had not the acts stopped short of their full effect. *Territory v. Carrera*, 1892-NMSC-023, 6 N.M. 594, 30 P. 872; *Territory v. Sevailles*, 1855-NMSC-001, 1 N.M. 119.

Averment of use of deadly weapon. — An indictment for an assault with intent to kill was insufficient unless it averred that the assault was committed with a deadly weapon and with every ingredient necessary to have constituted the crime of murder if death had ensued. *Territory v. Sevailles*, 1855-NMSC-001, 1 N.M. 119.

Knife as deadly weapon. — An indictment averring an assault with a knife with intent to kill was sufficient, although not stating the knife to be a deadly weapon. *Territory v. Sevailles*, 1855-NMSC-001, 1 N.M. 119.

Conviction under section other than that charged. — Under count charging assault with intent to murder, alleging essentials of assault with deadly weapon, defendant could not be convicted of latter offense. *State v. Taylor*, 1927-NMSC-081, 33 N.M. 35, 261 P. 808.

Evidence of victim's character. — Absent any claim of self-defense, the victim's asserted character traits were not essential elements of the defense in a prosecution for assault with intent to commit a violent felony and were not provable by specific acts of conduct, but were only provable by reputation or opinion evidence. *State v. Bazan*, 1977-NMCA-011, 90 N.M. 209, 561 P.2d 482, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Evidence of other crime. — In prosecution for assault with pistol with intent to kill, where there was some evidence that accused intended to kill the prosecuting witness

as a "stool pigeon," it was not error to permit inquiry, on cross-examination of accused, whether he had not been indicted the day before the assault for a prohibition violation. *State v. Solis*, 1934-NMSC-077, 38 N.M. 538, 37 P.2d 539.

Statements of deceased victim as hearsay. — The oral statements of one who died after an assault with intent to kill and before trial were not admissible on a prosecution for the offense since they constituted hearsay and were incompetent and irrelevant. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

Weight of defendant's statements of intent. — Statement by defendant that he wanted to indulge in a lascivious act other than intercourse upon the person of prosecutrix did not negative possible intent to compel sexual intercourse since jury might well have believed that defendant's announced intention was only preliminary to raping her. *State v. Compos*, 1952-NMSC-016, 56 N.M. 89, 240 P.2d 228.

Evidence sufficient to go to jury. — There was sufficient evidence to take case to jury where elements of unlawfulness, deliberateness and premeditated design together with an intent to take the life of the person assaulted were amply shown. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

Instructions to contain definition of assault. — The definition of assault found in Section 30-3-1 NMSA 1978 contains essential elements of the crime of which defendant was convicted, assault with intent to commit a violent felony, and failure of the trial judge to define assault was jurisdictional error. *State v. Jones*, 1973-NMCA-107, 85 N.M. 426, 512 P.2d 1262.

Charge on right to defend property properly refused. — In prosecution for assault with intent to kill, trial court did not err in refusing an instruction that a person has a right to defend his property from trespass or larceny and that jury should acquit defendant if it found that he shot at prosecuting witness to stop him from removing defendant's property and such action was necessary to prevent it, where evidence did not show prosecuting witness was on land leased by defendant at time of assault and in light of instructions given. *State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122.

Refusal to instruct not prejudicial. — Defendant was not prejudiced by refusal to give requested instruction on accidental discharge of gun, while not engaged in the commission of a felony, where the subject was adequately covered in the court's general charge. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

Instruction improper. — Where defendant was convicted of assault with intent to commit a violent felony against the adult child of the victim whom defendant shot and killed; defendant fired shots into a house that was occupied by the victim’s adult child and others; and the jury was instructed that for it to find defendant guilty of assault with intent to commit a violent felony on the victim’s adult child, the jury had to find that defendant intended to kill the victim’s child or any other person or commit murder or mayhem on the victim’s adult child or any other person, the instruction misstated the law

regarding assault with intent to commit a violent felony and because the jury instruction allowed the jury to convict defendant of assaulting the victim's adult child on the ground that defendant intended to commit a violent felony against the victim, not the victim's adult child, the jury may have convicted defendant of crime that did not exist. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Where gun accidentally discharged while defendant was engaged in committing a felony or misdemeanor at the time of the homicide, an instruction which did not recognize defendant's liability to conviction was improper. *State v. Smith*, 1947-NMSC-035, 51 N.M. 184, 181 P.2d 800.

Informing jury of co-defendant's guilty plea deemed error. — The fact that a co-defendant has pled guilty to conspiracy to commit murder, presented to the jury in a case involving the defendant's conspiracy, does not come within Rule 803(22), N.M.R. Evid. (now Paragraph V of Rule 11-803 NMRA) is hearsay, and informing the jury of this guilty plea is error. *State v. Urioste*, 1980-NMCA-103, 94 N.M. 767, 617 P.2d 156, cert. denied, 94 N.M. 806, 617 P.2d 1321.

Sentence not excessive. — Where minimum sentence was less than a third of the maximum which could have been imposed for conviction of assault with intent to rape, sentence was not excessive, particularly in view of liberal policy of giving prisoners time off for good behavior, and liberal commutations. *State v. Compos*, 1952-NMSC-016, 56 N.M. 89, 240 P.2d 228.

Sentence improper. — Sentence of 7 to 15 years for convictions of assault with intent to kill and assault with a deadly weapon were not in accordance with the so-called indeterminate sentence law, former 41-17-1, 1953 Comp., which required a trial judge to sentence a person found guilty of an offense to the minimum and maximum provided by statute for the offense. *State v. Romero*, 1963-NMSC-168, 73 N.M. 109, 385 P.2d 967 (decided under prior law).

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48 to 55.

Assault with intent to kill in connection with the use of automobile for unlawful purpose or in violation of law, 99 A.L.R. 756.

Impotency as defense to charge of rape, attempt to rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

What constitutes offense of "sexual battery," 87 A.L.R.3d 1250.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of assault and battery laws limited to protection of females or which provide greater penalties for males than for females, 5 A.L.R.4th 708.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

6A C.J.S. Assault and Battery §§ 72, 75 to 81.

30-3-4. Battery.

Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.

Whoever commits battery is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-3-4, enacted by Laws 1963, ch. 303, § 3-4.

ANNOTATIONS

Cross references. — For assault and battery upon revenue division employees, *see* 7-1-75 NMSA 1978.

For battery upon peace officers, *see* 30-22-24 NMSA 1978.

Lesser included offense. — Petty-misdemeanor battery is a lesser included offense of aggravated battery. The difference is that simple battery does not require an intent to injure. *State v. Garcia*, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048.

Battery is a lesser included offense of aggravated battery upon a peace officer under Section 30-22-25 NMSA 1978. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Battery of spouse. — There is no language in this statute indicating that different standards should be employed when the victim of a battery is the spouse of the defendant. *State v. Seal*, 1966-NMSC-123, 76 N.M. 461, 415 P.2d 845.

Angry and insolent manner. — Where there was testimony that appellant grabbed his wife, pushed or "slammed" her against a parked car, held her there and after she broke away, followed her to her car where he proceeded to talk to her for at least an hour while she cried and screamed for him to let her go, there was ample evidence for the trial court to conclude that appellant acted in a rude, insolent or angry manner as defined in this section when he applied force to the person of his wife. *State v. Seal*, 1966-NMSC-123, 76 N.M. 461, 415 P.2d 845.

Parent common law discipline privilege. — A parent has a privilege to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child. *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174, 117 P.3d 980.

An isolated instance of moderate or reasonable physical force that results in nothing more than transient pain or temporary marks or bruises is protected under the parental discipline privilege. *State v. Lefevre*, 2005-NMCA-101, 138 N.M. 174, 117 P.3d 980.

Battery is included within offense of aggravated battery. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

Battery does not merge with false imprisonment. — Since false imprisonment requires a constraining or confining with knowledge of lack of legal authority and battery does not, and the elements for proving the two offenses differ, the two offenses do not merge. *State v. Muise*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, cert. denied, 103 N.M. 287, 705 P.2d 1138, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Proof of battery demands conviction or acquittal thereon. — Regardless of whether either assault or aggravated assault is included in the charge of battery since there was proof of a battery, defendant should be convicted of some degree of battery (either

aggravated or simple) or acquitted. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

Charge of unlawfulness mandatory. — Indictment charging that defendant "did beat, bruise and wound" a person, but omitting to aver it was done "unlawfully" was bad; by using the word "unlawfully" the statute intended to discriminate between lawful and unlawful acts of violence. *Territory v. Miera*, 1866-NMSC-004, 1 N.M. 387.

Double jeopardy. — Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Where provision in an order prohibiting domestic violence (OPDV), prohibiting "battering in any manner," contained all elements of the statutorily defined offense of battery, a criminal prosecution for battery following a contempt proceeding for violating the OPDV violated defendant's right against double jeopardy. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454., cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

Kidnapping and battery. — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim’s hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant’s convictions did not violate double jeopardy because defendant’s conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim’s hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

Instruction on simple battery wrongly refused. — Battering a peace officer while in the lawful discharge of his duties is battering the person of another, and where there was evidence that the victim police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Where there was evidence tending to establish the included offense of battery in charge of aggravated battery, trial court erred in refusing to instruct on lesser included offense. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Right to de novo appeal. — Where defendant was convicted in metropolitan court of battery against a household member in violation of this section, because the state did not prosecute the battery under Section 30-3-15 NMSA 1978, state could not contend that defendant was convicted of a crime involving domestic violence and he was entitled to a de novo appeal in district court rather than just an on-record review of the proceeding. *State v. Trujillo*, 1999-NMCA-003, 126 N.M. 603, 973 P.2d 855.

Law reviews. — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico – State v. Santillanes," see 32 N.M.L. Rev. 313 (2002).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 37 to 41.

Peace officers' criminal responsibility for wounding one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

Right of one in loco parentis other than teacher to punish child, 43 A.L.R. 507.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

6A C.J.S. Assault and Battery §§ 70, 71.

30-3-5. Aggravated battery.

A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

History: 1953 Comp., § 40A-3-5, enacted by Laws 1963, ch. 303, § 3-5; 1969, ch. 137, § 1.

ANNOTATIONS

Cross references. — For aggravated battery upon peace officer, *see* 30-22-25 NMSA 1978.

I. GENERAL CONSIDERATION.

Section not violative of constitution's title requirements. — Although this section provides that an aggravated battery may be either a misdemeanor or a felony, depending on the circumstances, N.M. Const., art. IV, § 16 is not violated, since title clearly shows that the subject of the act is aggravated battery and that more than one penalty is provided. *State v. Segura*, 1973-NMCA-006, 83 N.M. 432, 492 P.2d 1295.

Section not void for vagueness. — This section is not void for vagueness because a defendant's aggravated battery may be either a felony or misdemeanor or that it depends entirely on the view of the evidence taken by the trier of facts. *State v. Segura*, 1973-NMCA-006, 83 N.M. 432, 492 P.2d 1295.

This section is not unconstitutionally vague either when its subsections are compared or when the entire section is compared with Section 30-3-4 NMSA 1978. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

Section not in conflict with Section 31-18-15.1 NMSA 1978. — This section and Section 31-18-15.1 NMSA 1978 (aggravating circumstances affecting sentencing) do not provide punishment for the same offense, and these sections are not in conflict. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

The elements of an offense do no more than establish the offense. The circumstances surrounding the offense, including the circumstances surrounding each of the elements

of the offense, may be considered under Section 31-18-15.1 NMSA 1978. *State v. Wilson*, 1982-NMCA-019, 97 N.M. 534, 641 P.2d 1081, cert. denied, 98 N.M. 50, 644 P.2d 1039.

Defendant charged in the alternative. — Aggravated battery is a third degree felony if it causes great bodily harm or if it was committed with a deadly weapon. There is nothing unfair in charging a defendant in the alternative, where the evidence supports a third degree felony conviction under both alternatives. *State v. Kenny*, 1991-NMCA-094, 112 N.M. 642, 818 P.2d 420, cert. denied, 112 N.M. 499, 816 P.2d 1121.

Consent is not defense to crime of aggravated battery, irrespective of whether the victim invites the act and consents to the battery. *State v. Fransua*, 1973-NMCA-071, 85 N.M. 173, 510 P.2d 106.

Intoxication a valid defense. — A showing of intoxication to a degree that would make specific intent impossible would establish a valid defense to the charge of aggravated battery and since the evidence in defendant's case raised an issue of fact for the jury on the question of intent to injure by showing intoxication to such a degree that defendant was unable to form the necessary intent, defendant was entitled to an instruction on this defense; the failure to so instruct was reversible error. *State v. Crespin*, 1974-NMCA-104, 86 N.M. 689, 526 P.2d 1282.

Protection of property. — The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable, both civilly and criminally, for the assault. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Right of confrontation not violated. — Where no prior statement of any kind by the victim of an aggravated assault was brought to the attention of the jury or offered by the state, and defendant neither sought a continuance nor indicated that he desired to call the victim as a witness or what evidence he believed might be developed from the victim, his constitutional right of confrontation was not violated by absence of victim from trial. *State v. James*, 1966-NMSC-110, 76 N.M. 376, 415 P.2d 350.

Continuance properly refused. — Defendant's effort to have aggravated battery case continued and to have victim examined by another doctor was properly refused where there was nothing to show that defense was surprised by doctor's testimony or that defendant was prejudiced in his defense on the merits. *State v. Foster*, 1971-NMCA-064, 82 N.M. 573, 484 P.2d 1283.

Aggravation of sentence. — Rule against use of elements of a crime as the basis for aggravating the sentence for that crime was not violated where the defendant's failure to aid the victim and the brutality of the crime were used to aggravate the defendant's sentence; defendant's failure to aid the victim after the beating is clearly not an element of aggravated battery and the brutality of the crime, although it is a fact used to prove great bodily harm, does not equate to great bodily harm for purposes of the aggravation

statute. *State v. Kurley*, 1992-NMCA-105, 114 N.M. 514, 841 P.2d 562, cert denied, 114 N.M. 413, 839 P.2d 623.

Where the defendant pleaded guilty to aggravated battery with great bodily harm, the defendant's sentence could be aggravated without actual evidence that his own acts, rather than the acts of his companions, were brutal; defendant's participation in the beating, which was brutal enough to actually cause death, standing alone, was sufficient. *State v. Kurley*, 1992-NMCA-105, 114 N.M. 514, 841 P.2d 562, cert denied, 114 N.M. 413, 839 P.2d 623.

Waiver of error. — Where defendant pleaded not guilty when arraigned and proceeded to trial without questioning propriety of magistrate's bind over, his claim that criminal information charged him with offense of aggravated battery, rather than attempted aggravated battery, concerning which there had been no preliminary examination, was waived. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Defendant was bound by plea of guilty to attempt to commit aggravated battery and was not entitled to post-conviction relief either on grounds that his actions did not constitute attempt to commit aggravated battery or that state had failed to establish his intent. *State v. Bonney*, 1971-NMCA-041, 82 N.M. 508, 484 P.2d 350.

Withdrawal of plea properly denied. — Trial court's denial of defendant's motion to withdraw his plea of guilty to a charge of aggravated assault after sentence was imposed did not violate due process where the only basis asserted for withdrawal of the plea was that the trial court refused to follow the sentencing recommendation of the district attorney. *State v. Ramos*, 1973-NMCA-103,85 N.M. 438, 512 P.2d 1274.

Firearm enhancement statute constitutionally applied to conviction under section. — Neither the rules of statutory construction nor the federal and state constitutional provisions against double jeopardy prohibit the application of the firearm enhancement statute to a person convicted of aggravated battery with a deadly weapon when the weapon used was a firearm. *State v. Gonzales*, 1981-NMCA-023, 95 N.M. 636, 624 P.2d 1033, *overruled on other grounds*, *Buzbee v. Donnelly*, 1981-NMSC-097, 96 N.M. 692, 634 P.2d 1244.

II. ELEMENTS OF AGGRAVATED BATTERY.

The question of whether an individual has used his mouth as a deadly weapon is strictly a question of fact, reserved for the jury. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

This section requires intent to injure, of which there must be substantial evidence for there to be proof that the crime of aggravated battery has been committed. *State v. Mora*, 1970-NMCA-072, 81 N.M. 631, 471 P.2d 201, cert. denied, 81 N.M. 668, 472 P.2d 382.

Specific intent to injure is essential element of crime of aggravated battery, and the state must prove beyond a reasonable doubt that the defendant knowingly committed the crime purposely intending to violate the law. *State v. Crespin*, 1974-NMCA-104, 86 N.M. 689, 526 P.2d 1282; *State v. Mills*, 1980-NMCA-005, 94 N.M. 17, 606 P.2d 1111, cert. denied, 94 N.M. 628, 614 P.2d 545.

Intent to injure may be inferred. — Intent to injure, as required by this section, need not be established by direct evidence but may be inferred from conduct and the surrounding circumstances. *State v. Michael S*., 1995-NMCA-112, 120 N.M. 617, 904 P.2d 595, cert. denied, 120 N.M. 533, 903 P.2d 844.

Under former law, specific intent to commit mayhem was inferred as a matter of law. Where the defendant deliberately committed the crime of assault and battery, in so doing, he committed mayhem. *State v. Hatley*, 1963-NMSC-110, 72 N.M. 377, 384 P.2d 252 (decided under prior law).

Great bodily harm. — Subsection C of this section requires only that great bodily harm could result, not that it must result. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777, cert. denied, 116 N.M. 71, 860 P.2d 201.

Great bodily harm includes permanent loss or impairment (permanent injury). *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

Proximate cause of harm. — Whether battery caused great bodily harm is to be determined by "proximate cause" and a defendant's act need not be a direct, that is, immediate, cause. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

Nature of injury determines degree of crime. — Whether crime is a misdemeanor or a felony depends largely, as shown by Subdivisions B and C, on the nature of the injury inflicted. State v. Chavez, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

The nature of the injury was an important element of mayhem. *State v. Martin*, 1926-NMSC-048, 32 N.M. 48, 250 P. 842 (decided under prior law).

Degree of harm for jury. — It was a question of fact for the jury whether forcible tattooing of victim with needle and India ink from back of neck to center part of waist, which tattoo recited an offensive sentence in large letters and could be removed only with strenuous and extensive skin grafting, was "great bodily harm" as required under this section and defined at 30-1-12 NMSA 1978. *State v. Ortega*, 1966-NMSC-186, 77 N.M. 312, 422 P.2d 353.

Degree of harm. — It was for the jury to determine whether the injuries inflicted on gasoline station attendant who was robbed, beaten and set on fire with gasoline were

likely to cause death or great bodily harm, and defendant's motion for dismissal of the indictment, which charged him with a felony, on his assertion that doctor's testimony "proved" he was guilty only of misdemeanor, was properly refused. *State v. Foster*, 1971-NMCA-064, 82 N.M. 573, 484 P.2d 1283.

Knife as deadly weapon. — For a knife to be a deadly weapon it must come within the portion of this statute as to any other deadly weapons with which dangerous wounds can be inflicted. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

Baseball bat as deadly weapon. — In a prosecution for aggravated battery with a deadly weapon, the question of whether a baseball bat was a deadly weapon should have been left to the jury; however, the error is not fundamental and must be preserved for appeal. *State v. Traeger*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Jury justified in so finding. — Where no one directly testified the knife was one with which dangerous wounds could be inflicted, but the wounds were described by the physician who treated the victim, and they were sufficiently severe to keep him in a hospital under the doctor's care for a week, and in addition, the scars caused by the knife wounds were shown to the jury, in view of the depth and length of the wounds the jury was fully justified in finding the knife used was a deadly weapon, although the blade used was only about two inches in length. *State v. Martinez*, 1953-NMSC-031, 57 N.M. 174, 256 P.2d 791.

III. EVIDENCE AND PROOF.

Sufficient evidence. — Where the victim was shot multiple times at close range outside a friend’s home; after hearing shots, the friend went outside and saw defendant fleeing and the victim on the ground severely wounded; the victim told the friend and a police officer that defendant was the shooter; a forensic scientist identified a gun found in defendant’s vehicle as the same gun used to shoot the victim; and a neighbor identified the vehicle shown in a photograph of defendant’s vehicle as identical to the vehicle that sped way from the scene of the shooting, there was substantial evidence to support defendant’s conviction of aggravated battery with a deadly weapon causing great bodily harm. *State v. Fuentes*, 2010-NMCA-027, 147 N.M. 761, 228 P.3d 1181, cert. denied, 2010-NMCERT-002, 147 N.M. 704, 228 P.3d 488.

Evidence sufficient to provide defendant used his mouth as a deadly weapon. — Where defendant bit the victim during an altercation, defendant’s bite broke the victim’s skin, defendant admitted that he had hepatitis C, a medical expert testified that transmission of the hepatitis C virus is possible through a bite that breaks the skin, that hepatitis C could result in liver cancer, ultimately leading to death, and defendant told the victim when he bit the victim that he hoped the victim would die, there was sufficient evidence to prove that defendant used his mouth as a deadly weapon. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

Conviction or acquittal of proved offense. — Regardless of whether either assault or aggravated assault is included in charge of battery, where there is proof of a battery, defendant should be convicted of some degree of battery (either aggravated or simple) or acquitted. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

Corroboration of victim's testimony unnecessary. — Victim's testimony supported determination that defendant committed battery with a gun and with intent to injure, and did not require corroboration. *State v. Tafoya*, 1969-NMCA-073, 80 N.M. 494, 458 P.2d 98.

Testimony corroborated. — Defendant's testimony that he threw gun away after leaving scene of burglary and aggravated battery, along with photographs of victim showing facial cuts and abrasions, corroborated victim's testimony that defendant used a gun in commission of crimes. *State v. Tafoya*, 1969-NMCA-073, 80 N.M. 494, 458 P.2d 98.

Circumstantial evidence was sufficient for a reasonable mind to infer defendant shot the victim with a pellet gun, where there was evidence that defendant came out of his house with a rifle or other gun in his hand and shouted at the victim and his companions to "go somewhere else and play," after they had been shooting off fireworks, and five or ten minutes later the victim was struck with a pellet as a noise was heard from the direction of defendant's house. *State v. Stenz*, 1990-NMCA-005, 109 N.M. 536, 787 P.2d 455, cert. denied, 109 N.M. 562, 787 P.2d 842.

Sufficient evidence. — Evidence that defendant jumped on the victim's leg and shattered it was sufficient to support defendant's conviction for aggravated battery. *State v. Garcia*, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Evidence sufficient to support conviction. — Where evidence, though disputed, showed that defendant was playing pool with several persons, that an argument began and that in the resulting altercation defendant pulled a gun, shot at one person and missed, and shot at another and hit him in the leg, held that it was sufficient to support a verdict of aggravated battery. *State v. Santillanes*, 1974-NMCA-092, 86 N.M. 627, 526 P.2d 424.

Evidence for felony conviction. — Where the victim testified that she was hit on the head three times with an object which she described as "very hard" and it appeared from the record that following the attack she was taken to the hospital and six stitches were required to close the wound on her head, this evidence sufficiently established an aggravated battery under Subsection C. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151.

There was substantial evidence to support the charge since the evidence established that the defendant acted in a way that would have likely resulted in great bodily harm or even death to the victim, despite the lack of evidence of such harm. *State v.*

Dominguez, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147, cert. denied, *sub nom*., *Ortega v. State*, 115 N.M. 409, 852 P.2d 682 (1993).

Sufficient evidence. — Since the victims testified that the two defendants intruded into their home, beat and kicked the husband, and dragged both him and his wife around the house in search of money, this evidence sufficiently established an aggravated battery under Subsection A. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Evidence that the defendant stabbed or slashed the victim with a knife constituted evidence upon which the jury could find that the defendant committed the offense of aggravated battery; also, the trial court could properly find that the defendant's acts of repeatedly stabbing the victim constituted circumstances surrounding the offense, warranting enhancement of the defendant's sentence. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

Evidence of mayhem insufficient. — Under former law conviction of mayhem was not sustained by proof of an assault and a blow which cut prosecuting witness' lip, requiring some stitches, but resulting in no permanent injury or disfigurement. Court would take notice of such lack of evidence even though defendant failed to preserve proper exceptions. *State v. Raulie*, 1936-NMSC-039, 40 N.M. 318, 59 P.2d 359 (decided under prior law).

IV. DOUBLE JEOPARDY.

Lesser included offense. — Where defendant was charged with felony aggravated battery for using his mouth as a deadly weapon, evidence was presented that tended to establish the lesser included offense, and the only difference between misdemeanor aggravated battery and felony aggravated battery was whether defendant used his mouth as a deadly weapon, defendant was entitled to a jury instruction on the lesser include offense. *State v. Neatherlin*, 2007-NMCA-035, 141 N.M. 328, 154 P.3d 703.

Double jeopardy. — Where defendant pushed and punched the victim and after a third person knocked the victim down, the defendant jumped on the victim, shattering the victim's leg, defendant's acts were not distinct and defendant's convictions for aggravated battery and misdemeanor battery violated the double jeopardy clause. *State v. Garcia*, 2009-NMCA-107, 147 N.M. 150, 217 P.3d 1048, cert. denied, 2009-NMCERT-008, 147 N.M. 395, 223 P.3d 940.

Defendant's convictions for aggravated battery with a deadly weapon and attempted murder arising out of unitary conduct did not violate the double jeopardy clause. *State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

It was not double jeopardy to try defendant on charge of aggravated battery when lesser charge of attempt was dismissed prior to trial, and no issue as to double punishment or

merged offenses was involved. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Defendant's convictions for both attempted first degree murder and aggravated battery did not constitute double jeopardy. *State v. Vallejos*, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68.

Defendant’s convictions of aggravated battery and shooting at or from a motor vehicle do not violate double jeopardy. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

No merger with assault with intent to commit violent felony. — The double jeopardy clause does not prohibit sentencing for both assault with intent to commit a violent felony murder and for aggravated battery with a deadly weapon; one offense does not subsume the other and other indicia of legislative intent suggests an intent to punish separately. *State v. Cowden*, 1996-NMCA-051, 121 N.M. 703, 917 P.2d 972, cert. denied, 121 N.M. 644, 916 P.2d 844.

Aggravated assault is lesser included offense. — Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. *State v. DeMary*, 1982-NMSC-144, 99 N.M. 177, 655 P.2d 1021.

Merger with robbery. — Aggravated battery merges with a robbery offense when a defendant's intent to take the victim's purse includes an intent to injure the victim. *State v. Gammil*, 1989-NMCA-005, 108 N.M. 208, 769 P.2d 1299, *overruled in part on other grounds*, *State v. Fuentes*, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203.

No merger with armed robbery. — Offense of aggravated battery did not merge with the armed robbery. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Separate punishment for armed robbery and aggravated battery is consistent with legislative intent and does not constitute double jeopardy. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203. .

Aggravated battery lesser included offense of attempted murder. — In a prosecution for attempted murder, the trial court properly instructed the jury on aggravated battery as a lesser included offense at the state's request, because the elements of the lesser crime were a subset of the elements of the charged crime and, further, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

Battery is included within offense of aggravated battery. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

Concept inapplicable. — The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Separate punishments intended. — The legislature intended to create separately punishable offenses between shooting at or from a motor vehicle and aggravated battery. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

V. JURY INSTRUCTIONS.

When instruction on battery required. — Where there was evidence tending to establish the included offense of battery in charge of aggravated battery, trial court erred in refusing to instruct on lesser included offense. *State v. Duran*, 1969-NMCA-048, 80 N.M. 406, 456 P.2d 880.

In prosecution for aggravated battery, lesser offense of simple battery may necessarily be included in court's charge to jury only in the event there is some evidence which would justify a conviction of the lesser offense. *State v. James*, 1966-NMSC-110, 76 N.M. 376, 415 P.2d 350.

There was no evidence to support a finding that defendant did not intend to injure victim, and therefore the trial court did not err in refusing to give an instruction on simple battery, which is a lesser included offense of aggravated battery. *State v. Pettigrew*, 1993-NMCA-095, 116 N.M. 135, 860 P.2d 777, cert. denied, 116 N.M. 71, 860 P.2d 201.

Instruction must be tendered. — Alleged error of court in failing to instruct on lesser included offense of simple battery in prosecution for aggravated battery was not properly before appellate court for review where no instruction on lesser offense was ever submitted to the trial court. *State v. James*, 1966-NMSC-110, 76 N.M. 376, 415 P.2d 350.

Instruction not warranted. — Where defendant, convicted of aggravated battery, admitted that he had pistol in his possession at time of fight with which he shot victim

and that he intended to hit victim with it, instruction on lesser included offense was not warranted. *State v. Jaramillo*, 1971-NMCA-057, 82 N.M. 548, 484 P.2d 768.

Instructions erroneous. — In a prosecution for aggravated battery with a deadly weapon, since there was a finding of sufficient evidence to support jury instructions on self-defense and defense of another, the instruction on the charged offense was erroneous because it did not include the essential element of unlawfulness, and the error was not cured by separate instructions on self-defense and defense of another, and the instructions on self-defense and defense of another were erroneous because they did not clearly place the burden of proof on the state. *State v. Acosta*, 1997-NMCA-035, 123 N.M. 273, 939 P.2d 1081, cert. quashed, 124 N.M. 312, 950 P.2d 285.

Instructing on intent. — Subsection C of this section requires an "intent to injure" and where requested instruction referred to "a specific intent to commit an aggravated battery," this would have been misleading to the jury and was properly denied. *State v. Vasquez*, 1971-NMCA-182, 83 N.M. 388, 492 P.2d 1005.

Defendant need not intend particular result. — In a prosecution for aggravated battery, the defendants requested the following instruction, which was properly refused: "A defendant may not be held guilty as aider and abettor for independent act of another person, even though same victim was assaulted by both, since sharing of criminal intent is absent." The evidence demonstrated that the defendants and the principal defendant did not act independently of each other, even if the defendants did not intend or foresee the stabbing of the victim by the principal defendant. *State v. Dominguez*, 1993-NMCA-042, 115 N.M. 445, 853 P.2d 147, cert. denied, *sub nom.*, *Ortega v. State*, 115 N.M. 409. 852 P.2d 682 (1993).

Material element of offense. — In instruction defining the material elements of crime in this section, one of the elements to be proved beyond a reasonable doubt was that defendant inflicted great bodily harm. *State v. Chavez*, 1971-NMCA-030, 82 N.M. 569, 484 P.2d 1279, cert. denied, 82 N.M. 562, 484 P.2d 1272.

General instruction superfluous. — An instruction generally defining aggravated battery was not needed to guide the jury and was superfluous where the trial court instructed the jury as to the material elements of the aggravated battery elements of the aggravated battery charge. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Allegedly inconsistent instruction not jurisdictional error. — Defendant's claim that instruction defining aggravated battery covered three alternatives and thus was inconsistent with the specific charge of aggravated battery by use of a deadly weapon did not amount to jurisdictional error. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Inconsistent instruction not fundamental error. — In conviction for aggravated battery, where the evidence was clear that a deadly weapon was used, even if the

giving of general definition of aggravated battery was error, it did not shock the conscience to let defendant's conviction stand, and there was no basis for applying the doctrine of fundamental error. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 48, 49.

Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 A.L.R. 634.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury or death, 25 A.L.R.2d 1215.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

Adequacy of defense counsel's representation of criminal client - conduct occurring at time of trial regarding issues of diminished capacity, intoxication, and unconsciousness, 78 A.L.R.5th 197.

Adequacy of defense counsel's representation of criminal client - pretrial conduct or conduct at unspecified time regarding issues of diminished capacity, intoxication, and unconsciousness, 79 A.L.R.5th 419.

6A C.J.S. Assault and Battery § 72.

30-3-6. Reasonable detention; assault, battery, public affray or criminal damage to property.

A. As used in this section:

(1) "licensed premises" means all public and private rooms, facilities and areas in which alcoholic beverages are sold or served in the customary operating procedures of establishments licensed to sell or serve alcoholic liquors;

(2) "proprietor" means the owner of the licensed premises or his manager or his designated representative; and

(3) "operator" means the owner or the manager of any establishment or premises open to the public.

B. Any law enforcement officer may arrest without warrant any persons he has probable cause for believing have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property. Any proprietor or operator who causes such an arrest shall not be criminally or civilly liable if he has actual knowledge, communicated truthfully and in good faith to the law enforcement officer, that the persons so arrested have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property.

History: Laws 1981, ch. 255, § 1; 1983, ch. 268, § 1.

ANNOTATIONS

The 1983 amendment deleted "on licensed premises" following "detention" in the catchline, added "or criminal damage to property" at the end of the catchline, inserted Paragraph (3) of Subsection A, substituted "Sections" for "Section" in the first sentence of Subsection B, added "or criminal damage to property" at the end of the first and second sentences of Subsection B and inserted "or operator" and "communicated truthfully and in good faith to the law enforcement officer" in the second sentence of Subsection B.

Warrantless arrest was not unlawful. — Where defendant, charged with petty misdemeanor battery in magistrate court, filed a motion to dismiss or in the alternative to suppress evidence, arguing that his arrest violated the misdemeanor arrest rule and that the evidence was tainted by the unlawful arrest, and where the magistrate court dismissed the criminal complaint and the state appealed to the district court, and where the district court determined that defendant's arrest was illegal and remanded the case to magistrate court for imposition of the court's dismissal order, the district court erred in determining that defendant's arrest was illegal, because a plain reading of this section permits a law enforcement officer to arrest people for certain enumerated crimes, including battery, without a warrant when the officer has probable cause to believe that

a crime has occurred, and in this case, the state presented facts sufficient to establish probable cause that defendant committed a battery against the victim. *State v. Veith*, 2022-NMCA-039, cert. denied.

Warrantless arrest made under the authority of this section was not unconstitutional. — Where defendant, charged with petty misdemeanor battery in magistrate court, filed a motion to dismiss or in the alternative to suppress evidence, arguing that his arrest violated the misdemeanor arrest rule and that the evidence was tainted by the unlawful arrest, and where the magistrate court dismissed the criminal complaint, and where the district court, on the state's appeal, determined that defendant's arrest was illegal and remanded the case to magistrate court for imposition of the court's dismissal order, defendant's warrantless arrest was valid under the New Mexico constitution, because an on-the-scene arrest supported by probable cause will usually supply the requisite exigency, and in this case, the responding officer was dispatched to the scene based on a call that defendant was attacking the victim, arrived at the scene, interviewed witnesses, and determined based on his investigation that he had probable cause to arrest defendant for battery. The officer did not have information to act on before he arrived at the scene and investigated, and he did not have time to secure a warrant before responding; the officer developed probable cause to arrest based on his review of the evidence at the scene. *State v. Veith*, 2022-NMCA-039, cert. denied.

30-3-7. Injury to pregnant woman.

A. Injury to [a] pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or stillbirth as a result of that injury.

B. As used in this section:

(1) "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth and which is not an induced abortion, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception; and

(2) "stillbirth" means the death of a fetus prior to the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy and which is not an induced abortion; and death is manifested by the fact that after the expulsion or extraction the fetus does not breathe spontaneously or show any other evidence of life such as heart beat, pulsation of the umbilical cord or definite movement of voluntary muscles.

C. Whoever commits injury to [a] pregnant woman is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1985, ch. 239, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For injury to pregnant woman by vehicle, *see* 66-8-101.1 NMSA 1978.

30-3-8. Shooting at dwelling or occupied building; shooting at or from a motor vehicle.

A. Shooting at a dwelling or occupied building consists of willfully discharging a firearm at a dwelling or occupied building. Whoever commits shooting at a dwelling or occupied building that does not result in great bodily harm to another person is guilty of a fourth degree felony. Whoever commits shooting at a dwelling or occupied building that results in injury to another person is guilty of a third degree felony. Whoever commits shooting at a dwelling or occupied building that results in great bodily harm to another person is guilty of a second degree felony.

B. Shooting at or from a motor vehicle consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another. Whoever commits shooting at or from a motor vehicle that does not result in great bodily harm to another person is guilty of a fourth degree felony. Whoever commits shooting at or from a motor vehicle that results in injury to another person is guilty of a third degree felony. Whoever commits shooting at or from a motor vehicle that results in great bodily harm to another person is guilty of a second degree felony.

C. This section shall not apply to a law enforcement officer discharging a firearm in the lawful performance of his duties.

History: Laws 1987, ch. 213, § 1; 1993, ch. 78, § 1.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, deleted "Inhabited" preceding "Dwelling" and inserted "shooting at or from a motor vehicle" in the section heading; designated the formerly undesignated provisions as Subsection A and rewrote the provisions thereof; and added Subsections B and C.

This section reflects legislature's judgment that traditional homicide and assault and battery crimes are inadequate to respond to the particular dangers involved with motor vehicle shootings. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

No double jeopardy violation. — Defendant's convictions of voluntary manslaughter and shooting at or from a motor vehicle do not violate double jeopardy. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Where the facts support non-unitary conduct for two violations of this section, defendant's double jeopardy claim is rejected. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Conviction for shooting at a motor vehicle under Subsection B of this section did not preclude the state from seeking a further conviction for first or second degree murder under Section 30-2-1 NMSA 1978. *State v. Garcia*, 2005-NMCA-042, 137 N.M. 315, 110 P.3d 531, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Violation of double jeopardy. — There was no double jeopardy violation for convictions for second degree murder and shooting at or from a motor vehicle because the testimony at trial permitted the inference that each conviction was based on distinct conduct and because the two statutes evince legislative intent to impose separate punishments for each crimes. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Convictions for felony murder and shooting at a dwelling violated defendant's right to be protected from double jeopardy. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

Cumulative punishment is precluded for shooting at a vehicle and homicide. — New Mexico jurisprudence precludes cumulative punishment for the offenses of causing great bodily harm to a person by shooting at a motor vehicle and the homicide resulting from the penetration of the same bullet into the same person. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Where defendant and defendant's companions were accosted by a rival gang in front of defendant's family home, guns were pulled on both sides and defendant's sibling was severely wounded by gunshots in the leg and abdomen; while defendant's group were trying to help defendant's sibling in the driveway and stop the bleeding from the gunshot wounds, the person in the rival gang who had been shooting at defendant and defendant's companions returned in a Ford Expedition; when defendant saw gunfire coming from the Expedition, defendant ran into the house and retrieved an AK-47 rifle and began shooting at the Expedition; the driver of Expedition was shot seven times and died; the jury convicted defendant of voluntary manslaughter and shooting into a motor vehicle resulting in great bodily harm, the Double Jeopardy Clause protected defendant from being punished both for the homicide of the victim and for shooting into a vehicle causing great bodily harm to the victim where both convictions were premised on the unitary act of shooting the victim. *State v. Montoya*, 2013-NMSC-020, 306 P.3d 426, *overruling State v. Gonzales*, 1992-NMSC-003, 113 N.M. 221, 824 P.2d 1023, *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563 and *State v. Riley*, 2010-NMSC-005, 147 N.M. 557, 226 P.3d 656.

Legislature intended to provide multiple punishments for the offenses of second degree murder and shooting into or from a vehicle. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Acts must be done while in vehicle. — Shooting from a motor vehicle requires that the acts be done while in a motor vehicle. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Shooting entirely within a vehicle. — Shooting entirely within a vehicle is neither shooting "at" nor "from" a vehicle pursuant to Subsection B of 30-3-8 NMSA 1978. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

Where defendant, who was riding in the back seat of a vehicle, shot the driver of the vehicle and the passenger who was riding in the front seat of the vehicle, Subsection B of 30-3-8 NMSA 1978 did not apply to defendant's conduct. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

This section does not require proof of death or include death as an alternative to great bodily harm. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Elements distinguished between crimes. — Voluntary manslaughter and shooting at or from a motor vehicle resulting in great bodily harm have distinct elements. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

Evidence sufficient. — Where defendant shot multiple times into a house, wounding one victim; witnesses testified that defendant opened fire on the house without any one firing back at defendant; and the victim testified that the victim was wounded by the gunfire, there was sufficient evidence to support defendant's conviction of shooting at a dwelling. *State v. Torrez*, 2013-NMSC-034.

Where defendant fired two gunshots into a house; the bullets found in the house matched those fired from defendant's handgun; the trajectory of the bullets indicated that the shooter was aiming directly at the house; defendant had expressed hostility towards one of the occupants of the house whom defendant knew was in the house; after defendant fired into the house, defendant aimed the gun downward and shot and killed the victim; the trajectory of the bullets that entered the body of the victim was different from the trajectory of the bullets that entered the house, there was sufficient evidence to support defendant's conviction for shooting at a dwelling. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Evidence is sufficient under this section which supports conviction, which requires proof that the defendant willfully discharged a firearm from a motor vehicle with reckless disregard for another. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

"Reckless disregard" requires that defendant's conduct created a substantial and foreseeable risk and that defendant disregarded such risk and was wholly indifferent to the consequences of his conduct and the welfare and safety of others. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Vehicle not required to be in motion. — The unambiguous language of this section does not require that the vehicle be in motion. *State v. Mireles*, 2004-NMCA-100, 136 N.M. 337, 98 P.3d 727, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Evidence insufficient. — Evidence was insufficient to sustain defendant's conviction where the evidence showed that he fired shots from a balcony downward, but there was no evidence that he fired in the direction of any building. *State v. Trujillo*, 2002-NMSC-005, 131 N.M. 709, 42 P.3d 814.

No merger with aggravated assault with a deadly weapon. — Separate punishments are intended for the offenses of shooting into an occupied vehicle and aggravated assault with a deadly weapon. *State v. Sosa*, 1997-NMSC-032, 123 N.M. 564, 943 P.2d 1017 *abrogated by State v. Porter*, 2020-NMSC-020.

Knowledge that building occupied required. — The statute requires not only that the discharge of the firearm be intentional and that it be discharged at a building intentionally, but that the discharge occur with the knowledge or reason to believe that the building was occupied at the time of the shooting. *State v. Elmquist*, 1992-NMCA-119, 114 N.M. 551, 844 P.2d 131.

Knowledge of occupation is not an element of shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Evidence sufficient to prove conspiracy to commit shooting at a dwelling. — Where defendant’s friends asked defendant for a ride from a party; one of the friends suggested that they go "do some shootings"; defendant agreed to the plan and drove to the location of a trailer selected by the friend; the friend exited defendant’s vehicle and fired three shots at the trailer; the owner of the trailer had recently moved from the trailer, but kept some possessions in the trailer and parked two vehicles in front of the trailer; and defendant claimed that defendant had no reason to know that the trailer was occupied at the time of the shooting, the evidence was sufficient to prove that defendant had the requisite intent to agree and the intent to commit shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Conspiracy to shoot from vehicle. — To be guilty of conspiracy to shoot from a motor vehicle, there must have been an agreement that one of the parties thereto would shoot a firearm recklessly from the vehicle; the agreement could be explicit or a mutually implied understanding, but mere passive submission or acquiescence in the conduct of

others would not suffice. *State v. Mariano R*., 1997-NMCA-018, 123 N.M. 121, 934 P.2d 315.

Conviction as accessory. — Where defendant was convicted of violating this section as an accessory to the crime and the crime is one enumerated in Section 33-2-34L(4)(j) NMSA 1978, the fact that he pleaded guilty as an accessory and not a principal is irrelevant for purposes of the Earned Meritorious Deductions Act. *State v. Flores*, 2005-NMCA-092, 138 N.M. 61, 116 P.3d 852, cert. denied, 2005-NMCERT-007, 138 N.M. 145, 117 P.3d 951.

Separate punishments intended. — The legislature intended to punish the crimes of voluntary manslaughter and shooting at or from a motor vehicle separately. *State v. Dominguez*, 2005-NMSC-001, 137 N.M. 1, 106 P.3d 563.

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

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

Retroactive application of new substantive rule established in *State v. Marquez*. — Where petitioner was convicted of first-degree murder under a general verdict at a trial in which the jury instructions contained two alternative theories for the jury to use as a basis for the first-degree murder conviction: felony murder predicated on shooting at or from a motor vehicle and willful and deliberate murder, and where, on direct appeal, the New Mexico supreme court vacated petitioner's conviction for felony murder, holding that the crime of shooting at or from a motor vehicle may not serve as the predicate felony in support of a felony murder charge, and where, in a petition for habeas corpus, petitioner claimed that the supreme court's holding applies retroactively and that his conviction for willful and deliberate murder must also be vacated, the district court erred

in denying petitioner's habeas petition, because a general verdict must be reversed if one of the alternative bases of conviction is legally inadequate, and in this case it is impossible to determine whether the general verdict was based on the legally invalid theory of felony murder or on willful and deliberate murder. *Rudolfo v. Steward*, 2023-NMSC-013.

Shooting at or from a motor vehicle cannot serve as the underlying felony sustaining a felony murder conviction. — Where defendant was convicted of first-degree felony murder predicated on the underlying felony of shooting at or from a motor vehicle, the New Mexico supreme court vacated defendant's conviction of felony murder because shooting at or from a motor vehicle is an elevated form of aggravated battery, and thus cannot be used as a predicate for felony murder. *State v. Baroz*, 2017-NMSC-030.

Shooting resulting in death. — Subsection A of this section, construed with the definition of "great bodily harm" in Section 30-1-12A NMSA 1978 includes a shooting at a dwelling that results in death. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

Felony murder. — Applying the strict-elements test, shooting at a dwelling is not a lesser included offense of second degree murder, and the offense could serve as a predicate for applying the felony-murder doctrine. *State v. Varela*, 1999-NMSC-045, 128 N.M. 454, 993 P.2d 1280.

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

Instruction on defense of another. — Where defendant and the occupants of a house exchanged multiple gun shots; the shots defendant fired at the house killed one victim; defendant was tried for shooting at a dwelling; defendant requested a jury instruction on defense of another on the grounds that shots from the house were fired in the direction of defendant's car where two of defendant's friends were waiting; defendant testified that defendant shot back at the house, because people in the house were shooting at defendant; defendant's friends testified that they were not aware of any bullets reaching the vicinity of the car; and there was no evidence that defendant shot to protect anyone other than defendant, the district court did not err in refusing to instruct on defense of another. *State v. Torrez*, 2013-NMSC-034.

Exception to best-evidence rule for inaccessible text messages. — Where defendant was charged with shooting at a motor vehicle and aggravated assault with a

deadly weapon, and where the state presented testimony from the victim's nephew that he had seen threatening text messages from defendant on the victim's phone on the day of the incident, the district court did not abuse its discretion in admitting the testimony of the victim's nephew where the court found that the state had met its burden of showing that it had made a diligent, but unsuccessful, effort to obtain the original text messages and that there was no evidence indicating that additional efforts may have been successful. *State v. Stevenson*, 2020-NMCA-005, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms § 29.

94 C.J.S. Weapons §§ 19, 20.

30-3-8.1. Seizure and forfeiture of motor vehicle; procedure.

A. A motor vehicle shall be subject to seizure and forfeiture when the vehicle is used or intended for use in the commission of the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978.

B. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of a motor vehicle subject to forfeiture pursuant to Subsection A of this section.

History: Laws 1993, ch. 78, § 2; 2002, ch. 4, § 11.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, deleted former Subsections B through F, which contained standards and procedures for the forfeiture of motor vehicles used or intended for use in the commission of the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978; and added present Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Who is exempt from forfeiture of conveyances under "innocent owner" provision of 21 USC § 881(a)(4), 112 A.L.R. Fed. 589.

30-3-8.2. Court record of conviction; revocation of driver's license.

Upon a conviction for the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978, or of a conviction for a conspiracy or attempt to commit that offense, the district court shall send a record of the conviction to the motor vehicle division of the taxation and revenue department. The division shall immediately revoke the driver's licenses or driving privileges of all persons convicted of the offense of shooting at or from a motor vehicle, or convicted of conspiring or

attempting to commit that offense, pursuant to the provisions of Subsection E of Section 66-5-29 NMSA 1978.

History: Laws 1993, ch. 78, § 3.

ANNOTATIONS

Effective dates. — Laws 1993, ch. 78, § 5 makes the act effective on July 1, 1993.

30-3-9. Assault; battery; school personnel.

A. As used in this section:

(1) "in the lawful discharge of his duties" means engaged in the performance of the duties of a school employee; and

(2) "school employee" includes a member of a local public school board and public school administrators, teachers and other employees of that board.

B. Assault upon a school employee consists of:

(1) an attempt to commit a battery upon the person of a school employee while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct which causes a school employee while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

Whoever commits assault upon a school employee is guilty of a misdemeanor.

C. Aggravated assault upon a school employee consists of:

(1) unlawfully assaulting or striking at a school employee with a deadly weapon while he is in the lawful discharge of his duties;

(2) committing assault by threatening or menacing a school employee who is engaged in the lawful discharge of his duties by a person wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner so as to conceal identity; or

(3) willfully and intentionally assaulting a school employee while he is in the lawful discharge of his duties with intent to commit any felony.

Whoever commits aggravated assault upon a school employee is guilty of a third degree felony.

D. Assault with intent to commit a violent felony upon a school employee consists of any person assaulting a school employee while he is in the lawful discharge of his duties with intent to kill the school employee.

Whoever commits assault with intent to commit a violent felony upon a school employee is guilty of a second degree felony.

E. Battery upon a school employee is the unlawful, intentional touching or application of force to the person of a school employee while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

Whoever commits battery upon a school employee is guilty of a fourth degree felony.

F. Aggravated battery upon a school employee consists of the unlawful touching or application of force to the person of a school employee with intent to injure that school employee while he is in the lawful discharge of his duties.

Whoever commits aggravated battery upon a school employee, inflicting an injury to the school employee which is not likely to cause death or great bodily harm but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

Whoever commits aggravated battery upon a school employee, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

G. Every person who assists or is assisted by one or more other persons to commit a battery upon any school employee while he is in the lawful discharge of his duties is guilty of a fourth degree felony.

History: Laws 1989, ch. 344, § 1.

ANNOTATIONS

School employee. — Security guards providing services for a school district pursuant to a contact with a school board are school employees. *State v. Johnson*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863, *rev'g* 2008-NMCA-106, 144 N.M. 629, 190 P.3d 350.

Where a private security company and a school district entered into a contract to provide security services to the school district; the security company hired and paid security guards to work at a high school; the security guards were neither hired directly by the school board nor paid directly by the school board for their services pursuant to the contract; the principal of the high school determined what hours the security guards should work and at what locations; the principal could dictate that a particular security guard could not work at the high school; and the site administrator had full direction over security guard assignments, including temporary assignments at other school district

schools, the security guards were school employees. *State v. Johnson*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863, *rev'g* 2008-NMCA-106, 144 N.M. 629, 190 P.3d 350.

Contract security guards. — Where a school district contracted with a third party to provide school security guards; the school district set the hours worked by the guards, supervised them on a daily basis and required the guards to adhere to policies and procedures of the school district; the third party retained the ability to hire, fire and discipline the guards; the third party was required to insure the guards; and the third party paid the guards' salaries, the security guards were not school employees. *State v. Johnson*, 2008-NMCA-106, 144 N.M. 629, 190 P.3d 350, *rev'd*, 2009-NMSC-049, 147 N.M. 177, 218 P.3d 863.

"Use" of a deadly weapon in the context of assault with a deadly weapon construed. — A defendant *uses* a deadly weapon to commit assault where a defendant makes *facilitative use* of the deadly weapon. Facilitative use of a deadly weapon may be found if (1) a deadly weapon is present at some point during the encounter, (2) the victim knows or, based on the defendant's words or actions, has reason to know that the defendant has a deadly weapon, and (3) the presence of the weapon is intentionally used by the defendant to facilitate the commission of the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

Sufficient evidence of assault on a school employee with a deadly weapon. — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish the BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you feel if a twelve-year old shot you?". There was sufficient evidence to satisfy the essential element that the child *used* the deadly weapon where the evidence supported findings that a deadly weapon was present, that the principal knew or had reason to know from the child's words and actions that the child had a BB gun when the child threatened him, and that the presence of the weapon was intentionally used by the child to facilitate the commission of an assault on the principal. Based on the child's verbal threats that took advantage of the presence of the BB gun, it was reasonable for the jury to determine that the child's conduct caused the principal to reasonably believe that he was in danger of receiving an immediate battery, and thus the child *used* the deadly weapon to facilitate the assault. *State v. Zachariah G.*, 2022-NMSC-003, *aff'g* 2021-NMCA-036.

Sufficient evidence of aggravated assault with a deadly weapon on a school employee. — Where a child was adjudicated a delinquent for committing aggravated assault with a deadly weapon on a school employee, there was sufficient evidence to support the adjudication where, although the child did not brandish or retrieve a BB gun he had concealed in his waistband, the child refused to reveal the object to the school principal and asked the school principal menacing questions, including "What would happen if somebody shot up the school?", "Are you afraid to die?", and "How would you

feel if a twelve-year-old shot you?". A reasonable juror could have determined that the child threatened the principal with the BB gun and that the gun was instrumental to the child's assault because the child's menacing and threatening questions instilled fear in the principal while the gun was bulging from the child's pants and of which the child knew the principal was aware. *State v. Zachariah G.*, 2021-NMCA-036, cert. granted.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

30-3-9.1. Assault; battery; sports officials.

A. As used in this section:

(1) "in the lawful discharge of his duties" means engaged in the performance of the duties of a sports official;

(2) "sports official" means a person who:

(a) serves as a referee, umpire linesman, timer or scorer, or who serves in a similar capacity, while working, supervising or administering a sports event; and

(b) is registered as a member of a local, state, regional or national organization that is engaged in providing education and training to sports officials.

B. Assault upon a sports official consists of:

(1) an attempt to commit a battery upon the person of a sports official while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct that causes a sports official while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

C. Whoever commits assault upon a sports official is guilty of a misdemeanor.

D. Aggravated assault upon a sports official consists of unlawfully assaulting or striking at a sports official with a deadly weapon while he is in the lawful discharge of his duties.

E. Whoever commits aggravated assault upon a sports official is guilty of a third degree felony.

F. Battery upon a sports official is the unlawful, intentional touching or application of force to the person of a sports official while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

G. Whoever commits battery upon a sports official is guilty of a misdemeanor.

H. Aggravated battery upon a sports official consists of the unlawful touching or application of force to the person of a sports official with intent to injure that sports official while he is in the lawful discharge of his duties.

I. Whoever commits aggravated battery upon a sports official, inflicting an injury to the sports official that is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

J. Whoever commits aggravated battery upon a sports official, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

History: Laws 2001, ch. 92, § 1.

ANNOTATIONS

Cross references. — For interference with an athletic event, *see* 30-20-18 NMSA 1978.

Effective dates. — Laws 2001, ch. 92, § 2, makes the act effective on July 1, 2001.

30-3-9.2. Assault; battery; health care personnel.

A. As used in this section:

(1) "health facility" means a public or private hospital, outpatient facility, diagnostic and treatment center, rehabilitation center or infirmary. "Health facility" also includes those facilities that, by federal regulation, must be licensed by the state to obtain or maintain full or partial, permanent or temporary federal funding, but "health facility" does not include a skilled nursing facility, a nursing facility or other long-term residential care facility;

(2) "health care worker" means an employee of a health facility or a licensed emergency medical technician; and

(3) "in the lawful discharge of the health care worker's duties" means engaged in the performance of the duties of a health care worker.

B. Assault upon a health care worker consists of:

(1) an attempt to commit a battery upon the person of a health care worker who is in the lawful discharge of the health care worker's duties; or

(2) any unlawful act, threat or menacing conduct that causes a health care worker who is in the lawful discharge of the health care worker's duties to reasonably believe that the health care worker is in danger of receiving an immediate battery.

Whoever commits assault upon a health care worker is guilty of a misdemeanor.

C. Aggravated assault upon a health care worker consists of:

(1) unlawfully assaulting or striking at a health care worker with a weapon while the health care worker is in the lawful discharge of the health care worker's duties; or

(2) willfully and intentionally assaulting a health care worker who is in the lawful discharge of the health care worker's duties with intent to commit any felony.

Whoever commits aggravated assault upon a health care worker is guilty of a third degree felony.

D. Assault with intent to commit a violent felony upon a health care worker consists of assaulting a health care worker who is in the lawful discharge of the health care worker's duties with intent to kill the health care worker.

Whoever commits assault with intent to commit a violent felony upon a health care worker is guilty of a second degree felony.

E. Battery upon a health care worker is the unlawful, intentional touching or application of force to the person of a health care worker who is in the lawful discharge of the health care worker's duties, when done in a rude, insolent or angry manner.

Whoever commits battery upon a health care worker is guilty of a fourth degree felony.

F. Aggravated battery upon a health care worker consists of the unlawful touching or application of force to the person of a health care worker with intent to injure that health care worker while the health care worker is in the lawful discharge of the health care worker's duties.

Whoever commits aggravated battery upon a health care worker, inflicting an injury to the health care worker that is not likely to cause death or great bodily harm but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

Whoever commits aggravated battery upon a health care worker, inflicting great bodily harm or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

G. A person who assists or is assisted by one or more other persons to commit a battery upon a health care worker who is in the lawful discharge of the health care worker's duties is guilty of a fourth degree felony.

History: Laws 2006, ch. 27, § 1.

ANNOTATIONS

Effective dates. — Laws 2006, ch. 27 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

Not unconstitutionally vague. — Section 30-3-9.2 NMSA 1978 is not unconstitutionally vague. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754, 266 P.3d 34, cert. denied, 2011-NMCERT-010.

The element of knowledge of the victim's identity as a health care worker is an essential element for the crime of battery upon a health care worker. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

Knowledge of the identity of the victim is an essential element. — Where defendant was charged with battery upon a health care worker for striking a security guard at a medical center, and the trial court instructed the jury on the elements of battery upon a health care worker, but omitted the requirement that defendant had knowledge that the victim was a health care worker, the failure to instruct the jury that a conviction for battery on a health care worker required the element of knowledge that the victim was a health care worker was fundamental error. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

Meaning of "health care worker". — A security guard who was employed by a medical center, who was not a medical professional, who was not employed for the purpose of providing medical care, who was not licensed in any medical field, and whose employment duties related to security, not medicine, was a "health care worker" under Section 30-3-9.2(A)(2) NMSA 1978. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

Battery committed while in protective custody due to intoxication. — The Detoxification Reform Act, Sections 43-2-1.1 NMSA 1978 et seq., does not preclude the criminal prosecution of a defendant for battery upon a health care worker merely because the defendant was in protective custody due to intoxication at the time of the offense. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754, 266 P.3d 34, cert. denied, 2011-NMCERT-010.

Health facility. — Where the victim of defendant's battery was employed by a facility that was licensed as an adult residential health facility, provided protective custody to

alcohol-impaired persons, and identified substance abuse issues based upon patients' medical history, vital signs, laboratory testing, and formal assessments and developed treatment plans based upon those observations, which included prescribing and dispensing of medications and behavioral therapy, the facility was a "health facility" and the victim qualified as a health care worker. *State v. Tsosie*, 2011-NMCA-115, 150 N.M. 754, 266 P.3d 34, cert. denied, 2011-NMCERT-010.

Sufficient evidence. — Where defendant was brought to a medical center for detoxification evaluation; the medical staff determined that defendant was not free to be released and requested security guards employed by the medical center to restrain defendant until defendant's parents arrived to pick defendant up; the security guards' job description included restraining persons brought in for detoxification evaluation; defendant tried to leave and the security guards restrained defendant; and defendant struck one of the security guards, there was sufficient evidence that the security guard was a health care worker lawfully performing the security guard's duties. *State v. Valino*, 2012-NMCA-105, 287 P.3d 372, cert. denied, 2012-NMCERT-009, 296 P.3d 1207.

30-3-10. Short title.

Sections 30-3-10 through 30-3-18 NMSA 1978 may be cited as the "Crimes Against Household Members Act".

History: Laws 1995, ch. 221, § 1; 2009, ch. 255, § 1.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, changed the reference of the act to Sections 30-3-10 through 30-3-18 NMSA 1978,

30-3-11. Definitions.

As used in the Crimes Against Household Members Act:

A. "household member" means a spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes Against Household Members Act;

B. "continuing personal relationship" means a dating or intimate relationship;

C. "strangulation" means the unlawful touching or application of force to another person's neck or throat with intent to injure that person and in a manner whereby great bodily harm or death can be inflicted, the result of which impedes the person's normal breathing or blood circulation; and

D. "suffocation" means the unlawful touching or application of force that blocks the nose or mouth of another person with intent to injure that person and in a manner whereby great bodily harm or death can be inflicted, the result of which impedes the person's normal breathing or blood circulation.

History: Laws 1995, ch. 221, § 2; 2008, ch. 16, § 1; 2010, ch. 85, § 1; 2018, ch. 30, § 1.

ANNOTATIONS

The 2018 amendment, effective July 1, 2018, added definitions of "strangulation" and "suffocation" to the Crimes Against Household Members Act; added Subsections C and D.

The 2010 amendment, effective July 1, 2010, in Subsection A, after "former spouse", deleted "or family member, including a relative"; after second instance of "present or former", added "parent"; and after "parent in-law", added "grandparent, grandparent-in-law".

The 2008 amendment, effective July 1, 2008, added the definition of "continuing personal relationship" in Subsection B.

Minor child of accused is not included in the definition of "household member". *State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295.

Adult children — A plain reading of this section supports a conclusion that the definition of "household member" includes adult children of the accused. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

Victim need not cohabit or reside with defendant in order to be a household member. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

30-3-12. Assault against a household member.

A. Assault against a household member consists of:

(1) an attempt to commit a battery against a household member; or

(2) any unlawful act, threat or menacing conduct that causes a household member to reasonably believe that he is in danger of receiving an immediate battery.

B. Whoever commits assault against a household member is guilty of a petty misdemeanor.

History: Laws 1995, ch. 221, § 3.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 221, § 8 made the Crimes Against Household Members Act effective on July 1, 1995.

30-3-13. Aggravated assault against a household member.

A. Aggravated assault against a household member consists of:

(1) unlawfully assaulting or striking at a household member with a deadly weapon; or

(2) willfully and intentionally assaulting a household member with intent to commit any felony.

B. Whoever commits aggravated assault against a household member is guilty of a fourth degree felony.

History: Laws 1995, ch. 221, § 4.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 221, § 8 made the Crimes Against Household Members Act effective on July 1, 1995.

Sufficient evidence. — Where defendant pointed a gun at the victim and told the victim that defendant was going to shoot the victim; the victim believed defendant was going to shoot the victim; the victim grabbed the gun away and threw the gun into a field; the police found the gun in the field; the gun was a Raven brand gun; the police found a Raven brand firearms box in defendant's home; and defendant and the victim had ended their relationship a week before, the evidence was sufficient to convict defendant of aggravated assault against a household member. *State v. Quintana*, 2009-NMCA-115, 147 N.M. 169, 218 P.3d 87.

30-3-14. Assault against a household member with intent to commit a violent felony.

A. Assault against a household member with intent to commit a violent felony consists of any person assaulting a household member with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery, kidnapping, false imprisonment or burglary.

B. Whoever commits assault against a household member with intent to commit a violent felony is guilty of a third degree felony.

History: Laws 1995, ch. 221, § 5.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 221, § 8 made the Crimes Against Household Members Act effective on July 1, 1995.

Separate punishable offenses. — Criminal sexual penetration and assault with intent to commit criminal sexual penetration on a household member statutes create separate punishable offenses. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

Double jeopardy. — Where an assault was with an intent to commit criminal sexual penetration, followed then by criminal sexual penetration, the fear, and the acts of penetration with resulting personal injury, are reasonably separable conduct that the defendant was not placed in double jeopardy. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

30-3-15. Battery against a household member.

A. Battery against a household member consists of the unlawful, intentional touching or application of force to the person of a household member, when done in a rude, insolent or angry manner.

B. Whoever commits battery against a household member is guilty of a misdemeanor.

C. Upon conviction pursuant to this section, an offender shall be required to participate in and complete a domestic violence offender treatment or intervention program approved by the children, youth and families department pursuant to rules promulgated by the department that define the criteria for such programs.

D. Notwithstanding any provision of law to the contrary, if a sentence imposed pursuant to this section is suspended or deferred in whole or in part, the period of probation may extend beyond three hundred sixty-four days but may not exceed two years. If an offender violates a condition of probation, the court may impose any sentence that the court could originally have imposed and credit shall not be given for time served by the offender on probation; provided that the total period of incarceration shall not exceed three hundred sixty-four days and the combined period of incarceration and probation shall not exceed two years.

History: Laws 1995, ch. 221, § 6; 2001, ch. 144, § 1; 2007, ch. 221, § 1; 2008, ch. 16, § 2.

ANNOTATIONS

The 2008 amendment, effective July 1, 2008, provided for participation in intervention programs in Subsection C.

The 2007 amendment, effective July 1, 2007, added Subsections C and D.

The 2001 amendment, effective July 1, 2001, in Subsection B, increased the penalty for the offense of battery against a household member from a petty misdemeanor to a misdemeanor.

Unlawfulness is an essential element of battery against a household member. — Whether a defendant's touch or application of force was unlawful is an essential element of battery against a household member, so if there is some evidence that excused or justified the defendant's conduct, which is to say if the essential element of unlawfulness was contested, the court has a duty to instruct the jury on the state's burden to prove unlawfulness beyond a reasonable doubt. *State v. Smith*, 2021-NMSC-025, *aff'g* A-1-CA-34765, mem. op. (Dec. 16, 2019) (nonprecedential).

Defendant was entitled to an instruction on unlawfulness. — Where defendant was convicted of battery against a household member, based on evidence that defendant pushed his girlfriend to the ground after she pushed him away from the door to prevent him from entering their apartment and that defendant backed his car into his girlfriend, making contact with her arm, when she did not move away while defendant was trying to exit the parking lot, and where, at trial, defendant argued that his use of force was justified as a reasonable response to his girlfriend's initial use of force and that his conduct was justified or excused because his girlfriend committed the crime of deprivation of property of a household member, the trial court erred in denying defendant's requested instruction on unlawfulness, because, as an essential element of the crime of battery against a household member, if there was some evidence that excused or justified defendant's conduct, which is to say if the essential element of unlawfulness was contested, the court had a duty to instruct the jury on the state's burden to prove unlawfulness beyond a reasonable doubt. *State v. Smith*, 2021-NMSC-025, *aff'g* A-1-CA-34765, mem. op. (Dec. 16, 2019) (nonprecedential).

Battery against one's own child is not encompassed in the offense of battery against a household member. *State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295.

Sufficient evidence of battery against a household member. — Where defendant was charged with criminal sexual penetration of a minor and battery against a household member, and where the state relied on testimony elicited from the victim that defendant kicked and pushed her and that defendant is her uncle, there was sufficient evidence to prove beyond a reasonable doubt that defendant intentionally touched or applied force to the victim in a rude, insolent or angry manner and that the victim was a household member. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Adult children. — A plain reading of this section supports a conclusion that the definition of a "household member" includes adult children of the accused. *State v.*

Montoya, 2005-NMCA-005, 136 N.M. 764, 104 P.3d 540, cert. quashed, 2005-NMCERT-011, 138 N.M. 586, 124 P.3d 564.

Right to de novo appeal. — Where defendant was convicted in metropolitan court of battery against a household member in violation of 30-3-4 NMSA 1978, because the state did not prosecute the battery under this section, state could not contend that defendant was convicted of a crime involving domestic violence and he was entitled to a de novo appeal in district court rather than just an on-record review of the proceeding. *State v. Trujillo*, 1999-NMCA-003, 126 N.M. 603, 973 P.2d 855.

Convictions for robbery and battery against a household member did not violate double jeopardy. — Where defendant, who was a former employee of a restaurant, had an intimate romantic relationship with the victim who was the assistant manager of the restaurant; under the guise of returning the victim's cell phone, defendant approached the victim outside the restaurant, grabbed two money bags containing receipts of the restaurant that the victim intended to deposit; and when defendant grabbed the money bags, defendant struck the victim in the face and fled the scene, defendant's conviction for robbery and battery against a household member did not violate double jeopardy. *State v. Gutierrez*, 2012-NMCA-095, 286 P.3d 608, cert. denied, 2012-NMCERT-008.

State statute does not preempt municipal ordinance. — The state statute providing a full misdemeanor penalty for certain acts of domestic violence does not preclude prosecution of an offense under a municipal ordinance that only provides a petty misdemeanor penalty. 2008 Op. Att'y Gen. No. 08-06.

Am. Jur. 2d, A.L.R. and C.J.S. references. — "Cohabitation" for purposes of domestic violence statutes, 71 A.L.R.5th 285.

30-3-16. Aggravated battery against a household member.

A. Aggravated battery against a household member consists of the unlawful touching or application of force to the person of a household member with intent to injure that person or another.

B. Whoever commits aggravated battery against a household member is guilty of a misdemeanor if the aggravated battery against a household member is committed by inflicting an injury to that person that is not likely to cause death or great bodily harm, but that does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body.

C. Whoever commits aggravated battery against a household member is guilty of a third degree felony if the aggravated battery against a household member is committed:

(1) by inflicting great bodily harm;

(2) with a deadly weapon;

(3) by strangulation or suffocation; or

(4) in any manner whereby great bodily harm or death can be inflicted.

D. Upon conviction pursuant to Subsection B of this section, an offender shall be required to participate in and complete a domestic violence offender treatment or intervention program approved by the children, youth and families department pursuant to rules promulgated by the department that define the criteria for such programs.

E. Notwithstanding any provision of law to the contrary, if a sentence imposed pursuant to the provisions of Subsection B of this section is suspended or deferred in whole or in part, the period of probation may extend beyond three hundred sixty-four days but may not exceed two years. If an offender violates a condition of probation, the court may impose any sentence that the court could originally have imposed and credit shall not be given for time served by the offender on probation; provided that the total period of incarceration shall not exceed three hundred sixty-four days and the combined period of incarceration and probation shall not exceed two years.

History: Laws 1995, ch. 221, § 7; 2007, ch. 221, § 2; 2008, ch. 16, § 3; 2018, ch. 30, § 2.

ANNOTATIONS

The 2018 amendment, effective July 1, 2018, provided that aggravated battery against a household member may be committed by strangulation or suffocation; in Subsection B, after "household member", added "is guilty of a misdemeanor if the aggravated battery against a household member is committed", and after "organ of the body", deleted "is guilty of a misdemeanor"; and in Subsection C, after "household member", added "is guilty of a third degree felony if the aggravated battery against a household member is committed", added the paragraph designations "(1)" and "(2)", in Paragraph C(1), after "harm", deleted "or doing so", in Paragraph C(2), after "weapon", deleted "or doing so", added a new paragraph C(3) and the new paragraph designation "(4)", and in Paragraph C(4), after "can be inflicted", deleted "is guilty of a third degree felony".

The 2008 amendment, effective July 1, 2008, provided for participation in intervention programs in Subsection D.

The 2007 amendment, effective July 1, 2007, added Subsections D and E.

Intent to injure victim required. — Defendant's conviction for aggravated battery on a household member was reversed where there was no direct testimony supporting the trial court's finding that he acted with the specific intent to harm the victim and there was not sufficient circumstantial evidence to support a finding of intent. *State v. Wynn*, 2001-NMCA-020, 130 N.M. 381, 24 P.3d 816.

Application of force. — Defendant's act of striking a window with sufficient force to propel the glass inward and against the victim constituted the application of force to the victim within the meaning of section. *State v. Wynn*, 2001-NMCA-020, 130 N.M. 381, 24 P.3d 816.

30-3-17. Multiple convictions of battery or aggravated battery.

A. Whoever commits three offenses of battery against a household member as provided in Section 30-3-15 NMSA 1978 or aggravated battery against a household member as provided in Subsection B of Section 30-3-16 NMSA 1978, or any combination thereof, when the household member is a spouse, a former spouse, a co-parent of a child or a person with whom the offender has had a continuing personal relationship is guilty of a fourth degree felony.

B. Whoever commits four or more offenses of battery against a household member as provided in Section 30-3-15 NMSA 1978 or aggravated battery against a household member as provided in Subsection B of Section 30-3-16 NMSA 1978, or any combination thereof, when the household member is a spouse, a former spouse, a co-parent of a child or a person with whom the offender has had a continuing personal relationship is guilty of a third degree felony.

C. For the purpose of determining the number of offenses committed, each offense must have been committed after conviction for the preceding offense.

History: Laws 2008, ch. 16, § 4.

ANNOTATIONS

Effective dates. — Laws 2008, ch. 16, § 6 made this section effective July 1, 2008.

Applicability. — Laws 2008, ch. 16, § 5 provided that the provisions of Laws 2008, ch. 16, § 4 apply to convictions obtained on or after July 1, 2008.

Habitual offender enhancement not prohibited. — Where defendant, a three-time domestic violence offender, pleaded no contest to, and was convicted of, felony battery against a household member, the district court did not err in enhancing defendant's sentence by one year, pursuant to 31-18-17(A) NMSA 1978, based on a prior conviction for false imprisonment, because contrary to defendant's argument, the felony battery against a household member statute is not self-enhancing, and based on the plain language of the statutes at issue, the one-year habitual offender enhancement of defendant's fourth degree felony battery on a household member sentence was proper as a matter of law. *State v. Barela*, 2019-NMCA-005, cert. granted.

The Habitual Offender Act is applicable to convictions of felony battery against a household member. — Where defendant pleaded guilty to battery against a household member after battering the mother of his child, and where this was defendant's third

conviction of battery against a household member, and where the district court enhanced defendant's conviction to a fourth degree felony under § 30-3-17(A) NMSA 1978, and where defendant had previously been convicted of a separate felony, the district court enhanced defendant's sentence by one year under the Habitual Offender Act, § 31-18-17 NMSA 1978, the district court did not err in applying the Habitual Offender Act, because the plain language of § 30-3-17(A) NMSA 1978 and § 31-18-17 NMSA 1978 does not preclude their simultaneous application. *State v. Barela*, 2021-NMSC-001, *aff'g* 2019-NMCA-005, 458 P.3d 501.

30-3-18. Criminal damage to property of household member; deprivation of property of household member.

A. Criminal damage to the property of a household member consists of intentionally damaging real, personal, community or jointly owned property of a household member with the intent to intimidate, threaten or harass that household member.

B. Whoever commits criminal damage to the property of a household member is guilty of a misdemeanor, except that when the damage to the household member's interest in the property amounts to more than one thousand dollars ($1,000), the offender is guilty of a fourth degree felony.

C. Deprivation of the property of a household member consists of intentionally depriving a household member of the use of separate, community or jointly owned personal property of the household member with the intent to intimidate or threaten that household member.

D. Whoever commits deprivation of the property of a household member is guilty of a misdemeanor.

History: 1978 Comp., § 30-3-18, as enacted by Laws 2009, ch. 255, § 2.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 255 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

30-3-19. Threatening a judge or an immediate family member of a judge; penalty.

A. No person shall threaten a judge or the immediate family member of a judge with the intent to:

(1) place the judge or the immediate family member of a judge in fear of great bodily harm to the judge or to an immediate family member of the judge;

(2) prevent or interrupt the ability to carry out the judge's job duties; or

(3) retaliate against a judge on account of the performance of the judge's official duties during the judge's term of service.

B. A person who violates the provisions of this section is guilty of a fourth degree felony.

C. As used in this section:

(1) "immediate family member" means a spouse, child, sibling, parent, grandparent or grandchild, and "immediate family member" includes a stepparent, a stepchild, a stepsibling and an adoptive relationship;

(2) "judge" means a current or former justice, judge, magistrate, domestic violence special commissioner or hearing officer; and

(3) "retaliate" means intentionally threatening bodily injury to or damage to the property of a judge or a family member of a judge with the intent to retaliate against the judge for the judge's exercise of the judge's judicial duties and causing the judge or the family member to reasonably believe that the judge's or the family member's person or property is in danger.

History: Laws 2022, ch. 56, § 47.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 56, § 47 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

30-3-20. Malicious sharing of personal information of a judge or an immediate family member of a judge; penalty.

A. No person shall share the personal information of a judge or an immediate family member of a judge with the intent to:

(1) cause harm to the judge or an immediate family member of a judge;

(2) place the judge or an immediate family member of a judge in fear of great bodily harm to the judge or to an immediate family member of the judge; or

(3) prevent or interrupt the ability to carry out the judge's job duties.

B. A person who violates the provisions of this section is guilty of a misdemeanor.

C. As used in this section:

(1) "immediate family member" means a spouse, child, sibling, parent, grandparent or grandchild, and "immediate family member" includes a stepparent, a stepchild, a stepsibling and an adoptive relationship;

(2) "judge" means a current or former justice, judge, magistrate, domestic violence special commissioner or hearing officer; and

(3) "personal information" means a person's personal physical address, personal phone number or physical location.

History: Laws 2022, ch. 56, § 48.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 56, § 48 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

ARTICLE 3A
Harassment and Stalking

30-3A-1. Short title.

Chapter 30, Article 3A NMSA 1978 may be cited as the "Harassment and Stalking Act".

History: 1978 Comp., § 30-3A-1, enacted by Laws 1997, ch. 10, § 1; 2009, ch. 21, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1997, ch. 10, § 7, repealed 30-3A-1 NMSA 1978, as enacted by Laws 1993, ch. 86, § 1, and Laws 1997, ch. 10, § 1, enacted a new section, effective July 1, 1997.

The 2009 amendment, effective July 1, 2009, changed the reference to the act to Chapter 30, Article 3A, NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction and application of stalking statutes, 29 A.L.R.5th 487.

30-3A-2. Harassment; penalties.

A. Harassment consists of knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and that serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress.

B. Whoever commits harassment is guilty of a misdemeanor.

History: 1978 Comp., § 30-3A-2, enacted by Laws 1997, ch. 10, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1997, ch. 10, § 7, repealed 30-3A-2 NMSA 1978, as enacted by Laws 1993, ch. 86, § 2, and Laws 1997, ch. 10, § 2, enacted a new section, effective July 1, 1997.

Constitutionality. — This section, as applied to defendant who repeatedly trespassed on victim's property, looked in her windows, and followed her both on and off her property, was not unconstitutionally vague; a person of ordinary intelligence would have known that such behavior was unlawful and would inflict substantial emotional distress upon the victim. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Double jeopardy. — When the defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the contempt adjudication. *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185, cert. denied, 123 N.M. 229, 938 P.2d 204.

Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of § 2A6.1 of United States Sentencing Guidelines (USSG § 2A6.1), pertaining to sentence to be imposed for making threatening communications, 148 A.L.R. Fed. 501.

30-3A-3. Stalking; penalties.

A. Stalking consists of knowingly pursuing a pattern of conduct, without lawful authority, directed at a specific individual when the person intends that the pattern of conduct would place the individual in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint of the individual or another individual.

B. As used in this section:

(1) "lawful authority" means within the scope of lawful employment or constitutionally protected activity; and

(2) "pattern of conduct" means two or more acts, on more than one occasion, in which the alleged stalker by any action, method, device or means, directly, indirectly or through third parties, follows, monitors, surveils, threatens or communicates to or about a person.

C. Whoever commits stalking is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted of stalking to participate in and complete a program of professional counseling at the person's own expense or a domestic violence offender treatment or intervention program.

History: 1978 Comp., § 30-3A-3, enacted by Laws 1997, ch. 10, § 3; 2009, ch. 21, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1997, ch. 10, § 7, repealed 30-3A-3 NMSA 1978, as amended by Laws 1995, ch. 23, § 1, and Laws 1997, ch. 10, § 3, enacted a new section, effective July 1, 1997.

The 2009 amendment, effective July 1, 2009, deleted former Subsections A and B and inserted new Subsections A and B; and in Subsection D, added the domestic violence offender treatment or intervention program.

Evidence sufficient. — Evidence that defendant repeatedly trespassed onto victim's property and that defendant was the party who looked into victim's windows and followed her was sufficient to support convictions for stalking, harassment and criminal trespass. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Double jeopardy. — When the defendant had been convicted of contempt, a misdemeanor, for violating a domestic violence protective order and sentenced to jail time, double jeopardy did not bar prosecution of the defendant for the offenses of stalking and harassment stemming from the same conduct that gave rise to the

contempt adjudication. *State v. Gonzales*, 1997-NMCA-039, 123 N.M. 337, 940 P.2d 185, cert. denied, 123 N.M. 229, 938 P.2d 204.

Where the state relies on identical acts of an accused involving the same course of conduct to prove both the offenses of harassment and of stalking, double jeopardy provisions preclude multiple punishment, and the offense of harassment is subsumed into the offense of misdemeanor stalking. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

30-3A-3.1. Aggravated stalking; penalties.

A. Aggravated stalking consists of stalking perpetrated by a person:

(1) who knowingly violates a permanent or temporary order of protection issued by a court, except that mutual violations of such orders may constitute a defense to aggravated stalking;

(2) in violation of a court order setting conditions of release and bond;

(3) when the person is in possession of a deadly weapon; or

(4) when the victim is less than sixteen years of age.

B. Whoever commits aggravated stalking is guilty of a fourth degree felony. Upon a second or subsequent conviction, the offender is guilty of a third degree felony.

C. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted of aggravated stalking to participate in and complete a program of professional counseling at his own expense.

History: Laws 1997, ch. 10, § 4.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 10, § 8 made the Harassment and Stalking Act effective July 1, 1997.

Proof of intent. — Although aggravated stalking need not be construed as requiring, like aggravated assault, some use of a weapon, it is reasonable to construe the aggravated stalking statute as requiring some intent to use a weapon not specifically named or specifically described in 30-1-12B NMSA 1978 as a weapon. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

Jury instruction. — Under an aggravated stalking charge, when the object or instrument in question is an unlisted one that falls within the catchall language of 30-1-12B NMSA 1978, the jury must be instructed (1) that the defendant must have possessed the object or instrument with the intent to use it as a weapon, and (2) the object or instrument is one that, if so used, could inflict dangerous wounds. *State v. Anderson*, 2001-NMCA-027, 130 N.M. 295, 24 P.3d 327.

The aggravated stalking statute is not unconstitutionally vague. *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

The aggravated stalking statute requires only one act in furtherance of a pattern of stalking. *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Sufficient evidence. — Where the victim of the defendant's stalking attempted to end the relationship between the defendant and the victim; the defendant threatened to kill the victim and to damage the victim's car, left threatening letters in the victim's mailbox and made threatening phone calls to the victim's father; the victim obtained a temporary restraining order against the defendant; before the TRO was served, the defendant appeared at the victim's apartment with Ninja-style knives, told police officers that the defendant was at the apartment to put the fear of God into the victim; when the TRO was served on the defendant, the defendant stated that a piece of paper would not stop the defendant from inflicting pain and fear on the victim; and the victim found a copy of the TRO in the door of the apartment with a threatening message written by the defendant, the evidence was sufficient to support the defendant's conviction of aggravated stalking. *State v. Smile*, 2009-NMCA-064, 146 N.M. 525, 212 P.3d 413, cert. quashed, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

30-3A-4. Exceptions.

The provisions of the [Harassment and] Stalking Act do not apply to:

A. picketing or public demonstrations that are lawful or that arise out of a bona fide labor dispute; or

B. a peace officer in the performance of his duties.

History: 1978 Comp., § 30-3A-4, enacted by Laws 1997, ch. 10, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not a part of the law.

Repeals and reenactments. — Laws 1997, ch. 10, § 7, repealed 30-3A-4 NMSA 1978, as enacted by Laws 1993, ch. 86, § 4, and Laws 1997, ch. 10, § 5, enacted a new section, effective July 1, 1997.

ARTICLE 4
Kidnapping

30-4-1. Kidnapping.

A. Kidnapping is the unlawful taking, restraining, transporting or confining of a person, by force, intimidation or deception, with intent:

(1) that the victim be held for ransom;

(2) that the victim be held as a hostage or shield and confined against his will;

(3) that the victim be held to service against the victim's will; or

(4) to inflict death, physical injury or a sexual offense on the victim.

B. Whoever commits kidnapping is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.

History: 1953 Comp., § 40A-4-1, enacted by Laws 1963, ch. 303, § 4-1; 1973, ch. 109, § 1; 1995, ch. 84, § 1; 2003 (1st S.S.), ch. 1, § 2.

ANNOTATIONS

Cross references. — For essential elements of kidnapping jury instruction, *see* UJI 14-403 NMRA.

The 2003 (1st S.S.) amendment, effective February 3, 2004, substituted "physical injury or a sexual offense" for "great bodily harm" near the end of Subsection B.

The 1995 amendment, effective July 1, 1995, substituted "kidnapping" for "kidnaping" in the heading and throughout the section; in Subsection A, substituted "restraining, transporting or confining" for "restraining or confining", substituted "by force, intimidation or deception" for "by force or deception", deleted "that the victim" following "intent"; in Paragraphs A(1) and A(3) inserted "that the victim"; in Paragraph A(2), inserted "that the victim be held" and "or shield and"; added Paragraph A(4); and in Subsection B, substituted the language beginning with "he voluntarily" and ending with "harm upon the victim" for "the victim is freed without having had great bodily harm inflicted upon him by his captor".

I. GENERAL CONSIDERATION.

Not void for vagueness. — The 2003 amendment to Subsection B of 30-4-1 NMSA 1978, which replaced the phrase "great bodily harm" with the phrase "physical injury" did not did nor render 30-4-1 NMSA 1978 unconstitutionally vague. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Constitutionality, vagueness. — Defendant's contention that the words "held to service against the victim's will" had no general meaning which the public could comprehend and thus rendered the statute unconstitutionally vague was without merit. *State v. Aguirre*, 1972-NMSC-081, 84 N.M. 376, 503 P.2d 1154.

The language of Subsection B, regarding how a first degree crime is reduced to a second degree crime, is not unconstitutionally vague because it can be understood by, and gives reasonable notice to, persons of ordinary intelligence exercising common sense. *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

If multiple victims, kidnapping offense committed against each one. — Where the criminal information charges that each of a number of victims was held as hostage, the defendant is put on notice that the state charges that one offense of kidnapping was committed by holding any one of the victims as a hostage, and the defendant should be prepared to defend the charge in connection with each of the victims. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

Standing to challenge validity. — Defendant, who by standing mute in fact entered a plea of not guilty and was convicted on trial of a second degree felony for kidnapping, had no standing to attack the validity of the kidnapping statute (as it read prior to the 1973 amendment) on grounds that leaving to the jury the decision as to whether the crime should be a capital or second degree felony constituted a denial of equal protection. *State v. Sharpe*, 1970-NMCA-078, 81 N.M. 637, 471 P.2d 671.

Construction. — Subsection A(1) of this section should read "Kidnapping is the unlawful taking, . . . with the intent that the victim be held for ransom and confined against his will," and Subsection A(2) should read "Kidnapping is the unlawful taking, . . . with the intent that the victim be held as a hostage and confined against his will." *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844 (decided under prior law).

Person asked to do or forbear act cannot be same as victim in a prosecution for kidnapping. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

Each of two hostages may also be third person. — If it is charged that X and Y were held as hostages, this does not prohibit a conviction of kidnapping on the basis that X was hostage for the performance of some act by Y, and vice versa. *State v. Davis*, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

Jury instructions. — Where defendant entered the victim's house; defendant pulled a gun, put the gun to the victim's head, and told the victim that defendant planned to rape the victim; defendant threatened to kill the victim's child if the victim did not comply; defendant raped the victim; a jury convicted defendant of kidnapping in the first degree and second degree criminal sexual penetration; the district court gave the jury UJI 14-403 NMRA, the kidnapping jury instruction, but did not give the jury UJI 14-6018, the special verdict form asking the jury to find whether defendant committed a sexual offense against the victim; and the district court modified defendant's conviction for first degree kidnapping to second degree kidnapping because the jury did not find, pursuant to the special verdict form, that defendant committed a sexual offense against the victim, the district court erred in modifying defendant's conviction for first degree kidnapping because the jury independently found that defendant had committed a sexual offense against the victim. *State v. Dominguez*, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

II. ELEMENTS OF KIDNAPPING.

"Force". — "Force" cannot be construed to mean merely violent or deadly force, as it could not have been the legislative intention to so limit the statute, for many kidnappings are accomplished by the use of only minimal force, as, for example, where a child is abducted. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

"Deception" necessarily implies that the victim is unaware that she is being kidnaped. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

"Hostage". — Term "hostage," when used with reference to a person and in the context in which it is used in New Mexico's kidnapping statute, implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person. *State v. Crump*, 1971-NMSC-051, 82 N.M. 487, 484 P.2d 329; State v. Davis, 1979-NMCA-015, 92 N.M. 563, 591 P.2d 1160.

"Held to service". — The purpose of 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*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

The third objective mentioned in the statute, holding for service, should be construed to effectuate the same overall scheme as the first two objectives - holding for ransom and as a hostage - namely, to accomplish some goal that the perpetrator may view as beneficial to himself or herself. *State v. Ortega*, 1991-NMSC-084, 112 N.M. 554, 817 P.2d 1196.

Once the defendant restrained the victim by force or coercion for service against her will, the crime of kidnapping occurred; the key to the restraint element in kidnapping is the point at which the victim's physical association with the defendant was no longer voluntary. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

Taking the victim by force and deception in order to convince him to end his relationship with another person constituted "holding for service" within this section. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Incidental restraint in homicide not sufficient. — The mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping. Unlike cases involving criminal sexual penetration or robbery, no "service" is performed by the victim of a shooting with intent to kill because the victim does not confer any independent assistance or benefit to the perpetrator of the crime. *State v. Baca*, 1995-NMSC-045, 120 N.M. 383, 902 P.2d 65.

Incidental restraint in criminal sexual penetration of a minor not sufficient. — The legislature did not intend to punish related incidental movement and restraints occurring prior to and during sexual assaults as the separate crime of kidnapping; to determine whether a restraint or movement is incidental to another crime, the court looks to whether the restraint or movement increases the culpability of the defendant over and above his culpability for the other crime, whether the movements of the victim substantially increased the risk of harm over and above that necessarily present in the accompanying crime, or whether the restraint served to decrease the defendant’s risk of detection or the difficulty of the commission of the crime. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Where four-year-old victim testified that defendant lay on top of her on the bed and sexually assaulted her, there was no evidence of restraint on her movement; defendant’s incidental restraint did not increase his culpability beyond that already inherent to any sexual assault, and the child victims’ testimony did not indicate that the restraint was any longer or greater than that necessary to commit the sexual assault, the restraint did not increase the victim’s risk of harm or the severity of the assault beyond that inherent to the underlying crime, and the restraint did not serve to decrease defendant’s risk of detection or the difficulty of the commission of the crime; the restraint, therefore, was incidental to the sexual assault perpetrated on the child victim and did not establish conduct that the legislature intended to support a kidnapping conviction. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Where eight-year-old victim testified that when she and defendant were in her mom's room, defendant made her take her clothes off, and the two got into bed where defendant sexually assaulted her, any incidental restraint in making the child remove her clothing is not the type of separate conduct that the legislature intended to punish as kidnapping; the conduct did not increase defendant's culpability beyond that inherent to the assault, the restraint was not longer or greater than necessary to complete the assault, the restraint did not increase the risk of harm to the child or the severity of the assault, and the restraint used to compel the removal of the child's clothes is inherent to the sexual assault and was not done to make the commission of the crime easier or less detectable; any restraint that was utilized to compel the child to remove her clothing was incidental to the sexual assault. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Where eight-year-old victim testified that defendant "made her go" or "took her into another room", the movement was from one room to another in the family residence where they were both already located; the movement did not subject the child to a substantial increase in risk of harm above and beyond that inherent in a sexual assault; the brief movements from one room to another, in furtherance of the sexual assault, were incidental to the crimes and cannot support a separate kidnapping conviction. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Kidnapping was not incidental to battery. — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant's convictions did not violate double jeopardy because defendant's conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim's hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

Incidental restraint in aggravated battery not sufficient. — The Legislature did not intend to punish as kidnapping restraints that are merely incidental to another crime. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

Where defendant and another assailant broke into the home of the victim armed with metal bars or bats; defendant began striking victim with a metal bar; the victim fought back and was able to gain the upper hand; while victim was on top of defendant hitting defendant, defendant restrained the victim and called for the other assailant to help; the other assailant began striking victim, allowing defendant to get free and continue striking the victim; and the episode lasted two to four minutes, the restraint of the victim was as

a matter of law insufficient to support a conviction for kidnapping because the restraint was no longer or greater than that necessary to achieve a battery and the brief restraint did not subject the victim to substantially greater risk of harm. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

Prolonged period of restraint not incidental to aggravated assault. — Where defendants told the victims that they could not leave the apartment until missing drugs were found, prevented the victims from opening the door to the apartment as they tried to leave, held a knife to the throat of one victim and beat another victim to unconsciousness, and prevented the victims from leaving the apartment for approximately two hours, such a prolonged period of restraint was not incidental to or inherent in the aggravated assault. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

Restraint not incidental to child endangerment. — Where defendant was charged with child endangerment and kidnapping, evidence that defendant committed a home invasion and pointed a gun at the fifteen-year-old victim was the basis for the child endangerment charge, and evidence that defendant then ordered the victim to lock the door and forced the victim, at gunpoint, to assist in a futile room-to-room search for an individual not present in the home was the factual basis for the kidnapping charge. The restraint in which the victim was held to service to open each door in the home to allow defendant to search each empty room was not incidental to endangering the victim by pointing the gun at him in the first instance. *State v. Ramirez*, 2016-NMCA-072, cert. denied.

Intent required. — There must be an intent to confine against the victim's will when he is taken, restrained or confined with intent that he be held for ransom, or as a hostage, but it is not necessary that he be confined against his will when the purpose of the taking, restraining or confining is that the victim be held to service against his will. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

Determination of intent for jury. — Under the pertinent definition of kidnapping, it is the intent of the defendant which controls, and the determination as to whether this intent was present is for the trier of the facts when this is an issue in the case. *State v. Aguirre*, 1972-NMSC-081, 84 N.M. 376, 503 P.2d 1154.

Reversal of conviction where evidence of intent lacking. — Where there was neither direct evidence nor proof of acts, occurrences or circumstances which could serve as support for an inference of intent to hold victim for ransom or as a hostage, or to service against her will, the finding of guilt could not stand. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

Proof of victim's state of mind is not essential to prove kidnapping by deception; rather, the offense may be proved by circumstantial evidence. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308 (1983).

Conviction sufficient if kidnapper rapes victim during course of abduction. — A conviction for kidnapping with the intent to hold for services is sufficient if the kidnapper rapes the victim during the course of the abduction. It is immaterial whether or not the intent to rape existed at the beginning of the act. *State v. Hutchinson*, 1983-NMSC-029, 99 N.M. 616, 661 P.2d 1315.

Distinction between kidnapping and false imprisonment. — The distinction between false imprisonment and kidnapping by holding to service is whether the defendant intended to hold the victim to service against the victim's will. *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152.

Merely to confine or restrain against a person's will without the requisite intention is not kidnapping, but is false imprisonment under Section 30-4-3 NMSA 1978, when done with knowledge of an absence of authority. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

Distinction between kidnapping and second degree criminal sexual penetration. — A kidnapping was factually distinct from attempted criminal sexual penetration where the force used was not the kind "necessarily involved in every sexual penetration without consent." *State v. Allen*, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

III. EVIDENCE AND PROOF.

Admission of evidence. — It was not error for trial court to admit into evidence gun and other items found on person of individual who participated with defendant in an attempted robbery, out of which grew the crime of kidnapping with which defendant was charged. *State v. Samora*, 1971-NMCA-149, 83 N.M. 222, 490 P.2d 480.

Sufficient evidence of deception. — Evidence that defendant entered the back seat of a car, with victims in front, under the false promise that defendant needed a ride and that defendant actually intended to murder the victims was sufficient evidence to support the element of deception. *State v. Sanchez*, 2000-NMSC-021, 129 N.M. 284, 6 P.3d 486.

Sufficient evidence of kidnapping by deception. — Where the victim, a fifteen year old boy, testified that he was led to believe that defendant was going to give him a ride home, but defendant instead took the victim to defendant’s apartment where defendant provided the victim with drugs and alcohol, performed oral sex on the victim and asked the victim for anal sex, and where the victim testified that he felt forced to enter the apartment and believed he was threatened, there was sufficient evidence to support defendant’s kidnapping conviction. *State v. Simmons*, 2018-NMCA-015, cert. denied.

Sufficient evidence of kidnapping by intimidation. — Where defendant was convicted of kidnapping, and where defendant claimed that the state failed to present sufficient evidence of kidnapping because there was no proof that he restrained the

victim with the intent to inflict a sexual offense because the primary evidence of kidnapping occurred after the sexual offense, evidence that, prior to the sexual offense, defendant threatened the victim with a knife, ordered her to take off her pajamas, allowed her to travel from the bedroom to the restroom only, followed her to the restroom and masturbated while she used the restroom, and ultimately ordered her to return to the bedroom where the sexual assault occurred, was sufficient for a jury to reasonably conclude that defendant restricted or confined the victim using intimidation when he threatened her life using a knife, and the jury could then infer from defendant's actions that he restrained her while intending to inflict a sexual offense on her. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

Post-1995 version of the kidnapping statute. — A defendant can be found guilty of kidnapping for taking someone against his or her will to hold that person, inter alia, "to service" *or* to inflict death, physical injury or a sexual offense on that person. *State v. Telles*, 2019-NMCA-039, cert. denied.

Sufficient evidence of kidnapping. — At defendant's trial for murder, kidnapping and tampering with evidence, where the state provided evidence establishing that defendant beat the victim with a bat and then moved the victim's body to a back room and then rolled the body in a carpet, there was sufficient evidence to prove, beyond a reasonable doubt, that defendant intended to inflict death or physical injury on the victim by moving him to the back room and rolling him up in the carpet. *State v. Telles*, 2019-NMCA-039, cert. denied.

Where defendant was convicted of criminal sexual penetration in the commission of a felony and first-degree kidnapping, the jury could have reasonably inferred that defendant took or transported the victim by deception based on the victim's testimony that he got into defendant's truck because defendant said that he would take the victim home, that defendant confined the victim by force based on the victim's testimony that when he tried to escape from defendant's truck, the door was locked, that defendant intended to hold the victim against his will to inflict a sexual offense against him based on the victim's testimony that defendant took him to a remote location, pulled down his pants, and then penetrated his anus, that defendant transported the victim to a remote location and confined him there for the purpose of inflicting a sexual offense on him based on defendant's statement upon completion of the sexual act, "Now I can take you home," that defendant's act against the victim was unlawful because the jury could have inferred that it was done without the victim's consent and for the purpose of gratifying defendant's sexual desire or to intrude upon the victim's bodily safety or integrity. There was sufficient evidence to support defendant's convictions. *State v. Samora*, 2016-NMSC-031.

Sufficient evidence of restraint and confinement. — Where defendant was charged with kidnapping and criminal sexual penetration of a minor, and where the evidence established that the child victim encountered defendant in an outdoor shed and, upon seeing him, tried to retreat through the shed's open door, but before she could do so, defendant stopped her retreat by grabbing her by the arm, suggesting that they "make

babies" and shutting the door to the shed before throwing her to the floor and sexually assaulting her, there was sufficient evidence of restraint and confinement, independent from the restraint used during the sexual assault, to support defendant's kidnapping conviction. Defendant's actions constituted a completed kidnapping upon preventing the victim's escape, regardless of the sexual assault that followed. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Evidence sufficient. — Where defendant entered the victim's house; defendant pulled a gun, put the gun to the victim's head, and told the victim that defendant planned to rape the victim; defendant threatened to kill the victim's child if the victim did not comply; and defendant raped the victim, there was sufficient evidence of force and intimidation, independent of the force used during the criminal sexual penetration, to support defendant's kidnapping conviction. *State v. Dominguez*, 2014-NMCA-064, cert. denied, 2014-NMCERT-005.

Where defendant's spouse had a series of affairs with the victim; defendant entered the estranged spouse's apartment, confronted the victim with a gun, bound the victim with duct tape, and after defendant and the victim had a conversation, defendant cut the duct tape from the victim and drove the victim to defendant's motel where defendant killed the victim; defendant was armed with a knife and two guns when defendant and the victim left the apartment; and the jury could infer that the victim did not willingly accompany defendant to the motel from evidence that defendant had defendant's hands in defendant's pockets when defendant and the victim entered the motel, the victim left the victim's watch and wallet at the apartment, and defendant was armed with the same guns when defendant forced the spouse to accompany defendant to the motel, and the spouse was afraid defendant would shoot the spouse, there was sufficient evidence to support defendant's conviction of first degree kidnapping. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Evidence that defendant bound and gagged a girl and her mother, raped the mother and stated that the girl and her mother were to take defendant out of state, to Oklahoma, was sufficient to show the kidnapping of the girl with the intent to hold her to service against her will. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd in part on other grounds*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464.

Evidence that the defendant called the victim's mother and demanded $50,000 and that the defendant was having financial difficulties was sufficient to support a finding that the victim was taken with intent to hold him for ransom even though the defendant testified that the call was merely to divert suspicion. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Even though there was evidence that defendant's association with the victim began as a consensual encounter in which he proposed to give the victim a ride, the defendant's statements, physical evidence, and the testimony of the victim's mother gave rise to a reasonable inference that the association became involuntary. *State v. Allen*, 2000-

NMSC-002, 128 N.M. 482, 994 P.2d 728, cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

Evidence was sufficient to convict defendant of first degree kidnapping where it was shown that he enticed the victim to enter his car by deception, transported him by deception and intimidation with the intent to inflict a sexual offense, and that he did not voluntarily free the victim. *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Evidence was sufficient to show that kidnapping was complete before the act of attempted criminal sexual penetration or the act of murder began, as the jury could have found that defendant kidnapped the victim by deception when he initially offered her a ride home with another intent in mind, that she was restrained by deception when he changed the intended destination of the ride, or when the victim made the final walk from the car to her death. *State v. Jacobs*, 2000-NMSC-026, 129 N.M. 448, 10 P.3d 127, *overruled on other grounds by State v. Martinez*, 2021-NMSC-002.

Sufficient evidence of confinement or transportation by deception. — Where defendant was charged with human trafficking of a minor and kidnapping, and where the evidence at trial showed that defendant instructed an associate to invite the victim, a seventeen-year-old girl, into a vehicle to smoke marijuana and drink alcohol while the victim was waiting for a bus at the bus station, that defendant and his nephew jumped into the vehicle and drove away from the bus station, and that defendant instructed the associate to take away the victim's identification so she would not want to leave, and where the victim testified that she was never left alone, was afraid to run away, and was placed with "clients" to perform sex acts, a reasonable jury could find that defendant confined or transported the victim by deception and intended to hold her against her will for the purpose of making her work for defendant. *State v. Carson*, 2020-NMCA-015, cert. denied.

Evidence that defendant used his truck to block the victim from leaving defendant's property, that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim, that defendant was angry and immediately became involved in the beating of the victim when the other defendants arrived, permitted the jury to conclude that the defendant held the victim so that the victim could be physically beaten. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

Insufficient evidence of kidnapping where conduct was incidental to killing. — In defendant’s trial for murder and kidnapping, there was insufficient evidence to support defendant’s conviction for kidnapping where the evidence showed that the victim was assaulted in a parking lot, dragged to the edge of the lot behind a trash can where the victim was struck again at least once and where she was later found. In this case, any restraint occurred during the commission of one continuous attack that ended in murder,

and the legislature did not intend to punish as kidnapping conduct that is merely incidental to another crime. *State v. Thomas*, 2016-NMSC-024.

Evidence insufficient. — Defendant's conviction for kidnapping was not supported under several alternative theories presented by the state. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

IV. DOUBLE JEOPARDY.

Kidnapping and battery. — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim's hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location and again beat the victim and forced the victim to have intercourse with defendant; and defendant was convicted of kidnapping in the first degree and battery, defendant's convictions did not violate double jeopardy because defendant's conduct was not factually unitary or legally unitary because the jury could have determined that the victim suffered physical injuries when defendant dragged the victim from the vehicle, threw the victim into the bushes, pulled the victim's hair, or otherwise restrained the victim, all actions distinct from the hitting and kicking on which the battery charge was based. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

Convictions of voluntary manslaughter and kidnapping did not violate double jeopardy. — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, and shot the victim twice in the head while the victim was still alive; and defendant used two different types of force when defendant shot the victim in the chest and when defendant kept the unconscious victim in the vehicle, defendant's convictions of voluntary manslaughter for shooting the victim in the chest and kidnapping for keeping the unconscious victim in defendant's vehicle and transporting the victim to the isolated area were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

Sentences for kidnapping and felony murder not double jeopardy. — Sentences for both kidnapping and felony murder did not violate double jeopardy since the kidnapping was sufficiently separated in time and space from the murder to establish two distinct crimes. *State v. Kersey*, 1995-NMSC-054, 120 N.M. 517, 903 P.2d 828.

Where the conduct underlying defendant's convictions for aggravated kidnapping and first degree felony murder was not unitary, the district court did not violate double jeopardy by convicting and sentencing defendant for both first degree felony murder and aggravated kidnapping. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

No merger with assault conviction. — Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy

considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

Convictions for kidnapping and aggravated assault did not violate double jeopardy. — Where defendants told the victims that they could not leave the apartment until missing drugs were found, prevented the victims from opening the door to the apartment as they tried to leave, held a knife to the throat of one victim and beat another victim to unconsciousness, and prevented the victims from leaving the apartment for approximately two hours, the jury could reasonably have concluded that the victims were confined in the apartment by force or intimidation when defendants told the victims that they could not leave and closed the door when the victims tried to leave, and that this conduct was independent of and distinct from one defendant’s wielding of the knife. If the conduct is not unitary, there is no double jeopardy violation. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

Charges of kidnapping and second degree criminal sexual penetration do not merge since the elements of the offense of second degree criminal sexual penetration do not involve all of the elements of kidnapping. *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, 691 P.2d 67.

Consecutive sentences. — Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Predicate and compound offenses. — The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes protect different social norms. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Merger of criminal sexual penetration and kidnapping based on same act. — Defendant's convictions for second degree criminal sexual penetration (commission of a felony) under Section 30-9-11D NMSA 1978 and kidnapping, stemming from the same act of sexual intercourse, potentially violated double jeopardy rights and were required to be set aside. *State v. Crain*, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095.

Kidnapping and false imprisonment. — Where over a three week period, at least two circumstances of kidnapping, as well as that of false imprisonment were separated by several days and intervening events that included consensual sex, drinking and daily

activities, and terminations of the intent to restrain, defendant's convictions for kidnapping and false imprisonment did not violate the double jeopardy clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Kidnapping and murder. — Where defendant first restrained the victim for the purpose of sexually assaulting the victim and made efforts to do so and defendant deliberately intended to make sure the victim was never going to leave the room where the victim was restrained after the sexual assault, defendant's convictions for first degree kidnapping and first degree murder did not violate the double jeopardy clause. *State v. Saiz*, 2008-NMSC-048, 144 N.M. 663, 191 P.3d 521, abrogated on other grounds in *State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783.

Double jeopardy. — Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

Kidnapping and attempted tampering with evidence. — Where defendant was convicted of both kidnapping and attempted tampering with evidence, and where the evidence at trial established that defendant beat the victim with a baseball bat, moved the body into a back room and then rolled the body in a carpet, defendant's double jeopardy rights were not violated, because each statute requires proof of a fact, or facts, that the other does not, tampering with evidence focusing on a defendant's intent to hide evidence to avoid prosecution, and kidnapping focusing instead on a defendant's intent in unlawfully taking, restraining transporting or confining a person, and the statutes were intended to address distinct social harms, tampering with evidence designed to punish individuals who attempt to interfere with the administration of justice by hiding or changing evidence that could be used in a criminal prosecution and the kidnapping statute designed to prevent individuals from harming others or depriving others of their freedom with the intent to force them to do something against their will. *State v. Telles*, 2019-NMCA-039, cert. denied.

Lesser included offense. — Where defendant drove the victim to a deserted area, pulled the victim out of the vehicle, pulled the victim’s hair, kicked the victim, threw the victim into bushes, and beat the victim; defendant held the victim by the arm and drove to a second location where defendant again beat the victim; when the victim attempted to run away, defendant put the victim in the vehicle and drove to a third location where defendant again beat the victim; and defendant was charged with kidnapping in the first degree; defendant was not entitled to a jury instruction on the lesser included offense of false imprisonment because the only rational view of the evidence was that defendant intended to injure the victim as they drove between locations and false imprisonment was not the greatest offense committed. *State v. Sotelo*, 2013-NMCA-028, 296 P.3d 1232, cert. denied, 2013-NMCERT-001.

False imprisonment is a lesser offense necessarily included in kidnapping by holding to service. *State v. Armijo*, 1977-NMCA-070, , 90 N.M. 614, 566 P.2d 1152.

No merger with murder charge. — The homicide was sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

Consecutive sentences for kidnapping and criminal sexual penetration. — Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnapping and the predicate felony of kidnapping with intent to hold for service is, in general, permissible because the two crimes address different social norms. *State v. Tsethlikai*, 1989-NMCA-107, 109 N.M. 371, 785 P.2d 282, cert. denied, 109 N.M. 262, 784 P.2d 1005 (1990).

No unitary act. — Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnapping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act", imposition of consecutive sentences was not double jeopardy. *State v. Andazola*, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

V. JURY INSTRUCTIONS.

Hostage defined. — Refusal to give a requested instruction defining "hostage" is no error, because "hostage" is not a technical term; the jurors can properly apply the common meaning of "hostage" and the application of the common meaning did not prejudice the defendant. *State v. Carnes*, 1981-NMCA-126, 97 N.M. 76, 636 P.2d 895.

Multiple kidnappings. — Where defendant was charged with kidnapping; identical jury instructions were given for each count alleged to have occurred on different dates; there was evidence to support separate incidents; and the court told the jury that to convict defendant on both counts, the jury had to be convinced, beyond a reasonable doubt, that two different incidences had occurred, the instructions were not deficient because they did not set out findings to support the separate convictions and did not lead to a violation of the due process clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668., 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Omission of the incidental restraint limitation in the kidnapping instruction was not error. — Where defendant was tried before a jury on charges of criminal sexual penetration in the first degree, kidnapping in the first degree, armed robbery, aggravated burglary and criminal sexual contact, and where defendant claimed that it was fundamental error not to include the incidental restraint limitation to kidnapping in the essential elements instruction on kidnapping, the jury was properly instructed because a finding on whether the restraint of the victim resulting in the kidnapping was slight, inconsequential, or merely incidental to the commission of another crime was not required in this case where any restraint incidental to the sexual assaults was separate

and distinct from the restraint that defendant used to complete the kidnapping. *State v. Sena*, 2020-NMSC-011, *rev'g in part* 2018-NMCA-037, 419 P.3d 1240.

Failure to instruct on incidental restraint resulted in fundamental error. — Where defendant was convicted of criminal sexual penetration, kidnapping, armed robbery, aggravated burglary, and criminal sexual contact, and where defendant claimed that the district court's kidnapping instruction was erroneous because it omitted an essential element of the crime when it failed to instruct the jury that any restraint of the victim must have been more than incidental, the erroneous instruction resulted in fundamental error, because kidnapping statutes do not apply to unlawful confinements or movements incidental to the commission of other felonies and the omission of incidental restraint from the jury instructions could have resulted in the jury convicting defendant based upon a deficient understanding of the legal meaning of restraint as an essential element of kidnapping. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

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. — 1 Am. Jur. 2d Abduction and Kidnapping § 1 et seq.

Fraud or false pretenses, kidnapping by, 95 A.L.R.2d 450.

What is "harm" within provisions of statutes increasing penalty for kidnapping where victim suffers harm, 11 A.L.R.3d 1053.

Seizure of prison officials by inmates as kidnapping, 59 A.L.R.3d 1306.

False imprisonment as included offense within charge of kidnapping, 68 A.L.R.3d 828.

Necessity and sufficiency of showing, in kidnapping prosecution, that detention was with intent to "secretly" confine victim, 98 A.L.R.3d 733.

Loco parentis, taking of child by person in, 20 A.L.R.4th 823.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Coercion, compulsion, or duress as defense to charge of kidnapping, 69 A.L.R.4th 1005.

Validity, construction and application of "hold to service" provision of kidnapping statute, 28 A.L.R.5th 754.

Seizure or detention for purpose of committing rape, robbery, or other offense as constituting separate crime of kidnapping, 39 A.L.R.5th 283.

51 C.J.S. Kidnapping § 1.

30-4-2. Criminal use of ransom.

Criminal use of ransom consists of knowingly receiving, possessing, concealing or disposing of any portion of money or other property which has at any time been delivered for the ransom of a kidnaped person.

Whoever commits criminal use of ransom is guilty of a third degree felony.

History: 1953 Comp., § 40A-4-2, enacted by Laws 1963, ch. 303, § 4-2.

30-4-3. False imprisonment.

False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.

Whoever commits false imprisonment is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-4-3, enacted by Laws 1963, ch. 303, § 4-3.

ANNOTATIONS

Motive is not necessary element of crime of false imprisonment. *State v. Tijerina*, 1972-NMCA-169, 84 N.M. 432, 504 P.2d 642, *aff'd*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

False imprisonment does not require physical restraint of the victim; it may also arise out of words, acts, gestures, or similar means. *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159, cert. denied, 108 N.M. 668, 777 P.2d 907.

Kidnapping and false imprisonment. — Where over a three week period, at least two circumstances of kidnapping, as well as that of false imprisonment were separated by several days and intervening events that included consensual sex, drinking and daily activities, and terminations of the intent to restrain, defendant's convictions for kidnapping and false imprisonment did not violate the double jeopardy clause. *State v.*

Dombos, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Lesser included offense of kidnapping. — False imprisonment is a lesser offense necessarily included in kidnapping by holding to service. The distinction between these two offenses is whether the defendant intended to hold the victim to service against the victim's will. *State v. Armijo*, 1977-NMCA-070, 90 N.M. 614, 566 P.2d 1152.

Absence of intent. — Merely to confine or restrain against a person's will without the requisite intention is not kidnapping, but is false imprisonment under this section, when done with knowledge of an absence of authority. *State v. Clark*, 1969-NMSC-078, 80 N.M. 340, 455 P.2d 844.

Held without consent. — A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

False imprisonment did not merge with criminal sexual penetration. — There was sufficient evidence to support separate charges for false imprisonment and criminal sexual penetration where the victim testified that defendant would not let her out of the bedroom for a period of time after the criminal sexual penetration occurred. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, cert. denied, 128 N.M. 689, 997 P.2d 821, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Defendant's convictions of false imprisonment and criminal sexual penetration in the second degree, which arose out of the same conduct, violated the double jeopardy clause. *State v. Armendariz*, 2006-NMCA-152, 140 N.M. 712, 148 P.3d 798, cert. quashed, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Defendant's convictions for false imprisonment and criminal sexual penetration without the use of a deadly weapon, which arose out of the same conduct, did not violate the double jeopardy clause. *State v. Fielder*, 2005-NMCA-108, 138 N.M. 244, 118 P.3d 752, cert. quashed, 2006-NMCERT-004, 139 N.M. 429, 134 P.3d 120.

"No lawful authority". — Knowledge of lack of authority to restrain a minor spouse could reasonably be inferred from the circumstances as defendant had no lawful authority to engage in domestic violence and he displayed continuing abusive behavior; there was nothing about defendant's actions that permitted an inference that he was acting pursuant to a valid, recognized, and lawful marital authority to act for his spouse in her best interests. *State v. Barrera*, 2002-NMCA-098, 132 N.M. 707, 54 P.3d 548, cert. denied, 132 N.M. 674, 54 P.3d 78.

False imprisonment does not merge with battery. — Since battery required a touching or application of force and false imprisonment does not, and the elements for proving the two offenses differ, the two offenses do not merge. *State v. Muise*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, cert. denied, 103 N.M. 287, 705 P.2d 1138, *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Consecutive sentences for armed robbery and false imprisonment were proper; since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it was clear the crimes did not merge even when considered in light of the facts. *State v. Moore*, 1989-NMCA-073, 109 N.M. 119, 782 P.2d 91, cert. denied, 109 N.M. 54, 781 P.2d 782.

Armed robbery and false imprisonment separate offenses. — Because the statutory definitions of armed robbery and false imprisonment make it clear that the legislature intended to protect different individual interests and, therefore, create separately punishable offenses for violations of those interests, and since the record separated the conduct of the defendant which comprised armed robbery and the conduct which comprised false imprisonment and showed how the conduct for each conviction involved completely separate and distinct actions on the part of the defendant, conviction on both counts was proper. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Merger of conviction for aggravated assault into offense of false imprisonment. — Even though defendant's acts of threatening each of multiple victims with a deadly weapon constituted the means by which his victims were restrained or confined against their will so as to cause the assault to merge into the crime of false imprisonment, the trial court did not err in refusing to merge defendant's convictions of aggravated assault into the offenses of false imprisonment, because there was evidence of multiple acts of aggravated assault committed against each victim. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

Merger of assault and false imprisonment. — The charge of assault by a prisoner should not be merged for sentencing purposes with the charge of false imprisonment where the facts supporting the two charges are not identical. Merger is also inappropriate in such a case because the statute prohibiting assault and the statute prohibiting false imprisonment advance two distinct social norms. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Double jeopardy not found. — Convictions for accessory to assault with intent to commit a violent felony, accessory to aggravated battery with great bodily harm, and accessory to false imprisonment did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Crime of violence. — This crime is a crime of violence for purposes of sentencing a defendant as a career offender under federal law. *United States v. Zamora*, 222 F.3d 756 (10th Cir.), cert. denied, 531 U.S. 1043, 121 S. Ct. 641, 148 L. Ed. 2d 547 (2000).

Sufficient evidence. — Where defendant pinned the victim, who was defendant's spouse, down in the master bedroom to keep the victim from leaving the house, did not allow the victim to walk freely through the house, rigged a door so the victim could not leave the house, and removed the phones so the victim could not call the police; defendant choked the victim until the victim passed out, and defendant's actions were done with physical force, the evidence was sufficient to support defendant's conviction for false imprisonment. *State v. McGee*, 2002-NMCA-090, 132 N.M. 537, 51 P.3d 1191, cert. denied, 132 N.M. 551, 52 P.3d 411.

Evidence sufficient to support conviction. — The evidence was sufficient to support a conviction for false imprisonment where it was shown that the defendant, acting in concert with another, forced a school bus to stop, disabled the bus, and forced the driver, through fear of violence, to remain confined in the bus until police and rescue arrived. *State v. Muise*, 1985-NMCA-090, 103 N.M. 382, 707 P.2d 1192, cert. denied, 103 N.M. 287, 705 P.2d 1138 (1985), *overruled on other grounds*, *State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Evidence sufficiency. — A defendant's acts of specifically pointing a rifle at each of several victims on two or more separate instances, accompanied by verbal threats, constituted evidence from which the jury could properly determine that defendant committed the separate offenses of aggravated assault and false imprisonment against each victim. Moreover, the jury could find that defendant falsely imprisoned his victims at the beginning of the episode and thereafter committed additional independent aggravated assaults for which he could be separately punished. *State v. Bachicha*, 1991-NMCA-014, 111 N.M. 601, 808 P.2d 51, cert. denied, 111 N.M. 529, 807 P.2d 227.

Evidence was sufficient to convict defendant of false imprisonment where it showed that she was armed; she decided, along with two others, to snatch a stranger off the street; the victim was forced into the back of a two-door car from which he could not get out except through the driver door or the passenger side door; and, as they drove, defendant pressed her foot on the gas pedal to maintain the car's speed while the driver turned around to beat the victim. *State v. Smith*, 2001-NMSC-004, 130 N.M. 117, 19 P.3d 254.

Evidence introduced to show how the defendant and his cohorts carefully orchestrated a prison escape was sufficient for the jury to find that the defendant planned, anticipated, and intended the assault and false imprisonment of a peace officer during the escape. The defendant need not have known the peace officer's name, but only that the victim would be a peace officer. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Evidence that intruders threw the house residents, husband and wife, into a closet, sufficed for a conviction of false imprisonment. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994) and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Evidence was sufficient to support defendant's conviction for false imprisonment, where the victim testified that defendant put a screwdriver up to her side and told her that if she tried to leave, he "would put that screwdriver through" her. *State v. Singleton*, 2001-NMCA-054, 130 N.M. 583, 28 P.3d 1124, cert. denied, 130 N.M. 558, 28 P.3d 1099.

Evidence was sufficient to support defendant's conviction of false imprisonment, given that the victims were bound hand and foot. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Verdict not ambiguous. — Handwritten addition to typewriter guilty verdict form which reiterated the guilty verdict but also spoke of defendant's motive in committing crime of false imprisonment did not render the verdict ambiguous and the court committed no error in accepting it. *State v. Tijerina*, 1972-NMCA-169, 84 N.M. 432, 504 P.2d 642, *aff'd*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, and cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

No collateral estoppel. — State did not violate guarantee against double jeopardy in prosecuting defendant for assault with intent to commit a violent felony and false imprisonment, after an acquittal on charges of assault on a jail and false imprisonment and kidnapping of another individual arising out of the same incident, since when the jury in the first trial acquitted defendant they did not necessarily conclude that he was not present at the jail that day and thus did not commit any crimes, but simply that he was not guilty of the crimes alleged. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, *aff'g*, 1972-NMCA-169, 84 N.M. 432, 504 P.2d 642, and cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 32 Am. Jur. 2d False Imprisonment §§ 157, 160.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 A.L.R.3d 1109.

Liability for negligently causing arrest or prosecution of another, 99 A.L.R.3d 1113.

Civil liability for "deprogramming" member of religious sect, 11 A.L.R.4th 228.

Penalties for common-law criminal offense of false imprisonment, 67 A.L.R.4th 1103.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Free exercise of religion clause of First Amendment as defense to tort liability, 93 A.L.R. Fed. 754.

35 C.J.S. False Imprisonment § 71.

30-4-4. Custodial interference; penalties.

A. As used in this section:

(1) "child" means an individual who has not reached his eighteenth birthday;

(2) "custody determination" means a judgment or order of a court of competent jurisdiction providing for the custody of a child, including visitation rights;

(3) "person" means any individual or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

(4) "physical custody" means actual possession and control of a child; and

(5) "right to custody" means the right to physical custody or visitation of a child arising from:

(a) a parent-child relationship between the child and a natural or adoptive parent absent a custody determination; or

(b) a custody determination.

B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

C. Unlawful interference with custody consists of any person, not having a right to custody, maliciously taking, detaining, concealing or enticing away or failing to return any child with the intent to detain or conceal permanently or for a protracted time that child from any person having a right to custody of that child. Whoever commits unlawful interference with custody is guilty of a fourth degree felony.

D. Violation of Subsection B or C of this section is unlawful and is a fourth degree felony.

E. A peace officer investigating a report of a violation of this section may take a child into protective custody if it reasonably appears to the officer that any person will flee with the child in violation of Subsection B or C of this section. The child shall be placed with the person whose right to custody of the child is being enforced, if available and appropriate, and, if not, in any of the community-based shelter care facilities as provided for in Section 32-1-25.1 NMSA 1978 [repealed].

F. Upon recovery of a child a hearing by the civil court currently having jurisdiction or the court to which the custody proceeding is assigned, shall be expeditiously held to determine continued custody.

G. A felony charge brought under this section may be dismissed if the person voluntarily returns the child within fourteen days after taking, detaining or failing to return the child in violation of this section.

H. The offenses enumerated in this section are continuous in nature and continue for so long as the child is concealed or detained.

I. Any defendant convicted of violating the provisions of this section may be assessed the following expenses and costs by the court, with payments to be assigned to the respective person or agency:

(1) any expenses and costs reasonably incurred by the person having a right to custody of the child in seeking return of that child; and

(2) any expenses and costs reasonably incurred for the care of the child while in the custody of the human services department [health care authority department].

J. Violation of the provisions of this section is punishable in New Mexico, whether the intent to commit the offense is formed within or outside the state, if the child was present in New Mexico at the time of the taking.

History: 1978 Comp., § 30-4-4, enacted by Laws 1989, ch. 206, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Section 32-1-25.1 NMSA 1978, was repealed by Laws 1993, ch. 77, § 234, effective July 1, 1993. For present comparable provisions, *see* 32A-4-8 NMSA 1978.

Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Repeals and reenactments. — Laws 1989, ch. 206, § 1 repealed former 30-4-4 NMSA 1978, as enacted by Laws 1977, ch. 58, § 1, relating to custodial interference, and enacted a new section, effective April 4, 1989.

Cross references. — For provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act, *see* 40-10A-101 to 40-10A-403 NMSA 1978.

Severability. — Laws 1989, ch. 206, § 2 provides for the severability of the act if any part or application thereof is held invalid.

Sufficient evidence to support custodial interference. — Where custody of the defendant's child was transferred to the children, youth and families department; the child was placed in a foster home; the child left the foster home and returned to the defendant's home; the defendant allowed the child to stay with the defendant in the defendant's home and never informed either the police or the children, youth and families department that the child was doing so, the evidence was sufficient to support the defendant's conviction of custodial interference. *State v. Romero*, 2009-NMCA-012, 145 N.M. 594, 203 P.3d 125, cert. quashed, 2009-NMCERT-002, 145 N.M. 704, 204 P.3d 29.

Section not unconstitutionally vague. — The terms "without good cause," "protracted time," "maliciously," "detaining," and "deprive permanently" as used in this section are of such well recognized meaning that individuals are placed on notice of the conduct sought to be proscribed and, therefore, the section is not unconstitutionally vague. *State v. Luckie*, 1995-NMCA-075, 120 N.M. 274, 901 P.2d 205, cert. denied, 120 N.M. 184, 899 P.2d 1138.

Jurisdiction. — The child must be present in New Mexico when criminal acts of custodial interference are committed for New Mexico to have criminal jurisdiction. *State v. Sung*, 2000-NMCA-031, 128 N.M. 786, 999 P.2d 430.

Proper venue for the trial of the offense of custodial interference. — In the event elements of a crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. Interfering with or depriving a custodial parent of their right to custody is an essential element of the crime of custodial interference as are the methods for accomplishing the interference or deprivation. Because deprivation is an element, where the person was deprived of the right of custody establishes a proper venue for the trial of the offense of custodial interference. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Where defendant violated an order of custody, issued by a Taos county district court, by depriving the father of the child of his right to custody, the father's right to custody exists with him in his county of residence, the county in which he was given custody, and the county in which he was deprived of the custody of his son. Under the custodial interference statute, a person may be charged in the place where the harm sought to be

prevented by the statute results, and therefore venue may lie in Taos county district court. *State v. Lefthand*, 2015-NMCA-117, cert. denied, 2015-NMCERT-011.

Elements of custodial interference. — To be guilty of custodial interference for taking the children for two weeks, the defendant had to have engaged in either interference by "taking" or "failing to return" the children without good cause. *State v. Munoz*, 2006-NMSC-005, 139 N.M. 106, 129 P.3d 142.

Protracted period of time. — Trial court's refusal to give defendant's requested jury instruction defining "protracted period of time" was not erroneous because the meaning of the phrase is readily understandable and the defendant argued in closing arguments that two weeks was not long enough. *State v. Munoz*, 2006-NMSC-005, 139 N.M. 106, 129 P.3d 142.

Good cause. — The term "good cause" encompasses the concepts of subjective "good faith" and objective reasonableness of the defendant and therefore a defendant must have an honest belief that his actions are necessary to protect a child from harm and that honest belief must be reasonable. *State v. Munoz*, 2006-NMSC-005, 139 N.M. 106, 129 P.3d 142.

Defense waived by no contest plea. — Although defendant's challenge to the jurisdiction of a Missouri court in entering a modification to an earlier divorce decree is a defense to the charges of custodial interference, defendant waived the defense when he entered a no contest plea. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, *rev'd*, 2006-NMSC-043, 140 N.M. 406, 143 P.3d 168.

Legal right to custody not absolute. — Parents' natural and legal right to custody of their children is prima facie and not an absolute right. *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134.

Parent's natural right to custody includes the right to remove the child from this jurisdiction in the absence of any legal modification of that right, but that right may be lost through court order. *State v. Whiting*, 1983-NMCA-123, 100 N.M. 447, 671 P.2d 1158.

Parental right to custody curtailed by custody order. — Because of the custody order under Sections 40-4-7B(4) and 40-4-9.1 NMSA 1978, defendant's otherwise natural and usual right to remove her children from the court's jurisdiction is curtailed to the extent that she could not do so without the court's consent. *State v. Whiting*, 1983-NMCA-123, 100 N.M. 447, 671 P.2d 1158.

Right continues until terminated by appropriate authority. — A parent has a legal right to the custody of his child unless that right had been terminated, however temporarily, by appropriate authority. *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134.

Double jeopardy violation. — Where, although there were three children involved, the alleged violation relates to only one custody order for all the children, the court violated double jeopardy requirements in convicting defendant on three counts of custodial interference, and sentencing defendant consecutively on each count. *State v. Hunter*, 2005-NMCA-089, 138 N.M. 96, 117 P.3d 254, *rev'd*, 2006-NMSC-043, 140 N.M. 406, 143 P.3d 168.

Written judgment required. — A parent's legal right to custody of a child does not end until entry of, and the giving of, notice of a judgment in compliance with Rule 62(a), N.M.R. Child. Ct. (*see* Rule 10-352 NMRA), requiring a signed written judgment and disposition. *State v. Sanders*, 1981-NMCA-053, 96 N.M. 138, 628 P.2d 1134.

Law reviews. — For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (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. — Kidnapping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 A.L.R.4th 823.

Liability of legal or natural parent, or one who aids or abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

ARTICLE 5
Abortion (Repealed.)

30-5-1. Repealed.

History: 1953 Comp., § 40A-5-1, enacted by Laws 1969, ch. 67, § 1; 1978 Comp., § 30-5-1, repealed by Laws 2021, ch. 2, § 1.

ANNOTATIONS

Repeals. — Laws 2021, ch. 2, § 1 repealed 30-5-1 NMSA 1978, as enacted by Laws 1969, ch. 67, § 1, relating to definitions, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-5-2. Repealed.

History: 1953 Comp., § 40A-5-2, enacted by Laws 1969, ch. 67, § 2; 1978 Comp., § 30-5-2, repealed by Laws 2021, ch. 2, § 1.

ANNOTATIONS

Repeals. — Laws 2021, ch. 2, § 1 repealed 30-5-2 NMSA 1978, as enacted by Laws 1969, ch. 67, § 2, relating to persons and institutions exempt, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-5-3. Repealed.

History: 1953 Comp., § 40A-5-3, enacted by Laws 1969, ch. 67, § 3; 1978 Comp., § 30-5-3, repealed by Laws 2021, ch. 2, § 1.

ANNOTATIONS

Repeals. — Laws 2021, ch. 2, § 1 repealed 30-5-3 NMSA 1978, as enacted by Laws 1969, ch. 67, § 3, relating to criminal abortion, effective June 18, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

ARTICLE 5A
Partial-Birth Abortion Ban

30-5A-1. Short title.

This act [30-5A-1 to 30-5A-5 NMSA 1978] may be cited as the "Partial-Birth Abortion Ban Act".

History: Laws 2000, ch. 55, § 1.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

Cross references. — For family planning, *see* 24-8-1 NMSA 1978.

For sterilization, *see* 24-9A-1 NMSA 1978

For maternal, fetal and infant experimentation, *see* 9A-24-1 NMSA 1978.

Section partially unconstitutional (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — Portions of this section which define those "justified medical terminations" not proscribed by Section 30-5-3 NMSA 1978 (repealed) as only those where physician used acceptable medical procedures in accredited hospitals after approval by special hospital board, and either where continuation of pregnancy would result in death or grave injury to mother, where child was likely to have grave physical or mental defects or where pregnancy resulted from rape or incest, held unconstitutional by virtue of 1973 holdings in Doe v. Bolton (410

U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201) and Roe v. Wade (410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147). *State v. Strance*, 1973-NMCA-024, 84 N.M. 670, 506 P.2d 1217.

This section does not define murder, homicide or feticide (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978), but is concerned with the special circumstances required for abortion to be a criminal offense. *State v. Willis*, 1982-NMCA-151, 98 N.M. 771, 652 P.2d 1222 (specially concurring opinion).

Meaning of "abortion" (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — The word "abortion" was commonly employed in law to designate the means used to procure miscarriage. *State v. Grissom*, 1930-NMSC-109, 35 N.M. 323, 298 P. 666.

Meaning of "justified medical termination" (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — When limited definition of "justified medical termination" necessitated by court's reading of Roe v. Wade (410 U.S. 113) and Doe v. Bolton (410 U.S. 179) into Section 30-5-1 NMSA 1978 (repealed) is applied to this section what emerges is a criminal statute penalizing the act of performing abortions on the unconsenting, or performing an abortion on a woman under the age of 18 years without the consent of both the woman and her then living parent or guardian, or the performance of an abortion by a person who is not a physician licensed by the state. *State v. Strance*, 1973-NMCA-024, 84 N.M. 670, 506 P.2d 1217.

Proof of pregnancy (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — Although there was no direct, positive proof that on the day of the first attempted abortion the fetus was living, there was ample evidence for the jury to reasonably arrive at such a conclusion where the physician who had originally examined the woman on whom the abortion was performed testified as to the tests he had made on her and expressed the opinion that she was about two months pregnant. *State v. Gutierrez*, 1965-NMSC-143, 75 N.M. 580, 408 P.2d 503.

Condition presumed to continue (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — Although there was proof which might be construed to the effect that it was impossible to tell whether on the day of the original abortion attempt the fetus was alive or dead, the rule in this jurisdiction is that a condition once shown to exist will be presumed to continue until the contrary is established by evidence, direct or presumptive. *State v. Gutierrez*, 1965-NMSC-143, 75 N.M. 580, 408 P.2d 503.

Evidence of other abortions (Decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — The gist of offense under Laws 1919, ch. 4, § 1 (former 40-3-1, 1953 Comp.), was intent to murder a quick child by performing an abortion upon mother; in a prosecution under that section, proof of other abortions

where the child had not quickened was not relevant and should be excluded. *State v. Bassett*, 1921-NMSC-016, 26 N.M. 476, 194 P. 867.

Instruments and drugs (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — Instruments and drugs were sufficiently connected with the accused and with the operation to make them admissible on his trial for abortion. *State v. Grissom*, 1930-NMSC-109, 35 N.M. 323, 298 P. 666.

Exhibition of instruments (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — In a prosecution for an attempted abortion, exhibition of dilator in cross-examination of accused was not error. *State v. Lewis*, 1932-NMSC-033, 36 N.M. 218, 12 P.2d 849.

Erroneous instructions on corroboration (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — In prosecution for abortion, defendant could be convicted by uncorroborated testimony of an accomplice, but where court gave instruction requiring corroboration, there must be some other evidence in the record tending to show that defendant took part in the commission of the crime. *State v. Gutierrez*, 1965-NMSC-143, 75 N.M. 580, 408 P.2d 503.

Enforceability of section (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — Under current law, Section 30-5-2 NMSA 1978 (repealed) is entirely enforceable, and this section and Section 30-5-1 NMSA 1978 (repealed) are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the state of New Mexico. 1990 Op. Att'y Gen. No. 90-19.

Parental consent provision (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — New Mexico's parental consent provision may become enforceable either through legislative enactment of amendments to existing law or, under certain circumstances, through modification of current federal abortion jurisprudence. 1990 Op. Att'y Gen. No. 90-19.

Consent of husband not required (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — Consent of the husband of a woman over the age of 18 is not required when she requests a justified medical termination of her pregnancy. 1970 Op. Att'y Gen. No. 70-91.

Married woman under eighteen (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — A woman under eighteen, but lawfully married, can request a justified medical termination of her pregnancy without the consent of her parent or guardian, or of her husband. 1970 Op. Att'y Gen. No. 70-91.

Divorced or separated woman (decided prior to the repeal of the criminal abortion statutes, §§ 30-5-1 to 30-5-3 NMSA 1978). — A married woman who subsequently is divorced or separated, regardless of age, is an emancipated person who is entitled to determine herself, without the consent of any other person, whether she will request medical termination of her pregnancy hereunder. 1970 Op. Att'y Gen. No. 70-91.

Law reviews. — For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "Perspectives on the Abortion Decision," see 9 N.M.L. Rev. 175 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Constitutional right of prisoners to abortion services and facilities - federal cases, 90 A.L.R. Fed. 683.

Validity, construction, and application of statutes requiring parental notification of or consent to minor's abortion, 77 A.L.R.5th 1.

Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women, 20 A.L.R.4th 1166.

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

1 Am. Jur. 2d Abortion and Birth Control § 1 et seq.

Criminal responsibility of one other than subject or actual perpetrator of abortion, 4 A.L.R. 351.

Revocation of physician's or surgeon's license for performing abortion, 82 A.L.R. 1184.

Admissibility in prosecution for abortion of evidence of other abortions or attempted abortions by accused on same woman, 15 A.L.R.2d 1080.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts, 16 A.L.R.2d 949.

Pregnancy as element of abortion, 46 A.L.R.2d 1393.

1 C.J.S. Abortion and Birth Control; Family Planning §§ 10 to 12.

30-5A-2. Definitions.

As used in the Partial-Birth Abortion Ban Act [30-5A-1 to 30-5A-5 NMSA 1978]:

A. "abortion" means the intentional termination of the pregnancy of a female by a person who knows the female is pregnant;

B. "fetus" means the biological offspring of human parents;

C. "partial-birth abortion" means a procedure in which any person, including a physician or other health care professional, intentionally extracts an independently viable fetus from the uterus into the vagina and mechanically extracts the cranial contents of the fetus in order to induce death; and

D. "physician" means a person licensed to practice in the state as a licensed physician pursuant to the Medical Practice Act [Chapter 61, Article 6 NMSA 1978] or an osteopathic physician licensed pursuant to Chapter 61, Article 10 NMSA 1978.

History: Laws 2000, ch. 55, § 2.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

30-5A-3. Prohibition of partial-birth abortions.

No person shall perform a partial-birth abortion except a physician who has determined that in his opinion the partial-birth abortion is necessary to save the life of a pregnant female or prevent great bodily harm to a pregnant female:

A. because her life is endangered or she is at risk of great bodily harm due to a physical disorder, illness or injury, including a condition caused by or arising from the pregnancy; and

B. no other medical procedure would suffice for the purpose of saving her life or preventing great bodily harm to her.

History: Laws 2000, ch. 55, § 3.

ANNOTATIONS

Cross references. — For family planning, *see* 24-8-1 NMSA 1978.

For sterilization, *see* 24-9-1 NMSA 1978

For maternal, fetal and infant experimentation, *see* 24-9A-1 NMSA 1978.

Effective dates. — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

Severability. — Laws 2000, ch. 55, § 6 provides that, if any part or application of § 3 of the Partial-Birth Abortion Act is held invalid, the remainder of the act or its application to other situations or persons shall be likewise invalid. Section 3 of that act is not severable.

30-5A-4. Civil remedies.

A. Except as provided in Subsection B of this section, the following persons may bring a civil action to obtain relief pursuant to this section against a person who has violated the provisions of Section 3 [30-5A-3 NMSA 1978] of the Partial-Birth Abortion Ban Act:

(1) the person on whom a partial-birth abortion was performed;

(2) the biological father of the fetus that was the subject of the partial-birth abortion; and

(3) the parents of the person on whom the partial-birth abortion was performed if that person had not reached the age of majority at the time of the abortion.

B. The persons named as having a right of action in Subsection A of this section are barred from bringing a civil action pursuant to this section if:

(1) the pregnancy of the person on whom the partial-birth abortion was performed resulted from criminal conduct of the person seeking to bring the action; or

(2) the partial-birth abortion was consented to by the person seeking to bring the action.

C. A person authorized to bring a civil action pursuant to this section may recover compensatory damages for loss caused by violation of Section 3 of the Partial-Birth Abortion Ban Act.

History: Laws 2000, ch. 55, § 4.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

30-5A-5. Criminal penalty; exception.

A. Except as provided in Subsections B, C, D and E of this section, a person who violates Section 3 [30-5A-3 NMSA 1978] of the Partial-Birth Abortion Ban Act is guilty of a fourth degree felony and shall be sentenced pursuant to Section 31-18-15 NMSA 1978.

B. The provisions of the Partial-Birth Abortion Ban Act shall apply only to the exact procedure specified in that act.

C. The provisions of the Partial-Birth Abortion Ban Act are not intended to criminalize any other method of terminating a woman's pregnancy.

D. The provisions of the Partial-Birth Abortion Ban Act are not intended to subject a woman, upon whom the procedure specified in that act is performed, to criminal culpability as an accomplice, aider, abettor, solicitor or conspirator.

E. The provisions of the Partial-Birth Abortion Ban Act are not intended to subject any person to criminal culpability pursuant to laws governing attempt, solicitation or conspiracy to commit a crime.

History: Laws 2000, ch. 55, § 5.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 55 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on May 17, 2000, 90 days after adjournment of the legislature.

Severability. — Laws 2000, ch. 55, § 6 provides that, except for § 3 of the Partial-Birth Abortion Ban Act, if any part or application of that act is held invalid, the remainder of its application to other situations or persons shall not be affected.

ARTICLE 6
Crimes Against Children and Dependents

30-6-1. Abandonment or abuse of a child.

A. As used in this section:

(1) "child" means a person who is less than eighteen years of age;

(2) "neglect" means that a child is without proper parental care and control of subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them; and

(3) "negligently" refers to criminal negligence and means that a person knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.

B. Abandonment of a child consists of the parent, guardian or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect. A person who commits abandonment of a child is guilty of a misdemeanor, unless the abandonment results in the child's death or great bodily harm, in which case the person is guilty of a second degree felony.

C. A parent, guardian or custodian who leaves an infant less than ninety days old in compliance with the Safe Haven for Infants Act [Chapter 24, Article 22 NMSA 1978] shall not be prosecuted for abandonment of a child.

D. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

(1) placed in a situation that may endanger the child's life or health;

(2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather.

E. A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony and for second and subsequent offenses is guilty of a second degree felony. If the abuse results in great bodily harm to the child, the person is guilty of a first degree felony.

F. A person who commits negligent abuse of a child that results in the death of the child is guilty of a first degree felony.

G. A person who commits intentional abuse of a child twelve to eighteen years of age that results in the death of the child is guilty of a first degree felony.

H. A person who commits intentional abuse of a child less than twelve years of age that results in the death of the child is guilty of a first degree felony resulting in the death of a child.

I. Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises

that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance shall be deemed prima facie evidence of abuse of the child.

J. Evidence that demonstrates that a child has been knowingly and intentionally exposed to the use of methamphetamine shall be deemed prima facie evidence of abuse of the child.

K. A person who leaves an infant less than ninety days old at a hospital may be prosecuted for abuse of the infant for actions of the person occurring before the infant was left at the hospital.

History: 1953 Comp., § 40A-6-1, enacted by Laws 1973, ch. 360, § 10; 1977, ch. 131, § 1; 1978, ch. 103, § 1; 1984, ch. 77, § 1; 1984, ch. 92, § 5; 1989, ch. 351, § 1; 1997, ch. 163, § 1; 2001, ch. 31, § 9; 2001, ch. 132, § 9; 2004, ch. 10, § 1; 2004, ch. 11, § 1; 2005, ch. 59, § 1; 2009, ch. 259, § 1.

ANNOTATIONS

Cross reference. — For jury instructions to be given in abandonment and abuse or neglect of a child, *see* UJI 14-606 to 14-607 NMRA.

The 2009 amendment, effective June 19, 2009, added Subsection J.

The 2005 amendment, effective June 17, 2005, added Subsections F, G, and H to define negligent abuse of a child that results in death and the intentional abuse of a child twelve to eighteen years that results in death as first degree felonies and the intentional abuse of a child less that twelve years that results in death as a first degree felony resulting in the death of a child.

The 2004 amendment, effective July 1, 2004, added a new Subsection F; designated the last paragraph of Subsection D as a new Subsection E; and redesignated former Subsection F as Subsection G.

Meaning of "negligently". — The criminal negligence articulated in 30-6-1(A)(3) NMSA 1978 means "reckless disregard" and what has been called "criminally negligent child abuse" should be labeled "reckless child abuse" without any reference to negligence. The jury should be instructed with this terminology alone. *State v. Consaul*, 2014-NMSC-030, *overruling in part State v. Schoonmaker*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

Sufficient evidence. — Where defendant drove a pickup toward a group of children who were trick-or-treating on Halloween; the chaperone pushed the children out of the way but was struck and killed; the group was visible to motorists; and defendant altered defendant’s course and drove toward the group and increased defendant’s speed, defendant’s conviction of intentional child abuse by endangerment was supported by

substantial evidence. *State v. Melendrez*, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

Sufficient evidence of child abuse. — Where defendant was charged with criminal sexual penetration of a minor and child abuse, and where the state relied on testimony elicited from the victim that defendant grabbed her forcefully by the arm, threw her onto the ground, and pushed and kicked her when she stood up, that she was fourteen years old and that these events occurred in New Mexico two years earlier, there was sufficient evidence to prove beyond a reasonable doubt that defendant intentionally or with reckless disregard and without justification caused the victim to be placed in a situation which endangered her life or health. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Circumstantial evidence. — A properly instructed jury may be justified in returning a guilty verdict based primarily on evidence that the defendant had the best opportunity to inflict the injury. *State v. Sheldon*, 1990-NMCA-039, 110 N.M. 28, 791 P.2d 479, cert. denied, 110 N.M. 44, 791 P.2d 798, and cert. denied, 498 U.S. 969, 111 S. Ct. 435 (1990).

Evidence insufficient. — Mere proximity to a dangerous situation is insufficient to support a conviction for child abuse by endangerment. *State v. Trujillo*, 2002-NMCA-100, 132 N.M. 649, 53 P.3d 909, cert. denied, 132 N.M. 674, 54 P.3d 78.

Attempt. — There is such a crime as attempt to commit child abuse when the theory of the case is intentional child abuse. *State v. Herrera*, 2001-NMCA-073, 131 N.M. 22, 33 P.3d 22, cert. denied, 131 N.M. 64, 33 P.3d 284.

Criminal negligence. — The mens rea element of negligence in the child abuse statute requires a showing of criminal negligence instead of ordinary civil negligence. To satisfy the element of negligence in Section 30-6-1 NMSA 1978 requires proof that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child. *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358.

Failure to instruct on the legal definition of "reckless disregard" as the applicable standard or criminal negligence was fundamental error. *State v. Mascarenas*, 2000-NMSC-017, 129 N.M. 230, 4 P.3d 1221.

No specific intent to disregard one's obligations is involved in the concept of conscious disregard. — The critical inquiry is whether defendants' acts or omissions, irrespective of whether they were knowingly committed, caused or permitted a child to be placed in a situation that may endanger the child's life or health or to be exposed to the inclemency of the weather, and a defendant acts recklessly within the meaning of § 30-6-1(D) NMSA 1978, when he or she disregards a substantial and justifiable risk of serious harm to the safety or health of a child. No specific intent to disregard one's obligations is involved in the concept of conscious disregard; the only intent involved is

purposely engaging in conduct which implies a conscious disregard of one's obligations. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Sufficient evidence to support convictions for reckless child abuse. — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where defendants argued that there was insufficient evidence to support their convictions for reckless child abuse because the state failed to show that the defendants acted with a reckless disregard for the safety of the victims, that they did not know they left the victims unattended in the SUV, and therefore, they did not knowingly act or fail to act, there was sufficient evidence to support defendants' convictions because defendants knew the victims were originally in the SUV, defendants created the risk by failing to take the victims out of the SUV, and defendants disregarded that risk by leaving them there. Moreover, defendants' conduct while caring for the victims on the day in question, failing to follow CYFD policies on which they had been trained and failing to follow their own internal accountability procedures, demonstrated a conscious disregard for the safety of the victims. *State v. Taylor*, 2021-NMCA-033, cert. granted.

District court did not err in denying separate instruction on the definition of "reckless disregard." — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of reckless disregard as set forth in UJI 14-133 NMRA, the district court did not err in denying defendants' proposed jury instruction because the elements instruction, UJI 14-622 NMRA, already defined the mens rea necessary to convict defendants for reckless child abuse. *State v. Taylor*, 2021-NMCA-033, cert. granted.

District court did not err in denying separate instruction on the definition of "accidental conduct." — Where defendants, owners of a daycare, were each convicted of one count of reckless child abuse resulting in great bodily harm and one count of reckless child abuse resulting in death after failing to remove two one-year-old children under their supervision from a hot SUV following a trip to a park, resulting in the death of one child and life-threatening injuries to the other child, and where, at trial, defendants requested, in addition to the elements instruction, that the district court instruct the jury on the definition of "accidental conduct," claiming that the death of one child and the great bodily harm of the other child that occurred while in the care of defendants was accidental, the district court did not err in denying defendants' proposed instruction because the elements instructions tracked the language of the uniform jury instructions for reckless child abuse, UJI 14-615 NMRA and UJI 14-622 NMRA, and

therefore accurately conveyed the law to the jury, making the proposed "accidental conduct" instruction unnecessary. *State v. Taylor*, 2021-NMCA-033, cert. granted.

Penalty. — The 2005 amendments to this section and their history show that the legislature intended the phrase "first degree felony resulting in the death of a child" to designate an entirely different level of noncapital offense — one that results in life in prison which is unusual, if not unprecedented, for an offense other than first degree murder. The result is a new level of offense and a new prison sentence that is at least 66% longer than the 18-year sentence for any other first degree felony. *Garcia v. State*, 2010-NMSC-023, 148 N.M. 414, 237 P.3d 716.

Double jeopardy. — Vehicular homicide is a lesser offense than child abuse resulting in death. *State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456.

The child abuse statute is neither preempted by the reckless driving statute, specifically, nor by the Motor Vehicle Code, generally. *State v. Guilez*, 2000-NMSC-020, 129 N.M. 240, 4 P.3d 1231.

General/specific statute rule was inapplicable where facts supported both a charge of DWI with a minor and child abuse by endangerment. — In consolidated cases, where defendants were driving while intoxicated with minors in their vehicles, and where both defendants were charged with child abuse by endangerment, but where both defendants moved to dismiss those charges, arguing that NMSA 1978, § 66-8-102.5 (DWI with a minor) displaced the prosecutor's charging discretion under the general/specific statute rule, the district court improperly limited prosecutorial charging discretion by dismissing the child abuse by endangerment charges, because while the child abuse and DWI with a minor statute share similar purposes and histories, there are differences in the conduct each criminalizes, and the plain language of § 66-8-102.5 provides no indication that the legislature intended it to always be charged by a prosecutor instead of child abuse by endangerment. *State v. Saltwater*, 2024-NMCA-018, cert. denied.

Child abuse of fetus. — Infliction of injuries to a fetus, which resulted in the death of a child, is insufficient to support a charge of child abuse resulting in death under Section 30-6-1 NMSA 1978. *State v. Mondragon*, 2008-NMCA-157, 145 N.M. 574, 203 P.3d 105.

Any person construed. — The statute for negligent child abuse resulting in death is not restricted to persons having a special relationship with the child, such as parent or guardian. It applied to defendant who was 18 years of age and who shot the victim, who was 14 years of age, and defendant's friend. *State v. Reed*, 2005-NMSC-031, 138 N.M. 365, 120 P.3d 447.

There is no reason to believe that the legislature intended that the protection of this section be limited only to the children of abusive parents. The defendant who drove a car whose occupants threw beer bottles and rammed a truck in which a child was riding

may be guilty of child abuse. *State v. Lujan*, 1985-NMCA-111, 103 N.M. 667, 712 P.2d 13, cert. denied, 103 N.M. 740, 713 P.2d 556 (1986).

"Leaving" and "abandoning" defined. — The New Mexico legislature intended "leaving" in 30-6-1(B) NMSA to create an independent theory of criminal culpability distinct from "abandoning". The definition of "leave" that is consistent with the intent of the legislation is to take leave of or withdraw oneself from, whether temporarily or permanently, and the definition of "abandon" that is consistent with the intent of the legislation is to forsake or desert in spite of an allegiance, duty, or responsibility, or withdraw one's protection, support, or help from. Section 30-6-1(B) NMSA 1978 criminalizes either intentionally leaving, even temporarily, or intentionally abandoning a child, but only under circumstances where doing so exposes the child to a risk of harm. *State v. Stephenson*, 2017-NMSC-002, *aff'g* 2015-NMCA-038.

Insufficient evidence to support abandonment of a child. — Where defendant was convicted of abandonment of a child resulting in great bodily harm, the evidence presented at trial that defendant locked her two-year-old child in his bedroom to go to sleep for the night, but that defendant remained in the apartment, and where the child was found the following morning pinned between the dresser and the crossbar of his toddler bed, was insufficient to prove that defendant intentionally left her child at a time and under circumstances when the child's well-being was at risk of harm. *State v. Stephenson*, 2017-NMSC-002, *aff'g* 2015-NMCA-038.

Abandonment construed. — To be convicted of criminal child abandonment, evidence of abandonment must demonstrate that a parent, guardian or custodian left the child without an intent to return. *State v. Stephenson*, 2015-NMCA-038, cert granted, 2015-NMCERT-001.

Insufficient evidence of criminal child abandonment. — Where parent locked a child in his bedroom and then ignored the child's cries from another room, and where there was no evidence that the parent intended to leave the child in his bedroom without an intent to return, there was insufficient evidence to support a conviction for criminal child abandonment. *State v. Stephenson*, 2015-NMCA-038, cert granted, 2015-NMCERT-001.

Ordinary negligence not punishable. — A conviction for child abuse by endangerment cannot be based on a mere possibility, however remote, that harm may result from a defendant's acts. The legislature intended to punish conduct that created a reasonable probability or possibility that a child will be endangered. The child abuse statute contains no indication that the legislature intended felony punishment to attach to ordinary negligent conduct. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835.

Susceptibility of child. — Although a child's susceptibility to harm is a factor a jury might consider when determining whether a defendant has committed child abuse, this factor alone is insufficient for a reviewing court to rule as a matter of law that defendant

did not cause the child to be in a situation that might endanger his health. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the circumstances as a whole satisfied the essential elements of the crime of child abuse beyond a reasonable doubt. *State v. Jensen*, 2006-NMSC-045, 140 N.M. 416, 143 P.3d 178.

Abuse of a child encompasses abuse by endangerment that results in emotional injury. — The crime of child abuse by endangerment may be based on evidence of a truly significant risk of serious harm to a child's emotional health, just as when a child's physical health is endangered. *State v. Galindo*, 2018-NMSC-021.

Where defendant was convicted of child abuse not resulting in death or great bodily harm to his thirteen-year-old daughter (child), and where the state presented evidence that on the night defendant's infant daughter died, the child found defendant kneeling on the floor, holding the baby's "purple, bluish" body and calling the child to come and help him revive the baby, that defendant persisted in his frantic attempts to revive the baby, which included putting the baby's naked body in the kitchen sink and rubbing ice on her, performing CPR on her "very hard", biting her, splashing water on her in the shower and rubbing perfume on her body, and that defendant refused to let the child go get help from relatives who lived nearby, and where the child testified that the she felt shocked and scared, and that the baby's death made her feel "dead inside", defendant's conduct was sufficient to show that defendant exposed the child to a truly significant risk of serious emotional harm, because in light of the other evidence that defendant sexually assaulted and violently abused the baby, resulting in her death, defendant's conduct drew the child into the aftermath of defendant's crimes against the baby. The jury reasonably could have found that defendant endangered the child's emotional health by compelling her to witness and participate in the further abuse of the baby's lifeless body, as defendant tried to undo the effects of what he had already done to the baby. *State v. Galindo*, 2018-NMSC-021.

Insufficient evidence of recklessly permitting child abuse. — Where defendant was convicted of child abuse not resulting in death or great bodily harm to his thirteen-year-old daughter (child) based on three alternative theories of abuse, including intentionally causing the child to be placed in a situation that endangered her life or health, recklessly causing the child to be placed in a situation that endangered her life or health, and recklessly permitting the child to be placed in a situation that endangered her life or health, defendant's conviction for recklessly permitting the child to be placed in a situation that endangered her life or health was not supported by sufficient evidence, because there was no evidence that anyone other than defendant inflicted the abuse against the child, and "permitting" child abuse refers to the passive act of failing to prevent someone else, a third person, from inflicting the abuse. *State v. Galindo*, 2018-NMSC-021.

Sufficient evidence of child abuse resulting in death. — Where defendant was convicted of child abuse resulting in the death of his infant daughter, and where the state presented evidence that the baby died from blunt force trauma to her head, that

the baby also suffered injuries to her groin area, and that the baby showed no signs of choking, and where defendant claimed that there was insufficient evidence that he acted intentionally and without justification because the evidence showed not that he meant to harm the baby, but that he was attempting to shock her into consciousness after he found her not breathing, the jury was free to reject defendant's version of events especially where there were inconsistencies between defendant's explanation of the baby's injuries and the medical evidence; the jury could have reasonably concluded that defendant acted intentionally and without justification. *State v. Galindo*, 2018-NMSC-021.

Sufficient evidence of intentional child abuse. — Where defendant admitted to police that she often lost her temper when her eight-month-old baby cried, admitted that she had bitten her baby, that she had shaken her baby, that she had hit the baby in the head, that she had thrown the baby on the bed causing the baby to hit her head against the wall, and that she had thrown the baby on the floor, and where the forensic pathologist testified that, based on the evidence of multiple bruises on the baby's face and head and evidence of bleeding around the baby's brain and inside the baby's eyes, the baby died from a fatal traumatic brain injury, defendant's conviction for intentional child abuse resulting in the death of a child was supported by substantial evidence. *State v. Cabezuela*, 2015-NMSC-016.

Elements of intentional child abuse. — Intentional child abuse under Section 30-6-1 NMSA 1978 occurs only when a defendant causes the abuse. It does not include the failure to act to prevent another from abusing the child. UJI 14-602 NMRA for intentionally causing child abuse is a misstatement of the relevant law when it includes the phrase "failure to act". *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Where the state only charged defendant with intentional child abuse resulting in death and the court instructed the jury that the state had to prove beyond a reasonable doubt that defendant's "actions or failure to act resulted in the death" of the child, the jury was improperly instructed as to the elements of intentional child abuse resulting in death, because the instruction included both intentional and negligent theories of child abuse. *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Elements of intentional child abuse resulting in the death of a child under the age of twelve. – Where the state charged defendant with intentional child abuse resulting in death of a child who was eight months old and the jury instruction required the jury to find that the child was under the age of eighteen, but did not require the jury to find that the child was under the age of twelve, the jury was improperly instructed as to the elements of intentional child abuse resulting in the death of a child under the age of twelve. *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Elements instruction on intentional child abuse resulting in death did not result in fundamental error. — Where defendant was convicted of intentional child abuse resulting in the death of a child less than twelve years of age, defendant's contention

that the jury instructions improperly defined the intent element for the crime of intentional child abuse by endangerment was without merit, because the instructions given at defendant's trial required the jury to find that defendant acted intentionally when he caused the child to be placed in a situation that endangered her life or safety or caused the child to be tortured, cruelly confined, or cruelly punished. The elements instruction for intentional child abuse by endangerment was not incomplete or otherwise inconsistent with the law, nor was the jury instruction confusing or misleading under the circumstances of the case. *State v. Lucero*, 2017-NMSC-008.

Proof required for conviction of child abuse by endangerment. — A discernible risk of danger to a particular child or particular children is required to support a conviction of child abuse by endangerment and for a defendant to be criminally liable for child abuse by endangerment, the defendant must be aware of a particular danger to the identifiable child or children when engaging in the conduct that creates the risk of harm. *State v. Gonzales*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271, cert. granted, 2011-NMCERT-008, 268 P.3d 513.

Insufficient evidence of child abuse by endangerment. — Where defendant was tried on multiple alternative theories of child abuse relating to injuries sustained by her son, and where the jury acquitted defendant under the state's principle theory of child abuse, that she inflicted her son's injuries, but convicted her under one of the state's alternatives, that she recklessly permitted by endangerment each of her son's injuries, there was insufficient evidence to support defendant's convictions for child abuse by endangerment, because it was the state's theory that defendant was guilty of permitting her son to be endangered because she allowed her boyfriend to abuse the child, but the state failed to provide any evidence of any act or omission by defendant establishing that she allowed her boyfriend to abuse the child, and in fact, the state attempted to convince the jury that the boyfriend did not harm the child, which was consistent with the state's primary theory that defendant, rather her boyfriend, inflicted her son's injuries but inconsistent with the alternative theory that defendant allowed her boyfriend to abuse the child. *State v. Leidy*, 2023-NMCA-073.

Insufficient evidence of permitting endangerment by medical neglect. — Where defendant was tried on multiple alternative theories of child abuse relating to injuries sustained by her son, and where the jury acquitted defendant under the state's principle theory of child abuse, that she inflicted her son's injuries, but convicted her under one of the state's alternatives, that she recklessly permitted by endangerment each of her son's injuries, there was insufficient evidence to support defendant's conviction for child endangerment by medical neglect, because under a medical neglect theory, the state had to put forth substantial evidence that defendant's neglect resulted in the child's great bodily harm, meaning that medical neglect was at least a significant cause of the child's great bodily injury, but there was no evidence presented that defendant's failure to seek treatment for the injuries resulted in great bodily harm to the child, and with regard to the count related to bruises on the child, the state presented no evidence suggesting that medical treatment was even necessary for the bruises. *State v. Leidy*, 2023-NMCA-073.

Evidence of DWI was insufficient to support conviction of child abuse by endangerment. — Where defendant, who was severely drunk, collided with a vehicle in which two children were riding in the back seat, killing one child and injuring the other child, and the state failed to prove that defendant was aware of the danger to the particular children who were the victims of defendant's drunk driving, the evidence was insufficient to convict defendant of negligent or intentional child abuse by endangerment. *State v. Gonzales*, 2011-NMCA-081, 150 N.M. 494, 263 P.3d 271, cert. granted, 2011-NMCERT-008, 268 P.3d 513.

A moving DWI is a sufficient factual basis for a child abuse by endangerment conviction. — The mere fact that a defendant was driving a vehicle in which a child was a passenger while defendant was intoxicated, standing alone, is sufficient as a matter of law to support a conviction of for child abuse by endangerment. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. quashed, 2013-NMCERT-003.

Where defendant with driving a vehicle with defendant's nine-year-old child in the vehicle; defendant drove through an intersection without stopping at a stop sign and crashed into a ditch across the intersecting roadway; the child suffered minor injuries; defendant claimed the defendant could not stop the vehicle because the brakes failed; and defendant was convicted of driving while intoxicated, defendant's moving DWI alone was a sufficient factual basis for defendant's child abuse by endangerment conviction even if the DWI did not otherwise separately evince indicial of unsafe driving. *State v. Orquiz*, 2012-NMCA-080, 284 P.3d 418, cert. quashed, 2013-NMCERT-003.

Evidence sufficient to support conviction for child endangerment. — Where defendant claimed, in his trial on child endangerment, that the state failed to prove that defendant knew the victim was a child, evidence that defendant, during a home invasion, asked the fifteen-year-old victim, "Are your parents home?", was sufficient evidence for the jury to infer defendant's awareness that the person he would later hold at gunpoint was a child. *State v. Ramirez*, 2016-NMCA-072, cert. denied.

Sufficient evidence of child abuse. — Where, in defendant's trial for first-degree murder and child abuse, the jury heard evidence that defendant fired a gun at the victim nine times at point-blank range, that the victim was seated in the front passenger seat of his vehicle, and that the victim's three children were sitting in the back seats of the vehicle in immediate proximity to their father, and where the jury heard evidence that although the victim was shot nine times, only five of the bullets were found inside his body, that several of the bullets defendant fired traveled through the victim and continued onward, one of which traveled through the driver's-side window in the second row of seats of the vehicle and one of which was recovered from the inside roof of the vehicle, there was sufficient evidence to support the jury's determination that defendant placed the three children in a situation that endangered their lives and that defendant showed a reckless disregard for their safety and health. *State v. Ramirez*, 2018-NMSC-003.

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

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

Separate instructions on intentional and negligent child abuse were warranted. — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital and died from an injury to the brain caused by lack of oxygen to the brain; defendant was indicted for both negligent and intentional child abuse resulting in great bodily harm; at the beginning of the trial, the state's theory was that defendant placed the child in a dangerous situation by swaddling the child tightly and leaving the child unattended; and during the trial, the state introduced the theory that defendant intentionally suffocated the child, defendant was entitled to separate jury instructions for negligent and intentional child abuse because the state's theories of how the harm to the child occurred were different and inconsistent. *State v. Consaul*, 2014-NMSC-030.

When separate instructions are required to prove reckless or intentional child abuse. — Jury instructions are to be read and considered as a whole and when so considered they are proper if they fairly and accurately state the applicable law; where a defendant is charged with both reckless and intentional child abuse resulting in the death of a child under twelve years of age, separate instructions for reckless and intentional child abuse are not necessary as long as the verdict forms make it clear which crime defendant was convicted of because the punishments are different for each crime. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was not reversible error where the elements of both intentional and reckless child abuse were contained in one instruction, when the instruction provided the definitions of reckless acts and intentional acts, and the special forms provided to the jury made it clear which

crime defendant was convicted of: intentional child abuse resulting in the death of a child under twelve years of age. *State v. Montoya*, 2015-NMSC-010.

Reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve. — The statutory elements of reckless child abuse resulting in the death of a child under twelve are a subset of the statutory elements of intentional child abuse resulting in the death of a child under twelve; the only distinction between the two crimes is the mens rea required, either intentional or reckless; one can commit child abuse recklessly without acting intentionally, but one cannot intentionally commit child abuse without consciously disregarding a substantial and unjustifiable risk. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction, instructing the jury that if they determined that defendant was guilty of child abuse resulting in death, they had to then determine whether defendant committed the crime intentionally or with reckless disregard, if the jury found that defendant committed the crime intentionally, then they were to complete the special verdict form and go no further, if they had reasonable doubt as to whether the crime was committed intentionally, they had to decide whether the crime was committed with reckless disregard, and if the jury could not find that the crime was committed intentionally or with reckless disregard, they were to find defendant not guilty of child abuse resulting in death. *State v. Montoya*, 2015-NMSC-010.

Lesser-included offense of intentional child abuse resulting in the death of a child under twelve. — Because reckless child abuse resulting in the death of a child under twelve is a lesser-included offense of intentional child abuse resulting in the death of a child under twelve, when a defendant is charged with intentional child abuse resulting in the death of a child under twelve, the defendant will be on notice to defend against both intentional and reckless child abuse resulting in the death of a child under twelve when the abuse results from the same conduct or course of conduct. *State v. Montoya*, 2015-NMSC-010.

Where defendant was charged with both intentional and reckless child abuse, it was appropriate for the trial court to use a step-down instruction providing the process by which the jury should consider each charge when both charges were based on the same course of conduct. *State v. Montoya*, 2015-NMSC-010.

Sufficient evidence of intentional child abuse. — Where the state presented evidence that the seventeen-month-old child was in good health prior to being left alone with defendant, the child's injuries could not have been accidental, and that defendant admitted hitting the child, there was sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant committed intentional child abuse resulting in the death of a child under the age of twelve. *State v. Montoya*, 2015-NMSC-010.

Instruction on lesser included offense not warranted. — Where defendant was charged with child abuse resulting in the death of a child under twelve years of age; the state presented expert evidence that the child's death was caused by blunt force injuries to the child's head due to vigorous shaking of the child; and defendant requested an instruction on the lesser included offense of child abuse not resulting in death on the basis of defendant's admission that when defendant pulled the child's pants too hard, the child fell back on the child's head, the trial court did not abuse its discretion in refusing the lesser included instruction, because the incident to which defendant admitted did not rise to the level of criminally punishable conduct and there was insufficient evidence to support a conviction of child abuse not resulting in death. *State v. Juan*, 2010-NMSC-041, 148 N.M. 747, 242 P.3d 314.

Substantial evidence. — Where defendant left the defendant's child, who was two years of age, with defendant's friend while defendant went to work; the friend later asked defendant to return home and told defendant that the friend had picked the child up by the child's ears and had thrown the child into a bathtub; defendant saw physical symptoms, which suggested that the friend had caused serious injury to the child; defendant had previously witnessed the friend abuse the child; defendant stayed home with the child the next day, but returned to work on the third day leaving the child in the friend's care; the friend later asked defendant to return home; when defendant returned home, defendant found that the child was dead; and the evidence showed that the injury that resulted in the child's death occurred on the third day, there was sufficient evidence to support defendant's conviction of negligently permitting child abuse resulting in death. *State v. Vasquez*, 2010-NMCA-041, 148 N.M. 202, 232 P.3d 438. cert. denied, 2010-NMCERT-004, 148 N.M. 572, 240 P.3d 659.

Sufficient evidence of child endangerment. — Where defendant was driving with defendant's six-year-old child in the car; defendant smelled of alcohol and defendant's eyes were bloodshot and watery; defendant admitted to drinking at least five beers and some tequila prior to driving; and defendant admitted that defendant probably had too much alcohol to drive, the circumstantial evidence constituted substantial evidence that defendant acted with reckless disregard for the safety of defendant's child. *State v. Chavez*, 2009-NMCA-089, 146 N.M. 729, 214 P.3d 794, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Sufficient evidence of intentional child abuse. — Where defendant did not dispute that the child died due to a blunt force injury to the head and that the cause of death was homicide; in two police interviews, defendant admitted harming the child on the day and night of the incident; and in a third police interview, defendant stated that defendant's friend harmed the child, there was sufficient evidence from which the jury could have found beyond a reasonable doubt that defendant intentionally abused the child and a retrial was not barred by double jeopardy. *State v. Cabezuela*, 2011-NMSC-041, 150 N.M. 654, 265 P.3d 705.

Where the defendant's three-year-old son was found by police officers naked with linear wounds on the child's back and stomach; the child was staying with the defendant at the

time; the officers testified that the defendant was hostile and uncooperative; there were fifteen marks on the child's body extending from the child's lower to upper back; some of the marks wrapped around the child's abdomen; the defendant claimed that a dog caused the marks on the child's body; a doctor testified that the marks were consistent with child abuse, that the marks appeared to have been caused by the child being hit with a thin, flexible object, and that the marks were not consistent with dog scratches; and the officers retrieved various cords from the home that were consistent with the child's injuries, the evidence was sufficient to convict the defendant of intentional child abuse. *State v. Davis*, 2009-NMCA-067, 146 N.M. 550, 212 P.3d 438.

Sufficient evidence. — Circumstantial evidence that the child was in defendant's sole care for 56 minutes preceding defendant's discovering of the child's injuries; the child's injuries may have been inflicted minutes before the child began to display symptoms of the injury; once the child suffered the injuries, the child would have quickly become very sick; the child's injuries were acute, meaning that the injuries may have been inflicted seconds before they were discovered; and the child's skull fracture looked as if it had been inflicted a very short time prior to the child's death, there was sufficient evidence to support the finding that defendant caused the child's death. *State v. Jojola*, 2005-NMCA, 119, 138 N.M. 459, 122 P.3d 43, cert. quashed, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

Sufficient evidence of intentional child abuse by torture. — Where a child victim testified that defendant, the child's foster father, used a stun gun on him more than twenty-four times, where pictures admitted at trial showed injuries to the child and where there was corroborating testimony from the child's sister and the investigating detective, a rational jury could have found defendant guilty beyond a reasonable doubt as the child's principal abuser on twenty-four counts of child abuse by torture, and where the child testified that defendant purchased the stun gun and gave it to his son, that the child was stunned by defendant's son approximately fifteen times, was stunned by defendant's other son approximately three times, that defendant was present during the assaults by one of the sons and would laugh in response, and where there was corroborating testimony from the child's sister, a rational jury could have found defendant guilty beyond a reasonable doubt as an accessory to child abuse inflicted by another. *State v. Vargas*, 2016-NMCA-038.

Instruction based on the statutory presumption of child abuse by endangerment. — Where the defendant was convicted of negligently permitting child abuse by endangerment after the defendant was arrested in a house where chemicals and equipment involved with methamphetamine production were found, and where the trial court, in addition to an instruction on the essential elements of child abuse by endangerment, instructed the jury, based on the presumption created by Section 30-6-1 NMSA 1978, that "Evidence that demonstrates that a child has been knowingly, intentionally or negligently allowed to enter or remain in a motor vehicle, building or any other premises that contains chemicals and equipment used or intended for use in the manufacture of a controlled substance may be deemed evidence of abuse of the child", the instruction was erroneous, because a reasonable juror could have concluded that

he or she was not required to find the essential element of endangerment beyond a reasonable doubt. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

A conviction of child abuse by endangerment requires proof of the actual presence of a child when the dangerous situation occurred and the mere fact that a child normally resided in a home that contains chemicals and equipment used or intended for use in the manufacturing of a controlled substance is insufficient to support a conviction of child abuse by endangerment. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

Evidence insufficient. — Where the defendant was convicted of negligently permitting child abuse by endangerment after the defendant was arrested in a house where chemicals and equipment involved with methamphetamine production were found; there was evidence that the child resided in the house with the defendant; the child was not present in the house on the date the defendant was arrested; no methamphetamine was found in the house; and there was no evidence of specific dates when the child had been present in the house, of when the items that could be used to produce methamphetamine had been taken into the house, that any of the dangerous, legal, household chemicals in the house were stored in a manner that could endanger a child, of when or how often methamphetamine production had occurred in the house, or that the house was contaminated, the evidence was insufficient to support the defendant's conviction of child abuse by endangerment. *State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

Endangerment by medical neglect. — In the context of medical neglect, causing medical neglect and permitting medical neglect define identical criminal acts. *State v. Nichols*, 2016-NMSC-001, *rev'g* 2014-NMCA-040, 321 P.3d 937.

Where defendant, whose six-month-old baby died from a loss of blood associated with blunt abdominal trauma and a lacerated liver, was charged with both causing endangerment by medical neglect and permitting endangerment by medical neglect, and where the jury found defendant not guilty of causing medical neglect but guilty of permitting medical neglect, both of which imply passive involvement, the conflicting verdicts preclude any determination of which culpable act was the actual basis for the jury's conviction of defendant. Defendant's conviction for negligently permitting medical neglect of his son was reversed. *State v. Nichols*, 2016-NMSC-001, *rev'g* 2014-NMCA-040, 321 P.3d 937.

Endangerment by "medical neglect" defined. — "Medical neglect" is defined as the failure to provide medical, dental, or psychiatric care that is necessary to prevent or to treat serious physical or emotional injury or illness. *State v. Garcia*, 2021-NMSC-019.

Insufficient evidence of causation in a case alleging intentional child abuse by endangerment through medical neglect. — Where defendant was found guilty of intentional child abuse resulting in the death of a child under the age of twelve by endangerment through medical neglect, and where the state introduced evidence that

the child, while under the care of defendant, suffered blunt force trauma and other injuries to his head that resulted in a lack of oxygen and blood to the brain, and that defendant, in order to avoid blame for the child's injuries, did not call 911 and instead took the child to the child's mother, but where the state's medical experts could not testify to a reasonable degree of medical certainty that the child would have lived with earlier medical intervention, there was insufficient evidence to prove beyond a reasonable doubt that defendant's failure to call 911 resulted in the child's death. Proof of causation in a criminal medical neglect case requires that the medical neglect be a factual, but-for cause of the child's death. *State v. Garcia*, 2021-NMSC-019.

Insufficient evidence of conspiracy to commit child abuse. — Where defendant was found guilty of conspiracy to commit intentional child abuse resulting in the death of a child under the age of twelve by endangerment through medical neglect, and where the state introduced evidence that the child, while under the care of defendant and defendant's wife, suffered blunt force trauma and other injuries to his head that resulted in a lack of oxygen and blood to the brain, and sought to prove that either defendant or his wife stood by while the baby was brutally beaten to death and did nothing or both defendant and his wife beat the child to death, there was insufficient evidence to support the conviction because no evidence was presented from which a jury could infer that defendant and his wife formed a mutually implied agreement to commit child abuse against the child. *State v. Garcia*, 2021-NMSC-019.

Insufficient evidence of reckless child abuse based on medical expert testimony. — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child’s crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital, and died from an injury to the brain caused by lack of oxygen to the brain; the state’s theory was that defendant placed the child in a dangerous situation by swaddling the child tightly and leaving the child unattended; expert medical testimony provided the only evidence that the child may have been suffocated and that the child had not been injured by other, noncriminal causes; and the state’s medical experts testified almost unanimously that the mere act of swaddling the child and placing the child face down on a pillow would not have caused the severe brain injuries they observed in the child, the state failed to prove causation and the charge of criminal recklessness completely failed for lack of substantial evidence. *State v. Consaul*, 2014-NMSC-030.

Use of medical testimony alone to support a criminal conviction. — Medical testimony to support causation in a criminal proceeding, as a matter of evidentiary foundation, should describe in detail the methodology utilized first to "rule-in" possible causes and then to "rule-out" all but one. Based on that process of elimination, described in detail to the jury, a doctor then should be able to offer an opinion on causation to a reasonable degree of medical probability which satisfies a minimum standard for admissibility. In a criminal trial, to meet a standard of proof beyond a reasonable doubt, prosecutors point to additional, non-opinion evidence, so that when considered cumulatively all the evidence is sufficient to support a verdict beyond a

reasonable doubt. If, however, the prosecution is relying solely on medical opinion, it must go beyond the mere probable causation required for admissibility. The medical testimony should establish why the expert opinions are sufficient in themselves to establish guilt beyond a reasonable doubt. *State v. Consaul*, 2014-NMSC-030.

Insufficient evidence of intentional child abuse based on medical testimony as to a "likely" cause. — Where defendant, who was responsible for watching the child and who was frustrated and irritated by the child's crying, bundled the child in a blanket tighter than usual and put the child face down on a pillow in the crib; the child became ill, was taken to a hospital and died from an injury to the brain caused by lack of oxygen to the brain; the state's theory was that defendant intentionally suffocated the child; the expert medical testimony provided the only evidence that the child may have been suffocated and that the child had not been injured by other, noncriminal causes; and the state's medical experts testified that they suspected child abuse, that they could not rule out child abuse, and that they could not think of other explanations for the child's injuries, that child abuse was a likely cause, and that the child was likely suffocated, the evidence was insufficient to establish beyond a reasonable doubt that defendant intentionally suffocated the child. *State v. Consaul*, 2014-NMSC-030.

Mens rea for intentional child abuse by endangerment. — Where defendant was charged with intentional child abuse by endangerment, and where the state presented evidence at trial that defendant drove poorly while intoxicated, with her child strapped in a car seat, the evidence was insufficient to support the jury's verdict that defendant committed intentional child abuse by endangerment, because the mens rea for intentional child abuse by endangerment requires a conscious object to endanger a child, and no evidence was presented that it was defendant's conscious objective to endanger her child. *State v. Granillo*, 2016-NMCA-094, cert. denied.

Insufficient evidence of child abuse based on DWI. — Where police officers found defendant in the driver's seat of a van that was parked on a roadside; the van was not running; the keys were not in the ignition; both defendant and the passenger in the van were intoxicated and incapable of driving; the passenger's children were in the back seat; and the state did not rely on a theory of past driving, but on the theory that defendant might drive the van while impaired and place the children in a situation which endangered their lives and health, the evidence was insufficient to support defendant's conviction of child abuse. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 585, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Evidence of endangerment based on filthy living conditions. — When filthy living conditions provide the exclusive basis for charging the defendant with child endangerment, the state has the burden to identify the specific dangers posed by the living environment and to present evidence to support a finding that there is a substantial and foreseeable risk that such filthy living conditions endangered the child. *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891, *rev'g* 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558.

Insufficient evidence of endangerment based on filthy living conditions. — Where there was dirty laundry, dirty dishes, dirty diapers and mouse droppings throughout the defendant's house; the house contained dangerous features, such as a damaged ceiling, broken glass in the yard, nail-ridden debris from a collapsed shed, a gap in the floor boards on the front porch and household chemicals within reach of the children; open and broken dresser drawers were easily accessible to the children who could get inside and get stuck; closets were open and had piles of items inside that could fall on and injure a child; the shower and toilet were covered in mold; a razor was accessible to the children; rodent droppings were present throughout the house, including in cabinets where dishes and food were stored and on the dishes; no hot water from the tap was available, because the propane that fueled the water heater was empty and disconnected; the electric stove was available to heat water for washing, cooking and bathing; there was no evidence of drugs or alcohol in the house; the children were physically healthy and well-nourished; and there was no evidence connecting these conditions to a substantial and foreseeable risk of harm to the children, the evidence was insufficient to support a finding that the defendant's conduct created a substantial and foreseeable risk of harm to the children. *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891, *rev'g* 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558.

Insufficient evidence of endangerment. — Where defendant's neighbor found defendant's three-year-old child wandering around outside their apartment building at 2:00 a.m.; the child was crying and cold and wearing only a dirty diaper; the apartment was in a high-crime area and there was a busy parking lot, alley and street nearby; the door to defendant's apartment was ajar when the neighbor returned the child to the apartment; the neighbor found defendant asleep in the apartment; defendant was intoxicated; and the state produced no evidence that the child had been in a direct line of harm or exposed to anything more than a possibility of danger or that defendant's intoxication contributed to the child's wandering outside the apartment, the evidence was insufficient to support defendant's conviction for negligent child abuse by endangerment because the state failed to prove that the risk to the child was foreseeable and probable. *State v. Garcia*, 2014-NMCA-006, cert. granted, 2013-NMCERT-012.

Where defendant took the child to a tattoo parlor and signed a written consent to allow the child to have the child's tongue pierced without the knowledge, authorization or permission of the child's parent; the piercing was successful, but the child sustained serious injuries as a result of an accidental fall in the tattoo parlor; the child received penicillin during the course of treatment and it was discovered that the child was allergic to the drug; defendant lacked knowledge about tongue piercing and about the child's allergy to penicillin; defendant did not perform the piercing; and the owner of the tattoo parlor had sufficient knowledge and experience to perform the tongue piercing, the evidence was insufficient to support defendant's conviction of child abuse by endangerment because the evidence did not show that defendant's conduct created a substantial and foreseeable risk of serious harm to the child. *State v. Webb*, 2013-NMCA-027, 296 P.3d 1247, cert. denied, 2013-NMCERT-002.

Where the defendant placed the defendant's five-month-old child to sleep in a dresser drawer filled with blankets and padding because the child's bassinet had broken; the child died in the drawer; the autopsy listed the cause of death as inconclusive; and there was an absence of evidence in the record to indicate that the sleeping conditions presented anything more than a mere possibility of harm, the evidence failed to establish that the defendant created a substantial and foreseeable risk that the child would suffer a serious injury. *State v. Chavez*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891, *rev'g* 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558.

Insufficient evidence of endangerment based on DWI. — Where defendant was seated in the driver's seat of a vehicle with defendant's spouse in the middle, and defendant's four-year-old child on the passenger side of the vehicle; the vehicle was not running; defendant was holding the keys; open alcohol containers were on the floor and in the cup holders; defendant was intoxicated; defendant informed police officer that defendant was going to a local store; and defendant was convicted of DWI by actual physical control, there was insufficient evidence to support a conviction for felony child abuse by endangerment. *State v. Etsitty*, 2012-NMCA-012, 270 P.3d 1277, cert. denied, 2011-NMCERT-012.

Sufficient evidence of child abuse. — Where defendant fired two gunshots into a house in which a child, aged three weeks, was situated at the time of the shooting; the bullets found in the house matched those fired from defendant's handgun; and before the shooting, a witness told defendant that there was a newborn baby in the house, there was sufficient evidence to support defendant's conviction of negligent abuse of the child. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Sufficient evidence of child abuse by endangerment. — Where five-year-old triplets and a 15-year-old child lived with defendant and defendant's spouse in a small house; the home was littered with cat urine and feces, trash, rotten food, dirty dishes and piles of dirty clothes; two loaded firearms with spare ammunition and magazines were in an open box on the floor in the master bedroom; the children played with toy guns, including a toy gun that was a Glock replica indistinguishable from a real gun; when police officers enter the home, defendant had glass pipes for smoking methamphetamine on defendant's person; defendant admitted that defendant and defendant's spouse had been using methamphetamine for three days and had not slept; and defendant admitted that defendant smoked methamphetamine when the children were home and left drug paraphernalia, including syringes, strewn about the master bedroom and the backyard, there was sufficient evidence to support defendant's conviction of negligent child abuse by endangerment. *State v. Schaaf*, 2013-NMCA-082.

Where the defendant lived in a trailer with his three small children and the mother of the children; the trailer had no gas utility and no alternative heating source or hot water; the trailer was infested with mice; the ceiling appeared ready to collapse; one window was missing, another was broken and glass shards were on the ground; the bathroom and shower were moldy; razors and chemicals were left where the children could access them; there was a trash pit at ground level outside the trailer that had flies and a

pungent odor; open cans of solvent and cleaning fluid were on the porch; there were car parts, spray cans, matches and other objects that could be dangerous to children about the yard; the ramp leading to the trailer had a gap wide enough to injure a child; and the defendant sometimes left the children unattended in this environment, the defendant's conviction of child abuse by endangerment was supported by substantial evidence. *State v. Chavez*, 2008-NMCA-126, 145 N.M. 11, 193 P.3d 558, *rev'd*, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891.

Sufficient evidence of child abuse resulting in death. — Where the defendant put her child, who was sick with bronchitis, in a low youth-bed without rails on his back with a bottle and covered him with a blanket and placed an electric space heater on the floor within nine inches from the bed and left the child unattended all night and where the child rolled off the bed and was burned to death by the space heater, the evidence was sufficient to convict the defendant of negligent child abuse resulting in death. *State v. Chavez*, 2007-NMCA-162, 143 N.M. 126, 173 P.3d 48, cert. denied, 2007-NMCERT-011, 143 N.M. 155, 173 P.3d 762.

"Endangered". — Although the jury was not instructed on the definition of "endangered", when a common term is used, the jury may properly apply the common meaning of the term. *State v. Jensen*, 2005-NMCA-140, 138 N.M. 647, 124 P.3d 1186, *rev'd*, 2006-NMSC-045, 140 N.M. 416, 143 P.3d 178.

Evidence insufficient. — Where the state's case was nothing more than that the child abuse by endangerment statute criminalizes the filthy conditions of a non-controlling caretaker's home continually made available to a 15-year old boy, and absent evidence showing the particular susceptibility to endangerment of a child who has reached 15 years of age, the evidence was not sufficient for a rational jury to conclude, from common experience beyond a reasonable doubt, that the situation was sufficiently precarious such that the child was on a reasonably sure path to harm's way with unfortunate health consequences reasonably likely to result. *State v. Jensen*, 2005-NMCA-140, 138 N.M. 647, 124 P.3d 1186, *rev'd*, 2006-NMSC-045, 140 N.M. 416, 143 P.3d 178.

Evidence insufficient to convict of child abuse. — In low-speed vehicle chase, where evidence showed that defendant was speeding, but then slowed to posted speed limit; that defendant lawfully went through intersections after he failed to stop for the police; that defendant failed to use a turn signal on one turn; that defendant slowed, but did not come to a complete stop at one stop sign; that defendant's automobile was drifting back and forth within its lane of travel; that there was no evidence that three children in the vehicle were unrestrained; that there was no evidence of the surrounding circumstances, such as the extent of defendant's abrupt swerve, traffic congestion or volume; and that defendant was acquitted of DWI, the evidence was insufficient to justify a finding that defendant showed a reckless disregard for the children in the automobile or exposed them to a substantial risk to their safety, to sustain a conviction of felony child abuse. *State v. Clemonts*, 2006-NMCA-031, 139 N.M. 147, 130 P.3d 208, cert. denied, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

Reckless disregard. — For negligent child abuse, one need only have reckless disregard to the consequences in the face of substantial and foreseeable danger. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

Evidence sufficient to convict of negligent abuse. — Where the evidence established that prior to 3:20 p.m. on July 24, 2000, deceased child was a normal and healthy baby, and two hours later, after being in defendant's sole custody and care, he was not, and medical witnesses testified that deceased child suffered substantial, serious injuries that were consistent with shaken baby syndrome and that those injuries would manifest shortly after being violently shaken, and although defendant offered several innocent explanations, the consensus of the medical witnesses was that his explanations were medically unacceptable, and he also admitted shaking the child on two occasions, evidence is sufficient for the jury to convict defendant of criminally negligent child abuse. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

Endangerment. — Because Subsection D(1) of this section proscribes conduct that may endanger the health, as well as the life, of a child, it was unnecessary for the state to show that an amount of marijuana accessible to the children could have been fatal. *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

It was within the jurors' experience to decide whether the amount of accessible marijuana in the apartment endangered the health of a three-year-old child and a one-year-old child who lived in the apartment. *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

Double jeopardy not violated. — Defendant's acquittal of intentional child abuse and subsequent prosecution for negligent child abuse did not violate the federal constitutional guarantee against double jeopardy. *State v. Schoonmaker*, 2005-NMCA-012, 136 N.M. 749, 105 P.3d 302, *rev'd on other grounds*, 2008-NMSC-010, 143 N.M. 373, 176 P.3d 1105.

Double jeopardy violated. — Defendant's convictions for second degree murder and child abuse resulting in death, for the death of defendant's child that resulted from the same conduct, violated the double jeopardy clause. *State v. Mann*, 2000-NMCA-088, 129 N.M. 600, 11 P.3d 564, *aff'd*, 2002-NMSC-001, 131 N.M. 459, 39 P.3d 124.

Single continuous act. — Where defendant drove while intoxicated with three children who were not restrained, defendant committed one continuous act and defendant was subject to only one charge and one punishment for child abuse. *State v. Castaneda*, 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368, cert. denied, 130 N.M. 558, 28 P.3d 1099.

Viable fetus not a child. — Legislature did not intend for a viable fetus to be included within the statutory definition of a child for the purposes of the child abuse statute. State

cannot prosecute a mother for child abuse when the mother uses cocaine during her pregnancy. *State v. Martinez*, 2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195, cert. quashed, 2007-NMCERT-005, 141 N.M. 762, 161 P.3d 259.

Section does not impose a mandatory minimum sentence for purposes of federal sentencing. — Where defendant pleaded guilty in federal court to one count of second-degree child abuse, and where the district court imposed a forty-two month sentence, which both parties concede was based on a calculation error which resulted in a sentence longer than the court intended to impose, but where the government argued that the error was harmless because defendant was subject to a six-year minimum sentence under this section, the error was not harmless, because although a second-degree felony carries a basic sentence of nine years imprisonment, § 31-20-3 NMSA 1978, and a trial court may reduce a basic sentence upon a finding by the judge of any mitigating circumstances surrounding the offense or concerning the offender, § 31-18-15.1 NMSA 1978, but in no case shall the reduction in sentence exceed one-third of the basic sentence, a New Mexico trial court has discretion to vary the penalty for a crime by suspending part or all of the sentence. Thus, under the New Mexico sentencing scheme, defendant would not be required to serve a minimum of six years and may not be required to serve any period of incarceration or even to receive any sentence at all. *United States v. Jones*, 921 F.3d 932 (10th Cir. 2019).

Law reviews. — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico — State v. Santillanes," see 32 N.M.L. Rev. 313 (2002).

For note, "Criminal Law: The Child Abuse Statute Now Requires Criminal Negligence — Santillanes v. State," see 24 N.M.L. Rev. 477 (1994).

30-6-2. Abandonment of dependent.

Abandonment of dependent consists of a person having the ability and means to provide for his spouse or minor child's support and abandoning or failing to provide for the support of such dependent.

Whoever commits abandonment of dependent is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-6-2, enacted by Laws 1963, ch. 303, § 6-2; 1969, ch. 182, § 4; 1973, ch. 241, § 1; 1995, ch. 123, § 1.

ANNOTATIONS

Cross references. — For enforcement of duty of support owed to spouse or minor children by the health care authority department, *see* 27-2-28 to 27-2-31 NMSA 1978.

For mutual obligation of support between husband and wife, *see* 40-2-1 NMSA 1978.

For Uniform Interstate Family Support Act, *see* Chapter 40, Article 6A NMSA 1978.

The 1995 amendment, effective July 1, 1995, in the first sentence, substituted "or" for "and" following "his spouse" and deleted "and thereby leaving such spouse or minor child dependent upon public support" following "of such dependent".

Section not void for vagueness. — This section conveys a definite warning of proscribed conduct; it is not unconstitutionally vague and does not violate due process. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

No unequal classification. — Since the crime proscribed in this section is defined in terms of a defendant's actions, the contention of unequal classification of defendants allegedly (based on the actions of the victims in seeking or not seeking public support) has no factual basis. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

No affirmative action required of dependents. — This statute contains no requirement that official action be taken to obtain public welfare benefits from the health and social services department (now the health care authority department) and hence the equal protection claim based on the concept that public welfare benefits must be sought by those abandoned in order to support a prosecution hereunder is without merit. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

This statute is not written in terms of becoming dependent, but rather, refers to acts of a defendant which leave the victim dependent on public support. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

Both legitimate and illegitimate children are entitled to support from their mothers and fathers. *Stringer v. Dudoich*, 1978-NMSC-071, 92 N.M. 98, 583 P.2d 462.

Partial correction of social evil acceptable. — Fact that this section fails to cover all abandonments and failures to support, by focusing only on those persons whose actions leave their dependents dependent on public support, does not violate the requirement of equal protection because the partial correction of the social evil in question has a rational relation to the object of the legislation. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

Standing to question constitutionality. — Since defendant was charged only with abandoning his minor children, that offense applying equally to both men and women, his rights were not affected by statutory distinction formerly making it an offense for a man to abandon his wife, but not for a wife to abandon her husband, and accordingly his claims of unconstitutionality based on sex discrimination did not present an issue for decision. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

Social evil. — Abandonment of or failure to support minor children is a social evil. *State v. Villalpando*, 1974-NMCA-020, 86 N.M. 193, 521 P.2d 1034, cert. denied, 86 N.M. 189, 521 P.2d 1030.

Evidence sufficient. — Where the record was replete with evidence that defendant abandoned his minor children without sufficient means of support, it amply supported conviction of abandonment under former 40-2-4, 1953 Comp., and obviated consideration of whether evidence must show that children were destitute when defendant left them. *State v. Seaton*, 1965-NMSC-123, 75 N.M. 511, 407 P.2d 354.

Law reviews. — For comment, "Artificial Insemination in New Mexico," see 10 Nat. Resources J. 353 (1970).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Desertion and Nonsupport §§ 1 to 23, 51 to 64.

Criminal responsibility of husband for abandonment or nonsupport of wife who refuses to live with him, 3 A.L.R. 107, 8 A.L.R. 1314.

Adultery of wife as affecting criminal charge of abandonment against husband, 17 A.L.R. 999.

Illegitimate child as within statute relating to duty to support child, 30 A.L.R. 1075.

Extent or character of support contemplated by statute making nonsupport of wife offense, 36 A.L.R. 866.

Power to make abandonment, desertion or nonsupport of wife or family criminal offense, 48 A.L.R. 1193.

Criminal liability of father for desertion of or failure to support child as affected by decree of divorce or separation, 73 A.L.R.2d 960.

41 C.J.S. Husband and Wife §§ 242 to 246; 67A C.J.S. Parent and Child § 165 to 167.

30-6-3. Contributing to delinquency of minor.

Contributing to the delinquency of a minor consists of any person committing any act or omitting the performance of any duty, which act or omission causes or tends to cause or encourage the delinquency of any person under the age of eighteen years.

Whoever commits contributing to the delinquency of a minor is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-6-3, enacted by Laws 1963, ch. 303, § 6-3; 1990, ch. 19, § 1.

ANNOTATIONS

The 1990 amendment, effective July 1, 1990, substituted "the delinquency of a minor" for "delinquency of minor" in two places.

Statute does not violate freedom of expression. — The contributing to the delinquency of a minor statute does not violate the first amendment or Article II, Section 17 of the New Mexico Constitution. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

Statute is not unconstitutionally overbroad. — The contributing to the delinquency of a minor statute is not unconstitutionally overbroad under the first amendment. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

Statute is not unconstitutionally vague. — The contributing to the delinquency of a minor statute is not unconstitutionally vague in violation of due process. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

Defendant's constitutional rights were not violated. — Where defendant was convicted of contributing to the delinquency of a minor when defendant wrote a sexually explicit letter to the victim, defendant's conviction did not violate defendant's first amendment or New Mexico constitution freedom of expression rights because the conviction was premised on the effect of encouraging or tending to cause or encourage the victim's delinquency, not on the content of the letter, and Section 30-6-3 NMSA 1978 is content neutral, furthers an important and substantial governmental interest unrelated to suppression of free speech, is limited to circumstances that do not substantially burden more speech that necessary to further the interest of protecting children from delinquency, is not unconstitutionally overbroad under the first amendment, and is not void for vagueness in violation of defendant's due process rights. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

General/specific rule did not apply. — Where defendant, who was convicted of contributing to the delinquency of a minor when defendant wrote a sexually explicit letter to the victim, claimed that under the general/specific rule, the state was required to charge defendant under the sexually oriented materials statute, Section 30-37-2 NMSA 1978, rather than under Section 30-6-3 NMSA 1978; the general/specific rule states that if one statute deals with a subject in general and comprehensive terms and another statute addresses part of the same subject matter in a more specific manner, the latter controls; the contributing to the delinquency of a minor statute requires that the material

encourage delinquency; and the sexually oriented materials statute only requires the knowing delivery of harmful materials to a minor, the general/specific rule did not apply because the statutory elements of the statutes were not the same and defendant's conviction did not violate the general/specific rule. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

Double jeopardy. — Where defendant served varieties of alcohol over a considerable period of time at his own home to invited minors, and personally interacted with the minors, intending and encouraging different minors to drink to intoxication he could be found guilty of multiple counts of contributing to the delinquency of a minor. *State v. Stone*, 2008-NMCA-062, 144 N.M. 78, 183 P.3d 963, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

Jurisdiction. — Insofar as the juvenile law formerly purported to confer "exclusive original jurisdiction" on juvenile courts over persons contributing to the delinquency of juveniles it was invalid since the constitution vests sole and exclusive jurisdiction for the trial of all felony cases in the district courts. *State v. McKinley*, 1949-NMSC-010, 53 N.M. 106, 202 P.2d 964.

Contributing minor triable in district court. — A minor, properly transferred from children's court to district court, may be tried and convicted of contributing to the delinquency of a minor under this section. *State v. Pitts*, 1986-NMSC-011, 103 N.M. 778, 714 P.2d 582.

Infants have generally been favored class for special protection in New Mexico; therefore, the legislature intended to make the commission of the act of contributing to the delinquency of a minor a crime without regard to intent. *State v. Gunter*, 1974-NMCA-132, 87 N.M. 71, 529 P.2d 297, cert. denied, 87 N.M. 48, 529 P.2d 274, and cert. denied, 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975).

Acts of commission or omission. — Any act of commission or omission causing or tending to cause juvenile delinquency as specifically defined came within the act. *State v. McKinley*, 1949-NMSC-010, 53 N.M. 106, 202 P.2d 964.

Evidence that act causes delinquency. — In order to prove the offense of contributing to the delinquency of a minor, the state does not need to prove that the defendant's acts had any particular effect on the victim; it is enough that his acts encourage the child to engage in delinquent behavior. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

Defendant need not actually cause delinquency. — The jury can convict if the defendant's act actually caused or encouraged the particular minor to commit a delinquent act or if the act only tends to cause or encourage delinquency generally. The "tends to cause or encourage" language refers to an objective view of the defendant's conduct. There is no requirement that the defendant actually cause delinquency. *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172.

Tending to cause, encourage delinquency. — Defendant's acts or omissions must have caused or tended to cause or encourage the delinquency of the juvenile. *State v. Grove*, 1971-NMCA-086, 82 N.M. 679, 486 P.2d 615.

Sufficient evidence of contributing to the delinquency of a minor. — Where defendant was charged with criminal sexual penetration of a minor and contributing to the delinquency of a minor, and where the state relied on testimony elicited from the victim that defendant pinned her to the floor, with her arms above her head and her legs under his, while defendant's son sat on the victim's chest and sexually assaulted her by putting his penis in her mouth, and that defendant's son was approximately fourteen years old, there was sufficient evidence to prove beyond a reasonable doubt that defendant caused or encouraged his son to engage in fellatio with the victim, and that doing so caused or encouraged the delinquency of defendant's son. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Tending to cause violation of law, or immorality. — Defendant's acts must have tended to cause or encourage the prosecuting witness to violate the law of the state or to conduct himself in a manner injurious to his morals. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

Causing disobedience of lawful command. — In order to convict defendant of contributing to the delinquency of a minor for causing or encouraging the minor to refuse to obey the reasonable and lawful command or direction of the minor's parent, the state must prove that defendant knew or by the exercise of reasonable care should have known of such command or direction. *State v. Romero*, 2000-NMCA-029, 128 N.M. 806, 999 P.2d 1038.

Habituality of juveniles' conduct not prerequisite to conviction of defendant. — Defendant's contention that for his acts to be criminal hereunder they must tend to encourage "habitual" conduct on the part of the minor was unfounded, as the end result of defendant's acts, that is, whether they result in habitual conduct on the part of the juvenile, is not a prerequisite to the charge of contributing to the delinquency of a minor. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

Multiple victims. — Where defendant perpetrated distinct and separate acts with respect to each of seven juveniles, submission of separate elements instructions to the jury relating to each of the juveniles did not violate defendant's right against double jeopardy and his conviction on seven separate counts of contributing to the delinquency of a minor was justified along with his sentence to seven sentences. *State v. Barr*, 1999-NMCA-081, 127 N.M. 504, 984 P.2d 185.

Criminal sexual contact of minor is separate offense. — The legislature intended for the crimes of criminal sexual contact of a minor and contributing to the delinquency of a minor to be separate crimes, punishable separately even when unitary conduct violates

both statutes. Therefore, convictions under both statutes do not violate double jeopardy principles. *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172.

Indecent exposure is separate offense. — An element of indecent exposure is that the defendant's acts take place in "public view"; there is no such element in contributing to delinquency of a minor, and the trial court's refusal to give the instruction as a lesser included offense was proper. *State v. Henderson*, 1993-NMSC-068, 116 N.M. 537, 865 P.2d 1181, *overruled in part on other grounds*, *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731; *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156.

Criminal sexual penetration is separate offense. — Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. *State v. Walker*, 1993-NMSC-069, 116 N.M. 546, 865 P.2d 1190.

Sexually explicit letter. — Where defendant, who was the biological parent of the victim, lived with the victim, the victim’s mother, and the victim’s sibling; on the day the offense occurred, defendant was alone in the house; the victim subsequently found a five page handwritten letter in the victim’s underwear drawer that contained a story entitled "I Just a Fantasy Story"; the letter describing various sexual acts between the writer and the reader; the victim recognized the handwriting in the letter as defendant’s handwriting; a handwriting analyst testified that the handwriting was defendant’s handwriting; the content of the letter provided clues that defendant was the author; and the police found an envelope in the victim’s parents’ bedroom with the writing "I Just a fantasy" on it, the evidence was sufficient to support defendant’s conviction of contributing to the delinquency of a minor. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

Sufficiency of information. — Information charging defendant with contributing to delinquency of minor did not fail to charge an offense even though it did not name the victim or allege particular acts. *State v. Roessler*, 1954-NMSC-017, 58 N.M. 102, 266 P.2d 351.

Evidence sufficient. — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of two counts of contributing to the delinquency of a minor based on an unclothed experience with two teenage children who were members of defendant's religious community; defendant claimed that the experiences were purely spiritual healing experiences; the teenage children each visited defendant alone and lay in bed naked with defendant; one child testified that defendant kissed the child on the breast; and the other child testified that while the child was unclothed and in bed next to the unclothed defendant, defendant put defendant's chest below the child's breast, defendant embraced the child by putting defendant's arm on the child’s back as

they lay on their sides, and defendant laid defendant's head and hand on the child's heart, there was sufficient evidence to support defendant's convictions of contributing to the delinquency of a minor. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

Where defendant took the child to a tattoo parlor and signed a written consent to allow the child to have the child's tongue pierced without the knowledge, authorization or permission of the child's parent, there was sufficient evidence to support defendant's conviction of contributing to the delinquency of a minor because defendant's actions caused or encouraged the child to deceive the child's parent by obtaining the piercing without permission. *State v. Webb*, 2013-NMCA-027, 296 P.3d 1247, cert. denied, 2013-NMCERT-002.

Evidence that a 17 year old boy bought two cans of beer at defendant's place and drank one of them, that the girl from whom he purchased the beer took the money into the bedroom where defendant was in bed and handed it to her or placed it on the bed beside her, and that officer found four boys in defendant's living room with empty and open cans of beer in front of them, was sufficient to warrant a conviction hereunder. *State v. Ferguson*, 1967-NMSC-032, 77 N.M. 441, 423 P.2d 872.

Evidence was sufficient for conviction where it showed that defendant accompanied the victim and two other minors to a store to buy alcohol, that when they arrived at the store, defendant purchased alcohol, and that, once the group arrived back at the house where a party was underway, the victim carried the alcohol into the house and drank some of it. *State v. Perea*, 2001-NMCA-002, 130 N.M. 46, 16 P.3d 1105, *aff'd in part and vacated in part on other grounds*, *State v. Perea*, 2001-NMSC-026, 130 N.M. 732, 31 P.3d 1006.

Defendant's acts in indecently touching the private parts of a minor and talking indecently to him tended to cause or encourage his victim to violate former 40A-9-8, 1953 Comp., prohibiting indecent exposure, and also tended to cause or encourage him to conduct himself in a manner injurious to his morals. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

Evidence that defendant showed a men's magazine to a minor and told him to unbutton his pants was sufficient for the jury to find defendant guilty of contributing to the delinquency of a minor, even without evidence that defendant engaged in fellatio or had criminal sexual contact with the minor. *State v. Corbin*, 1991-NMCA-021, 111 N.M. 707, 809 P.2d 57, cert. denied, 111 N.M. 720, 809 P.2d 634.

Sufficient evidence of contributing to the delinquency of a minor. — Where defendant was charged with contributing to the delinquency of a minor (CDM), evidence that defendant had driven to Wal-Mart with the minor child and the two had discussed the child shoplifting with him, that defendant looked out to see if anyone was coming while the child shoplifted, and where a Wal-Mart asset protection associate testified that defendant and the child appeared to be working together and that she believed that

defendant was assisting the child in picking out merchandise to steal, was sufficient to support defendant's conviction for CDM. *State v. Lozoya*, 2017-NMCA-052, cert. denied.

Sufficient evidence to support conviction of contributing to the delinquency of a minor. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for contributing to the delinquency of a minor was supported by substantial evidence where the evidence presented at trial established that defendant instructed his co-conspirator to create an advertisement for the victim, a seventeen-year old girl, on a website commonly used to advertise prostitution services, explained to the victim that she would use the ad in order to exchange sex for money, and informed the victim when and where to meet people who responded to the ad. *State v. Jackson*, 2018-NMCA-066, cert. denied.

Contributing to the delinquency of a minor does not require proof that the offender knew the age of the child. — Where defendant was charged with contributing to the delinquency of a minor (CDM) for assisting a minor child in stealing bottles of alcohol from Wal-Mart, defendant's argument that failure to provide a knowledge-of-age element to the jury instruction constituted error was without merit, because CDM does not require proof that the offending adult know the age of the child to whose delinquency the adult contributed. *State v. Lozoya*, 2017-NMCA-052, cert. denied.

Evidence insufficient. — If from the evidence, it could be inferred that defendant was present when juvenile engaged in his admitted activities with marijuana, nevertheless there was no evidence that defendant had anything to do with these activities nor any evidence that defendant approved of them. In the absence of such evidence an inference that defendant was present when juvenile engaged in his marijuana activities was insufficient to sustain defendant's conviction for contributing to the delinquency of the juvenile. *State v. Grove*, 1971-NMCA-086, 82 N.M. 679, 486 P.2d 615.

Jury instruction proper. — Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

Trial court was not without jurisdiction to impose sentence against defendant following his conviction some seven years earlier of contributing to delinquency of a minor child, at which time the court had deferred sentence until the "further order of the court." *State v. Sorrows*, 1957-NMSC-091, 63 N.M. 277, 317 P.2d 324.

Sentencing discretion not abused. — Where defendant pled guilty to contributing to delinquency of a minor, two counts of attempted rape being thereafter dismissed, it could not be said as a matter of law that the trial court abused its discretion by not

adopting report of psychiatrist recommending probation or in not requesting diagnosis and recommendation from the department of corrections (now the criminal justice department) pursuant to Section 31-20-3 NMSA 1978. *State v. Hogan*, 1972-NMCA-037, 83 N.M. 608, 495 P.2d 388.

Availability of psychiatric help in penitentiary. — Where defendant convicted of contributing to delinquency of a minor asked court of appeals to take judicial notice that no psychiatric or psychological help was available for him at the penitentiary, but cited neither source nor reference for such a proposition and court found none in its search, assertion was not a matter for judicial notice. *State v. Hogan*, 1972-NMCA-037, 83 N.M. 608, 495 P.2d 388.

Conviction allowed to stand. — Since appellate court could only speculate as to why the jury acquitted defendant of assault, that acquittal, even though irreconcilable with conviction for contributing to delinquency of a minor by indecently touching his private parts, did not require the conviction to be set aside as a matter of law. *State v. Leyba*, 1969-NMCA-030, 80 N.M. 190, 453 P.2d 211, cert. denied, 80 N.M. 198, 453 P.2d 219.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children § 128 et seq.

Acts in connection with marriage of infant below marriageable age as contributing to delinquency, 68 A.L.R.2d 745.

Applicability of statute against contributing to the delinquency of children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Criminal liability for contributing to delinquency of minor by sexually immoral acts as affected by fact that minor was married at time of acts charged, 84 A.L.R.2d 1254.

Criminal liability for contributing to delinquency of minor as affected by the fact that minor has not become a delinquent, 18 A.L.R.3d 824.

Mens rea or guilty intent as necessary element of offense of contributing to delinquency or dependency of minor, 31 A.L.R.3d 848.

Drugs: giving, selling or prescribing, dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

43 C.J.S. Infants § 95.

30-6-4. Obstruction of reporting or investigation of child abuse or neglect.

Obstruction of reporting or investigation of child abuse or neglect consists of:

A. knowingly inhibiting, preventing, obstructing or intimidating another from reporting, pursuant to Section 32A-4-3 NMSA 1978, child abuse or neglect, including child sexual abuse; or

B. knowingly obstructing, delaying, interfering with or denying access to a law enforcement officer or child protective services social worker in the investigation of a report of child abuse or sexual abuse.

Whoever commits obstruction of reporting or investigation of child abuse or neglect is guilty of a misdemeanor.

History: Laws 1989, ch. 287, § 1; 2014, ch. 10, § 1.

ANNOTATIONS

The 2014 amendment, effective May 21, 2014, corrected an outdated reference in the NMSA 1978; and in Subsection A, after "Section", changed "32-1-15" to "32A-4-3".

ARTICLE 6A
Sexual Exploitation of Children

30-6A-1. Short title.

Chapter 30, Article 6A NMSA 1978 may be cited as the "Sexual Exploitation of Children Act".

History: Laws 1984, ch. 92, § 1; 2015, ch. 13, § 1.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, changed the statutory reference of the Sexual Exploitation of Children Act from "Sections 1 through 4 of this act" to "Chapter 30, Article 6A NMSA 1978".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of 18 USCS §§ 371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography, 86 A.L.R. Fed. 359.

30-6A-2. Definitions.

As used in the Sexual Exploitation of Children Act:

A. "prohibited sexual act" means:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadomasochistic abuse for the purpose of sexual stimulation; or

(5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation;

B. "visual or print medium" means:

(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or

(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery;

C. "performed publicly" means performed in a place that is open to or used by the public;

D. "manufacture" means the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age; and

E. "obscene" means any material, when the content if taken as a whole:

(1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;

(2) portrays a prohibited sexual act in a patently offensive way; and

(3) lacks serious literary, artistic, political or scientific value.

History: Laws 1984, ch. 92, § 2; 1993, ch. 116, § 1; 2001, ch. 2, § 1.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, added Subsection E.

The 1993 amendment, effective June 18, 1993, in Subsection A(5), substituted "lewd and sexually explicit exhibition with a focus on" for "lewd exhibition of"; in Subsection B(1), substituted "computer diskette, videotape, videodisc or any computer or electronically generated imagery" for "videotape or videodisk"; in Subsection B(2), substituted "computer diskette, videotape, videodisc or any computer generated or electronically generated imagery" for "videotape or videodisk"; and in Subsection D, deleted "for pecuniary profit" following "repackaging" and substituted "eighteen" for "sixteen".

Manufacture of prohibited images. — The copying of digital pornographic images to a portable storage device creates a new digital copy of the prohibited image sufficient to constitute manufacturing. *State v. Smith*, 2009-NMCA-028, 145 N.M. 757, 204 P.3d 1267, cert. quashed, 2009-NMCERT-012, 147 N.M. 601, 227 P.3d 91.

"Lewdness" – factors considered. – Factors used to help determine whether a photograph involving a child is lewd include consideration of whether: (1) the focus is on the genital or pubic area; (2) the setting is sexually suggestive; (3) the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) the child is fully or partially clothed; (5) the depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) the depiction is designed to elicit a sexual response in the viewer. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

"Sexually explicit exhibition". – A "lewd and sexually explicit exhibition" means a visible display or readily discernable depiction of a child engaged in sexually provocative conduct; thus, to qualify, a photograph must be identifiable as hard-core child pornography, that is, it must display visible signs of sexual eroticism, rather than merely depict a naked child. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

"Focus on the genitals or pubic area". – Focus can be determined by photographic elements, such as design, composition, lighting, positioning, attire, and setting; in some instances the question of whether a photo focuses on the genitals or pubic area is apparent on the face of the photo and therefore can be dealt with as an undisputed fact – the photo either focuses on the area or it does not. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

"For the purpose of sexual stimulation". – Under an objective standard, the central question is whether, based on the overall content of a photograph, a reasonable person could find the photograph was intended to elicit a sexual response; it is not a defendant's private reaction that transforms an innocent photo into a lewd exhibition, but rather the objectively ascertainable intended effect on the viewer. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Under an objective intent analysis, child pornography is not created and the Sexual Exploitation of Children Act is not violated simply because a person derives sexual enjoyment from otherwise innocent photographs; rather, the focus is on the harm to the child that flows from trespasses against the child's dignity when treated as a sexual object. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

"Patently offensive" – community tolerance standard adopted. — Contemporary community standards should be judged by whether the average person or community would be tolerant of the materials in the possession of another, even though most members of the community might themselves be offended; community tolerance thus determines whether the material is patently offensive. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668, *overruled in part*, *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105; *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

30-6A-3. Sexual exploitation of children.

A. It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a fourth degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978. When a separate finding of fact made by a court or jury shows beyond a reasonable doubt that a child depicted in the visual or print medium is a child under the age of thirteen, the basic sentence shall be increased by one year, and the sentence imposed by this subsection shall be the first year served and shall not be suspended or deferred; provided that when the offender is a youthful offender, the sentence imposed by this subsection may be increased by one year.

B. The provisions of Subsection A of this section shall not apply to a depiction possessed by a child under the age of eighteen in which the depicted child is between the ages of fourteen and eighteen and the depicted child knowingly and voluntarily consented to the possession, and:

(1) the depicted child knowingly and voluntarily consented to the creation of the depiction; or

(2) the depicted child knowingly and voluntarily produced the depiction without coercion.

This subsection shall not prohibit prosecution nor create an immunity from prosecution for the possession of depictions that are the result of coercion.

C. It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a third degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly. A person who violates the provisions of this subsection is guilty of a third degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978 unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a second degree felony for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. A person who violates the provisions of this subsection is guilty of a fourth degree felony.

G. It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts a prohibited sexual act

or simulation of such an act and if that person knows or has reason to know that a real child under eighteen years of age, who is not a participant, is depicted as a participant in that act. A person who violates the provisions of this subsection is guilty of a third degree felony.

H. The penalties provided for in this section shall be in addition to those set out in Section 30-9-11 NMSA 1978.

History: Laws 1984, ch. 92, § 3; 1989, ch. 170, § 1; 1993, ch. 116, § 2; 2001, ch. 2, § 2; 2007, ch. 144, § 1; 2016, ch. 2, § 1.

ANNOTATIONS

Cross references. — For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

The 2016 amendment, effective February 25, 2016, increased the penalties for sexual exploitation of children offenses and exempted certain behavior from the offense of possession of prohibited material where the person possessing the material is a minor and the person depicted in the material is a minor between the ages of fourteen and eighteen and consented to the creation, production and possession of the material; in Subsection A, after "fourth degree felony", added the remainder of the subsection; added a new Subsection B and redesignated the succeeding subsections accordingly; in Subsection C, after "third degree felony", added the remainder of the subsection; in Subsection D, after "third degree felony", added "for sexual exploitation of children and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978", and after "second degree felony", added the remainder of the subsection; and in Subsection E, after "second degree felony", added the remainder of the subsection.

The 2007 amendment, effective July 1, 2007, added Subsections E and F and relettered former Subsection E as Subsection G.

The 2001 amendment, effective July 1, 2001, added Subsection A and renumbered the remaining subsections accordingly; in Subsection B, deleted "or posess with intent to distribute" following "intentionally distribute," and inserted "obscene" preceding "medium depicts"; throughout the section, inserted "obscene" preceding "visual or print medium"; and made stylistic changes.

The 1993 amendment, effective June 18, 1993, inserted "that person knows or has reason to know that" in the first sentence of Subsection A; and substituted "eighteen" for "sixteen" in the first sentence of Subsections A, B, and C.

The 1989 amendment, effective June 16, 1989, in Subsection A deleted "for pecuniary profit" following "possess with intent to distribute" in the first sentence, and substituted "third" for "fourth" in the second sentence; in Subsection B substituted "third" for "fourth" near the beginning of the second sentence and "second" for "third" near the end of that

sentence; deleted former Subsection C, which read: "It is unlawful for any person to intentionally cause or permit a child under sixteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows or intends that the act be recorded in any visual or print medium made for the purpose of sale or other pecuniary profit. Any person who violates this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony"; redesignated former Subsection D as present Subsection C, while substituting "second" for "third" in the second sentence therein; and added present Subsection D.

Vagueness. — This section is not vague nor is the decision of Myers II, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105 an unforeseeable interpretation of the statute. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

Constitutional challenge to sexual exploitation of children statute. — Where defendant was charged with two counts of manufacturing child pornography and one count of possession of child pornography, and where defendant claimed that, contrary to constitutional guarantees of equal protection and substantive due process, there is no rational basis for punishing him with second-degree manufacturing and fourth-degree possession for recording a sex act to which the minor participant legally consented, defendant's constitutional challenge was denied because defendant failed to address how this section treated differently groups that were similarly situated. *State v. Gwynne*, 2018-NMCA-033, cert. denied.

Elements of the crime of sexual exploitation of children by manufacture. — Although the plain language of this section does not provide any scienter requirement for the crime of sexual exploitation of children by manufacture, the crime of sexual exploitation of children by manufacture, like the crimes of sexual exploitation of children by possession and distribution, requires the state to prove scienter with respect to the content of the manufactured visual or print medium. The state must prove the defendant intentionally manufactured a visual or print medium, the medium depicts a prohibited sexual act or simulation of such an act, the defendant knew or had reason to know that the medium depicts a prohibited sexual act or simulation of such act, the defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age, and the depictions are obscene. *State v. Rael*, 2021-NMCA-040, cert. granted.

Insufficient evidence to support defendant's conviction for possessing, distributing, and manufacturing sexual exploitation of children material. — Where defendant was convicted of one count of sexual exploitation of children by possession, one count of sexual exploitation of children by distribution, and three counts of sexual exploitation of children by manufacture, there was insufficient evidence to support defendant's convictions where the state failed to prove beyond a reasonable doubt that defendant knew or had reason to know that the videos supporting his convictions contained sexual exploitation of children material. *State v. Rael*, 2021-NMCA-040, cert. granted.

Sufficient evidence of manufacturing and possession of child pornography. — Where defendant was charged with two counts of manufacturing child pornography and one count of possession of child pornography, there was sufficient evidence to support defendant's convictions for both manufacturing and possession of child pornography where the state presented evidence that defendant video-recorded himself and a sixteen-year-old girl engaging in sexual intercourse on two separate occasions and evidence that law enforcement seized from defendant's home a collection of child pornography separate and distinct from the videos of defendant and the minor. *State v. Gwynne*, 2018-NMCA-033, cert. denied.

Lewdness standard. — The state must apply both an objective standard for lewdness and a subjective standard for the statutory element of "for the purpose of sexual stimulation." No accused can be convicted under the Act merely for his own misguided subjective intent; the images must first satisfy the objective criteria for lewdness. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

Retroactive application of interpretation. — The supreme court’s opinion in *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105 was not an unforeseeable judicial enlargement of the Sexual Exploitation of Children Act such that defendant could not fairly have foreseen that defendant’s conduct would be "lewd" within the meaning of the Act, the opinion applied retroactively to defendant’s conduct, and the retroactive application of the opinion to defendant’s conduct did not violate due process. *State v. Myers*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13, *rev'g* 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673.

Retroactive application of statutory interpretation. — Where, in 2004, defendant set up a video camera in a unisex bathroom adjacent to defendant’s office for the purpose of recording females while they used the restroom; two of the females were minors at the time of recording; in 2004, the judicial interpretation of Subsection D of Section 30-6A-3 NMSA 1978 required the state to prove that the photographs were hard-core child pornography and applied an objective standard to determine whether defendant intended to manufacture the photographs for purposes of sexual stimulation; and in 2007, the New Mexico supreme court changed the statutory interpretation to require the state to prove that the photographs were child pornography, which the fact finder determines to be obscene, and applied a subjective standard to determine whether defendant manufactured the photographs for purposes of sexual stimulation, Subsection D of Section 30-6A-3 NMSA 1978, as interpreted by the New Mexico supreme court, was unconstitutionally vague as applied to defendant’s conduct, because the New Mexico supreme court’s interpretation of the statute was unforeseeable. *State v. Myers*, 2010-NMCA-007, 147 N.M. 574, 226 P.3d 673, cert. granted, 2010-NMCERT-001, *rev'd*, 2011-NMSC-028, 150 N.M. 1, 256 P.3d 13.

Manufacture of prohibited images. — Where the defendant transferred pornographic images of children and infants from a computer to an external drive, the defendant manufactured the images. *State v. Smith*, 2009-NMCA-028, 145 N.M. 757, 204 P.3d 1267, cert. quashed, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

Lewd photographs. — Where the defendant covertly videotaped minor female victims using the bathroom; the photographs depicted the victims unclothed from the waist down; the victim's pubic area was the focal point of the photographs; the victims appeared to be unaware that they were being photographed; and the photographs placed the viewer in the position of a voyeur, the photographs were lewd because they had a voyeuristic and deviant quality that rendered them sexual in nature. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, *rev'g in part State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

Subjective standard adopted to determine intent. — The court rejected the objective standard, which views challenged material from the perspective of an ordinary reasonable person, and adopted the subjective standard, which examines the criminal defendant's actual intent in distributing, possessing, or manufacturing images, as the proper standard by which to assess whether challenged material is manufactured for the purpose of sexual stimulation. In determining the defendant's intent, the trier of fact is not limited to the photographs but, rather, is permitted to consider extrinsic evidence of the defendant's intent, such as the circumstances under which the photographs were taken, the location where the photographs were found, and the presence or absence of other pornographic material. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, *rev'g in part State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

Obscene photographs. — Where the defendant covertly videotaped minor female victims using the bathroom and the photographs depicted the victims unclothed from the waist down; the photographs of the victims depicted a lewd and sexually explicit exhibition with a focus on the pubic area of the victims for the defendant's own sexual gratification, the photographs were obscene because they constituted child pornography. *State v. Myers*, 2009-NMSC-016, 146 N.M. 128, 207 P.3d 1105, *rev'g in part State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554.

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

Sufficient evidence of possession of child pornography. — Where the state presented evidence that there were more than nine hundred downloads of suspected child pornography in a year to the IP address used by defendant's computer, most of which were determined to be images of child pornography, and where one investigator used peer-to-peer software to retrieve five images of child pornography from the shared folder of a single computer at the same IP address, and where officers executing a search of defendant's home discovered an external hard drive for defendant's computer

on which investigators were able to retrieve fifty-two images of child pornography that had been deleted, a rational jury could reasonably infer that defendant had knowingly obtained, manipulated, stored, and shared the child pornography using his computer, and there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant intentionally possessed child pornography. *State v. Adamo*, 2018-NMCA-013, cert. denied.

Mens rea for intentional distribution of child pornography. — General criminal intent, purposely doing an act which the law declares to be a crime, is sufficient to convict for intentional distribution of child pornography. *State v. Franco*, 2019-NMCA-057, cert. denied.

Mens rea for intentional possession of child pornography and intentional manufacture of child pornography. — General criminal intent, purposely doing an act which the law declares to be a crime, is the mens rea for intentional possession of child pornography and intentional manufacture of child pornography. *State v. Knight*, 2019-NMCA-060, cert. denied.

Substantial evidence supported defendant's convictions for intentional distribution of child pornography. — Where defendant was charged with eight counts of distribution of child pornography, and where, at trial, the state presented evidence that defendant downloaded a peer-to-peer, file-sharing network and acknowledged he was familiar with file-sharing networks, that for over five years defendant used such networks to access child pornography, that defendant used a network that required sharing in order to continue accessing files, that defendant kept files containing child pornography in his shared folder which were accessible to others on the network, and that defendant admitted that he was sharing, but denied that he was distributing child pornography, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed distribution of child pornography with the requisite intent. *State v. Franco*, 2019-NMCA-057, cert. denied.

Defendant's multiple convictions for distribution of child pornography violated double jeopardy. — Where defendant was convicted of eight counts of distribution of child pornography based on evidence that defendant downloaded a peer-to-peer, file-sharing network and acknowledged he was familiar with file-sharing networks, that for over five years defendant used such networks to access child pornography, that defendant used a network that required sharing in order to continue accessing files, that defendant kept files containing child pornography in his shared folder, which were accessible to others on the network, defendant's multiple convictions for distribution of child pornography violated double jeopardy, because defendant's conduct in using the file-sharing network did not constitute separate acts of sufficient distinctness to warrant multiple units of prosecution for distribution of child pornography. *State v. Franco*, 2019-NMCA-057, cert. denied.

Defendant's multiple convictions for intentional possession of child pornography violated double jeopardy. — Where defendant was convicted of four counts of

possession of child pornography, defendant could only be convicted of one count of possession of child pornography, because the unit of prosecution was ambiguous. *State v. Knight*, 2019-NMCA-060, cert. denied.

Defendant's multiple convictions for manufacture of child pornography did not violate double jeopardy. — Where defendant was convicted of ten counts of manufacture of child pornography, and where evidence showed that law enforcement officers found a computer in defendant's bedroom that contained ten separate videos containing child pornography, that the videos were contained on five different pieces of media; three videos on one DVD, one video on a second DVD, two videos on a third DVD, one video on a fourth DVD, and three videos on an external hard drive, double jeopardy did not require the counts to be merged, because each photograph the defendant copied of the child victims was a distinct violation of the statute. The unit of prosecution for the charges at issue is each copy of an electronic video file, no matter whether each file is copied individually or whether multiple files are copied in a batch. *State v. Knight*, 2019-NMCA-060, cert. denied.

Substantial evidence supported defendant's convictions for intentional possession of child pornography. — Where defendant was convicted of four counts of possession of child pornography, and where, at trial, the state presented evidence that when defendant's home was searched, law enforcement officers found a computer in his bedroom that contained four specific videos containing child pornography and that each of the file names identified contained the same child pornography search terms that defendant admitted to being familiar with, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed possession of child pornography with the requisite intent. *State v. Knight*, 2019-NMCA-060, cert. denied.

Substantial evidence supported defendant's convictions for intentional manufacture of child pornography. — Where defendant was convicted of ten counts of manufacture of child pornography, and where, at trial, the state presented evidence that when defendant's home was searched, law enforcement officers found a computer in his bedroom that contained ten separate videos containing child pornography, that the videos were contained on five different pieces of media; three videos on one DVD, one video on a second DVD, two videos on a third DVD, one video on a fourth DVD, and three videos on an external hard drive, and that each of the videos identified contained the same child pornography search terms that defendant admitted to being familiar with, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed manufacture of child pornography with the requisite intent. *State v. Knight*, 2019-NMCA-060, cert. denied.

Jury instruction on possession of child pornography did not result in fundamental error. — In defendant’s trial for possession of child pornography, where the jury was instructed that it had to find that defendant had any obscene visual medium in his possession, was given an instruction on “possession” that conformed with UJI 14-130 NMRA, which requires the jury to find that defendant knew he had pornographic computer images, that he knew they were on his person or in his presence, and that he

exercised control over them, and where the jury was instructed that it was required to find that defendant acted intentionally and that a person acts intentionally when he purposely does an act which the law declares to be a crime, there was no fundamental error in the jury instructions because the instructions fairly and correctly stated the applicable law and would not cause jury confusion or misdirection. *State v. Adamo*, 2018-NMCA-013, cert. denied.

Scienter requirement in jury instructions. — The scienter requirement in 30-6A-3(A) NMSA 1978, that a person “knows or has reason to know” that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient, and therefore fundamental error did not occur because there was no basis to conclude that the jury was misled or confused by the instructions they received. *State v. Adamo*, 2018-NMCA-013, cert. denied.

Failure to satisfy statutory elements. — Where the defendant hid a video camera in a women's bathroom; the state relied on photographs taken from the videotape as demonstrative of what was on the videotapes; and the photographs showed the victims’ pubic hair, the victims pulling up or pulling down their underwear, but did not show any external female genitalia, the photographs were not lewd, sexually explicit or inherently sexually suggestive and did not depict a prohibited sexual act and did not satisfy the statutory elements of the offense. *State v. Myers*, 2008-NMCA-047, 143 N.M. 710, 181 P.3d 702, *rev'd*, 2009-NMCA-016, 146 N.M. 128, 207 P.3d 1105.

Unit of prosecution is not defined. — The plain meaning of the language of Section 30-6A-3(A) NMSA 1978 as to the proper unit of prosecution is ambiguous and the history and purpose of the statute do not clarify the ambiguity. *State v. Olsson*, 2014-NMSC-012, *rev'g* 2008-NMCA-009, 143 N.M. 351,176 P.3d 340 and *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976.

***Herron* factors are not applicable in possession cases.** — The factor analysis in *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624, to determine whether offenses are distinct is specifically tailored to a case where a defendant has direct contact with a victim and is not applicable in possession cases. The indicia of distinctness factors do not determine the unit of prosecution in possession of child pornography cases. *State v. Olsson*, 2014-NMSC-012, *rev'g* 2008-NMCA-009, 143 N.M. 351,176 P.3d 340 and *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976.

Rule of lenity applied. — Where *Olsson* was charged with sixty counts of possession of child pornography based on photographs of minors found in three binders and three digital computer images; *Ballard* was charged with twenty-five counts of possession of child pornography based on twenty-five files that had been downloaded on five separate occasions and that consisted of eight files of video clips and seventeen files of still images; the statutory language of Section 30-6A-3(A) NMSA 1978 is ambiguous as to the unit of prosecution; and the factor analysis established in *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624, to determine whether offenses are distinct is not applicable in possession cases, the rule of lenity applied and *Olsson* and *Ballard*

could each only be charged with one count of possession of child pornography. *State v. Olsson*, 2014-NMSC-012, *rev'g* 2008-NMCA-009, 143 N.M. 351,176 P.3d 340 and *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976.

Unit of prosecution. — The unit of prosecution for Subsection D of Section 30-6A-3 NMSA 1978 is the production or copying of a single image of child pornography. *State v. Leeson*, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Where defendant's computer contained many pornographic images of children; the state charged defendant with twenty counts of sexual exploitation of children in violation of Subsection D of Section 30-6A-3 NMSA 1978; and defendant moved to have the twenty counts merged into one count on the ground that the multiple counts violated double jeopardy, each image of child pornography was a separate offense and double jeopardy did not require the counts to be merged. *State v. Leeson*, 2011-NMCA-068, 149 N.M. 823, 255 P.3d 401, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Section 30-6A-3 NMSA 1978 does not clearly define the unit of prosecution for the sexual exploitation of children based on the possession of binders containing obscene photographs. *State v. Olsson*, 2008-NMCA-009, 143 N.M. 351, 176 P.3d 340, *rev'd*, 2014-NMSC-012.

Unit of prosecution for possession of computer child pornography. — The principal unit-of-prosecution focus in cases under Section 30-6A-3 NMSA 1978 is on the definition of "visual or print medium". Multiple images or victims depicted in the possessed medium cannot, under the definition of "visual or print medium" in Section 30-6A-2 NMSA 1978, be identified as the principal or sole distinguishing or distinctiveness factor in determining what constitutes "obscene visual or print medium" under Section 3-6A-3(A) NMSA 1978. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd*, *State v. Olsson*, 2014-NMSC-012.

Where defendant's computer contained twenty-five files, consisting of twenty-five separate images of child pornography that defendant had downloaded on five occasions, and defendant was convicted of twenty-five counts of sexual exploitation of children for possession of the illicit images, defendant was erroneously charged with and convicted on twenty-five counts because defendant's chargeable unlawful possession under Section 30-6A-3(B)(2) NMSA 1978 consisted of five separate and distinct downloads. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd*, *State v. Olsson*, 2014-NMSC-012.

Unit of prosecution for distribution of computer child pornography. — Where defendant possessed child pornography images in a shared file accessible on peer-to-peer software that third parties could download, defendant's acts did not have sufficient distinctness to justify multiple punishments, and defendant could only be charged with one count of distribution of child pornography, because his act of creating one distinct

computer file containing multiple images of child pornography were not shown to be distinct with regard to any images placed in the shared file, no multiplicity of separate actions was alleged to have occurred, and no evidence was presented to establish that defendant personally sent any image to a third party. *State v. Sena*, 2016-NMCA-062, cert. granted.

Corpus delicti of computer child pornography. — Where defendant's computer hard drive contained twenty-five files consisting of twenty-five separate images of child pornography; the hard drive was not introduced into evidence; a copy of the hard drive burned on DVD discs was introduced into evidence; the state's expert, who did not create the DVDs, identified defendant's computer and hard drive from photographs the expert took and testified that the expert made a bit-for-bit copy of the hard drive, analyzed the copy and found child pornography on the hard drive; and the expert identified each file that was shown on the DVD and testified as to the name of the file when it was downloaded onto the hard drive, and that the images contained on the DVDs were the same images that the expert saw on the bit-for-bit copy of the hard drive, the trial court did not err in denying defendant's motion to dismiss for lack of corpus delicti. *State v. Ballard*, 2012-NMCA-043, 276 P.3d 976, *rev'd*, *State v. Olsson*, 2014-NMSC-012.

Search warrant based on information provided by internet providers was supported by probable cause. — Where defendant was charged with one count of possession of child pornography following two independent reports from two internet providers to the national center for missing and exploited children (NCMEC) that a user had posted child pornography onto their internet platforms, and where defendant filed a motion to suppress evidence recovered during a search of his house, arguing that the affidavit supporting the search warrant was insufficient to establish probable cause because it failed to contain either adequate descriptions of the images that purportedly constituted child pornography or independent verification that such images violated New Mexico's child pornography statute, the district court erred in granting defendant's motion to suppress, because the search warrant was supported by probable where the two internet providers functioned as credible hearsay sources akin to identified citizen informants and who, by first-hand knowledge, gathered their reported information regarding the transmission or receipt of child pornography in a reliable fashion, given federal requirements compelling their respective reporting to NCMEC, and where the affidavit supporting the request for a search warrant provided reasonable grounds for the issuing court to conclude that a search of defendant's home would uncover evidence of wrongdoing, stating that an identified user posted six images that contained explicit images of children in sexual acts or positions. The description of "sexual acts" was sufficiently detailed to be identifiable as depicting child pornography under either the New Mexico or federal definition of child pornography. *State v. Henz*, 2022-NMCA-031, cert. granted.

Defendant was over the age of eighteen when charged with possession of child pornography, and therefore the district court had jurisdiction over the case. — Where defendant was charged with one count of possession of child pornography

following two independent reports from two internet providers to the national center for missing and exploited children (NCMEC) that a user had posted child pornography onto their internet platforms, and where defendant argued that the children's court had exclusive jurisdiction over the case because the possession of child pornography began when defendant was a minor, the district court had jurisdiction over the case because, although defendant was seventeen years old when the internet providers reported information to the NCMEC that a user was posting child pornography on their platforms, defendant was eighteen years old when the search warrant was executed and when defendant was charged by criminal information with possession of child pornography. Defendant was undisputedly over the age of eighteen when he was found to be in possession of illegal images and charged accordingly. *State v. Henz*, 2022-NMCA-031 cert. granted.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of statutes regulating sexual performance by child, 42 A.L.R.5th 291.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Construction and application of United States Sentencing guideline § 2G2.1 et seq., pertaining to child pornography, 145 A.L.R. Fed. 481.

30-6A-4. Sexual exploitation of children by prostitution.

A. Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony.

B. Any person knowingly hiring or offering to hire a child under the age of sixteen to engage in any prohibited sexual act is guilty of a second degree felony.

C. Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium depicting such an act is guilty of a third degree felony.

History: Laws 1984, ch. 92, § 4; 1989, ch. 170, § 2; 2015, ch. 13, § 2.

ANNOTATIONS

Cross references. — For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

For abandonment or abuse of child, *see* 30-6-1 NMSA 1978.

For enticement of child, *see* 30-9-1 NMSA 1978.

For criminal sexual contact of a minor, *see* 30-9-13 NMSA 1978.

For sentencing for noncapital felonies, *see* 31-18-15 NMSA 1978.

The 2015 amendment, effective July 1, 2015, amended the Sexual Exploitation of Children Act by revising the age limitation so that knowingly hiring or offering to hire a child under the age of sixteen to engage in any prohibited sexual act is a second degree felony; deleted former Subsection B, which made it a second degree felony to hire or offer to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act; and added new Subsection B making it a second degree felony to knowingly hire or offer to hire a child under the age of sixteen to engage in any prohibited sexual act.

The 1989 amendment, effective June 16, 1989, in Subsection A inserted "knowingly" near the beginning of the subsection, and substituted "second" for "third" near the middle of the subsection and "first" for "second" near the end of the subsection; substituted "second" for "third" near the end of Subsection B; and substituted "third" for "fourth" near the end of Subsection C.

ARTICLE 7
Weapons and Explosives

30-7-1. "Carrying a deadly weapon".

"Carrying a deadly weapon" means being armed with a deadly weapon by having it on the person, or in close proximity thereto, so that the weapon is readily accessible for use.

History: 1953 Comp., § 40A-7-1, enacted by Laws 1963, ch. 303, § 7-1.

ANNOTATIONS

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For possession of deadly weapon or explosive by prisoner, *see* 30-22-16 NMSA 1978.

Scope and factual determinations to be made by jury. — "Carrying" does not a have a broader meaning in connection with the crime of carrying a weapon on school

grounds than the general definition set forth in this section, and whether the defendant was carrying a weapon was a factual matter to be determined by the jury. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

Loaded revolver was a deadly weapon. *Territory v. Watson*, 1904-NMSC-030, 12 N.M. 419, 78 P. 504.

Deadliness a jury question. — Where instrument used in assault was not per se a deadly weapon under Laws 1887, ch. 30, whether it was so was ordinarily a question for jury to determine, considering its character and manner of use. *State v. Conwell*, 1932-NMSC-042, 36 N.M. 253, 13 P.2d 554.

Readily accessible. — Evidence that a loaded gun was located in the trunk of the defendant's car where he could easily get at it was sufficient to show that it was readily accessible, and the evidence was thus sufficient to establish that the weapon was carried onto school premises in violation of 30-7-2.1 NMSA 1978. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

Character of weapon used went only to aggravation of offense. *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117; *Chacon v. Territory*, 1893-NMSC-024, 7 N.M. 241, 34 P. 448 (decided under prior law).

Omission in indictment to describe kind of knife was fatal, as it was necessary to charge that the knife was one "with which dangerous cuts could be given, or with which dangerous thrusts can be inflicted." *Territory v. Armijo*, 1894-NMSC-011, 7 N.M. 571, 37 P. 1117 (decided under prior law).

Instructions. — It is not error for the court in instructing the jury to define a deadly weapon in the terms of the statute. *State v. Dickens*, 1917-NMSC-041, 23 N.M. 26, 165 P. 850.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms §§ 7 to 19.

Firearm used as a bludgeon as a deadly weapon, 8 A.L.R. 1319.

Gun control laws, validity and construction of, 28 A.L.R.3d 845.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 931.

94 C.J.S. Weapons §§ 3 to 23.

30-7-2. Unlawful carrying of a deadly weapon.

A. Unlawful carrying of a deadly weapon consists of carrying a concealed loaded firearm or any other type of deadly weapon anywhere, except in the following cases:

(1) in the person's residence or on real property belonging to him as owner, lessee, tenant or licensee;

(2) in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property;

(3) by a peace officer in accordance with the policies of his law enforcement agency who is certified pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978];

(4) by a peace officer in accordance with the policies of his law enforcement agency who is employed on a temporary basis by that agency and who has successfully completed a course of firearms instruction prescribed by the New Mexico law enforcement academy or provided by a certified firearms instructor who is employed on a permanent basis by a law enforcement agency; or

(5) by a person in possession of a valid concealed handgun license issued to him by the department of public safety pursuant to the provisions of the Concealed Handgun Carry Act [Chapter 29, Article 19 NMSA 1978].

B. Nothing in this section shall be construed to prevent the carrying of any unloaded firearm.

C. Whoever commits unlawful carrying of a deadly weapon is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-2, enacted by Laws 1963, ch. 303, § 7-2; 1975, ch. 134, § 1; 1985, ch. 174, § 1; 2001, ch. 219, § 13.

ANNOTATIONS

Cross references. — For right of people to bear nonconcealed arms, *see* N.M. Const., art. II, § 6.

For the department of public safety, *see* 9-19-4 NMSA 1978.

For right of sheriffs to carry concealed arms, *see* 4-41-10, 4-41-10.1 NMSA 1978.

For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

The 2001 amendment, effective July 1, 2001, inserted Paragraph A(5).

The 1985 amendment substituted "in accordance with the policies of his law enforcement agency who is certified pursuant to the Law Enforcement Training Act; or" for "in the lawful discharge of his duties" in Subsection A(3) and added Subsection A(4).

Pocketknife. — An ordinary pocketknife is not a per se deadly weapon, without regard to its actual or intended use. *State v. Nick R.*, 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868.

Intended use of weapon. — Where the child worked in the child's father's furniture store; the father supplied all employees with pocketknives for opening boxes at work; one day at school, the child felt something in the child's pocket and pulled it out to look at it; and the object was a pocketknife the child had been using at work the day before when the child had been wearing the same pair of pants, the child was entitled to a jury determination of whether the child intended to carry the pocketknife as a deadly weapon. *State v. Nick R*., 2009-NMSC-050, 147 N.M. 182, 218 P.3d 868.

Constitutionality. — This section does not violate equal protection on the basis that it impermissibly distinguishes between rich and poor, in that homeowners and vehicle owners may properly conceal weapons whereas poor people do not own a residence or vehicle in which to conceal a weapon. *State v. McDuffie*, 1987-NMCA-077, 106 N.M. 120, 739 P.2d 989.

Legislative intent of Subsection A(2) — The legislature, in enacting Subsection A(2) of this section, was aware of the inherent characteristics of firearms, but nevertheless concluded that lawfully carried firearms do not present an unreasonable risk of harm to persons in the vicinity of the firearm. *State v. Garcia*, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41, cert. granted, 135 N.M. 566, 92 P.3d 12, *rev'd on other grounds*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72.

When object "deadly weapon". — Under this section, any object, even if manufactured for an innocent, nonviolent purpose, may be a deadly weapon, if it has a potential violent use and if, under the surrounding circumstances, the purpose of carrying the object was for use as a weapon. *State v. Blea*, 1983-NMCA-089, 100 N.M. 237, 668 P.2d 1114.

Peace officers. — None of the officers named in Laws 1891, ch. 63, § 3 (former 40-17-9, 1953 Comp.), providing when peace officers might carry weapons, had any more right to carry weapons than a private citizen, except when the same was done in the proper and necessary discharge of official duties. *Guyse v. Territory*, 1893-NMSC-022, 7 N.M. 228, 34 P. 295 (decided under prior law).

Carrying arms while traveling. — The word "travelers" in Laws 1887, ch. 30, § 9 (former 40-17-8, 1953 Comp.), providing that arms might be carried while traveling, did not include a ranch owner who made daily trips of less than ten miles to his ranch; nor could it have included one who had reached his objective before the homicide. *State v. Sedillo*, 1918-NMSC-105, 24 N.M. 549, 174 P. 985 (decided under prior law).

Fugitive from justice was not a "person traveling" under Laws 1887, ch. 30, § 9 (former 40-17-8, 1953 Comp.), and was therefore not permitted to carry arms. *State v. Starr*, 1917-NMSC-092, 24 N.M. 180, 173 P. 674, writ of error dismissed, 254 U.S. 611, 41 S. Ct. 61, 65 L. Ed. 437 (1920) (decided under prior law).

Statute inapplicable to murder case. — Statute pertaining to carrying weapon upon one's "landed estate" had no bearing in a murder case where accused pleaded self-defense, and testimony thereunder was properly excluded. *State v. Martinez*, 1929-NMSC-040, 34 N.M. 112, 278 P. 210.

Exception added by Concealed Handgun Act. — Under this section, the Concealed Handgun Carry Act does no more than add another exception to the general prohibition against carrying concealed weapons: carrying with a concealed handgun license. *State ex rel. New Mexico Voices for Children, Inc. v. Denko*, 2004-NMSC-011, 135 N.M. 439, 90 P.3d 458.

Instruction properly refused in burglary case. — Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and the trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754, and denial of post-conviction relief affirmed, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Evidence of crime. — Evidence tending to establish that defendant was armed with a loaded .38 caliber pistol concealed on his person was evidence tending to establish crime hereunder. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754, and denial of post-conviction relief affirmed, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Probable cause to arrest. — Sight of pistol in defendant's pocket gave arresting officer all the probable cause needed to make an arrest, regardless of whether the weapon later was found to be unloaded. *Ramirez v. Rodriguez*, 467 F.2d 822 (10th Cir. 1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1518, 36 L. Ed. 2d 185 (1973).

There was probable cause to arrest the defendant for carrying a concealed weapon, where his belligerent behavior had led to a police officer's request to step out of his car and the officer was justified in performing a patdown search after seeing another weapon fall out of the vehicle when defendant opened the door. *United States v.*

Henning, 906 F.2d 1392 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S. Ct. 789, 112 L. Ed. 2d 852 (1991).

Reasonable grounds of belief. — Where officer was told that man who assaulted deceased had gone into building where he subsequently found defendant wearing a coat which appeared to have bloodstains on the right sleeve, and he saw butt of a pistol protruding from defendant's pants pocket which had been concealed until the coat was opened, under the circumstances the officer had reasonable grounds to believe that defendant was unlawfully carrying a deadly weapon. *State v. Ramirez*, 1968-NMSC-148, 79 N.M. 475, 444 P.2d 986.

Tort liability of parents. — Absent knowledge on part of parent that child of 13 years was indiscreet or reckless in handling of firearms, mere keeping of a loaded gun on premises, and leaving the child there alone, did not make the parent liable for torts committed by the minor. *Lopez v. Chewiwie*, 1947-NMSC-061, 51 N.M. 421, 186 P.2d 512.

No duty on "Saturday night special" manufacturers not to sell. — In the area of firearm manufacture and sale, the New Mexico legislature, while imposing certain restrictions, has not seen fit to make such distribution per se unlawful and in the absence of any legislative action, or specific guidance from the New Mexico courts, the court held, in a case involving a "Saturday night special" used to kill plaintiff's husband, that it would not impose a "duty" upon manufacturers of firearms not to sell their products, merely because such products have the potential to be misused for purposes of criminal activity. *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), aff'd, 843 F.2d 406 (10th Cir. 1988).

Demonstration of switchblade to jury held proper. — Where a defendant was charged with unlawful possession of a switchblade, the trial court did not err in permitting a demonstration of how the knife worked. The issue for the jury in this case was how the knife could be opened. Therefore, the officer's demonstration was properly allowed over the objection made at trial. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Sufficiency of evidence. — Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. There was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Applicability to school security force. — Members of a security and patrol force composed of regular full-time employees of the Albuquerque public school system to guard school buildings and property could not be properly described as peace officers and must operate in compliance with the state statutes restricting possession and use of

deadly weapons. 1970 Op. Att'y Gen. No. 70-87 (unofficial opinion issued to superintendent of Albuquerque public schools).

Law reviews. — For article, "The Right (?) to Keep and Bear Arms," see 27 N.M.L. Rev. 491 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms §§ 8 to 20.

Firearm used as bludgeon as a deadly weapon, 8 A.L.R. 1319.

Offense of carrying weapon on person as affected by place where defendant was at the time, 73 A.L.R. 839.

Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Offense of carrying concealed weapons as affected by manner of carrying or place of concealment, 43 A.L.R.2d 492.

Scope and effect of exception in statute forbidding carrying of weapons, as to person on his own premises, 57 A.L.R.3d 938.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

What constitutes a "bludgeon," "blackjack" or "billy" within meaning of criminal possession statute, 11 A.L.R.4th 1272.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm, 55 A.L.R. Fed. 633.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

94 C.J.S. Weapons §§ 3 to 23.

30-7-2.1. Unlawful carrying of a deadly weapon on school premises.

A. Unlawful carrying of a deadly weapon on school premises consists of carrying a deadly weapon on school premises except by:

(1) a peace officer;

(2) school security personnel;

(3) a student, instructor or other school-authorized personnel engaged in army, navy, marine corps or air force reserve officer training corps programs or state-authorized hunter safety training instruction;

(4) a person conducting or participating in a school-approved program, class or other activity involving the carrying of a deadly weapon; or

(5) a person older than nineteen years of age on school premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. As used in this section, "school premises" means:

(1) the buildings and grounds, including playgrounds, playing fields and parking areas and any school bus of any public elementary, secondary, junior high or high school in or on which school or school-related activities are being operated under the supervision of a local school board; or

(2) any other public buildings or grounds, including playing fields and parking areas that are not public school property, in or on which public school-related and sanctioned activities are being performed.

C. Whoever commits unlawful carrying of a deadly weapon on school premises is guilty of a fourth degree felony.

History: Laws 1987, ch. 232, § 1; 1989, ch. 285, § 1; 1994, ch. 17, § 1.

ANNOTATIONS

Cross references. — For provision mandating adoption of student discipline policies pertaining to weapons in school, *see* 22-5-4.7 NMSA 1978.

The 1994 amendment, effective July 1, 1994, inserted "older than nineteen years of age" in Paragraph A(5); and, in Subsection B, divided the formerly undivided language

into an introductory paragraph and Paragraph (1), added Paragraph (2) and, in Paragraph (1), deleted "on school grounds" following "bus" and added "or" at the end.

The 1989 amendment, effective June 16, 1989, substituted "fourth degree felony" for "misdemeanor" at the end of Subsection C.

Scope and factual determinations to be made by jury. — "Carrying" does not a have a broader meaning for purposes of this section than the general definition set forth in 30-7-1 NMSA 1978, and whether the defendant was carrying a weapon was a factual matter to be determined by the jury. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

Readily accessible. — Evidence that a loaded gun was located in the trunk of the defendant's car where he could easily get at it was sufficient to show that it was readily accessible, and the evidence was thus sufficient to establish that the weapon was carried onto school premises in violation of this section. *State v. Salazar*, 1997-NMCA-043, 123 N.M. 347, 940 P.2d 195.

30-7-2.2. Unlawful possession of a handgun by a person; exceptions; penalty.

A. Unlawful possession of a handgun by a person consists of a person knowingly having a handgun in the person's possession or knowingly transporting a handgun, except when the person is:

(1) in attendance at a hunter's safety course or handgun safety course or participating in a lawful shooting activity;

(2) engaging in the use of a handgun for target shooting at an established range authorized by the governing body of the jurisdiction in which the range is located or in an area where the discharge of a handgun without legal justification is not prohibited by law;

(3) engaging in an organized competition involving the use of a handgun;

(4) participating in or practicing for a performance by an organization that has been granted exemption from federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the United States Internal Revenue Code of 1986, as amended or renumbered;

(5) engaging in legal hunting or trapping activities;

(6) traveling, with an unloaded handgun in the person's possession, to or from an activity described in Paragraph (1), (2), (3), (4) or (5) of this subsection; or

(7) on real property under the control of the person's parent, grandparent or legal guardian and the person is being supervised by a parent, grandparent or legal guardian.

B. A person who commits unlawful possession of a handgun by a person is guilty of a misdemeanor.

C. As used in this section:

(1) "person" means an individual who is less than nineteen years old; and

(2) "handgun" means a loaded or unloaded pistol, revolver or firearm that will or is designed to or may readily be converted to expel a projectile by the action of an explosion and the barrel length of which, not including a revolving, detachable or magazine breech, does not exceed twelve inches.

History: Laws 1994, ch. 22, § 2; 2022, ch. 56, § 25.

ANNOTATIONS

Cross references. — For Section 501 of the federal Internal Revenue Code, *see* 26 U.S.C. § 501.

The 2022 amendment, effective May 18, 2022, clarified exceptions for unlawful possession of a handgun by a person; and in Subsection A, Paragraph A(1), after "handgun safety course", added "or participating in a lawful shooting activity", and in Paragraph A(5), added "engaging in".

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "constructive possession" of unregistered or otherwise prohibited weapon under state law, 88 A.L.R.5th 121.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

30-7-2.3. Seizure and forfeiture of a handgun possessed or transported by a person in violation of unlawful possession of a handgun by a person.

A. A handgun is subject to seizure and forfeiture by a law enforcement agency when the handgun is possessed or transported by a person in violation of the offense of unlawful possession of a handgun by a person.

B. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of a handgun subject to forfeiture pursuant to Subsection A of this section.

History: Laws 1994, ch. 22, § 3; 2002, ch. 4, § 12.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, deleted former Subsections B through D, which contained standards and procedures for the forfeiture of handguns possessed or transported by persons in violation of the offense of unlawful possession of a handgun by a person; and added present Subsection B.

30-7-2.4. Unlawful carrying of a firearm on university premises; notice; penalty.

A. Unlawful carrying of a firearm on university premises consists of carrying a firearm on university premises except by:

(1) a peace officer;

(2) university security personnel;

(3) a student, instructor or other university-authorized personnel who are engaged in army, navy, marine corps or air force reserve officer training corps programs or a state-authorized hunter safety training program;

(4) a person conducting or participating in a university-approved program, class or other activity involving the carrying of a firearm; or

(5) a person older than nineteen years of age on university premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. A university shall conspicuously post notices on university premises that state that it is unlawful to carry a firearm on university premises.

C. As used in this section:

(1) "university" means a baccalaureate degree-granting post-secondary educational institution, a community college, a branch community college, a technical-vocational institute and an area vocational school; and

(2) "university premises" means:

(a) the buildings and grounds of a university, including playing fields and parking areas of a university, in or on which university or university-related activities are conducted; or

(b) any other public buildings or grounds, including playing fields and parking areas that are not university property, in or on which university-related and sanctioned activities are performed.

D. Whoever commits unlawful carrying of a firearm on university premises is guilty of a petty misdemeanor.

History: Laws 2003, ch. 253, § 1.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 253, § 2 made the act effective on July 1, 2003.

30-7-3. Unlawful carrying of a firearm in licensed liquor establishments.

A. Unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages consists of carrying a loaded or unloaded firearm on any premises licensed by the regulation and licensing department for the dispensing of alcoholic beverages except:

(1) by a law enforcement officer in the lawful discharge of the officer's duties;

(2) by a law enforcement officer who is certified pursuant to the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978] acting in accordance with the policies of the officer's law enforcement agency;

(3) by the owner, lessee, tenant or operator of the licensed premises or the owner's, lessee's, tenant's or operator's agents, including privately employed security personnel during the performance of their duties;

(4) by a person carrying a concealed handgun who is in possession of a valid concealed handgun license for that gun pursuant to the Concealed Handgun Carry Act [Chapter 29, Article 19 NMSA 1978] on the premises of:

(a) a licensed establishment that does not sell alcoholic beverages for consumption on the premises; or

(b) a restaurant licensed to sell only beer and wine that derives no less than sixty percent of its annual gross receipts from the sale of food for consumption on the premises, unless the restaurant has a sign posted, in a conspicuous location at each public entrance, prohibiting the carrying of firearms, or the person is verbally instructed by the owner or manager that the carrying of a firearm is not permitted in the restaurant;

(5) by a person in that area of the licensed premises usually and primarily rented on a daily or short-term basis for sleeping or residential occupancy, including hotel or motel rooms;

(6) by a person on that area of a licensed premises primarily used for vehicular traffic or parking; or

(7) for the purpose of temporary display, provided that the firearm is:

(a) made completely inoperative before it is carried onto the licensed premises and remains inoperative while it is on the licensed premises; and

(b) under the control of the licensee or an agent of the licensee while the firearm is on the licensed premises.

B. Whoever commits unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-7-2.1, enacted by Laws 1975, ch. 149, § 1; 1977, ch. 160, § 1; 1999, ch. 156, § 1; 2007, ch. 158, § 1; 2010, ch. 106, § 1.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, in Subsection A(4), after "Concealed Handgun Carry Act", deleted "provided that the" and added "on the premises of;"; and added Subparagraph (b) of Paragraph (4) of Subsection A.

The 2007 amendment, effective July 1, 2007, added Paragraphs (2) and (4) of Subsection A.

The 1999 amendment, effective July 1, 1999, substituted "regulation and licensing department" for "department of alcoholic beverage control" in the introductory paragraph of Subsection A and added Subsection A(5).

Purpose of statute is to protect innocent patrons of businesses held out to the public as licensed liquor establishments. *State v. Soto*, 1980-NMSC-114, 95 N.M. 81, 619 P.2d 185.

Purpose of statute. — The purpose of the section is to protect innocent patrons of businesses which are licensed liquor establishments, and application during periods when liquor sales are prohibited by statute still serves the purpose of preventing or warding off the potential for harm from the mixture of alcohol and firearms. *State v. Lake*, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380, cert. denied, 121 N.M. 676, 916 P.2d 1343.

State's prima facie case requires proof of licensing, and is satisfied by the testimony of the owner of the bar and by a copy of the license. *State v. Soto*, 1980-NMSC-114, 95 N.M. 81, 619 P.2d 185.

This section is constitutional, as being within the police powers of the legislature, and is a valid regulation of a constitutional privilege. *State v. Dees*, 1983-NMCA-105, 100 N.M. 252, 669 P.2d 261.

Constitutionality. — This section is not overbroad or vague; it does not require proof that the defendant knew his act to be unlawful. Further the definition of licensed premises includes areas of the licensed premises besides those where the alcoholic beverages are displayed, and in the case at bar, the defendant knew his conduct violated the statute since the defendant had been repeatedly warned by store employees that bringing a firearm into the store was illegal. *State v. Lake*, 1996-NMCA-055, 121 N.M. 794, 918 P.2d 380, cert. denied, 121 N.M. 676, 916 P.2d 1343.

Section applicable to any premises licensed for dispensing. — This section does not refer to a particular type of license; it applies to any premises licensed for dispensing; it is not limited to a dispenser's license and it is to be read with 60-3-1 NMSA 1978 (now 60-3A-3 NMSA 1978). *State v. Montoya*, 1977-NMCA-134, 91 N.M. 262, 572 P.2d 1270.

State of mind necessary for commission of the crime. — The requisite mens rea element of this crime is that the possession be intentional; in other words, that the offender have actual knowledge of the possession. The jury needs only to find that the defendant acted intentionally and that he or she purposely did an act which the law declared to be a crime, whether or not the defendant knew the act to be unlawful. *State v. Powell*, 1993-NMCA-021, 115 N.M. 188, 848 P.2d 1115.

General criminal intent. — This section requires general criminal intent as to carrying of the firearm, but not as to the premises upon which the firearm is carried. *State v. Torres*, 2003-NMCA-101, 134 N.M. 194, 75 P.3d 410, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Evidence sufficient for conviction. — To sustain the charge of unlawful carrying of a firearm in a licensed liquor establishment, the state was required to prove that defendant carried a loaded or unloaded firearm in an establishment licensed to dispense alcoholic beverages. Testimony that lounge displayed a license supports an inference that the license had not expired. Testimony that defendant carried a bag into the lounge which was later found to contain a handgun supports a reasonable inference is that it was the same one defendant carried in the lounge. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, cert. denied, 115. N.M. 228, 849 P.2d 371.

Mistake-of-fact defense. — Because of the strict liability nature of the offense of unlawfully carrying a firearm into a licensed liquor establishment, the defendant was not entitled to raise a mistake-of-fact defense regarding the nature of the establishment.

State v. Torres, 2003-NMCA-101, 134 N.M. 194, 75 P.3d 410, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Instructions. — The listing of the persons excepted in Subsection A does not constitute an essential element of the offense and the failure to instruct on these exceptions is not jurisdictional and reversible error, especially when the defendant has not cited proof nor stated any facts to show that the exceptions apply to him. *State v. Roybal*, 1983-NMCA-085, 100 N.M. 155, 667 P.2d 462.

Sale of firearms. — The selling of firearms in a licensed liquor establishment would be unlawful pursuant to this section. 1977 Op. Att'y Gen. No. 77-23.

Law reviews. — For article, "The Right (?) to Keep and Bear Arms," see 27 N.M.L. Rev. 491 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms § 27.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

94 C.J.S. Weapons § 7.

30-7-4. Negligent use of a deadly weapon.

A. Negligent use of a deadly weapon consists of:

(1) discharging a firearm into any building or vehicle or so as to knowingly endanger a person or his property;

(2) carrying a firearm while under the influence of an intoxicant or narcotic;

(3) endangering the safety of another by handling or using a firearm or other deadly weapon in a negligent manner; or

(4) discharging a firearm within one hundred fifty yards of a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons, without the permission of the owner or lessees thereof.

B. The provisions of Paragraphs (1), (3) and (4) of Subsection A of this section shall not apply to a peace officer or other public employee who is required or authorized by law to carry or use a firearm in the course of his employment and who carries, handles, uses or discharges a firearm while lawfully engaged in carrying out the duties of his office or employment.

C. The exceptions from criminal liability provided for in Subsection B of this section shall not preclude or affect civil liability for the same conduct.

Whoever commits negligent use of a deadly weapon is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-3, enacted by Laws 1963, ch. 303, § 7-3; 1977, ch. 266, § 1; 1979, ch. 79, § 1; 1993, ch. 139, § 1.

ANNOTATIONS

Cross references. — For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

The 1993 amendment, effective June 18, 1993, substituted "a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons" for "an inhabited dwelling or building" in Subsection A(4) and inserted "of this section" in Subsection C.

Subsection A(2) is not unconstitutionally vague. A person of ordinary intelligence would understand what conduct is prohibited by the statute: having a firearm nearby, readily capable of being put into action or service, while under the influence of alcohol. The statute plainly does not require that the intoxicated person actually use or intend to use the firearm. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, cert. denied, 115. N.M. 228, 849 P.2d 371.

Constitutionality. — Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. Therefore, the defendant's conviction for negligent use of a deadly weapon did not violate his right to bear arms under the state constitution, since there was evidence that he was intoxicated, he pointed the gun at another person, and he appeared to be loading the gun. *State v. Rivera*, 1993-NMCA-011, 115 N.M. 424, 853 P.2d 126, cert. denied, 115. N.M. 228, 849 P.2d 371.

"Negligent" defined. — "Negligent" means omitting to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693, *overruled*, *Santillanes v. State*, 1993-NMSC-012, 115 N.M. 215, 849 P.2d 358; *see State v. Yarborough*, 1995-NMCA-116, 120 N.M. 669, 905 P.2d 209.

Criminal negligence is not negligence referred to in Subsection C (now Subsection A (3) of this section). *State v. Grubbs*, 1973-NMCA-096, 85 N.M. 365, 512 P.2d 693.

Evidence of frame of mind. — Evidence of conduct at and subsequent to commission of crime of unlawfully discharging a firearm in a settlement was competent to show

frame of mind of defendant. *State v. Bustillos*, 1932-NMSC-004, 36 N.M. 30, 7 P.2d 296.

Instruction required in homicide case. — In homicide prosecution where one of defendant's theories was involuntary manslaughter, and record was replete with testimony that defendant was drunk while he rode around in automobile with deceased and witness holding and handling sawed-off shotgun, court's refusal to instruct the jury that negligent use of a weapon while under influence of an intoxicant was a petty misdemeanor left jury without a guide to determine whether this was a killing while in the commission of a misdemeanor, and was reversible error. *State v. Durham*, 1971-NMCA-168, 83 N.M. 350, 491 P.2d 1161.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms § 29.

Liability of private citizen or his employer for injury or damage to third person resulting from firing of shots at fleeing criminal, 29 A.L.R.4th 144.

Handgun manufacturer's or seller's liability for injuries caused to another by use of gun in committing crime, 44 A.L.R.4th 595.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

94 C.J.S. Weapons § 20.

30-7-4.1. Negligently making a firearm accessible to a minor; negligently making a firearm accessible to a minor resulting in great bodily harm or death; penalties.

A. A person commits the crime of negligently making a firearm accessible to a minor if:

(1) the person keeps or stores a firearm in a manner that negligently disregards a minor's ability to access the firearm; and

(2) a minor accesses the firearm and displays or brandishes the firearm in a threatening manner or causes injury to the minor or another person not resulting in great bodily harm or death.

Whoever commits negligently making a firearm accessible to a minor is guilty of a misdemeanor.

B. A person commits the crime of negligently making a firearm accessible to a minor resulting in great bodily harm or death if:

(1) the person keeps or stores a firearm in a manner that negligently disregards a minor's ability to access the firearm; and

(2) a minor accesses the firearm and uses it in a manner that causes great bodily harm to or death of the minor or another person.

Whoever commits negligently making a firearm accessible to a minor resulting in great bodily harm or death is guilty of a fourth degree felony.

C. A person does not violate Subsection A or B of this section if a minor obtains a firearm:

(1) that was either kept in a locked container and was securely stored or kept in a location that a reasonable person would believe to be secure when obtained by a minor;

(2) that was carried on the person or within the person's immediate control;

(3) that was locked with a firearm safety device that rendered the firearm inoperable;

(4) in the course of self-defense or defense of another person;

(5) by illegal entry to the person's property; or

(6) with the authorization of the minor's parent or guardian for lawful hunting, lawful recreational use or any other lawful purpose.

D. As used in this section:

(1) "brandish" means to display or make a firearm known to another person while the firearm is present on the person of the minor with intent to intimidate or injure a person;

(2) "firearm" means a weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion;

(3) "firearm safety device" means a gun safe or a device that prevents a firearm from being discharged or from being used to expel a projectile by the action of an explosion or a device other than a gun safe that locks a firearm and is designed to prevent children and unauthorized users from firing a firearm, which device may be installed on a firearm, be incorporated into the design of the firearm or prevent access to the firearm; and

(4) "minor" means a person under eighteen years of age.

History: Laws 2023, ch. 5, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 5 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

30-7-5. Dangerous use of explosives.

Dangerous use of explosives consists of maliciously exploding, attempting to explode or placing any explosive with the intent to injure, intimidate or terrify another, or to damage another's property.

Whoever commits dangerous use of explosives is guilty of a third degree felony.

History: 1953 Comp., § 40A-7-4, enacted by Laws 1963, ch. 303, § 7-4.

ANNOTATIONS

Lesser included offense. — Under the facts of this case, the aggravated burglary offense could not be committed without also committing the crime of dangerous use of explosives; the explosives offense does not have an element not included in the burglary offense. The explosives offense was an offense included within the aggravated burglary offense. *State v. Jacobs*, 1985-NMCA-054, 102 N.M. 801, 701 P.2d 400.

Merger with crime of arson. — The crime of dangerous use of explosives merges into a conviction for arson. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Explosions and Explosives §§ 221 to 225.

35 C.J.S. Explosives §§ 12, 13.

30-7-6. Negligent use of explosives.

Negligent use of explosives consists of negligently exploding, attempting to explode or placing any explosive in such a manner as to result in injury to another or to property of another, or in the probability of such injury.

Whoever commits negligent use of explosives is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-5, enacted by Laws 1963, ch. 303, § 7-5.

ANNOTATIONS

Cross references. — For excavation damage to pipelines and underground utility lines, *see* 62-14-1 NMSA 1978 et seq.

30-7-7. Unlawful sale, possession or transportation of explosives.

Unlawful sale, possession or transportation of explosives consists of:

A. knowingly selling or possessing any explosive or causing such explosive to be transported without having plainly marked in large letters in a conspicuous place on the box or package containing such explosive the name and explosive character thereof and the date of manufacture. For the purpose of this subsection, the term "explosive" is as defined in Section 2 [30-7-18 NMSA 1978] of the Explosives Act, but shall not include:

(1) explosive materials in medicine and medicinal agents in the forms prescribed by the official United States pharmacopoeia or the national formulary;

(2) small arms ammunition and components thereof;

(3) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches and friction primers intended to be used solely for sporting, recreational or cultural purposes as defined in Section 921(a)(16) [§ 921(a)(4)] of Title 18 of the United States Code, or in antique devices as exempted from the term "destructive device" in Section 921(a)(4) [§ 921(a)(16)] of Title 18 of the United States Code; or

(4) explosive materials transported in compliance with the regulations of the United States department of transportation and agencies thereof; or

B. knowingly transporting or taking any explosive upon or into any vehicle belonging to a common carrier transporting passengers. For the purpose of this subsection, the term "explosives" is as defined in Section 2 of the Explosives Act, but shall not include:

(1) explosive materials in medicines and medicinal agents in the forms prescribed by the official United States pharmacopoeia or the national formulary;

(2) small arms ammunition or components thereof; or

(3) explosive materials transported in compliance with the regulations of the United States department of transportation and agencies thereof.

Whoever commits unlawful sale, possession or transportation of explosives as set forth in Subsection A of this section is guilty of a petty misdemeanor.

Whoever commits unlawful transportation of explosives as set forth in Subsection B of this section is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-7-6, enacted by Laws 1963, ch. 303, § 7-6; 1981, ch. 246, § 7.

ANNOTATIONS

Cross references. — For possession of deadly weapon or explosive by prisoner, *see* 30-22-16 NMSA 1978.

Compiler's notes. — The reference to 18 U.S.C. § 921(a)(16) in Subsection A(3) seems incorrect, as that section deals with antique devices. Section 921(a)(4) of 18 U.S.C. deals with devices used for sporting, recreational or cultural purposes.

The reference to 18 U.S.C. § 921(a)(4) in Subsection A(3) seems incorrect, as that section deals with the definition of "destructive devices." Section 921(a)(16) of 18 U.S.C. deals with antique devices.

Applicability under former law. — Under former 40-15-1 and 40-15-2, 1953 Comp., relating to marking of explosives and transporting same on passenger cars, no restrictions were pronounced which would be applicable to movement of explosives by individuals or agencies of the state government. 1957 Op. Att'y Gen. No. 57-42.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Explosions and Explosives §§ 228 to 233.

35 C.J.S. Explosives § 12.

30-7-7.1. Unlawful sale of a firearm without a background check.

A. Unlawful sale of a firearm without a background check consists of the sale of a firearm without conducting a federal instant background check, subject to the following:

(1) if the buyer of a firearm is not a natural person, then each natural person who is authorized by the buyer to possess the firearm after the sale shall undergo a federal instant background check before taking possession of the firearm;

(2) a prospective firearm seller who does not hold a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a) shall arrange for a person who does hold that license to conduct the federal instant background check. A federal firearms licensee shall not unreasonably refuse to perform a background check pursuant to this paragraph; and

(3) a person who holds a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a) may charge a fee not to exceed thirty-five dollars ($35.00) for conducting a background check pursuant to this section.

B. The provisions of Subsection A of this section do not apply to the sale of a firearm:

(1) by or to a person who holds a current and valid federal firearms license issued pursuant to 18 U.S.C. Section 923(a);

(2) to a law enforcement agency;

(3) between two law enforcement officers authorized to carry a firearm and certified pursuant to federal law or the Law Enforcement Training Act [Chapter 29, Article 7 NMSA 1978]; or

(4) between immediate family members.

C. As used in this section:

(1) "consideration" means anything of value exchanged between the parties to a sale;

(2) "federal instant background check" means a background check that meets the requirements of 18 U.S.C. Section 922(t) and that does not indicate that a sale to the person receiving the firearm would violate 18 U.S.C. Section 922(g) or 18 U.S.C. Section 922(n) or state law;

(3) "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; and includes any handgun, rifle or shotgun; but shall not include an antique firearm as defined in 18 U.S.C. Section 921(16), a powder-actuated tool or other device designed to be used for construction purposes, an emergency flare or a firearm in permanently inoperable condition;

(4) "immediate family member" means a spouse, parent, child, sibling, grandparent, grandchild, great-grandchild, niece, nephew, first cousin, aunt or uncle; and

(5) "sale" means the delivery or passing of ownership, possession or control of a firearm for a fee or other consideration, but does not include temporary possession or control of a firearm provided to a customer by the proprietor of a licensed business in the conduct of that business.

D. Each party to an unlawful sale in violation of this section may be separately charged for the same sale.

E. Each firearm sold contrary to the provisions of this section constitutes a separate offense under Subsection A of this section.

F. Two or more offenses may be charged in the same complaint, information or indictment and shall be punished as separate offenses.

G. Whoever violates the provisions of this section is guilty of a misdemeanor.

History: Laws 2019, ch. 45, § 1.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 45, § 2 made Laws 2019, ch. 45, § 1 effective July 1, 2019.

30-7-7.2. Unlawful purchase or transfer of a firearm for another.

A. Unlawful purchase or transfer of a firearm for another consists of a person who knowingly purchases, transfers or conspires to purchase or transfer any firearm for, on behalf of or at the request or demand of another person, knowing that the other person:

(1) is a felon; or

(2) intends to use, carry, possess, sell or otherwise transfer possession of the firearm in furtherance of any felony or misdemeanor involving a firearm.

B. Prosecution pursuant to this section shall not prevent prosecution pursuant to any other section of the Criminal Code [30-1-1 NMSA 1978].

C. Whoever commits unlawful purchase or transfer of a firearm for another is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978].

D. As used in this section, "felon" means a person convicted of a felony offense by a court of the United States or any state or political subdivision, and:

(1) less than ten years have passed since the person completed serving a sentence or period of probation for the felony conviction, whichever is later;

(2) the person has not been pardoned for the felony conviction by the proper authority; and

(3) the person has not received a deferred sentence.

History: Laws 2023, ch. 195, § 1.

ANNOTATIONS

Compiler's notes. — Laws 2023, ch. 195, § 1 was not enacted as part of the Criminal Code, but was compiled there for the convenience of the user.

Effective dates. — Laws 2023, ch. 195 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

30-7-8. Unlawful possession of switchblades.

Unlawful possession of switchblades consists of any person, either manufacturing, causing to be manufactured, possessing, displaying, offering, selling, lending, giving away or purchasing any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or any knife having a blade which opens or falls or is ejected into position by the force of gravity or by any outward or centrifugal thrust or movement.

Whoever commits unlawful possession of switchblades is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-7, enacted by Laws 1963, ch. 303, § 7-7.

ANNOTATIONS

Constitutionality — The terms of this section have specific meanings and can be defined unambiguously. Giving those words their ordinary meanings results in a reasonable and practical construction. Therefore, the statute is not void for vagueness. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Constitutionality under the right to bear arms. — The appropriate level of constitutional scrutiny in a right to bear arms challenge pursuant to N.M. Const., art. II, § 6, is intermediate scrutiny; to survive a challenge under intermediate scrutiny, the government must show that the statute is substantially related to an important government purpose. *State v. Murillo*, 2015-NMCA-046.

This section serves an important governmental purpose, to protect the public from the surprise use of a dangerous weapon utilized in large part for unlawful activity, and prohibiting the possession of switchblades is substantially related to this narrow, but important, purpose. *State v. Murillo*, 2015-NMCA-046.

Constitutionality under substantive due process. — Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty; the appropriate level of scrutiny of a statute challenged under substantive due process grounds depends on the nature and importance of the individual interests asserted and the classifications created by the statute. *State v. Murillo*, 2015-NMCA-046.

Where defendant claimed that prohibiting the possession of switchblade knives violated his right to bear arms guaranteed under U.S. Const., amend. II, as applied to the states under the due process clause of U.S. Const., amend. XIV, the New Mexico court of appeals, applying intermediate scrutiny to this section, held that the statute is not repugnant to the right to bear arms under a federal standard and that defendant's federal substantive due process challenge fails. *State v. Murillo*, 2015-NMCA-046.

"Butterfly knife" included within the term "switchblade". — In determining whether a "butterfly knife" constitutes a switchblade, it is of no legal significance that a combination of gravity and centrifugal force is required. The phrase "any outward or centrifugal thrust or movement" suggests a legislative intent to include knives that require a combination of forces to operate. In this case, the words used and the intended purpose of the provision in which the words are contained indicate that the legislature intended to include a "butterfly knife" within the term "switchblade knife". *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Demonstration of switchblade to jury held proper. — Where a defendant was charged with unlawful possession of a switchblade, the trial court did not err in permitting a demonstration of how the knife worked. The issue for the jury in this case was how the knife could be opened. Therefore, the officer's demonstration was properly allowed over the objection made at trial. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Sufficiency of evidence. — Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. Thus there was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. *State v. Riddall*, 1991-NMCA-033, 112 N.M. 78, 811 P.2d 576, cert. denied, 112 N.M. 21, 810 P.2d 1241.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

30-7-9. Repealed.

History: 1953 Comp., § 40A-7-8, enacted by Laws 1969, ch. 122, § 1; repealed by Laws 2012, ch. 45, § 1.

ANNOTATIONS

Repeals. — Laws 2012, ch. 45, § 1 repealed 30-7-9 NMSA 1978, as enacted by Laws 1969, ch. 122, § 1, relating to firearms sales and purchases, effective July 1, 2012. For provisions of former section, *see* the 2011 NMSA 1978 on *NMOneSource.com*.

30-7-10. Short title.

Sections 30-7-10 through 30-7-15 NMSA 1978 may be cited as the "Bus Passenger Safety Act".

History: Laws 1979, ch. 376, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

30-7-11. Definitions.

As used in the Bus Passenger Safety Act [30-7-10 to 30-7-15 NMSA 1978]:

A. "bus transportation company" or "company" means any person, groups of persons or corporation providing for-hire transportation to passengers or cargo by bus upon the highways in New Mexico. The term also includes buses owned or operated by or for local public bodies, school districts, municipalities and by public corporations, boards and commissions; and

B. "bus" means any passenger bus, coach or other motor vehicle having a seating capacity of not less than fifteen passengers operated by a bus transportation company when used for the purpose of carrying passengers or cargo for hire.

History: Laws 1979, ch. 376, § 2.

30-7-12. Prohibitions; penalties.

A. It is unlawful to seize or exercise control of a bus by force or violence or by threat of force or violence. Whoever violates the provisions of this subsection is guilty of a third degree felony.

B. It is unlawful to intimidate, threaten or assault any driver, attendant, guard or passenger of a bus with the intent of seizing or exercising control of a bus. Whoever violates the provisions of this subsection is guilty of a fourth degree felony.

History: Laws 1979, ch. 376, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 A.L.R.4th 1127.

30-7-13. Carrying weapons prohibited.

A. It is unlawful for any person without prior approval from the company to board or attempt to board a bus while in possession of a firearm or other deadly weapon upon his person or effects and readily accessible to him while on the bus. Any person who violates the provisions of this subsection is guilty of a misdemeanor.

B. Subsection A of this section does not apply to duly elected or appointed law enforcement officers or commercial security personnel in the lawful discharge of their duties.

History: Laws 1979, ch. 376, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 A.L.R.4th 1127.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

30-7-14. Weapon detection.

A bus transportation company may employ any reasonable means, including mechanical, electronic or x-ray devices to detect concealed weapons, explosives or other hazardous material in baggage or upon the person of a passenger. The company may take possession of any concealed weapon, explosive or other hazardous material discovered and shall turn such items over to law enforcement officers.

History: Laws 1979, ch. 376, § 5.

30-7-15. Weapons; transporting.

Any person wishing to transport a firearm or other deadly weapon on a bus may do so only in accordance with regulations established by the company; provided that any firearm or deadly weapon must be transported in a compartment which is not accessible to passengers while the bus is moving.

History: Laws 1979, ch. 376, § 6.

30-7-16. Firearms or destructive devices; receipt, transportation or possession by certain persons; penalty.

A. It is unlawful for the following persons to receive, transport or possess a firearm or destructive device in this state:

(1) a felon;

(2) a person subject to an order of protection pursuant to Section 40-13-5 or 40-13A-5 NMSA 1978; or

(3) a person convicted of any of the following crimes:

(a) battery against a household member pursuant to Section 30-3-15 NMSA 1978;

(b) criminal damage to property of a household member pursuant to Section 30-3-18 NMSA 1978;

(c) a first offense of stalking pursuant to Section 30-3A-3 NMSA 1978; or

(d) a crime listed in 18 U.S.C. 921.

B. A felon found in possession of a firearm shall be guilty of a third degree felony.

C. A serious violent felon that is found to be in possession of a firearm shall be guilty of a third degree felony, and notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a basic term of six years imprisonment.

D. Any person subject to an order of protection pursuant to Section 40-13-5 or 40-13A-5 NMSA 1978 or convicted of a crime listed in Paragraph (3) of Subsection A of this section who receives, transports or possesses a firearm or destructive device is guilty of a misdemeanor.

E. As used in this section:

(1) except as provided in Paragraph (2) of this subsection, "destructive device" means:

(a) any explosive, incendiary or poison gas: 1) bomb; 2) grenade; 3) rocket having a propellant charge of more than four ounces; 4) missile having an explosive or incendiary charge of more than one-fourth ounce; 5) mine; or 6) similar device;

(b) any type of weapon by whatever name known that will, or that may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell that is generally recognized as particularly suitable for sporting purposes; or

(c) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in this paragraph and from which a destructive device may be readily assembled;

(2) the term "destructive device" does not include any device that is neither designed nor redesigned for use as a weapon or any device, although originally designed for use as a weapon, that is redesigned for use as a signaling, pyrotechnic, line throwing, safety or similar device;

(3) "felon" means a person convicted of a felony offense by a court of the United States or of any state or political subdivision thereof and:

(a) less than ten years have passed since the person completed serving a sentence or period of probation for the felony conviction, whichever is later;

(b) the person has not been pardoned for the felony conviction by the proper authority; and

(c) the person has not received a deferred sentence;

(4) "firearm" means any weapon that will or is designed to or may readily be converted to expel a projectile by the action of an explosion or the frame or receiver of any such weapon; and

(5) "serious violent felon" means a person convicted of an offense enumerated in Subparagraphs (a) through (n) of Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978; provided that:

(a) less than ten years have passed since the person completed serving a sentence or a period of probation for the felony conviction, whichever is later;

(b) the person has not been pardoned for the felony conviction by the proper authority; and

(c) the person has not received a deferred sentence and completed the total term of deferment as provided in Section 31-20-9 NMSA 1978.

History: Laws 1981, ch. 225, § 1; 1987, ch. 202, § 1; 2001, ch. 89, § 1; 2018, ch. 74, § 4; 2019, ch. 253, § 1; 2020, ch. 54, § 2; 2022, ch. 56, § 26.

ANNOTATIONS

The 2022 amendment, effective May 18, 2022, clarified the penalty for receipt, transportation or possession of a firearm or destructive device by a serious violent felon; in Subsection B, after "third degree felony", deleted "and shall be sentenced in accordance with the provisions of the Criminal Sentencing Act"; added a new Subsection C and redesignated former Subsections C and D as Subsections D and E, respectively; and in Subsection E, added Paragraph E(5).

The 2020 amendment, effective July 1, 2020, provided that the penalty for a felon in possession of a firearm or destructive device is a third degree felony; and in Subsection B, after "shall be guilty of a", deleted "fourth" and added "third", and after "Criminal Sentencing Act", deleted "provided that the violation of and the sentence imposed pursuant to this subsection shall be increased to a violation of and the sentence for a third degree felony if the person has previously been convicted of a capital felony or a serious violent offense provided in Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978".

The 2019 amendment, effective July 1, 2019, expanded the categories of persons who cannot receive, transport or possess a firearm, and revised the definition of "firearm" as used in this section; in the section heading, deleted "a felon" and added "certain persons"; in Subsection A, in the introductory clause, after "unlawful for", deleted "a felon" and added "the following persons", and added Paragraphs A(1) through A(3); in Subsection B, deleted "Any person violating the provisions of this section" and added "A felon found in possession of a firearm", and after "provided in", deleted "Subparagraphs (a) through (n) of"; added a new Subsection C and redesignated former Subsection C as Subsection D; and in Subsection D, Paragraph D(4), after "such weapon", deleted "or any firearm muffler or firearm silencer. ‘Firearm’ includes any handgun, rifle or shotgun".

The 2018 amendment, effective July 1, 2018, increased the penalty for a felon in possession of a firearm or destructive device if the person has previously been convicted of a capital felony or a serious violent offense, and provided clarifying language; in Subsection B, after "Criminal Sentencing Act", added the remainder of the subsection; and in Subsection C, Paragraph C(1), added "except as provided in Paragraph (2) of this subsection", at the end of Subparagraph C(1)(b), deleted "and" and added "or", added a new paragraph designation "(2)" and redesignated former Paragraphs C(2) and C(3) as Paragraphs C(3) and C(4), respectively.

The 2001 amendment, effective July 1, 2001, added the Paragraph designation C(1)(c) and substituted "this paragraph" for "Paragraphs (1) and (2)" within that new paragraph; and rewrote the definition of "felon" in Paragraph C(2).

The 1987 amendment, effective June 19, 1987, inserted "or destructive devices" in the catchline and "or destructive device" in Subsection A; substituted "fourth degree felony" for "misdemeanor" in Subsection B; and, in Subsection C, added present Paragraph (1) and redesignated former Paragraphs (1) and (2) as present Paragraphs (2) and (3).

A conditional discharge is not a conviction. — Where the district court had entered a conditional discharge order in a prior criminal proceeding against defendant; the order was entered without an adjudication of guilt and with a sentencing term; defendant’s probation was subsequently revoked and defendant was placed back on probation; a year later, defendant’s probation was again revoked and the district court ordered that defendant be incarcerated; and the district court did not revoke defendant’s conditional discharge, the district court did not err by dismissing a later felon in possession charge

against defendant on the ground that defendant’s conditional discharge had not been revoked and could not serve as the predicate felony for the felon in possession charge. *State v. Harris*, 2013-NMCA-031, 297 P.3d 374.

Bullets as destructive devices. — Nothing in this section says that destructive devices as defined in the section are deadly weapons. It is unreasonable to construe this section to say that destructive devices are necessarily also deadly weapons as defined in Section 30-1-12B NMSA 1978. Even were .22 caliber cartridges to be considered destructive devices under Section 30-7-16, the bullets were not deadly weapons under Section 30-1-12B. *State v. Galaz*, 2003-NMCA-076, 133 N.M. 794, 70 P.3d 784, cert denied, 133 N.M. 771, 70 P.3d 761.

Possession of firearms by felons. — The fact that New Mexico law does not forbid possession of firearms by those convicted of felonies more than 10 years ago does not preclude the federal government from doing so. United States v. Fuentes, 119 Fed. Appx. 248 (2004).

Admission of unavailable accomplice's tape recorded custodial police interview was not harmless error because it provided only direct evidence that defendant held firearm, it contradicted state's otherwise circumstantial case, and defendant expressly denied ever holding firearm. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162.

No preemption by federal firearms act. — Although federal law excludes antique firearms from the proscription of receipt of firearms by certain convicted felons while this section does not, this section is not preempted by the federal law. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 72, 792 P.2d 49, and cert. denied, 110 N.M. 183, 793 P.2d 865.

Proof of all three aspects not required for conviction. — Thus, the defendant could be convicted for the crime of felon transporting a firearm even though there was no evidence that he possessed or owned the firearm. This section prohibits receiving, transporting, or possessing any firearm; the use of the disjunctive "or" indicates that this section may be violated by any of the enumerated methods. *State v. Dunsmore*, 1995-NMCA-012, 119 N.M. 431, 891 P.2d 572.

"Constructive" possession. — Where state could not prove that defendant had actual possession of gun, the state can rely on a theory of "constructive" possession; that defendant knew the gun was present and exercised control over it. *State v. Garcia*, 2004-NMCA-066, 135 N.M. 595, 92 P.3d 41, *rev'd on other grounds*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72.

Evidence sufficient for conviction of possession. — Documentary evidence of a prior felony conviction and defendant's numerous statements during the interrogation that he possessed several of the victim's firearms is sufficient evidence for the conviction of felon in possession of a firearm. *State v. Lopez*, 2005-NMSC-036, 138

N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

Sufficient evidence of being a felon in possession of a firearm. — Where defendant was charged with being a felon in possession of a firearm after taking a gun inside a Las Cruces club, there was sufficient evidence to support the conviction, because based on evidence presented at trial that defendant told the officer that he was armed with a gun, a witness told the officer over the phone that defendant had a gun, and police recovered a handgun inside the club, a reasonable jury could have found that defendant had knowledge and control, and thereby possession, of a gun. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

Sufficient evidence of unlawful transportation of a firearm. — Where defendant was convicted of unlawful transportation of a firearm, and where defendant admitted that he was a felon at the time of the charged offense, and where the state presented evidence at trial that he was driving his accomplice around town and was aware that his accomplice had brought a gun into the car, there was sufficient evidence for a jury to find that defendant transported a firearm. *State v. Torres*, 2018-NMSC-013.

Defense of duress is available against the charge of felon in possession of a firearm only when no reasonable alternatives are available — a reasonable felon would resort to possession of a firearm only when committing the offense is the only reasonable alternative. *State v. Castrillo*, 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

District court properly refused to submit the defense of duress to the jury, where defendant, a convicted felon, could have contacted the police, or simply avoided his estranged wife after she smashed his car windshield, but instead he chose to arm himself by purchasing a handgun. *State v. Castrillo*, 1991-NMSC-096, 112 N.M. 766, 819 P.2d 1324.

No exception for self-defense. — This statute does not exclude from its operation felons who are defending themselves. *State v. Calvillo*, 1990-NMCA-046, 110 N.M. 114, 792 P.2d 1157, cert. denied, 110 N.M. 72, 792 P.2d 49 (1991).

Construed with 31-18-17 NMSA 1978. — Where defendants were convicted of the charge of felon in possession of a firearm contrary to 30-7-16 NMSA 1978, and the defendants were also sentenced as habitual offenders in accordance with 31-18-17 NMSA 1978, the trial court erred in sentencing the defendants as habitual offenders when the same prior felony convictions were relied upon to convict the defendants of the underlying offense of felon in possession of a firearm. *State v. Haddenham*, 1990-NMCA-048, 110 N.M. 149, 793 P.2d 279, cert. denied, 110 N.M. 72, 792 P.2d 49, and cert. denied, 110 N.M. 183, 793 P.2d 865.

Use of prior felony. — The state was not prevented from using distinct felonies obtained in the same judgment and sentence for the separate purposes of enhancement under the felon in possession statute and the general habitual offender

statute. *State v. Calvillo*, 1990-NMCA-046, 112 N.M. 140, 812 P.2d 794, cert. denied, 112 N.M. 77, 811 P.2d 575 (1991).

In this case it did not matter that the state did not specify which of the two felonies it was relying on to prove the principal crime, whichever felony the jury relied on, there was an additional one available for sentence enhancement. If the jury relied on both, there is still no double jeopardy problem. *State v. Dunsmore*, 1995-NMCA-012, 119 N.M. 431, 891 P.2d 572.

Details of the prior crime are irrelevant to prove the required element of the crime of being a felon in possession, and admission into evidence of the defendant's prior conviction of a firearms offense was reversible error. *State v. Tave*, 1996-NMCA-056, 122 N.M. 29, 919 P.2d 1094.

Multiple uses of prior convictions does not violate double jeopardy. — Where defendant’s prior felony convictions were used to establish defendant’s status as a habitual offender for sentencing for attempted murder and to serve as the predicate felony for defendant’s conviction of felon in possession of a firearm, the double jeopardy clause was not violated. *State v. Tafoya*, 2012-NMSC-030, 285 P.3d 604.

Jury instruction. — In a prosecution for being a felon in possession of a firearm, it was reversible error for the court to use UJI 14-1701 NMRA naming the predicate offense, *i.e*., aggravated assault with a deadly weapon. *State v. Tave*, 1996-NMCA-056, 122 N.M. 29, 919 P.2d 1094.

Unsubstantiated reference to drug dealer gun owner inappropriate. — Repeated references to defendant as a known drug dealer when the state lacked sufficient evidence to convict defendant of possession or distribution of illegal drugs, and instead relied on unsubstantiated hearsay to convince the jury defendant was a "known drug dealer" so, ipso facto, the shotgun must belong to him is prohibited and should be excluded. *State v. Rael*, 1994-NMCA-043, 117 N.M. 539, 873 P.2d 285.

Restoration of firearms privileges. — Firearm privileges are automatically restored when a person successfully completes the period of a deferred sentence. 1988 Op. Att'y Gen. No. 88-03.

Partial pardon by governor limiting right to use firearm. — The governor has the power under the New Mexico Constitution to grant a partial pardon conferring the right to vote and hold public office while denying the right to possess a firearm. 1992 Op. Att'y Gen. No. 92-09.

Law reviews. — For note, "Evidence Law – Boundaries, Balancing, and Prior Felony Convictions: After United States v. Old Chief," see 28 N.M. L. Rev. 583 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 79 Am. Jur. 2d Weapons and Firearms § 24.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms, 37 A.L.R.4th 1179.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

What amounts to "control" under state statute making it illegal for felon to have possession or control of firearm or other dangerous weapon, 66 A.L.R.4th 1240.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 A.L.R. Fed. 347.

94 C.J.S. Weapons § 2.

30-7-17. Short title.

Sections 1 through 6 [30-7-17 to 30-7-22 NMSA 1978] of this act may be cited as the "Explosives Act".

History: Laws 1981, ch. 246, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Explosions and Explosives §§ 214 to 237.

35 C.J.S. Explosives § 12.

30-7-18. Definitions.

As used in the Explosives Act [30-7-17 to 30-7-22 NMSA 1978]:

A. "explosive" means any chemical compound or mixture or device, the primary or common purpose of which is to explode and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters; and

B. "explosive device" or "incendiary device" means:

(1) any explosive bomb, grenade, missile or similar device;

(2) any device or mechanism used or created to start a fire or explosion with or without a timing mechanism except cigarette lighters and matches; or

(3) any incendiary bomb or grenade, fire bomb or similar device or any device which includes a flammable liquid or compound and a wick or igniting agent composed of any material which is capable of igniting the flammable liquid or compound.

History: Laws 1981, ch. 246, § 2; 1990, ch. 74, §1.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, in Subsection B, substituted " 'explosive device' " for " 'explosive' " at the beginning, deleted "dynamite and all other forms of high explosives" at the beginning and "or" at the end of Paragraph (1), added "except cigarette lighters and matches" at the end of Paragraph (2), and made a minor stylistic change in Paragraph (3).

30-7-19. Possession of explosives.

A. Possession of explosives consists of knowingly possessing, manufacturing or transporting any explosive and either intending to use the explosive in the commission of any felony or knowing or reasonably believing that another intends to use the explosive to commit any felony.

B. Any person who commits possession of explosives is guilty of a fourth degree felony.

History: Laws 1981, ch. 246, § 3; 1990, ch. 74, §2.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, deleted "or explosive or incendiary device" following "explosives" in the catchline and in Subsections A and B and, in Subsection A, inserted "knowingly", deleted "or any explosive or incendiary device, including any combination of parts from which such device may be made" following "any explosive", deleted "or device or combination of parts thereof " following "the explosive" in two places, and made minor stylistic changes.

30-7-19.1. Possession of explosive device or incendiary device.

A. Possession of an explosive device or incendiary device consists of knowingly possessing, manufacturing or transporting any explosive device or incendiary device or complete combination of parts thereof necessary to make an explosive device or incendiary device. This subsection shall not apply to any fireworks as defined in Section

60-2C-2 NMSA 1978 or any lawfully acquired household, commercial, industrial or sporting device or compound included in the definition of explosive device or incendiary device in Section 30-7-18 NMSA 1978 that has legitimate and lawful commercial, industrial or sporting purposes or that is lawfully possessed under Section 30-7-7 NMSA 1978.

B. Any person who commits possession of an explosive device or incendiary device is guilty of a fourth degree felony.

History: Laws 1990, ch. 74, § 3.

ANNOTATIONS

Dry ice bomb was not an explosive or an explosive device. — Where defendant had two bottles of dry ice and two gallon jugs of water; defendant admitted that defendant was going to a desert area to detonate a dry ice bomb; and dry ice bombs result from the expansion of gases, rather than by fire or burning, a dry ice bomb is neither an "explosive" nor an "explosive device" and is not prohibited by Section 30-7-19.1 NMSA 1978. *State v. Alverson*, 2013-NMCA-091, cert. granted, 2013-NMCERT-008.

30-7-20. Facsimile or hoax bomb or explosive.

Any person who intentionally gives, mails, sends or causes to be sent any false or facsimile bomb or explosive to another person or places or causes to be placed at any location any false or facsimile bomb or explosive, with the intent that any other person thinks it is a real bomb or explosive, is guilty of a fourth degree felony.

History: Laws 1981, ch. 246, § 4.

30-7-21. False report.

A. False report consists of knowingly conveying or causing to be conveyed to any police agency or fire department a false report concerning a fire or explosion or the placement of any explosives or explosive or incendiary device or any other destructive substance and includes, but is not limited to, setting off a fire alarm.

B. Any person who commits false report which causes death or great bodily harm to another is guilty of a fourth degree felony, but if such death or great bodily harm is not caused, the person is guilty of a misdemeanor.

History: Laws 1981, ch. 246, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

30-7-22. Interference with bomb or fire control.

A. Interference with bomb or fire control consists of:

(1) intentionally interfering with the proper functioning of a fire alarm system;

(2) intentionally interfering with the lawful efforts of a fireman or police officer to control or extinguish a fire or to secure the safety of any object reasonably believed to be a bomb, explosive or incendiary device; or

(3) intentionally interfering with the lawful efforts of a fireman or police officer to preserve for investigation or investigate the scene of a fire or explosion to determine its cause.

B. Any person who commits interference with bomb or fire control is guilty of a misdemeanor.

History: Laws 1981, ch. 246, § 6.

ANNOTATIONS

Severability. — Laws 1981, ch. 246, § 9, provides for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

ARTICLE 8
Nuisances

30-8-1. Public nuisance.

A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either:

A. injurious to public health, safety, morals or welfare; or

B. interferes with the exercise and enjoyment of public rights, including the right to use public property.

Whoever commits a public nuisance for which the act or penalty is not otherwise prescribed by law is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-1, enacted by Laws 1963, ch. 303, § 8-1.

ANNOTATIONS

Cross references. — For polluting of water being public nuisance, *see* 30-8-2 NMSA 1978.

For provisions on abatement of public nuisance, *see* 30-8-8 NMSA 1978.

For conduct offensive to public well-being, *see* 30-8-12 NMSA 1978.

For house of prostitution being public nuisance, *see* 30-9-8 NMSA 1978.

For gambling and gambling houses being public nuisance, *see* 30-19-8 NMSA 1978.

For provision making forest fire burning without proper precaution a public nuisance, *see* 30-32-1 NMSA 1978.

Nuisance must affect group of people. — A public nuisance must affect a considerable number of people or an entire community or neighborhood. *Environmental Improvement Div. v. Bloomfield Irrigation Dist*., 1989-NMCA-049, 108 N.M. 691, 778 P.2d 438, cert. denied, 108 N.M. 681, 777 P.2d 1325.

This section applies to "anything affecting any number of citizens", which means a considerable number of people or an entire community or neighborhood. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

Anticipatory nuisance. — Anticipatory nuisance is a valid cause of action. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

Acts of municipality under governmental authority. — In the absence of a showing of fraud, collusion, or illegality, a city's constitutional and statutory authority to construct public highways and bridges constitutes a valid defense to a claim of nuisance per se. *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, cert. denied, 113 N.M. 524, 828 P.2d 957 (1992).

Acts which the law authorized to be done, if carried out and maintained in the manner authorized by law, where a public entity acts under its governmental authority, do not constitute public nuisances per se. *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, cert. denied, 113 N.M. 524, 828 P.2d 957 (1992).

Absent a showing that a project is, or will be, conducted or maintained in a manner contrary to law, a city is lawfully empowered to initiate and construct such project, and the project is not subject to abatement as a public nuisance per se, because the construction, operation, and maintenance of a highway or bridge in a lawful manner does not constitute a public nuisance. *City of Albuquerque v. State ex rel. Vill. of Los Ranchos de Albuquerque*, 1991-NMCA-015, 111 N.M. 608, 808 P.2d 58, cert. denied, 113 N.M. 524, 828 P.2d 957 (1992).

Public works as public nuisance. — Public works projects are fundamentally different from private construction projects. A public project carries with it the presumption that it is for the public good; proof that it will be a nuisance must be balanced against its benefit for the public as a whole. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

Due authorization of public works. — If the public works project is in existence and poses a present nuisance, due authorization is a qualified defense; courts may or may not decide that despite the defense the project is still a nuisance. However, if the project has yet to be constructed and is challenged as an anticipatory nuisance in fact, due authorization is an absolute defense; courts will summarily conclude that there is no basis for a finding of nuisance. *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, 119 N.M. 150, 889 P.2d 185.

Contamination of underground water. — Where a sewage treatment facility is operated by a city in a manner which results in the contamination of the underground water to such a degree that it is offensive or dangerous for human consumption or use, is injurious to public health, safety and welfare and interferes with the exercise and enjoyment of public rights, including the right to use public property, the city has created a public nuisance within the meaning of this section. Relief in the nature of a mandatory injunction requiring abatement of the nuisance by ordering the city to extend its waterlines to residences in and outside its limits free of hookup charges would not be a "donation" in violation of N.M. Const., art. IX, § 14. *State ex rel. N.M. Water Quality Control Comm'n v. City of Hobbs*, 1974-NMSC-064, 86 N.M. 444, 525 P.2d 371.

Shooting range. — Use of private property as a trap shooting range was not a "public right," and, thus, the actions of adjoining landowners in making complaints to the sheriff who shut down the range for an investigation did not support a claim under this section. *State ex rel. Smith v. Riley*, 1997-NMCA-063, 123 N.M. 453, 942 P.2d 721.

Entrance to house. — "Stoop" or concrete platform 14–1/2 inches off ground located outside back door of premises which was only means of entrance and exit was not a public nuisance as defined by statute, nor a private nuisance. *Jellison v. Gleason*, 1967-NMSC-033, 77 N.M. 445, 423 P.2d 876.

Illegal sale of alcoholic beverages is not a statutory nuisance per se nor is it a common law nuisance per se. *State v. Davis*, 1958-NMSC-130, 65 N.M. 128, 333 P.2d 613.

Damages. — Compensatory damages are not available for statutory public nuisance, as abatement of the nuisance is the prescribed remedy. *New Mexico v. General Elec. Co*., 335 F. Supp. 2d 1185 (D.N.M. 2004).

Remedy in public nuisance actions. — In public nuisance cases, abatement of the nuisance is the remedy prescribed by statute, but damages, including noneconomic damages, may be appropriate in actions involving mixed public and private nuisances, so long as the plaintiff can show that they have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference. 2024 Op. Atty Gen. No. 2024-05.

Launching rockets. — Construction and launching of rockets without adequate supervision and without adequate safeguards being provided to protect the persons involved as well as other persons and property which could be harmed by such a dangerous mechanism would be a public nuisance under this section. 1961 Op. Att'y Gen. No. 61-134.

Law reviews. — For note, "The Availability of the Affirmative Defenses of Assumption of Risk and the 'Sale Defense' Against Common Law Public Nuisance Actions; United States v. Hooker Chemicals & Plastics Corp.," see Nat. Resources J. 941 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Nuisances §§ 35, 36, 403, 404.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances or prescribing a pecuniary penalty therefor, 12 A.L.R. 431, 121 A.L.R. 642.

Computer as nuisance, 45 A.L.R.4th 1212.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 A.L.R.4th 530.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Sewage treatment plant as constituting nuisance, 92 A.L.R.5th 517.

Preemption, by provisions of Clean Air Act (42 USCS §§ 7401 et seq.), of federal common law of nuisance in area of air pollution, 61 A.L.R. Fed. 859.

66 C.J.S. Nuisances §§ 2, 159.

30-8-2. Polluting water.

Polluting water consists of knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use. Polluting water constitutes a public nuisance.

For the purpose of this section, "body of water" means any public river or its tributary, stream, lake, pond, reservoir, acequia, canal, ditch, spring, well or declared or known ground waters.

Whoever commits polluting water for which the act or penalty is not otherwise prescribed by law is guilty of a misdemeanor.

History: 1953 Comp., § 40A-8-2, enacted by Laws 1963, ch. 303, § 8-2; 1993, ch. 291, § 19.

ANNOTATIONS

Cross references. — For Water Quality Act, relating to water pollution, *see* 74-6-1 NMSA 1978 et seq.

The 1993 amendment, effective June 18, 1993, inserted "for which the act or penalty is not otherwise prescribed by law" in the last paragraph and made a minor stylistic change.

Scope of section. — This section is a broad nuisance provision, but it does not contain specific mandatory requirements to create a specific duty to prevent water pollution. *Aragon v. United States*, 146 F.3d 819 (10th Cir. 1998).

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control §§ 134, 135.

Liability for injury to property occasioned by oil, water or the like, flowing from well, 19 A.L.R.2d 1025.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

93 C.J.S. Waters § 57.

30-8-3. Refuse defined.

Refuse means any article or substance:

A. which is commonly discarded as waste; or

B. which, if discarded on the ground, will create or contribute to an unsanitary, offensive or unsightly condition.

Refuse includes, but is not limited to, the following items or classes of items: waste food; waste paper and paper products; cans, bottles or other containers; junked household furnishings and equipment; junked parts or bodies of automobiles and other metallic junk or scrap; portions or carcasses of dead animals; and collections of ashes, dirt, yard trimmings or other rubbish.

History: 1953 Comp., § 40A-8-3, enacted by Laws 1963, ch. 303, § 8-3.

30-8-4. Littering.

A. Littering consists of discarding refuse:

(1) on public property in any manner other than by placing the refuse in a receptacle provided for the purpose by the responsible governmental authorities or otherwise in accordance with lawful direction; or

(2) on private property not owned or lawfully occupied or controlled by the person, except with the consent of its owner, lessee or occupant.

B. Whoever commits littering is guilty of a petty misdemeanor and, notwithstanding the provisions of Section 31-19-1 NMSA 1978, shall be punished by a fine of fifty dollars ($50.00). The use of uniform traffic citations is authorized for the enforcement of this section. The court may to the extent permitted by law, as a condition to suspension of any other penalty provided by law, require a person who commits littering to pick up and remove from any public place or any private property, with prior permission of the legal owner, any litter deposited thereon.

History: 1953 Comp., § 40A-8-4, enacted by Laws 1963, ch. 303, § 8-4; 1975, ch. 199, § 1; 1977, ch. 79, § 1; 1981, ch. 256, § 1; 2018, ch. 74, § 5.

ANNOTATIONS

Cross references. — For municipal refuse collection and disposal, *see* 3-48-1 NMSA 1978 et seq.

For provisions relating to uniform traffic citations, *see* 66-8-128 NMSA 1978 et seq.

The 2018 amendment, effective July 1, 2018, provided that the penalty for littering shall be a fine of fifty dollars, and removed language related to more severe penalties for

littering; in Subsection B, after "petty misdemeanor", added "and, notwithstanding the provisions of Section 31-19-1 NMSA 1978, shall be punished by a fine of fifty dollars ($50.00)"; and deleted former Subsection C, which stated "Any jail sentence imposed pursuant to Subsection B of this section may be suspended, in the discretion of the magistrate or judge, upon conditions that the offender assist in litter clean-up in the jurisdiction for a period not to exceed the length of the suspended sentence."

30-8-5. Enforcement.

The state game commission may designate trained employees of the commission vested with police powers to enforce the provisions of Section 30-8-4 NMSA 1978. In addition, members of the state police, county sheriffs and their deputies, police officers and those employees of the state park and recreation commission [state parks division of the energy, minerals, and natural resources department] vested with police powers shall enforce the provisions of that section.

History: 1953 Comp., § 40A-8-4.1, enacted by Laws 1975, ch. 199, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 1977, ch. 254, § 4, abolished the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act. Laws 1987, ch. 234 repealed the provisions relating to the natural resources department and created the energy, minerals, and natural resources department, including the state parks division. *See* 9-5A-3 and 9-5A-6.1 NMSA 1978.

30-8-6. Posting; notice to public.

The state highway department [department of transportation] and the state park and recreation commission [state parks division of the natural resources department] shall post in areas under their control pertinent portions of Section 30-8-4 NMSA 1978 and pleas for the public to take their refuse with them and to dispose of it properly.

History: 1953 Comp., § 40A-8-4.2, enacted by Laws 1975, ch. 199, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 1977, ch. 254, § 4, abolished the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act. Laws 1987, ch. 234 repealed the provisions relating to the natural resources department and created the energy, minerals, and natural

resources department, including the state parks division. *See* 9-5A-3 and 9-5A-6.1 NMSA 1978.

30-8-7. Public education.

The state game commission, the state highway department [department of transportation], the state park and recreation commission [state parks division of the natural resources department] and the environmental improvement agency [department of environment] are encouraged to institute public education programs through the news media in order to inform the public of the litter problem in New Mexico and of individual efforts that can be made to assist in the abatement of the problem. In addition, these agencies are authorized to work with industry organizations in a joint antilitter [anti-litter] campaign so that additional effect may be given to the antilitter [anti-litter] effort in New Mexico.

History: 1953 Comp., § 40A-8-4.3, enacted by Laws 1975, ch. 199, § 4.

ANNOTATIONS

Bracketed material. — The bracketed was was inserted by the compiler and is not part of the law.

Laws 1977, ch. 254, § 4, abolished the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act. Laws 1987, ch. 234 repealed the provisions relating to the natural resources department and created the energy, minerals, and natural resources department, including the state parks division. *See* 9-5A-3 and 9-5A-6.1 NMSA 1978.

30-8-8. Abatement of a public nuisance.

A. Except as herein provided, an action for the abatement of a public nuisance shall be governed by the general rules of civil procedure.

B. A civil action to abate a public nuisance may be brought, by verified complaint in the name of the state without cost, by any public officer or private citizen, in the district court of the county where the public nuisance exists, against any person, corporation or association of persons who shall create, perform or maintain a public nuisance.

C. When judgment is against the defendant in an action to abate a public nuisance, he shall be adjudged to pay all court costs and a reasonable fee for the complainant's attorney, when the suit is not prosecuted exclusively by the attorney general or a district attorney.

History: 1953 Comp., § 40A-8-5, enacted by Laws 1963, ch. 303, § 8-5.

ANNOTATIONS

Cross references. — For control of contagious diseases and dangerous conditions by health authorities, *see* 24-1-15 to 24-1-19, 24-1-21 NMSA 1978.

For admissibility of evidence in proceedings hereunder, *see* 30-9-7 NMSA 1978.

For procedure in seeking injunction, *see* Rules 1-065 and 1-066 NMRA.

Injunction authorized. — Injunctive relief could be employed to protect the public health, morals, safety and welfare from irreparable injury by a public nuisance. *State ex rel. Marron v. Compere*, 1940-NMSC-041, 44 N.M. 414, 103 P.2d 273.

Crime not enjoinable as such. — Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

Motion picture. — Injunction of motion picture as nuisance because of "lewdness" would be in the nature of censorship and prior restraint. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

Bond as enforcement device. — A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant from using, occupying or maintaining a certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

Civil action. — Action brought under general equity powers for protection of public morals is a civil action. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

Standing to sue for pollution abatement. — Action brought by attorney general and certain private citizens for injunction to abate alleged public nuisance caused by emissions from coal-burning power plant should have been dismissed in trial court since environmental improvement agency (now environment department) had primary jurisdiction over pollution control and means were available to compel agency to perform its duties, should it fail to do so. *State ex rel. Norvell v. Arizona Pub. Serv. Co*., 1973-NMSC-051, 85 N.M. 165, 510 P.2d 98.

Sufficiency of complaint. — Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

Injunction power of court. — Injunction under general equity powers of court to protect public morals could not be had where complaint was brought under statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that "lewdness, assignation or prostitution" existed there. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

Recovery of pecuniary damages is not provided by this section. Thus, a private plaintiff's attempt to recover pecuniary damages for the pollution of his groundwater must fail. *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Ry.*, 857 F. Supp. 838 (D.N.M. 1994).

Statute provides alternative means for abating noxious odors. — Where air quality standards or regulations have not been established as to what constitutes "air pollution" and thus no violation of the Air Quality Control Act (Sections 74-2-1 to 74-2-17 NMSA 1978) or regulations and standards is apparent, the public nuisance law may provide an alternative means for the environmental improvement division (now environment department) to abate noxious odors. 1978 Op. Att'y Gen. No. 78-12.

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass," see 9 N.M.L. Rev. 367 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Nuisances §§ 229 to 267.

Carwash as nuisance, 4 A.L.R.4th 1308.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.

Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

What constitutes special injury that entitles private party to maintain action based on public nuisance - modern cases, 71 A.L.R.4th 13.

Nuisance as entitling owner or occupant of real estate to recover damages for personal inconvenience, discomfort, annoyance, anguish, or sickness, distinct from, or in addition to, damages for depreciation in value of property or its use, 25 A.L.R.5th 568.

66 C.J.S. Nuisances §§ 102 to 110.

30-8-8.1. Abatement of house of prostitution.

A. When the public nuisance sought to be abated under the provisions of Section 30-8-8 NMSA 1978 is a house of prostitution, as defined in Section 30-9-8 NMSA 1978, in addition to injunctive relief, the remedies and presumptions provided in this section apply.

B. For the purposes of this section and Section 30-8-8 NMSA 1978, two or more convictions of any person or persons occurring at least one week apart within a period of one year for violation of either Section 30-9-2 or 30-9-3 NMSA 1978 arising out of conduct engaged in at the place described in an abatement action creates a presumption that the place is a house of prostitution. However, this presumption shall not arise unless the person against whom the abatement action is brought is shown to have had actual knowledge or to have received written notice from law enforcement officials of the convictions upon which the presumption is based. The knowledge must have been acquired or the notice given no more than thirty days after the date of the convictions. For the purpose of this section the "date of the convictions" is the date upon which a plea of guilty or nolo contendere or a judgment of guilty entered in the case charging the crime is final and unappealable.

C. If, in an abatement action brought under Section 30-8-8 NMSA 1978, a binding admission is made by the defendant or the court concludes that a house of prostitution exists at the location alleged, the court may, as part of its judgment:

(1) direct the removal from the house of prostitution all movable personal property used in conducting the house of prostitution and shall direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; and

(2) order the closing of the house of prostitution for a period of one year and prohibit any person entering it except under conditions specified in the order.

D. If a judgement entered under the provisions of Subsection C of this section includes the provisions of Paragraph (2) of that subsection, the court shall include in its judgment a provision for permitting the owner of the premises ordered closed to take possession of them if he files a bond with sureties to be approved by the court in an amount equal to the full value of the property conditioned upon his promise to abate the nuisance immediately and prevent the reoccurrence of the nuisance for one year thereafter.

History: Laws 1989, ch. 114, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Disorderly Houses §§ 40 to 48.

27 C.J.S. Disorderly Houses § 18.

30-8-9. Abandonment of dangerous containers.

Abandonment of dangerous containers consists of any person:

A. abandoning, discarding or keeping in any place accessible to children, any refrigerator, icebox, freezer, airtight container, cabinet or similar container, of a capacity of one and one-half cubic feet or more, which is no longer in use, without having the attached doors, hinges, lids or latches removed or without sealing the doors or other entrances so as to make it impossible for anyone to be imprisoned therein; or

B. who, being the owner, lessee or manager of any premises, knowingly permits any abandoned or discarded refrigerator, icebox, freezer, airtight container, cabinet or similar container of a capacity of one and one-half cubic feet or more, and which remains upon such premises in a condition whereby a child may be imprisoned therein.

Whoever commits abandonment of dangerous containers is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-6, enacted by Laws 1963, ch. 303, § 8-6.

30-8-10. Repealed.

ANNOTATIONS

Repeals. — Laws 2000, ch. 22, § 3 repealed 30-8-10 NMSA 1978, as enacted by Laws 1963, ch. 303, § 8-7, relating to placing injurious substances on highways, effective July 1, 2000. For provisions of the former section, *see* the 1999 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 66-7-364 NMSA 1978.

30-8-11. Illegal prescribing of medicine.

Illegal prescribing of medicine consists of any physician or other person, while under the influence of any alcoholic beverage or narcotic, prescribing or compounding for any other person, any poison, drug or medicine.

Whoever commits illegal prescribing of medicine while under the influence of any alcoholic beverage or narcotic is guilty of a misdemeanor.

History: 1953 Comp., § 40A-8-8, enacted by Laws 1963, ch. 303, § 8-8.

30-8-12. Repealed.

History: 1953 Comp., § 40A-8-9, enacted by Laws 1963, ch. 303, § 8-9; repealed by Laws 2018, ch. 74, § 56.

ANNOTATIONS

Repeals. — Laws 2018, ch. 74, § 56 repealed 30-8-12 NMSA 1978, as enacted by Laws 1963, ch. 303, § 8-9, relating to conduct offensive to public well-being, effective July 1, 2018. For provisions of former section, *see* the 2017 NMSA 1978 on *NMOnesource.com*.

30-8-13. Repealed.

History: 1953 Comp., § 40A-8-10, enacted by Laws 1963, ch. 303, § 8-10; 1966, ch. 44, § 1; 1967, ch. 180, § 1; repealed by Laws 2018, ch. 74, § 56.

ANNOTATIONS

Repeals. — Laws 2018, ch. 74, § 56 repealed 30-8-13 NMSA 1978, as enacted by Laws 1963, ch. 303, § 8-10, relating to unlawfully permitting livestock upon public highways, effective July 1, 2018. For provisions of former section, *see* the 2017 NMSA 1978 on *NMOnesource.com*.

30-8-14. Recompiled.

History: 1953 Comp., § 40A-8-10.1, enacted by Laws 1975, ch. 283, § 1; 1978 Comp., § 30-8-14, recompiled and amended as § 66-7-363.1 by Laws 2019, ch. 155, § 2.

ANNOTATIONS

Recompilations. — Laws 2019, ch. 155, § 2 recompiled and amended former 30-8-14 NMSA 1978 as 66-7-363.1 NMSA 1978, effective June 14, 2019.

ARTICLE 9
Sexual Offenses

30-9-1. Enticement of child.

Enticement of child consists of:

A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code; or

B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

History: 1953 Comp., § 40A-9-10, enacted by Laws 1963, ch. 303, § 9-10.

ANNOTATIONS

Cross references. — For sexual exploitation of children, *see* 30-6A-1 NMSA 1978 et seq.

For sexually oriented material harmful to minors, *see* 30-37-1 NMSA 1978 et seq.

Compiler's notes. — The words "Article 9 of the Criminal Code" refer to Article 9 of Laws 1963, ch. 303, the unrepealed portions of which are compiled herein as 30-9-1 to 30-9-4 and 30-9-5 to 30-9-9 NMSA 1978.

Possession is control, not forcible abduction. *State v. Perea*, 2008-NMCA-147, 145 N.M. 123, 194 P.3d 738, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

Possession of minor girl. — Where the thirteen-year old minor victim voluntarily entered the defendants' car; the defendant and the victim drove around all day; the victim was frightened but did not feel that she could summon help; the defendant determined the route and the stops and controlled the course of events; the victim was not of legal driving age and could not take control of the car; and the defendant's purpose was to have sex with the victim, the defendant had "possession" of the victim. *State v. Perea*, 2008-NMCA-147, 145 N.M. 123, 194 P.3d 738, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

A man who had a minor girl in his possession for evil purposes was guilty, whether she had been enticed away or carried off by him. *State v. Martin*, 1923-NMSC-036, 28 N.M. 489, 214 P. 575; *State v. Chenault*, 1915-NMSC-024, 20 N.M. 181, 147 P. 283; *State v. Chitwood*, 1923-NMSC-034, 28 N.M. 484, 214 P. 575.

"Enticement" means to incite or instigate, to allure, attract or lead astray; it indicates an intentional act. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

Not lesser included offense of criminal sexual penetration. — The offense of enticement of a child is not a lesser included offense of criminal sexual penetration. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

Completion of offense in evil intent. — The gravamen of charge that defendant had a female minor in his possession for evil purposes, to wit: sexual intercourse, was the evil purpose and intent of the possession, so that the offense was complete from the instant the accused formed the evil intent and purpose of sexual intercourse, regardless of whether it ever came about. *State v. Phipps*, 1943-NMSC-038, 47 N.M. 316, 142 P.2d 550 (decided under prior law).

Charging offense. — Where, in charging the offense, the words "for the purpose of unlawful sexual intercourse" were used, the quoted phrase did not describe an act of fornication only, since an act of sexual intercourse was lawful or unlawful according to the relation of the parties. *State v. Chenault*, 1915-NMSC-024, 20 N.M. 181, 147 P. 283.

Conclusions of jury sustained. — Where jury had opportunity to see the witnesses, heard their testimony and concluded that sexual intercourse had taken place, conviction would be sustained even though it necessitated the rejection of the truth of some of the state's testimony in the case. *State v. Phipps*, 1943-NMSC-038, 47 N.M. 316, 142 P.2d 550.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Validity, construction, and application of state stat-utes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

30-9-2. Prostitution.

Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.

As used in this section "sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission.

Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

History: 1953 Comp., § 40A-9-11, enacted by Laws 1963, ch. 303, § 9-11; 1981, ch. 233, § 1; 1989, ch. 132, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "a sexual act" for "sexual penetration" in the first and second paragraphs, and inserted "masturbation of another" in the second paragraph.

Constitutionality. — This section does not violate the equal protection clause of the fourteenth amendment of the United States constitution or the equal rights amendment of the New Mexico constitution. *State v. Sandoval*, 1982-NMCA-091, 98 N.M. 417, 649 P.2d 485.

"Masturbation" construed. — A jury instruction defining masturbation to include erotic stimulation of the genital organs by the alternative means of "sexual fantasies" extended the scope of criminal conduct prohibited by this section and constituted reversible error. *State v. Mayfield*, 1995-NMCA-077, 120 N.M. 198, 900 P.2d 358.

Possession of woman for unlawful purposes. — The having in possession of a woman for purposes of unlawful sexual intercourse was criminal. *State v. Chenault*, 1915-NMSC-024, 20 N.M. 181, 147 P. 283 (decided under prior law).

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Prostitution §§ 1 to 30.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Laws prohibiting or regulating "escort services," "outcall entertainment" or similar services used to carry on prostitution, 15 A.L.R.5th 900.

73 C.J.S. Prostitution and Related Offenses §§ 2 to 20.

30-9-3. Patronizing prostitutes.

Patronizing prostitutes consists of:

A. entering or remaining in a house of prostitution or any other place where prostitution is practiced, encouraged or allowed with intent to engage in a sexual act with a prostitute; or

B. knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another.

As used in this section, "a sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or an anal opening of another whether or not there is any emission.

Whoever commits patronizing prostitutes is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

History: 1953 Comp., § 40A-9-12, enacted by Laws 1963, ch. 303, § 9-12; 1981, ch. 233, § 2; 1989, ch. 132, § 2.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "a sexual act" for "sexual penetration" throughout the section, in Subsection B inserted "or one believed by the offeror to be a prostitute", inserted "masturbation of another" in the next-to-last undesignated paragraph, and substituted "an anal" for "oral" in the next-to-last undesignated paragraph.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

30-9-4. Promoting prostitution.

Promoting prostitution consists of any person, acting other than as a prostitute or patron of a prostitute:

A. knowingly establishing, owning, maintaining or managing a house of prostitution or a place where prostitution is practiced, encouraged or allowed, or participating in the establishment, ownership, maintenance or management thereof;

B. knowingly entering into any lease or rental agreement for any premises which a person partially or wholly owns or controls, knowing that such premises are intended for use as a house of prostitution or as a place where prostitution is practiced, encouraged or allowed;

C. knowingly procuring a prostitute for a house of prostitution or for a place where prostitution is practiced, encouraged or allowed;

D. knowingly inducing another to become a prostitute;

E. knowingly soliciting a patron for a prostitute or for a house of prostitution or for any place where prostitution is practiced, encouraged or allowed;

F. knowingly procuring a prostitute for a patron and receiving compensation therefor;

G. knowingly procuring transportation for, paying for the transportation of or transporting a person within the state with the intention of promoting that person's engaging in prostitution;

H. knowingly procuring through promises, threats, duress or fraud any person to come into the state or causing a person to leave the state for the purpose of prostitution; or

I. under pretense of marriage, knowingly detaining a person or taking a person into the state or causing a person to leave the state for the purpose of prostitution.

Whoever commits promoting prostitution is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-9-13, enacted by Laws 1963, ch. 303, § 9-13; 1981, ch. 233, § 3.

ANNOTATIONS

Cross references. — For sexual exploitation of children by prostitution, *see* 30-6A-4 NMSA 1978.

Suspension of sentence set aside. — Substantial evidence that defendant permitted certain premises which were under her control to be used for purposes of prostitution, lewdness and assignation, supported judgment of trial court in setting aside order of suspension of one month jail sentence imposed for keeping a house of prostitution. *State v. Snyder*, 1923-NMSC-021, 28 N.M. 387, 212 P. 736.

Sufficient evidence to support promoting prostitution conviction. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant’s conviction for promoting prostitution was supported by substantial evidence where the evidence presented at trial established that defendant created an advertisement for the victim on a website commonly used to advertise prostitution services, that defendant listed his phone number as the contact number in the advertisement, and that defendant took the victim to a gas station and dropped her off there intending for her to exchange sex for money. *State v. Jackson*, 2018-NMCA-066, cert. denied.

Indictment sufficient. — A count in which it was charged that defendant, on a certain day, at a certain place, did, unlawfully, set up and keep a house of prostitution in a certain town, within seven hundred feet of a certain theater, contrary to the form of the statute, sufficiently conformed with the statute (Laws 1901, ch. 84, § 1). *Territory v. McGrath*, 1911-NMSC-026, 16 N.M. 202, 114 P. 364 (decided under prior law).

It was unnecessary to set forth in the indictment the names of persons permitted to use the premises unlawfully. *State v. Alston*, 1923-NMSC-006, 28 N.M. 379, 212 P. 1031.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Disorderly Houses §§ 14, 19; 63A Am. Jur. 2d Prostitution §§ 7 to 9, 15 to 23.

Criminal responsibility of woman who connives or consents to her own transportation for immoral purposes, 84 A.L.R. 376.

Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 A.L.R.4th 1195.

Entrapment defense, availability in state court of defense where one accused of pandering denies participation in offense, 5 A.L.R.4th 1128.

Entrapment defense in sex offense prosecution, 12 A.L.R.4th 413.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

27 C.J.S. Disorderly Houses §§ 2 to 6; 73 C.J.S. Prostitution and Related Offenses §§ 4 to 13.

30-9-4.1. Accepting earnings of a prostitute.

Accepting the earnings of a prostitute consists of accepting, receiving, levying or appropriating money or anything of value, without consideration, from the proceeds of the earnings of a person engaged in prostitution with the knowledge that the person is engaged in prostitution and that the earnings are derived from engaging in prostitution, or knowingly owning or knowingly managing a house or other place where prostitution is practiced or allowed and living or deriving support or maintenance, in whole or in part, from the earnings or proceeds of a person engaged in prostitution at that house or place.

Whoever commits accepting the earnings of a prostitute is guilty of a fourth degree felony.

History: Laws 1981, ch. 233, § 4.

ANNOTATIONS

Sufficient evidence to support conviction. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for accepting earnings of a prostitute was supported by substantial evidence where trial testimony from the victim established that defendant knew that the victim was engaged in prostitution and that the victim gave defendant money she received as a result of various sexual transactions. *State v. Jackson*, 2018-NMCA-066, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Prostitution §§ 24 to 26.

73 C.J.S. Prostitution §§ 17, 18.

30-9-5. Order for medical examination and treatment.

In addition to its general sentencing authority, the court may order any defendant convicted of prostitution or patronizing prostitutes to be examined for venereal disease and shall sentence any diseased defendant to submit to medical treatment until he is discharged from treatment as noninfectuous [noninfectious]. If the defendant is without funds to pay for medical treatment, it shall be provided by the state department of public health [department of health].

History: 1953 Comp., § 40A-9-14, enacted by Laws 1963, ch. 303, § 9-14.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Section 12-1-2, 1953 Comp. (Laws 1937, ch. 39, § 2), creating the state department of health, was repealed by Laws 1968, ch. 37, § 7. Laws 1968, ch. 37, § 3, (former 12-1-28, 1953 Comp.), transferred all powers, duties, etc. of the department of public health to the health and social services department, which department was abolished by Laws 1977, ch. 253, § 5. Section 4 of the 1977 act established the health and environment department, consisting of several divisions. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

30-9-6. Testimony of witnesses to prostitution and lewdness.

In any investigation, proceeding, preliminary hearing or trial before any court, magistrate or grand jury concerning a violation of or an attempt to commit any crime in violation of Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article, no person shall be excused from giving testimony or producing documentary or other evidence material to such investigation, proceeding, preliminary hearing or trial on the ground that the testimony or evidence required of him is incriminating evidence;

provided that, any person who is so subpoenaed and ordered to testify or produce evidence concerning such crimes shall be immune to prosecution or conviction for any violation of such crimes about which he may testify.

History: 1953 Comp., § 40A-9-15, enacted by Laws 1963, ch. 303, § 9-15.

ANNOTATIONS

Cross references. — For protection against self-incrimination, *see* N.M. Const., art. II, § 15.

30-9-7. Evidence.

In any proceeding under Article 9 [30-9-1 to 30-9-9 NMSA 1978] or action to abate a public nuisance under Article 8 [30-8-1 to 30-8-4, 30-8-8 to 30-8-13 NMSA 1978], testimony about the following circumstances is admissible in evidence:

A. the general reputation of the place;

B. the reputation of the persons who reside in or frequent the place;

C. the frequency, timing and length of visits by nonresidents; and

D. prior convictions of the defendant or persons who reside in or frequent the place under Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article or Sections 40-34-1 through 40-34-5 New Mexico Statutes Annotated, 1953 Compilation, or of any other offense of like nature wherever committed.

History: 1953 Comp., § 40A-9-16, enacted by Laws 1963, ch. 303, § 9-16.

ANNOTATIONS

Cross references. — For general rule on admissibility of evidence of other crimes, *see* Paragraph B of Rule 11-404 NMRA.

Compiler's notes. — Sections 40-34-1 through 40-34-5, 1953 Comp., relating to prostitution, which are referred to in Subsection D, were repealed by Laws 1963, ch. 303, § 30-1.

Proof not restricted. — Evidence by which an establishment might be proved a house of prostitution was not limited to a proof of facts mentioned in statute. *Territory v. McGrath*, 1911-NMSC-026, 16 N.M. 202, 114 P. 364.

Admissibility of prior conviction. — Proof of a prior conviction for keeping a house of prostitution should have been restricted to a conviction previously had under the

provisions of current act (Laws 1921, ch. 69) and not of a prior act. *State v. Snyder*, 1923-NMSC-022, 28 N.M. 388, 212 P. 736 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Disorderly Houses §§ 29 to 32; 63A Am. Jur. 2d Prostitution § 28.

Admissibility, in prosecution for sexual offense, of evidence of other similar offense, 77 A.L.R.2d 841, 2 A.L.R.4th 330.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape person other than prosecutrix - prior offenses, 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other then prosecutrix - subsequent acts, 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix - offenses unspecified as to time, 88 A.L.R.5th 429.

27 C.J.S. Disorderly Houses § 14 (1-5); 73 C.J.S. Prostitution and Related Offenses § 6.

30-9-8. House of prostitution; public nuisance.

As used in this section "house of prostitution" means a building, enclosure or place that is used for the purpose of prostitution as that crime is defined in Section 30-9-2 NMSA 1978. A house of prostitution is a public nuisance per se.

History: 1953 Comp., § 40A-9-17, enacted by Laws 1963, ch. 303, § 9-17; 1989, ch. 114, § 2.

ANNOTATIONS

Cross references. — For abatement of public nuisance, *see* 30-8-8 NMSA 1978.

The 1989 amendment, effective March 28, 1989, added the first sentence.

Criminal proceeding. — Former statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that lewdness, assignation or prostitution existed was criminal in nature and the complaint was an action in the nature of a

criminal proceeding. *State ex rel. Murphy v. Morley*, 1957-NMSC-087, 63 N.M. 267, 317 P.2d 317.

Crime not enjoinable as such. — Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

Sufficiency of complaint. — Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

Bond as enforcement device. — A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant, from using, occupying or maintaining a certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. *State v. Robertson*, 1957-NMSC-060, 63 N.M. 74, 313 P.2d 342.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

30-9-9. Remedy of lessor.

If the lessee of property has been convicted of using it as a house of prostitution, or if the property has been adjudged to constitute a public nuisance for that reason, the lease by which the property is held is voidable by the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

History: 1953 Comp., § 40A-9-18, enacted by Laws 1963, ch. 303, § 9-18.

ANNOTATIONS

Cross references. — For provisions on forcible entry and unlawful detainer, *see* 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, *see* 47-8-1 NMSA 1978.

Recovery of rent barred. — Where building was leased with intent that it be used as a house of prostitution, and the house was so used, the lessor could not recover rent. *McRae v. Cassan*, 1910-NMSC-038, 15 N.M. 496, 110 P. 574.

30-9-10. Definitions.

As used in Sections 30-9-10 through 30-9-16 NMSA 1978:

A. "force or coercion" means:

(1) the use of physical force or physical violence;

(2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;

(3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;

(4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or

(5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

Physical or verbal resistance of the victim is not an element of force or coercion;

B. "great mental anguish" means psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms;

C. "patient" means a person who seeks or obtains psychotherapy;

D. "personal injury" means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ;

E. "position of authority" means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child;

F. "psychotherapist" means a person who is or purports to be a:

(1) licensed physician who practices psychotherapy;

(2) licensed psychologist;

(3) licensed social worker;

(4) licensed nurse;

(5) counselor;

(6) substance abuse counselor;

(7) psychiatric technician;

(8) mental health worker;

(9) marriage and family therapist;

(10) hypnotherapist; or

(11) minister, priest, rabbi or other similar functionary of a religious organization acting in his role as a pastoral counselor;

G. "psychotherapy" means professional treatment or assessment of a mental or an emotional illness, symptom or condition;

H. "school" means any public or private school, including the New Mexico military institute, the New Mexico school for the blind and visually impaired, the New Mexico school for the deaf, the New Mexico boys' school, the New Mexico youth diagnostic and development center, the Los Lunas medical center, the Fort Stanton hospital, the New Mexico behavioral health institute at Las Vegas and the Carrie Tingley crippled children's hospital, that offers a program of instruction designed to educate a person in a particular place, manner and subject area. "School" does not include a college or university; and

I. "spouse" means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce.

History: 1953 Comp., § 40A-9-20, enacted by Laws 1975, ch. 109, § 1; 1979, ch. 28, § 1; 1993, ch. 177, § 1; 2001, ch. 161, § 1; 2005, ch. 313, § 7.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, changed the name of the New Mexico school for the visually handicapped to the New Mexico school for the blind and visually impaired and changed the name of the Las Vegas medical center to the New Mexico behavioral institute at Las Vegas in Subsection H.

The 2001 amendment, effective July 1, 2001, added Subsection H and redesignated former Subsection H as Subsection I.

The 1993 amendment, effective July 1, 1993, in Subsection A, substituted "contact" for "conduct" near the beginning of Paragraph (4), redesignated the former second sentence of Paragraph (4) as the second undesignated paragraph of the subsection, added Paragraph (5), making a related grammatical change, and made stylistic changes; and added present Subsections C, F, and G, making related subsection redesignations.

Force or coercion. – Where defendant grabbed the victim's breasts, causing pain and discomfort and squeezed the victim's breasts so tightly that the victim was unable to breath, became dizzy, and was unable to escape from defendant's grip, there was sufficient evidence to support a finding that defendant used force to sexually assault the victim. *State v. Huff*, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104.

Mental anguish. – Expert testimony concerning the victim's mood swings from depression to anger, the victim's emotional inability to re-enroll in school, indications that the victim had started drinking more to block out what happened, and the victim's plan to move in order to avoid bad memories and embarrassment was sufficient evidence to establish the element of mental anguish. *State v. Barraza*, 1990-NMCA-026, 110 N.M. 45, 791 P.2d 799, cert. denied, 109 N.M. 704, 789 P.2d 1271.

Sufficient evidence of great mental anguish. — Where defendant was convicted of first-degree criminal sexual penetration (CSP), and where defendant claimed that the state failed to establish that the victim suffered great mental anguish as a result of the incident and that the evidence is therefore insufficient to support his conviction for first-degree CSP, evidence that the victim was over seventy years of age, that she moved to another state to live with her daughter because she felt unable to live alone, that she experienced constant flashbacks, and as a result had trouble concentrating and was unable to drive for a period of time, was sufficient to support a conclusion that the victim suffered great mental anguish as a result of the incident. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

Position of authority. – Where defendant was considered by the victim as a father figure; defendant acted as a father figure in the presence of other people; defendant did chores at the request of the victim's parent; defendant was entrusted by the victim's parent to act as the victim's guardian at times; defendant assumed the role of employer by allowing the victim to earn money at defendant's place of business; and defendant was the trusted friend of the victim's parent which allowed defendant to be alone with

the victim when the victim spent the night at defendant’s house or went to the dump in defendant’s truck, the evidence was sufficient to support a finding that defendant exercised a position of authority over the victim. *State v. Gipson*, 2009-NMCA-053, 146 N.M. 202, 207 P.3d 1179.

"Position of authority" interpreted. — In 30-9-10(E) NMSA 1978, the legislature has designated certain relationships with a child that represent a "position of authority," and the language "who, by reason of that position, is able to exercise undue influence over a child" does not pertain to each of the types of position of authority listed in the definition. Under the definition of "position of authority", a household member is presumed to be able to exercise undue influence over a child such that additional proof concerning a perpetrator’s use or possession of such authority is not required. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Where defendant, who was charged with criminal sexual contact of a child thirteen to eighteen years of age, did not dispute the evidence that he was a household member, but claimed that the state failed to prove that he used this position of authority to coerce the child to submit to sexual contact, the state was not required to prove that defendant, by reason of his position as a household member, was able to exercise undue influence over the child, because the legislature has designated certain relationships with a child, including a household member, that represent a position of authority for purposes of prosecution under 30-9-13 NMSA 1978. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Phrase "unless the couple is living apart" is not void for vagueness when construed and applied in the ordinary sense to mean a suspension of the marital relationship. *State v. Brecheisen*, 1984-NMCA-011, 101 N.M. 38, 677 P.2d 1074, cert. denied, 101 N.M. 11, 677 P.2d 624.

Evidence of living apart. — Evidence supported finding that defendant and his wife were living apart at the time of an alleged attack by defendant upon his wife, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Consensual sex between therapist and adult patient. — A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 1991-NMCA-043, 112 N.M. 143, 812 P.2d 797, cert. denied, 112 N.M. 77, 811 P.2d 575.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 A.L.R.3d 1227.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 A.L.R.3d 854.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 A.L.R.4th 1064.

30-9-11. Criminal sexual penetration.

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a depraved mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.

D. Criminal sexual penetration in the first degree consists of all criminal sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

E. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) by the use of force or coercion on a child thirteen to eighteen years of age;

(2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;

(3) by the use of force or coercion that results in personal injury to the victim;

(4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(5) in the commission of any other felony; or

(6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978].

F. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion not otherwise specified in this section.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

G. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

(1) not defined in Subsections D through F of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or

(2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-9-21, enacted by Laws 1975, ch. 109, § 2; 1987, ch. 203, § 1; 1991, ch. 26, § 1; 1993, ch. 177, § 2; 1995, ch. 159, § 1; 2001, ch. 161, § 2; 2003 (1st S.S.), ch. 1, § 3; 2007, ch. 69, § 1; 2009, ch. 56, § 1.

ANNOTATIONS

Cross references. — For assault with intent to commit a violent felony, *see* 30-3-3 NMSA 1978.

For sexual exploitation of children, *see* 30-6A-3 NMSA 1978.

For provision that testimony of a victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

For Uniform Jury Instructions, *see* UJI 14-941 to 14-963 NMRA.

Compiler's notes. — For Laws 2003, ch. 257 enactment concerning time limit for prosecution under this section, *see* 30-1-9.2 NMSA 1978 and notes thereto.

The 2009 amendment, effective July 1, 2009, in Subsection C, increased the age of the child victim from nine to thirteen years.

The 2007 amendment, effective July 1, 2007, added a new Subsection C to provide a penalty for aggravated criminal sexual penetration in the first degree; defined criminal sexual penetration in the second degree to consist of criminal sexual penetration by the use of force or coercion on a child thirteen to eighteen years of age; and eliminated the penalty for criminal sexual penetration in the third degree when the victim is thirteen to eighteen years of age.

The 2003 (1st S.S.) amendment, effective February 3, 2004, added the last two sentences of Subsection D and the last sentence of Subsection E.

The 2001 amendment, effective July 1, 2001, substituted "eighteen" for "sixteen" in Paragraph D(1); and in Subsection F, added the Paragraph (1) designation, inserted "the child" following "older than" in Paragraph (1), and added Paragraph (2).

The 1995 amendment, effective July 1, 1995, in Subsection D, added Paragraph (2) and redesignated the remaining paragraphs accordingly.

The 1993 amendment, effective July 1, 1993, designated the formerly undesignated provisions as Subsection A; added present Subsection B; redesignated former Subsections A through D as Subsections C through F; and substituted "Subsections C through E" for "Subsection A, B, or C" in the first paragraph of Subsection F.

The 1991 amendment, effective June 14, 1991, deleted "other than one's spouse" following "person" in the first paragraph and substituted "and not the spouse of that child" for "the child" at the end of the first sentence in Subsection D.

The 1987 amendment, effective June 19, 1987, added Subsection D.

I. GENERAL CONSIDERATION.

A. IN GENERAL.

Constitutionality. — "Unlawful" is defined as "without excuse of justification" and the use of that term by the statute does not render the statute void for vagueness. *State v. Larson*, 1980-NMSC-106, 94 N.M. 795, 617 P.2d 1310.

Identical counts and jury instructions. — Where multiple counts of criminal sexual penetration of a minor in the indictment and the counts in the jury instructions were carbon-copy counts of each other and where the child's testimony distinguished facts for each count and the defendant admitted to having sexual intercourse with the child on several occasions, there was sufficient evidence from which a jury could find separate incidents of criminal sexual penetration and there was no violation of double jeopardy. *State v. Martinez*, 2007-NMCA-160, 143 N.M. 96, 173 P.3d 18, cert. denied, 2007-NMCERT-011.

Double jeopardy. — The crime of attempted CSP III is subsumed within assault with intent to commit CSP. Proof of an overt act done with the intent of forcing CSP required by attempted CSP III is satisfied by the same proof required for the attempted restraint by force in the assault (attempted battery) charge. *State v. Schackow*, 2006-NMCA-123, 140 N.M. 506, 143 P.3d 745, cert. denied, 2006-NMCERT-008, 140 N.M. 422, 143 P.3d 184.

Multiple counts of criminal sexual penetration. — Section 30-9-11 NMSA 1878 cannot be said as a matter of law to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others. In determining whether an act is distinct our analysis is informed by the following factors culled from decisions of other jurisdictions that have considered the issue of multiple punishment in cases of rape: (1) temporal proximity of penetrations (the greater the interval between acts the greater the likelihood of separate offenses); (2) location of the victim during each penetration (movement or repositioning of the victim between penetrations tends to show separate offenses); (3) existence of an intervening event; (4) sequencing of penetrations (serial penetrations of different orifices, as opposed to repeated penetrations of the same

orifice, tend to establish separate offenses); (5) defendant's intent as evidenced by his conduct and utterances; and (6) number of victims (although not relevant here, multiple victims will likely give rise to multiple offenses). *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624.

The term "sexual intercourse" includes penetration of the vulva even when the vaginal canal is not penetrated. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

Applicable statute of limitations. — Where the state alleges that defendant committed criminal sexual penetration of a minor under the age of 13 between September and December of 1988 and in January of 1989, the applicable statute of limitations at the time defendant allegedly committed the crime is 15 years. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

Exclusion of defendant from courtroom. — Defendant's exclusion from the courtroom while child testified created a substantial risk that the jury would assume that the trial court believed that the defendant had engaged in misconduct necessitating his absence from the courtroom. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

Defendant absent from trial voluntarily. — Factors articulated in *State v. Clements*, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195, cert. denied, 107 N.M. 785, 765 P.2d 758, as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

Trial of co-defendants. — Whether separate trials are to be held for defendants jointly indicted for attempted forcible rape was a matter to be addressed to and resolved by the sound discretion of the trial court. *State v. Pope*, 1967-NMCA-010, 78 N.M. 282, 430 P.2d 779.

Defense of mistake of fact. — Twenty year-old defendant's conviction of fourth degree criminal sexual penetration was reversed, where the trial court did not consider his defense of mistake of fact, which was based on evidence that he had asked the fifteen year-old victim her age and was told by her and another person that she was seventeen. *Perez v. State*, 1990-NMSC-115, 111 N.M. 160, 803 P.2d 249.

Prosecutor's remarks held prejudicial. — The prosecutor made a legally incorrect statement of the law when he told the jury the crime for which the defendant was charged (criminal sexual penetration) was less serious than committing the crime with a weapon, thus invading the province of the court to give instructions on the law. Because the evidence of defendant's guilt was less than overwhelming, it is fair to assume that the prosecutor's remarks had some prejudicial impact, substantial enough to require a

new trial at the trial court's discretion. *State v. Gonzales*, 1986-NMCA-050, 105 N.M. 238, 731 P.2d 381, cert. quashed, 105 N.M. 211, 730 P.2d 1193 (1987).

Adoption of child conceived as result of rape. — Man convicted of criminal sexual penetration of a child had no constitutional right under the due process clauses of the United States or New Mexico Constitutions to withhold consent to adoption of the child conceived and born as a result of that act. *Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal*, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

Spouses living apart. — The phrase "living apart" as the phrase is used in the definition of the term "spouse" in Section 30-9-10 NMSA 1978 suggests that Section 30-9-11 NMSA 1978 was designed to prohibit nonconsensual sexual activity among married persons during interruption of the relationship and there is no indication that the legislature intended either a durational requirement or the existence of measures to terminate the marriage to impose criminal liability on one spouse for the rape of another. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

B. CONSTITUTIONALITY.

Speedy trial. — The right to a speedy trial based on a 1989 original complaint, which was dismissed, did not run from 1989 to 2002 when charges were re-filed because defendant was not an "accused" and knew he was not an "accused" during the approximately 13-year interval when no criminal sexual penetration of a minor under the age of 13 charges were pending against him. Therefore, defendant's speedy trial right did not attach until 2002. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

Phrase "perpetrated by the use of force or coercion" not vague. — Phrase "perpetrated by the use of force or coercion" in this section is not unconstitutionally vague since the crime is defined in terms of a result that defendant causes, and if a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result, that is, the crime. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Distinctions between degrees on basis of harm constitutional. — Determining the degree of a crime by the amount of the harm done to the victim does not make the statute unconstitutionally vague. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Section not void for vagueness. — Criminal sexual penetration could be committed by the use of force or coercion without the victim suffering personal injury as a result thereof and the distinction between second and third degree criminal sexual penetration based on personal injury to the victim is not void for vagueness as a matter of law. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408.

Former sodomy statute constitutional. — Former 40A-9-6, 1953 Comp., which embraced and proscribed sodomitic conduct even on the part of consenting adults was constitutionally valid. *State v. Elliott*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352 (decided under prior law, statute repealed).

And not violative of right of privacy. — On attack by an inmate of penal institution against constitutionality of former sodomy statute on grounds that it violated right of privacy, nothing in the language of the act could reasonably be considered as violative of any constitutionally protected area, nor did the record disclose an unconstitutional application of the law in the particular instance. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309 (decided under prior law, statute repealed).

Standing to challenge constitutionality. — Defendant's claims that definitional distinctions which go to difference between first and second degree criminal sexual penetration are unconstitutionally vague would not be considered by the appeals court when defendant was convicted of second degree criminal sexual penetration. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Since defendant did not claim nor argue that he was a member of the class discriminated against by the former sodomy statute or that his rights had been impaired by application of the statute to him, he lacked standing to challenge the constitutionality of the act. *State v. Armstrong*, 1973-NMCA-081, 85 N.M. 234, 511 P.2d 560, cert. denied, 85 N.M. 228, 511 P.2d 554, *overruled by State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207; *State v. Kasakoff*, 1972-NMCA-151, 84 N.M. 404, 503 P.2d 1182.

In prosecution for sodomy, where the state's evidence was that the act was committed by force and the defendant denied committing the act, defendant could not then argue that the incident was a consensual act between two adult persons and that the statute was unconstitutional as overbroad for prohibiting private consensual acts of adults. *State v. Kasakoff*, 1972-NMCA-151, 84 N.M. 404, 503 P.2d 1182.

Spouses living apart. — Where, at the time defendant broke into the house in which defendant’s spouse lived and forcibly had sexual contact with the spouse, defendant and the spouse were living apart, defendant did not have standing to challenge Section 30-9-11 NMSA 1978 on the ground that the statute was unconstitutionally overbroad, because it infringed on privacy in marriage which is a protected right of association under the First Amendment. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Section 30-9-11 NMSA 1978 is not unconstitutionally vague even though the phrase "living apart" is not defined as that phrase is used in the definition of the term "spouse"

in Section 30-9-10 NMSA 1978. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

C. ELEMENTS OF OFFENSE.

Criminal sexual penetration based on the commission of a felony. — When criminal sexual penetration in the second degree is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent. Simply causing another person to engage in otherwise lawful sexual intercourse at the same time a felony is being committed does not constitute the crime of criminal sexual penetration during the commission of a felony. The jury should be instructed that the crime of criminal sexual penetration during the commission of a felony requires the commission of unlawful sexual activity with the victim of the felony. *State v. Stevens*, 2014-NMSC-011, *overruling in part State v. Maestas*, 2005-NMCA-062, 137 N.M. 477.

Where defendant directed the victim to perform oral sex on defendant's friend after the three injected methamphetamine together; defendant did not force the victim to perform oral sex; the victim complied with defendant's direction because the victim was high and did not care; defendant was charged with causing criminal sexual penetration during the commission of the felony of distribution of a controlled substance to a minor; and the jury was not instructed that the state was required to prove that the sexual penetration was unlawful and that the penetration was caused by the commission of a felony against the victim, the deficiency in the jury instructions did not result in fundamental error, because the sexual relation between the victim, who was thirteen years of age, and defendant's friend, who was as least ten years older, was unlawful and the fact that it was after the victim had been injected with methamphetamine that the victim acquiesced to defendant's direction to perform oral sex established the nexus of causation between the commission of the felony against the victim and the resulting unlawful sexual act committed on the victim. State v. Stevens, 2014-NMSC-011, *overruling in part State v. Maestas*, 2005-NMCA-062, 137 N.M. 477.

Use of force. — Where the defendant ensured the physical isolation of the location where the incident occurred; locked the doors of the car; unbuttoned and took off the thirteen-year old victim's pants; told the victim that she was ready for intercourse despite her disagreement; reclined the victim's car seat and then climbed on top of her, initiating sex by forcing the victim's legs open; and persisted in having intercourse with the victim after she told the defendant that it hurt and asked him to stop, the evidence was sufficient to support the defendant's conviction of sexual penetration through the use of force or coercion. *State v. Perea*, 2008-NMCA-147, 145 N.M. 123, 194 P.3d 738, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

Criminal sexual penetration is not continuing offense. — Once the penetration is perpetrated, that criminal sexual penetration is a completed offense. *State v. Ramirez*,

1978-NMCA-102, 92 N.M. 206, 585 P.2d 651; *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159, cert. denied, 108 N.M. 668, 777 P.2d 907.

Penetration not essential. — Despite the heading "Criminal sexual penetration" for this section, the offense does not require penetration. *State v. Delgado*, 1991-NMCA-064, 112 N.M. 335, 815 P.2d 631, cert. denied, 112 N.M. 220, 813 P.2d 1018.

Force or coercion not an element. — Force or coercion is not an essential element of second degree criminal sexual penetration when defendant is in a position of authority over an inmate. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 477, 112 P.3d 1134, *rev'd on other grounds*, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933.

"Anguish" as personal injury. — "Anguish" means "distress," and mental anguish is distress of the mind; if such results from the use of force or coercion it is personal injury under this statute. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Specific intent to rape was not element of the crime. *State v. Ramirez*, 1972-NMCA-108, 84 N.M. 166, 500 P.2d 451, cert. denied, 84 N.M. 180, 500 P.2d 1303.

Intent. — The wording of this section was not meant to impose the additional requirement of showing specific intent. The intent which must be present to perform the act satisfies the "intentional causing" provision in this section. *State v. Keyonnie*, 1977-NMSC-097, 91 N.M. 146, 571 P.2d 413.

Voluntary drunkenness no defense. — Instruction that rape requires no specific intent and that voluntary drunkenness is neither excuse nor justification for crime of rape was correct. *State v. Ramirez*, 1972-NMCA-108, 84 N.M. 166, 500 P.2d 451, cert. denied, 84 N.M. 180, 500 P.2d 1303.

Specific sexual intent not an element. — The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408.

Proof of intent. — State was not required to prove motive or intent. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

"Perpetrated," in Subsection D, means accomplished, performed, committed. *State v. Ramirez*, 1978-NMCA-102, 92 N.M. 206, 585 P.2d 651.

Penetration must be intentional. — To prove criminal sexual penetration in the third degree, the state must establish that the penetration was intentional. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

Child under age of 13. — Causing a child under the age of 13 to engage in cunnilingus, even where there is no penetration, is sufficient to establish violation of this section. *State v. Orona*, 1982-NMSC-002, 97 N.M. 232, 638 P.2d 1077.

Penetration and felony must be continuous transaction under Subsection D(4) (now E(5)). — If a criminal sexual penetration occurs within the res gestae of a felony, Subsection D(4) (now E(5)) is applicable, and for the sexual penetration to come within the res gestae, the felony and the sexual penetration must be part of one continuous transaction and closely connected in point of time, place and causal connection. *State v. Martinez*, 1982-NMCA-053, 98 N.M. 27, 644 P.2d 541, cert. denied, 98 N.M. 336, 648 P.2d 794.

Means of committing offense. — Former law defining rape did not embrace several distinct offenses, but merely defined the various means by which the same offense might be committed. *Territory v. Edie*, 1892-NMSC-019, 6 N.M. 555, 30 P. 851, *aff'd on rehearing*, 1893-NMSC-016, 7 N.M. 183, 34 P. 46.

Force or coercion. — Unless there is force or coercion beyond that inherent in almost every criminal sexual penetration, the proper charge is third degree criminal sexual penetration. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

Intercourse with underage girl. — Rape could be perpetrated in any of the ways set out in the statutes and sexual intercourse with a girl with her consent constituted rape if she was less than 16 (now 13) years of age. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

Submission to request of authority figure is coercion if it is achieved through undue influence or affected by external forces. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Consensual sex between therapist and adult patient. — A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 1991-NMCA-043, 112 N.M. 143, 812 P.2d 797, cert. denied, 112 N.M. 77, 811 P.2d 575.

Spouses living apart. — Where defendant’s spouse asked defendant to move out of their house several days before defendant broke into the house and forcibly had sexual contact with the spouse; the separation was to last a month to give the spouse time to decide whether to seek a divorce; defendant believed defendant had no choice but to move out; and defendant moved some of defendant’s belongings out of the house and visited the spouse only to get work clothes and toiletries, there was a suspension of the marital relationship at the time defendant forcibly had sexual contact with the spouse. *Brescheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Guilt of each participant. — A person engages in sexual intercourse, cunnilingus, fellatio, or anal intercourse if that person is one of the two persons required for the performance of the act. *State v. Delgado*, 1991-NMCA-064, 112 N.M. 335, 815 P.2d 631, cert. denied, 112 N.M. 220, 813 P.2d 1018.

Statutory language genderless. — The genderless language used in the statute makes clear that the defendant can be either male or female. *State v. Delgado*, 1991-NMCA-064, 112 N.M. 335, 815 P.2d 631, cert. denied, 112 N.M. 220, 813 P.2d 1018.

Child not conceived "as a result of rape". — Child conceived as a result of fourth degree criminal sexual penetration of a 16-year-old was not conceived "as a result of rape" authorizing dismissal of the father from adoption proceedings under Subsection C of 32A-5-19 NMSA 1978. *State ex rel. Children, Youth & Families Dep't v. Paul P*., 1999-NMCA-077, 127 N.M. 492, 983 P.2d 1011.

Defendant entitled to discovery of information relevant to element of mental anguish which the state has to prove. *State v. Garcia*, 1980-NMCA-061, 94 N.M. 583, 613 P.2d 725, cert. denied, 94 N.M. 675, 615 P.2d 992.

Defendant may require complaining witness to undergo psychological examination. — When the mental condition of the victim is relevant because the state alleges the force or coercion resulted in mental anguish to the victim, defendant may require complaining witness to undergo a psychological examination, in order to adequately prepare his defense. *State v. Garcia*, 1980-NMCA-061, 94 N.M. 583, 613 P.2d 725, cert. denied, 94 N.M. 675, 615 P.2d 992.

D. MULTIPLE CONVICTIONS OR PUNISHMENTS.

Criminal sexual penetration and assault with intent to commit criminal sexual penetration on household member. — Criminal sexual penetration and assault with intent to commit criminal sexual penetration on a household member are separate offenses. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

Third degree criminal sexual penetration becomes second degree criminal sexual penetration when it is committed during the commission of any other felony. *Florez v. Williams*, 281 F.3d 1136 (10th Cir. 2002).

Offense of enticement of child is not lesser included offense of criminal sexual penetration. *State v. Garcia*, 1983-NMCA-069, 100 N.M. 120, 666 P.2d 1267, cert. denied, 100 N.M. 192, 668 P.2d 308.

Aggravated sodomy and murder not merged. — Homicide resulting from great bodily harm provided sufficient evidence for the jury to find aggravated sodomy and first degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461.

Merger of attempted criminal sexual penetration and criminal sexual contact of minor from unitary conduct. — Despite the state's contention that the conduct underlying the offenses charged against the defendant was not unitary, in that the defendant's action of lying on the victim constituted criminal sexual contact of a minor and his action of preparing to "hump" her constituted attempted criminal sexual penetration of a minor, the actions can only reasonably be deemed to constitute unitary conduct; the contact and attempted penetration all took place within the same short space of time, with no physical separation between the illegal acts. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

Criminal sexual contact of minor is not lesser included offense of attempted criminal sexual penetration. — For purposes of double jeopardy, the offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser included and greater inclusive crimes because they each contain different elements and stand independently in relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

Charges of kidnapping and second degree criminal sexual penetration do not merge since the elements of the offense of second degree criminal sexual penetration do not involve all of the elements of kidnapping. *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, 691 P.2d 67.

The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes protect different social norms. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Under the facts of this case, the jury could have inferred from facts other than the rape itself that defendant intended to hold the victim against her will from the moment of the abduction. Since the conduct underlying the offenses is not the same, the double jeopardy clause does not prohibit multiple punishments in this case. *State v. Ramos*, 1993-NMCA-072, 115 N.M. 718, 858 P.2d 94, cert. denied, 115 N.M. 602, 856 P.2d 250.

Merger of criminal sexual penetration and kidnapping based on same act. — Defendant's convictions for second degree criminal sexual penetration (commission of a felony) and kidnapping (no great bodily harm) under Section 30-4-1 NMSA 1978, stemming from the same act of sexual intercourse, potentially violated double jeopardy rights and were required to be set aside. *State v. Crain*, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095.

Consecutive sentences for kidnapping and criminal sexual penetration. — Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnapping and the predicate felony of kidnapping with intent to hold for

service is, in general, permissible because the two crimes address different social norms. *State v. Tsethlikai*, 1989-NMCA-107, 109 N.M. 371, 785 P.2d 282, cert. denied, 109 N.M. 262, 784 P.2d 1005 (1990).

Consective sentences. — Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 1990-NMSC-067, 110 N.M. 304, 795 P.2d 996.

Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnapping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act," imposition of consecutive sentences was not double jeopardy. *State v. Andazola*, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

Force or coercion for kidnapping or false imprisonment. — A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

False imprisonment and criminal sexual penetration II. — Defendant’s convictions of false imprisonment and criminal sexual penetration in the second degree which arose out of the same conduct violated the double jeopardy clause. *State v. Armendariz*, 2006-NMCA-152, 140 N.M. 712, 148 P.3d 798, cert. quashed, 2008-NMCERT-002, 143 N.M. 667, 180 P.3d 674.

False imprisonment and criminal sexual penetration III. — Defendant’s convictions for false imprisonment and criminal sexual penetration without the use of a deadly weapon which arose out of the same conduct did not violate the double jeopardy clause. *State v. Fielder*, 2005-NMCA-108, 138 N.M. 244, 118 P.3d 752, cert. quashed, 2006-NMCERT-004, 139 N.M. 430, 134 P.3d 123.

No merger of false imprisonment and criminal sexual penetration. — There was sufficient evidence to support separate charges for false imprisonment and criminal sexual penetration where the victim testified that defendant would not let her out of the bedroom for a period of time after the penetration occurred. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

No merger of aggravated burglary and criminal sexual penetration. — Since aggravated burglary (Section 30-16-4 NMSA 1978) and criminal sexual penetration in the third degree each require proof of facts which the other does not and since neither offense necessarily involves the other, there is no double jeopardy violation and no

merger of the offenses despite the fact that the same evidence may go toward proving both. *State v. Young*, 1978-NMCA-040, 91 N.M. 647, 579 P.2d 179, cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

No merger of offenses. — Where there was evidence that the victim awoke and found the defendant on top of her and that the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. *State v. Archunde*, 1978-NMCA-050, 91 N.M. 682, 579 P.2d 808.

Where defendant's acts constituting battery for purposes of aggravated burglary charges and acts constituting criminal sexual penetration (CSP) were separate and distinct, convictions and consecutive sentences for both CSP and aggravated burglary did not violate double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Aggravated burglary and attempted criminal sexual penetration merged. — Defendant's conduct consisting of his entry into a dwelling with intent to commit a felony and attempted criminal sexual penetration (CSP II) was unitary; thus, his convictions for both aggravated burglary and attempted CSP II violated double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Contributing to delinquency is separate offense. — Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. *State v. Walker*, 1993-NMSC-069, 116 N.M. 546, 865 P.2d 1190.

Felony-murder doctrine applied. — Applying the strict-elements test, first degree criminal sexual penetration (CSP) is not a lesser included offense of second degree murder and, accordingly, first degree CSP could properly serve as a predicate for applying the felony-murder doctrine. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

Sentence and prison discipline for same offense. — Contention by inmates convicted of sodomy that sentence imposed by court amounted to double jeopardy because they had already been punished by prison officials for same offense was without merit. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309.

Multiple sentences improper. — Consecutive sentences of 45 to 50 years and 80 to 99 years imposed on defendant for convictions of assault with intent to commit rape and

rape, respectively, were improper, since where charges arose out of the same transaction, were committed at the same time as part of a continuous act and were inspired by the same criminal intent which was an essential element of each offense, they were susceptible of only one punishment. *State v. Blackwell*, 1966-NMSC-088, 76 N.M. 445, 415 P.2d 563.

Increasing sentence based on consideration of element of offense. — Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under Subsection D(3) (now E(3)), and he contended that the trial court's consideration of the physical injury suffered by the victim in increasing the basic sentence pursuant to § 31-18-15.1 exposed him to double jeopardy, it was held that the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. *State v. Bernal*, 1987-NMCA-075, 106 N.M. 117, 739 P.2d 986, cert. denied, 106 N.M. 81, 738 P.2d 1326.

Aggravating factor improperly considered in sentencing. — While the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was error for the court to consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

Multiple penetrations. — Penetrations of separate orifices with the same object constitute separate offenses. Therefore, the acts of anal intercourse, sexual intercourse, and at least one instance of fellatio constitute separate offenses. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

Number of contacts. — The number of contacts is not dispositive of the existence of a separate violation of this section. *State v. Pisio*, 1994-NMCA-152, 119 N.M. 252, 889 P.2d 860, cert. denied, 119 N.M. 20, 888 P.2d 466.

Single criminal intent of several acts. — Defendant's contention that "single criminal intent" doctrine should have been applied to four acts of sodomy which he was convicted of having performed on victim over period of one and one half to two hours was neither supported by sufficient evidence nor properly preserved for review. *State v. Elliott*, 1977-NMSC-002, 89 N.M. 756, 557 P.2d 1105.

Multiple penetrations. — This section cannot be said, as a matter of law, to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others. *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624.

A case involving a single defendant tried on an indictment alleging multiple penetrations was remanded to the trial court with instructions to vacate 14 convictions and sentences for second degree criminal sexual penetration and to resentence accordingly, where the

evidence supported, at most, five convictions and sentences. *Herron v. State*, 1991-NMSC-012, 111 N.M. 357, 805 P.2d 624.

Defense must raise "single criminal intent" doctrine at trial. *State v. Elliott*, 1977-NMSC-002, 89 N.M. 756, 557 P.2d 1105.

Double jeopardy. — Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

When the defendant received consecutive sentences upon his plea of guilty to second degree criminal sexual penetration, aggravated burglary, kidnapping, and aggravated battery, in order to support a double jeopardy challenge he had the burden to provide a sufficient record for the court to determine unitary conduct for purposes of the double jeopardy analysis. *State v. Sanchez*, 1996-NMCA-089, 122 N.M. 280, 923 P.2d 1165.

Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. *State v. Powers*, 1998-NMCA-133, 126 N.M. 114, 967 P.2d 454, cert. quashed, 127 N.M. 392, 981 P.2d 1210 (1999).

Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Where an assault was with an intent to commit criminal sexual penetration, followed then by criminal sexual penetration, the fear, and the acts of penetration with resulting personal injury, are reasonably separable in terms of harm and social evil, and are sufficient to reflect a legislative intent to punish the conduct separately such that the

defendant was not placed in double jeopardy. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

II. INDICTMENT AND INFORMATION.

Information not unconstitutionally vague. — Where information expressly stated age of minor rape victim, and that age was under 10 years, argument that the information was so vague and indefinite as to violate due process in that it stated an offense both under statute covering rape of female under or over 16 when resistance is overcome by force, and also under statute relating to rape of female child under 10, was without merit. *Gallegos v. Cox*, 358 F.2d 703 (10th Cir.), cert. denied, 385 U.S. 869, 87 S. Ct. 138, 17 L. Ed. 2d 97 (1966).

Notice sufficient. — The trial court did not deprive defendant of opportunity to be informed of charges against him by failing to require the state to specify precisely which of several acts of sodomy defendant was accused of having been accessory to, where the indictment and bill of particulars which were a part of the record identified the date, the approximate time and nature of the crimes alleged, the prosecutrix and the associates with whom defendant was alleged to have committed the crimes. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

Lack of specificity not violative of double jeopardy. — The trial court's refusal to require that the state specify which act of sodomy the defendant was accessory to did not subject him to double jeopardy, on the basis of the argument that if he were indicted or informed against as accessory to a particular act of sodomy based on the same incident he could not point to his present conviction as precluding his trial on any particular act of sodomy, where he had not been indicted or informed against for another crime growing out of the same set of facts. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

Separate counts of incest and criminal sexual penetration. — There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Language of statute sufficient. — It was unnecessary to charge crime pursuant to the common law; an indictment in language of statute which in effect charged sexual intercourse with a female under the age of fourteen was sufficient, use of the word "ravish" being unnecessary. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

Use of words "carnally know and abuse" in indictment was surplusage. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

Charge of rape adequate. — An information "did, with force and arms in and upon the body of Agnes Vigil . . . unlawfully and feloniously make an assault, and did then and there wickedly and feloniously against her will . . . ravish and unlawfully know, contrary to the form of the statute . . ." was sufficient to charge rape and not merely an assault, notwithstanding the omission of any such words as "her the said Agnes Vigil" between the words "know" and "contrary." *State v. Alarid*, 1936-NMSC-047, 40 N.M. 450, 62 P.2d 817.

Information failing to name statutory rape victim not fatally defective. *State v. Roessler*, 1954-NMSC-017, 58 N.M. 102, 266 P.2d 351; *Ex parte Kelley*, 1953-NMSC-011, 57 N.M. 161, 256 P.2d 211.

Assault with intent to rape. — An indictment charging that defendant unlawfully, violently and forcibly assaulted prosecutrix with intent to ravish was sufficient charge of assault with intent to rape. *State v. Raulie*, 1930-NMSC-074, 35 N.M. 135, 290 P. 789.

Allegation of defendant's virility unnecessary. — It was unnecessary that indictment allege that defendant was over the age of fourteen or, being under that age, had the physical ability to commit the offense. *State v. Ancheta*, 1915-NMSC-003, 20 N.M. 19, 145 P. 1086.

Information and bill construed together. — In determining whether acts alleged constituted offense of sodomy, the information and the bill of particulars are to be read together as a single instrument. *State v. Putman*, 1967-NMCA-020, 78 N.M. 552, 434 P.2d 77.

Overinclusive bill of particulars not binding. — Although bill of particulars alleged two acts of sodomy, namely, requiring victim to take into her mouth the defendant's sexual organ and the placing of defendant's sexual organ in the victim's anus, the state was not bound by the statement in the bill of particulars to prove acts of both types of sodomy on the part of the defendant, and failure to instruct that the state must prove both types of sodomy before a conviction would be justified did not require reversal. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

Variance between information and instructions. — Jury instructions describing crime perpetrated by defendant as that of sexual intercourse with a female under sixteen years impaired no fundamental rights of defendant even though the crime was charged as "rape" in the information. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

III. EVIDENCE.

A. ADMISSIBILITY.

Dismissal unwarranted. — Where the state did not pursue the case of criminal sexual penetration of a minor under the age of 13 in 1989, because, at that time, it lacked the

evidence to go forward with the case, but the young child victim who in 1989 was apparently too traumatized to testify voluntarily came forward at a later age to testify, and there is no evidence that the state intended the delay to work a tactical disadvantage on defendant or that the state knew or should have known that the delay would cause any specific tactical disadvantage to defendant and defendant does not assert that the state improperly obtained such a tactical advantage, dismissal is not warranted on this basis. *State v. Hill*, 2005-NMCA-143, 138 N.M. 693, 125 P.3d 1175, cert. denied, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

Subsequent beating irrelevant to determination of degree of offense. — Defendant's beating of the victim with a blunt instrument subsequent to intercourse was not considered in determining whether or not the offense of criminal sexual penetration was committed by force or coercion resulting in personal injury because this beating went to the aggravated battery conviction. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Out-of-court identification. — Where victim testified that rapist was in her presence for approximately an hour and 40 minutes and at the police station she described him with some specificity, action of police officer in showing victim the driver's license photograph which victim knew came from wallet she had taken from rapist's pocket and asking "is this the man" was not so suggestive as to bar evidence of victim's out-of-court identification, nor was in-court identification inadmissibly tainted because of it. *State v. Baldonado*, 1971-NMCA-068, 82 N.M. 581, 484 P.2d 1291.

The out-of-court photographic identification procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification where the photographs viewed by the victim were all of male caucasians of about the same age and hirsuteness as defendant. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

Identification by child. — Testimony by witness that three-year old child said "this is the man" a half hour after attack upon her was properly admitted over objection that it was hearsay. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

Victim's identification was not tainted by the fact that the case agent and the child's grandmother hugged the child after she indicated that she was sure of her identification of the defendant as her assailant. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

Hypnotically enhanced testimony. — Post-hypnotic recollections, revived by the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or suggestibility. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

If the trial court's determination that the identifications were not "post-hypnotic recollections revived by hypnosis" is supported by substantial evidence, then the requirements established by *State v. Beachum*, 1981-NMCA-137, 97 N.M. 682, 643 P.2d 246, were not triggered. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

Where no details of the incident were mentioned during the hypnotic sessions; no information was sought from the child, nor details suggested, but the only suggestion made was that the child should remember; and there was independent, objective verification of the facts presented by other witnesses, the child victim's in-court identification was not impermissibly tainted by the unproductive hypnotic session. *State v. Clark*, 1986-NMCA-058, 104 N.M. 434, 722 P.2d 685, cert. denied, 104 N.M. 378, 721 P.2d 1309.

Testimony concerning post-traumatic stress disorder. — Testimony concerning post-traumatic stress disorder is admissible for establishing whether the alleged victim exhibits symptoms that are consistent with rape or sexual abuse. *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, *rev'g* 1991-NMCA-112, 116 N.M. 178, 861 P.2d 219.

Testimony concerning rape trauma syndrome. — Record did not suggest that the danger of unfair prejudice so outweighed the probative value of a witness's testimony concerning rape trauma syndrome as to require reversal in the absence of an objection, where there was little likelihood that the jury viewed the testimony as a "diagnosis" that the victim had been raped. *State v. Barraza*, 1990-NMCA-026, 110 N.M. 45, 791 P.2d 799, cert. denied, 109 N.M. 704, 789 P.2d 1271.

Testimony concerning rape trauma syndrome is not admissible in a prosecution involving rape or sexual abuse. *State v. Alberico*, 1993-NMSC-047, 116 N.M. 156, 861 P.2d 192, *rev'g* 1991-NMCA-112, 116 N.M. 178, 861 P.2d 219.

Foot tracks. — Nonexpert evidence as to identity of accused, derived from a comparison of foot tracks with other tracks known to be those of accused, was admissible. *State v. Ancheta*, 1915-NMSC-003, 20 N.M. 19, 145 P. 1086.

Confession admissible. — Where defendant, believing that prosecutrix had told of his relations with her, put himself under the protection of a third person and admitted to such person that he had slept with the prosecutrix, the confession was purely voluntary and admissible. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

Suppression of evidence of rape trauma syndrome. — An order suppressing a psychologist's testimony relating to rape trauma syndrome was affirmed, where it could not be said that the trial court's order was clearly against the logic and effect of the facts and circumstances, and where there was no request to limit the evidence rather than exclude it altogether. *State v. Bowman*, 1986-NMCA-014, 104 N.M. 19, 715 P.2d 467.

Ordinarily previous chastity of prosecuting witness is immaterial in a statutory rape case. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

Prior relations corroborative of statutory rape. — Evidence tending to show more than one act of criminal intercourse between accused and prosecutrix was admissible to show the relation and familiarity of the parties, and was corroborative of prosecutrix' testimony concerning the particular act relied upon for a conviction of statutory rape. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

Exclusion of evidence of prior rape and sexual conduct. — In prosecution for second degree criminal sexual penetration where theory of defense was that of fabrication of the rape and consensual intercourse, trial court properly excluded evidence of prior rape of victim and victim's prior sexual conduct. *State v. Fish*, 1984-NMSC-056, 101 N.M. 329, 681 P.2d 1106.

Previous intercourse admissible on issue of identity. — Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such condition. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

Previous intercourse not admissible on issue of penetration. — Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, since the sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

Evidence of defendant's vasectomy was probative of whether defendant committed the sexual assault as the victim described. — Where defendant was charged with criminal sexual penetration of an inmate, allegedly committed while defendant was employed as a corrections officer, and where, at trial, the district court admitted evidence regarding defendant's vasectomy over defendant's objection that the evidence was not relevant, the district court did not abuse its discretion in admitting the evidence because the serology report presented at trial identified the presence of semen, but no sperm on the victim's underwear, and additional evidence at trial established that a vasectomy is one reason why a semen sample might not contain sperm. Thus, evidence of defendant's vasectomy was probative of whether it was defendant's semen on the victim's underwear and whether he committed the sexual assault as the victim described. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

Defendant's occupation as police officer. — Evidence of the defendant's status as a police officer was material and relevant to the issue of whether he committed criminal sexual penetration in the third degree using his status as a police officer to force the

victim to engage in fellatio or perform other delinquent acts. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

B. INHERENT IMPROBABILITY.

Rule of inherent improbability. — Because of highly emotional and prejudicial elements present in cases of rape, supreme court has taken the position that over and above the substantial evidence rule applicable in appeals, it will review the evidence to determine whether or not it is so inherently improbable that, by conviction of the crime, a fundamental wrong has been done to defendant. *State v. Shouse*, 1953-NMSC-104, 57 N.M. 701, 262 P.2d 984.

Where defendant in prosecution for rape of a child contended that evidence was too vague and insufficient to establish guilt of defendant, appellate court would only weigh the evidence in the scales of inherent probability, and where there was substantial evidence tending to sustain the jury's verdict, its determination would be conclusive. *State v. Till*, 1967-NMSC-150, 78 N.M. 255, 430 P.2d 752, appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

Where there was absolutely no evidence corroborating the prosecuting witness, and her evidence was outside the domain of reasonable probability, and accused denied the offense, a verdict of guilty was set aside and a new trial ordered. *Mares v. Territory*, 1901-NMSC-010, 10 N.M. 770, 65 P. 165.

In cases of common-law rape, where in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence is so inherently improbable as to be unsubstantial, unless there is other testimony which points unerringly to the defendant's guilt, an appellate court will not uphold a conviction. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973) and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Reversal since evidence improbable. — District court should, and supreme court would, examine the evidence in a rape case with great care to determine whether testimony of prosecuting witness was inherently improbable; and if so, in absence of some evidence of some fact unequivocally and unerringly pointing to the defendant's guilt, a conviction would not be permitted to stand. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

Directed verdict. — Court was to instruct jury to find a verdict of not guilty on defendant's or its own motion when at the close of testimony in rape case insufficiently supported testimony of prosecuting witness was inherently improbable and a verdict based on it would constitute a miscarriage of justice. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

Rape not inherently improbable. — Testimony of examining physician that he found no evidence of trauma or injury to the vagina; that such lack of trauma is unusual in a rape case; that he found no other physical indication on the prosecutrix or her clothes that a rape had occurred; and that he found sperm in the vagina but that they were all immotile did not render the testimony of the prosecutrix inherently improbable. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Time element. — Where the prosecutrix testified that she was raped twice by defendant and forced to commit an act of sodomy within a period of approximately 30 minutes, and in addition, there was some conversation between the prosecutrix and defendant during this time, it could not be said as a matter of law that the events described could not in fact have occurred during the period stated. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Initial denial of sodomy. — Prosecutrix' denial that act of sodomy had occurred in first written statement to police and failure to mention it in second statement to police or to examining doctor did not render her testimony inherently improbable, where she explained that her denial and her failure to mention the act were the result of her embarrassment about it. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Unusual circumstances not inherently improbable. — The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction, and testimony which merely discloses unusual circumstances does not come within that category. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

Rule inapplicable to sodomy. — The "inherently improbable" rule enunciated by the supreme court in *State v. Shouse*, 1953-NMSC-104, 57 N.M. 701, 262 P.2d 984, a rape case, is not applicable in cases of sodomy. *State v. Kasakoff*, 1972-NMCA-151, 84 N.M. 404, 503 P.2d 1182.

C. CORROBORATION.

Bald charge insufficient. — In this jurisdiction, no corroboration of a prosecutrix by way of testimony of an independent character emanating from an outside source was required to sustain a conviction. But the bald charge of a woman against a man in that regard, unsupported and uncorroborated by facts and circumstances pointing to guilt of accused, was insufficient to meet requirement that verdict be supported by substantial evidence. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84

N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973) and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973); *State v. Armijo*, 1920-NMSC-011, 25 N.M. 666, 187 P. 553.

Surrounding facts as corroboration. — Testimony of prosecutrix required no corroboration except that surrounding facts and circumstances must have tended to establish truth of her testimony, but it need not have been evidence of an independent character, disconnected from her testimony. *State v. Ellison*, 1914-NMSC-076, 19 N.M. 428, 144 P. 10 (decided under prior law).

Other witnesses not required. — Corroboration of prosecutrix' testimony by other witnesses as to particular acts constituting offense of rape was not required and an instruction to that effect would correctly state the law. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

Corroboration in victim's complaint to mother. — In prosecution for rape, testimony of prosecuting witness was corroborated by proof of complaint made to her mother of the outrage committed upon her. *Territory v. Edie*, 1892-NMSC-019, 6 N.M. 555, 30 P. 851, *aff'd on reh'g*, 7 N.M. 183, 34 P. 46 (1893).

Defendant's own actions corroborative. — Defendant's actions both preceding and following rape, including rather severely injuring nose and lip of prosecutrix, making of threats on way home, and fleeing even before any report was made to the police pointed unerringly to his guilt, and constituted corroborating circumstances of the truth of prosecutrix' story. *State v. Ramirez*, 1962-NMSC-042, 70 N.M. 54, 369 P.2d 973.

Corroboration rule in rape cases was not applicable to sodomy. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973) (decided under prior law).

Corroboration rule not applicable to statutory rape. — In prosecutions for statutory rape, where consent was immaterial and force was not used, corroboration was not essential to a conviction, and it had only to be determined that the testimony of the prosecuting witness was not inherently improbable. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

Corroboration was not required in cases of statutory rape because the usual concomitant facts present in common-law rape, such as torn and disarranged clothing, wounds or bruises, outcries, etc., neither necessarily nor ordinarily appear. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

Uncorroborated testimony of child. — The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

In statutory sex offenses against a young victim corroboration of the claim that the defendant is the guilty party is not necessary where the evidence of guilt is substantial. *State v. Montoya*, 1957-NMSC-015, 62 N.M. 173, 306 P.2d 1095.

Independent of statute, a man could be convicted of rape upon the uncorroborated evidence of a strumpet or a girl under the age of ten years. *State v. Ellison*, 1914-NMSC-076, 19 N.M. 428, 144 P. 10.

Instruction properly refused. — As no corroboration of prosecutrix was necessary to uphold conviction, a requested instruction on subject of corroboration, contrary to the rule, was properly refused. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

Absence of corroboration. — In rape prosecution, where prosecutrix was not corroborated, evidence was insufficient, for want of such corroboration, to sustain conviction. *State v. Clevenger*, 1921-NMSC-097, 27 N.M. 466, 202 P. 687.

In cases of common-law rape, in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence might be so inherently improbable as to be unsubstantial, and would not uphold a conviction. *State v. Shults*, 1938-NMSC-070, 43 N.M. 71, 85 P.2d 591.

D. SUFFICIENCY.

Jury's function. — It is the jury's function in a rape case to judge the credibility of the witnesses and the weight to be given their testimony. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

The jury was to determine how much incriminating circumstances were weakened by contrary characterizations, more or less plausible, or by other facts having an opposite tendency in the evidence. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

Victim's age for jury. — Whether prosecutrix was under the age of consent was a jury question. *State v. Whitener*, 1918-NMSC-111, 25 N.M. 20, 175 P. 870.

Sufficient evidence of criminal sexual penetration of a minor under thirteen where there were inconsistencies as to the victim's age. — Where, on direct and cross-examination, victim testified that defendant had not digitally penetrated her until after she turned thirteen years old, but on redirect examination, after having her recollection refreshed, testified that defendant had penetrated her when she was twelve years old, there was sufficient evidence to support the jury's finding that defendant committed criminal sexual penetration of a minor under thirteen. Although the victim's testimony on redirect contradicted her testimony on direct and cross-examination, it is the exclusive province of the jury to resolve factual inconsistencies in a witness's testimony. *State v. Little*, 2020-NMCA-040.

Proof of penetration alone was sufficient to establish the crime of statutory rape. *State v. Harbert*, 1915-NMSC-023, 20 N.M. 179, 147 P. 280.

Penetration provable from circumstances. — Proof of penetration was essential to conviction of having carnally known and abused a minor child, but it was not necessary that it be proved by direct evidence; it might be established by circumstantial evidence. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

Opportunity and physical condition. — Proof of carnal knowledge could be adequately shown by fact that opportunity for sexual intercourse existed and that physical condition of the child showed abuse. *State v. Godwin*, 1947-NMSC-016, 51 N.M. 65, 178 P.2d 584.

A decedent constitutes a "person" for purposes of this section. — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration (CSP), based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, but where defendant argued that the statute requires that the victim be alive at the time of penetration, defendant was properly convicted of CSP because the purpose of the CSP statute is to protect against forcible, nonconsensual sexual penetration of a person's body and the legislative intent underlying CSP is the protection of people from unlawful intrusions into enumerated areas of the body, and it would be contrary to the spirit of the statute to exclude victims who were unable to consent or resist solely because the perpetrator rendered the victim permanently unconscious by killing the victim. *State v. Martinez*, 2021-NMSC-012.

The state sufficiently established the corpus delicti of CSP. — Where defendant was convicted of first-degree murder and third-degree criminal sexual penetration (CSP), based on defendant's admission that he killed the victim and then had sexual intercourse with the victim after she died, and where defendant argued that the corpus delicti rule requires the state to produce some evidence that a crime has been committed in addition to extrajudicial confessions or admissions of the accused to support a conviction, the state sufficiently established the corpus delicti of CSP because a defendant's extrajudicial statements may be used to establish the corpus delicti when the prosecution is able to demonstrate the trustworthiness of the confessions and introduce some independent evidence of a criminal act, and in this case, the postmortem condition and location of the victim's body was sufficient to corroborate the truthfulness of defendant's statements. *State v. Martinez*, 2021-NMSC-012.

Evidence of penetration sufficient. — Where child’s parent discovered a bruise on the child’s labia immediately after the child had been in defendant’s care; a linear abrasion went deep into the child’s vagina; two photographs of the bruise were admitted into evidence; the child told four people that defendant had pinched the child’s "cha-cha" and illustrated the statement by pulling on the child’s labia; and the bruise was consistent with being pinched, the evidence was sufficient to support defendant’s conviction of criminal sexual penetration by penetration. *State v. Massengill*, 2003-NMCA-024, 133 N.M. 263, 62 P.3d 354, cert. denied, 133 N.M. 126, 61 P.3d 835.

Testimony of doctor who examined victim, a minor child under the age of 13, in the evening of the day of alleged act of sodomy, that there had been a penetration into boy's anus, along with child's testimony as to the assault and as to the pain experienced by him as a result thereof, was sufficient evidence of penetration for jury's consideration. *State v. Mase*, 1965-NMSC-134, 75 N.M. 542, 407 P.2d 874.

Sufficient evidence to prove a pattern of conduct of criminal sexual penetration of a minor. — Where defendant was charged with twelve counts of criminal sexual penetration of a minor, and where the two children testified to a pattern of conduct where defendant would put his penis and fingers in each child's vagina and anus before she went to school in the mornings, and where the children further testified that defendant did this more than six times, with one instance tied to the first day of school, but where no other evidence tied an incident to a certain time or place, the undifferentiated multiple acts against a victim within a period of time is evidence sufficient to support a conviction on one count per child for a pattern of conduct of criminal sexual penetration of a minor. *State v. Huerta-Castro*, 2017-NMCA-026.

Sufficient evidence of aiding and abetting. — Evidence that defendant ordered the victims to perform fellatio on particular individuals and threatened the victims with grave bodily harm if they failed to do so and that defendant assisted in creating the atmosphere of intimidation which convinced the victims that the threats would be carried out, there was sufficient evidence to support defendant's conviction of accessory to criminal sexual penetration. *State v. Perez*, 2002-NMCA-040, 132 N.M. 84, 44 P.3d 530, cert. denied, 132 N.M. 83, 44 P.3d 529.

Evidence sufficient to sustain conviction. — Where defendant was convicted for criminal sexual penetration in the second degree which resulted in the pregnancy of the victim; the victim testified that defendant impregnated the victim when the victim was fourteen years old while the victim and the victim's family were living with defendant, that the victim felt compelled to have sex with defendant because defendant was an authority figure, that the sex was not consensual, and that defendant told the victim that if the victim reported the sexual intercourse, defendant would kill the victim and the victim's family; and a forensic DNA analyst testified that DNA samples from defendant, the victim, and the victim's child showed that defendant fathered the victim's child, there was sufficient evidence to support defendant's conviction. *State v. Fierro*, 2014-NMCA-004, cert. denied, 2013-NMCERT-012.

Where the child, who was six years old, testified that defendant put defendant's hand underneath the child's underwear, touched the child's vagina, and performed cunnilingus on the child; and the doctor who performed a SANE examination of the child testified that the child told the doctor that defendant had inserted defendant's fingers into the child's vagina; and the doctor's examination of the child revealed injuries to the child's vagina that were consistent with penetration by a finger or other object, the evidence was sufficient to support defendant's conviction of criminal sexual penetration of a minor. *State v. Skinner*, 2011-NMCA-070, 150 N.M. 26, 256 P.3d 969, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

The prosecutrix' testimony, which was not inherently improbable and which was corroborated by facts and circumstances, pointed unerringly to defendant and was sufficient evidence to sustain the conviction. *State v. Boyd*, 1972-NMCA-120, 84 N.M. 290, 502 P.2d 315, cert. denied, 84 N.M. 271, 502 P.2d 296, and cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973) and *reh'g denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Evidence consisting of the testimony of the victim's counselor and the victim herself was sufficient to support convictions of criminal sexual contact with a minor and criminal sexual penetration of a minor. *State v. Ortiz-Burciaga*, 1999-NMCA-146, 128 N.M. 382, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823.

When evidence as a whole left no doubt as to fact of intercourse and penetration, it was sufficient, even though if certain questions addressed to complaining witness with their answers alone were considered, there might have been some doubt as to sufficiency of proof. *State v. Alva*, 1913-NMSC-056, 18 N.M. 143, 134 P. 209.

Appellate court found no ground to disturb verdict of guilty where after sifting from any recitation of facts made to support claim that 11 year old prosecutrix' testimony was inherently improbable, all facts and inferences which verdict resolves against defendant, there remains testimony of a substantial character sufficient to support the conviction. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

An appellate court will not disturb the verdict of the jury if the victim's testimony was sufficiently credible for a conviction. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

Where defendant was convicted of numerous counts of criminal sexual penetration of a minor perpetrated on his eight-year-old daughter and four-year-old stepdaughter; the child victims' testimony that the nature of defendant's acts involved physical interaction that was skin to skin, that defendant rubbed or repetitiously slid his finger upon each child's unclothed genital openings, the requirement that penetration minimally occur to any extent was met, and where eight-year-old victim testified that defendant put his penis "where I go poop" and that it "actually went in", was sufficient evidence to support defendant's conviction for criminal sexual penetration of a minor, and where eight-year-old child victim's testimony established that defendant's repeated movements of his penis against her unclothed genitalia prior to emission penetrated the labia major to the slightest extent or beyond, met the penetrative element of criminal sexual penetration of a minor; there was sufficient evidence for a jury to conclude that defendant committed the acts of criminal sexual penetration. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004.

Evidence was sufficient to prove that defendant knew that the victim was unable to consent to sexual intercourse. — Where defendant was charged with criminal sexual penetration in the third degree (CSP), and where, at trial, the jury was instructed that to find defendant guilty of CSP by force or coercion, it must find, beyond a

reasonable doubt, that defendant caused the victim to engage in sexual intercourse, the victim was unconscious, asleep or physically helpless, and defendant knew or had reason to know of the victim's condition, and where, at trial, defendant admitted to engaging in sexual intercourse with the victim, the victim testified that she had consumed alcohol, was "making out" with another person, and then "blacked out" and did not remember anything that happened from the time she started making out with the other person until she "came to" in defendant's bedroom to find the other person and defendant having sex with her, and a toxicologist testified that the amount of alcohol and other substances the victim had in her body that night and the effect of those substances on the victim at the time of the incident could cause excessive sleeping, confusion, and difficulties with memory or speaking, there was sufficient evidence, viewed in the light most favorable to the verdict, to permit a rational trier of fact to find the essential elements of CSP beyond a reasonable doubt. *State v. Moreno-Ortiz*, 2022-NMCA-059, cert. denied.

Retrial was not barred where there was substantial evidence of defendant's guilt under the invalid jury instructions. — Where defendant was charged with two counts of criminal sexual penetration of a minor in the second degree (CSPM-II) based on the state's theory that defendant used his position of authority to coerce the victim to submit to the sexual act, and where the district court instructed the jury using an inapplicable uniform jury instruction that omitted the essential element of "force or coercion", retrial was not barred where there was substantial evidence of defendant's guilt under the given instructions where the jury could reasonably have concluded that the victim had been coerced into lying still while defendant perpetrated fellatio, a symptom of the undue influence that defendant's position as the victim's father enabled him to exercise. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

Sufficient evidence of criminal sexual penetration of a minor for purposes of retrial. — Where defendant was convicted of one count of criminal sexual penetration of a minor and twenty-one counts of criminal sexual contact of a minor, and where defendant's convictions were overturned based on the state's violation of defendant's constitutional right against self-incrimination, there was sufficient evidence to support each of defendant's convictions for purposes of retrial where, at trial, the state presented evidence from the child victim that defendant committed multiple instances of criminal sexual contact and at least one instance of criminal sexual penetration over a four-month period and defendant's admission that he had put the child's penis in his mouth at least once and had touched the child's penis between twenty and thirty times. *State v. Atencio*, 2021-NMCA-061, cert. granted.

Sufficient evidence of great mental anguish. — Where defendant was convicted of first-degree criminal sexual penetration (CSP), and where defendant claimed that the state failed to establish that the victim suffered great mental anguish as a result of the incident and that the evidence is therefore insufficient to support his conviction for first-degree CSP, evidence that the victim was over seventy years of age, that she moved to another state to live with her daughter because she felt unable to live alone, that she experienced constant flashbacks, and as a result had trouble concentrating and was

unable to drive for a period of time, was sufficient to support a conclusion that the victim suffered great mental anguish as a result of the incident. *State v. Sena*, 2018-NMCA-037, *rev'd in part by* 2020-NMSC-011.

Sufficient evidence of second-degree criminal sexual penetration perpetrated in the commission of a felony. — Where defendant was convicted of criminal sexual penetration in the commission of a felony and first-degree kidnapping, the jury could have reasonably inferred that defendant took or transported the victim by deception based on the victim's testimony that he got into defendant's truck because defendant said that he would take the victim home, that defendant confined the victim by force based on the victim's testimony that when he tried to escape from defendant's truck, the door was locked, that defendant intended to hold the victim against his will to inflict a sexual offense against him based on the victim's testimony that defendant took him to a remote location, pulled down his pants, and then penetrated his anus, that defendant transported the victim to a remote location and confined him there for the purpose of inflicting a sexual offense on him based on defendant's statement upon completion of the sexual act, "Now I can take you home," that defendant's act against the victim was unlawful because the jury could have inferred that it was done without the victim's consent and for the purpose of gratifying defendant's sexual desire or to intrude upon the victim's bodily safety or integrity. There was sufficient evidence to support defendant's convictions. *State v. Samora*, 2016-NMSC-031.

Sufficient evidence of criminal sexual penetration based on the commission of a felony. — Where defendant offered a ride home to a fifteen year old boy, but instead took the boy back to defendant's apartment where defendant offered the boy beer and cocaine, which were consumed by the boy, and where defendant then proceeded to perform oral sex on the boy and prior to taking the boy home the defendant asked the boy for anal sex, which the boy complied with because he was afraid that if he did not he would be anally penetrated, and where, at trial, a forensic examiner testified that she identified saliva that contained defendant's DNA on the inside of the victim's boxer shorts, there was sufficient evidence to support defendant's convictions for distribution of a controlled substance to a minor, CSP II, and contributing to the delinquency of a minor. *State v. Simmons*, 2018-NMCA-015, cert. denied.

Rape established. — Where the evidence establishes that defendant had sexual intercourse with a female without her consent and by forcibly overcoming her resistance, this was rape, regardless of the age of the victim. *State v. Garcia*, 1967-NMSC-140, 78 N.M. 136, 429 P.2d 334.

Conviction for rape not barred by facts also establishing statutory rape. *State v. Garcia*, 1967-NMSC-140, 78 N.M. 136, 429 P.2d 334.

Rape of child. — In prosecution for rape of child, statement of 9 year old prosecutrix and testimony of examining doctor expressing opinion that child had undergone sexual intercourse as late as the day charged constituted substantial evidence and met test of

inherent probability. *State v. Till*, 1967-NMSC-150, 78 N.M. 255, 430 P.2d 752, appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

When testimony of prosecuting witness, a child of between twelve and thirteen, was convincing, was not inherently improbable, was unshaken by cross-examination and was corroborated by the mother, and, up to a certain point, by defendant, it was sufficient to sustain a conviction of statutory rape. *State v. Keener*, 1938-NMSC-073, 43 N.M. 94, 85 P.2d 748.

Spouses living apart. — Evidence supported finding that defendant and his wife were living apart at the time of the attack, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Attempted sodomy. — Acts of defendant constituted an active effort to consummate crime of sodomy and were more than mere preparation, where in addition to his announced intention to "screw" 16 year old victim, defendant beat victim until he passed out and removed victim's clothes, during course of which events the fly on defendant's pants was open. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173.

IV. DEFENSES.

A. CONSENT.

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

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

Absence of consent not element of criminal sexual penetration. — Although absence of consent was an element of the rape statute, which has now been repealed, absence of consent is not an element of the crime of criminal sexual penetration as defined by the legislature. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60; *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Absence of consent not element of statutory rape. — Under former law, where intercourse was with a girl under age of 16 the state need have proved only that defendant indulged in intercourse with her, regardless of question of her consent. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

Absence of consent not required for rape. — Under former law, where victim was over age of consent, it was necessary to prove intercourse against her will. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

As was resistance. — To constitute the crime of rape of one over the age of consent, there must be resistance, and it must be forcibly overcome; it was not sufficient that the carnal act was violently accomplished, or that it was without her consent. *Mares v. Territory*, 1901-NMSC-010, 10 N.M. 770, 65 P. 165 (decided under prior law).

Amount of resistance required of victim depended upon the facts of the particular case. Resistance may be overcome by fear induced by threats as by physical violence. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402 (decided under prior law).

Violent injury indicative of adequate resistance. — Less than satisfactory evidence of resistance would not warrant reversal of rape conviction where the physical violence done to the prosecutrix and her resultant injuries therefrom tend to show that further resistance would have been of no avail and perhaps would have resulted in more serious injuries to her. *State v. Ramirez*, 1962-NMSC-042, 70 N.M. 54, 369 P.2d 973 (decided under prior law).

Threats overcoming resistance. — Fact that threats by which prosecutrix' resistance had been overcome were made by someone other than the defendant was immaterial. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977 (decided under prior law).

Consent inconsistent with evidence. — Evidence that prosecutrix' clothes were torn, that she suffered a scratch or cut on the side of her head which bled during the preliminary hearing, that immediately after the assault various witnesses noticed red welts or marks, on prosecutrix' throat and that her bedroom was in disarray, was inconsistent with sexual intercourse by consent. *State v. White*, 1967-NMSC-016, 77 N.M. 488, 424 P.2d 402.

Consensual sex. — Accused will not be convicted for engaging in purely consensual sex. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 477, 112 P.3d 1134, *rev'd on other grounds*, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933.

B. IMPOTENCY.

Assault with intent to rape. — Impotency could be shown but was not a complete defense to charge of assault with intent to rape. *State v. Ballamah*, 1922-NMSC-057, 28 N.M. 212, 210 P. 391.

V. SODOMY.

Force was not element of crime of sodomy under former law. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309 (decided under prior law).

Consent no defense. — Under former law, consent of both parties to the act of sodomy did not constitute a defense to that crime. *Washington v. Rodriguez*, 1971-NMCA-021, 82 N.M. 428, 483 P.2d 309 (decided under prior law).

Emission was not necessary element of crime of sodomy. *State v. Massey*, 1954-NMSC-018, 58 N.M. 115, 266 P.2d 359 (decided under prior law).

Each act distinct. — Since under former 40A-9-6, 1953 Comp., "any penetration" could complete the crime of sodomy, on its face the statute clearly allowed prosecution for different kinds or acts of sodomy. State v. Elliott, 1977-NMSC-002, 89 N.M. 756, 557 P.2d 1105.

Cunnilingus and fellatio. — Under former 40A-9-6, 1953 Comp., sodomy included a taking into the mouth "the sexual organ of any other person"; the statute was not limited to the sexual organ of the male, "any other person" including both male and female. *State v. Putman*, 1967-NMCA-020, 78 N.M. 552, 434 P.2d 77 (decided under prior law).

Where former statute (Laws 1876, ch. 34, § 1) provided a penalty for crime of sodomy, but did not define the term, the common-law definition would apply; hence, sexual copulation per os or fellatio, was not included in the offense of sodomy. *Bennett v. Abram*, 1953-NMSC-013, 57 N.M. 28, 253 P.2d 316 (discharging petitioners in habeas corpus proceeding where they pleaded guilty to charge of sodomy without proper advice as to nature of the crime) (decided under prior law).

Aiding and abetting shown. — It was not necessary that the state prove that defendant aided and abetted a particular act of sodomy, as his presence at the scene and active participation in the criminal conduct being undertaken, in such a way as to encourage the commission of the charged offenses, was enough to constitute aiding and abetting. *State v. Barnett*, 1973-NMCA-098, 85 N.M. 404, 512 P.2d 977.

VI. INSTRUCTIONS.

Use of wrong alternative in uniform instruction. — Where defendant was charged with first degree criminal sexual penetration of a minor for vaginal penetration and first degree criminal sexual penetration of a minor for anal penetration; the court instructed the jury that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the vagina and/or vulva" of the victim and that the state had to prove beyond a reasonable doubt that defendant "caused the insertion to any extent, of a penis into the anus" of the victim; and although the court erred in using the second alternative of the uniform instruction as the form of the instructions given to the jury, the instructions as given accurately reflected the statutory law and did

not constitute reversible error. *State v. Tafoya*, 2010-NMCA-010, 147 N.M. 602, 227 P.3d 92, cert. denied, 2009-NMCERT-012, 147 N.M. 600, 227 P.3d 90.

Essential elements of crime. — A jury must be instructed on the essential elements of the crime charged, and failure so to do is fundamental error because the error is jurisdictional and thus not harmless. *State v. Kendall*, 1977-NMCA-002, 90 N.M. 236, 561 P.2d 935, *rev'd in part*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464, (holding that under the circumstances an instruction that victim must not be defendant's spouse, was not necessary) (decided under prior law).

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

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

Criminal sexual penetration based on the commission of a felony. — When criminal sexual penetration is based on the commission of a felony, it must be a felony that is committed against the victim of, and that assists in the accomplishment of, sexual penetration perpetrated by force or coercion or against a victim who, by age or other statutory factor, gave no lawful consent. *State v. Simmons*, 2018-NMCA-015, cert. denied.

No fundamental error where instruction on CSP-II felony failed to instruct on causal link between the felony committed and the CSP. — In defendant’s trial for criminal sexual penetration (CSP II) based on the commission of a felony, where the jury was instructed that the state must prove defendant caused the victim to engage in fellatio and anal intercourse, and defendant committed the acts during the commission of kidnapping or distribution of a controlled substance to a minor or contributing to the delinquency of a minor, but was not instructed to find that the associated felony must be committed against the victim of and assist in the accomplishment of the CSP, the jury instruction was deficient but did not rise to the level of fundamental error, because a reasonable jury would not be confused by the instruction, and the connection between the associated felonies and the acts of CSP II was so apparent that the CSP II-felony convictions did not shock the judicial conscience. *State v. Simmons*, 2018-NMCA-015, cert. denied.

Intent instruction for felony underlying second-degree CSP was proper. — Where defendant was convicted of fourth-degree criminal sexual penetration of a minor and second-degree criminal sexual penetration of a minor, perpetrated during the commission of a felony, and where defendant claimed that the jury instruction on giving alcohol to a minor, the felony underlying his second-degree criminal sexual penetration conviction, was defective because it omitted the mens rea of the offense, whether he knew giving alcohol to a minor was unlawful, fundamental error did not occur with the given instruction, which set forth the proper mens rea for giving alcohol to a minor, whether defendant knew or had reason to know that the recipient of the alcohol was a minor. *State v. Muller*, 2022-NMCA-024, cert. denied.

Fundamental error occurred where jury convicted defendant on an invalid legal theory. — Where defendant was charged with two counts of criminal sexual penetration of a minor in the second degree (CSPM-II) based on the state's theory that defendant used his position of authority to coerce the victim to submit to the sexual act, and where the district court instructed the jury using an inapplicable uniform jury instruction that omitted the essential element of "force or coercion", fundamental error occurred because the given instructions would have confused or misled a reasonable juror and it was a miscarriage of justice to convict defendant of "position of authority" CSPM-II because that crime did not exist at the time the CSPM at issue was alleged to have occurred. *State v. Figueroa*, 2020-NMCA-007, cert. denied.

Instruction in language of statute. — 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 absence of the victim's consent. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Reading of statute permissible. — In prosecution for rape though there was no evidence tending to show that the prosecuting witness, through idiocy, imbecility or unsoundness of mind, either temporary or permanent, was incapable of giving consent, it was not error for the court, in its instructions, to read the entire section to the jury. *Territory v. Edie*, 1892-NMSC-019, 6 N.M. 555, 30 P. 851, *aff'd on reh'g*, 1893-NMSC-016, 7 N.M. 183, 34 P. 46.

Instruction constituting constructive amendment of information. — Jury instruction which allowed for conviction based on digital penetration occurring prior to the enactment of this section constituted a constructive amendment of the information which required reversal. *Hunter v. New Mexico*, 916 F.2d 595 (10th Cir. 1990), cert. denied, 500 U.S. 909, 111 S. Ct. 1693, 114 L. Ed. 2d 87 (1991).

Instruction on personal injury. — In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at 30-9-10C NMSA 1978, and also gave the statutory definition of great bodily harm at 30-1-12A NMSA 1978 in the instruction on first degree criminal sexual penetration, the lack of additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect,

and since he did not do so, he could not complain of the lack of additional definition of the term. *State v. Jiminez*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Failure to give charge of offense in third degree. — Failure to give defendant's tendered charge on criminal sexual penetration in the third degree was reversible error at his trial for false imprisonment and criminal sexual penetration in the second degree, where the jury could find from the evidence that the sexual intercourse occurred by coercion or force, but without the requisite elements of false imprisonment as an independent felony. *State v. Corneau*, 1989-NMCA-040, 109 N.M. 81, 781 P.2d 1159, cert. denied, 108 N.M. 668, 777 P.2d 907.

Victim other than spouse. — Where there was no evidence whatsoever that the victim raped, sodomized and killed was the spouse of the defendant, failure to instruct the jury that it must find that the victim was not defendant's wife in the rape conviction was not a jurisdictional error. *State v. Melton*, 1977-NMSC-014, 90 N.M. 188, 561 P.2d 461 (decided under prior law).

Reversal of defendant's conviction of criminal sexual penetration because of trial court's failure to instruct that jury must find that victim was other than defendant's spouse was improper under facts of the case, and defendant was properly convicted of criminal sexual penetration. *Kendall v. State*, 1977-NMSC-015, 90 N.M. 191, 561 P.2d 464 (decided under prior law).

Identical instructions on multiple counts. — Where the jury was given identical instructions on two counts of attempted criminal sexual penetration that were alleged to have occurred over a three week period and the victim testified that defendant attempted to force the victim to perform fellatio four times on different evenings; and the victim described intervening events between the attempted acts of fellatio, defendant’s acts were not unitary and the instructions did not violate the double jeopardy clause. *State v. Dombos*, 2008-NMCA-035, 143 N.M. 668, 180 P.3d 675, cert. denied, 2008-NMCERT-002, 143 N.M. 666, 180 P.3d 673.

Instructions on aiding and abetting. — Circumstantial evidence that defendant knew that throughout defendant’s companion forced the victim to commit various sexual acts; that on several occasions during the night at the companion’s request, defendant brought coffee and cigarettes to the companion in the bedroom; and that defendant had a knife in defendant’s belt was sufficient to support an instruction that the jury could convict defendant if defendant aided and abetted the companion in the commission of criminal sexual penetration. *State v. Duncan*, 1990-NMCA-063, 113 N.M. 637, 830 P.2d 554, *aff’d*, 1991-NMSC-010, 111 N.M. 354, 805 P.2d 621.

Lesser included offenses. — In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape,

simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Lesser included offense instruction. — Any variance between the victim's testimony at trial and her testimony before the grand jury was insufficient to require an instruction on a lesser included offense, where defendant's own testimony that he had no contact of any sort with the victim negated the possibility that such an instruction might have been warranted. *Chavez v. Kerby*, 848 F.2d 1101 (10th Cir. 1988).

Lesser included offenses and alibi. — Because the defendant offered the defense of an alibi, he was not entitled to a lesser included offense instruction on the ground that the jury might have rejected the part of the complainant's testimony regarding the use of a gun. *State v. Wilson*, 1993-NMCA-074, 117 N.M. 11, 868 P.2d 656, cert. quashed, 119 N.M. 311, 889 P.2d 1233 (1995).

Charge on third degree not warranted. — 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 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*, 1976-NMCA-096, 89 N.M. 652, 556 P.2d 60.

Instruction on consent properly refused. — Where a review of the record and a thorough examination of the prosecutrix' testimony does not ever raise a slight inference of consent on part of victim, it was not error for trial court to deny defendant's requested instruction on consent as a defense. *State v. Armstrong*, 1973-NMCA-081, 85 N.M. 234, 511 P.2d 560, cert. denied, 85 N.M. 228, 511 P.2d 554, *overruled on other grounds by State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207.

The district court did not err in denying proposed jury instruction on the age of consent. — Where defendant was charged with criminal sexual penetration of a minor (CSPM) for digitally penetrating the vagina of a sixteen-year-old female by force or coercion, and where, at trial, the jury was instructed that to convict defendant of CSPM, it must conclude that the charged act was unlawful, and the jury was also erroneously instructed that for the act to have been unlawful it must have been done without consent, and where defendant, arguing that because consent was put in issue, the jury should have been instructed on the age of consent in New Mexico, the district court did not err in denying defendant's requested instruction, because defendant's theory of the case was not that the victim consented, but that he never penetrated her, and no evidence of consent to digital penetration was presented during the trial. Moreover, if the prosecution has proved that force or coercion was used by the perpetrator, it has also necessarily proved that the act was non-consensual, and a separate finding of a lack of consent is not required; providing an instruction on the matter would have served only to suggest that the jury had to determine a fact not in issue. *State v. Cebada*, 2024-NMCA-023, cert. denied.

The district court did not coerce the jury into rendering a verdict by refusing to answer the jury's question regarding the age of consent. — Where defendant was charged with criminal sexual penetration of a minor (CSPM) for digitally penetrating the vagina of a sixteen-year-old female by force or coercion, and where, at trial, the jury was instructed that to convict defendant of CSPM, it must conclude that the charged act was unlawful, and the jury was also erroneously instructed that for the act to have been unlawful it must have been done without consent, and where, during deliberations, the jury indicated that it was confused about the age of consent in New Mexico, the district court did not abuse its discretion in refusing to answer the jury's question regarding the age of consent, because there were no statements from the jury indicating that it would not be able to reach a verdict, and defendant conceded that the jury knew it was an option to issue a verdict of not guilty, and therefore the district court did not coerce the jury into rendering a verdict. *State v. Cebada*, 2024-NMCA-023, cert. denied.

Requested instruction defining CSP of an inmate as an act committed without the inmate's consent properly denied. — Where defendant was charged with criminal sexual penetration (CSP) of an inmate, allegedly committed while defendant was employed as a corrections officer, and where, at trial, defendant proposed a jury instruction defining CSP of an inmate as an act committed without the inmate's consent, and where the district court determined that the phrase "without consent" was not necessary in the jury instruction defining unlawfulness for CSP of an inmate because, as a matter of law, an inmate cannot consent to sexual intercourse with a corrections officer, the district court did not err in denying defendant's proposed jury instruction defining unlawfulness for CSP of an inmate in terms of an absence of consent, because as a matter of law, an inmate confined in a correctional facility or jail cannot consent to sexual intercourse with a perpetrator in a position of authority over the inmate. *State v. Arvizo*, 2021-NMCA-055, cert. denied.

Defense of consent. — Effective for cases filed after January 20, 2005, instructions have been approved for the defense of consent in criminal sexual penetration cases that are analogous to the defense of self-defense. *State v. Jensen*, 2005-NMCA-113, 138 N.M. 254, 118 P.3d 762, cert. quashed, 2005-NMCERT-011, 138 N.M. 587, 124 P.3d 565.

Requested instruction on lesser offense properly refused when no supporting evidence. — Where there is no view of the evidence adduced which would support the jury in finding the defendant guilty of third degree criminal sexual penetration which would not also require the jury to find him guilty of second degree criminal sexual penetration, a requested instruction on the lesser offense is properly refused. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Charge on probability unnecessary. — It was not erroneous in rape case to refuse instructions calling for jury's consideration of reasonable probability of testimony of prosecuting witness where jury was instructed that they must find beyond a reasonable

doubt that defendant committed the offense charged before they could return verdict of guilty. *State v. Richardson*, 1944-NMSC-059, 48 N.M. 544, 154 P.2d 224.

Intoxication instruction. — Evidence in prosecution for criminal sexual penetration was sufficient under New Mexico law to warrant an intoxication instruction. *Florez v. Williams*, 281 F.3d 1136 (10th Cir. 2002).

Circumstantial evidence. — There was no error in court's refusal to give the usual stock instruction relating to circumstantial evidence where the state did not rely upon circumstantial evidence to prove its case in prosecution for sodomy involving two juveniles. *State v. Frederick*, 1964-NMSC-045, 74 N.M. 42, 390 P.2d 281.

Impotency. — Where certain statements and testimony of defendant were only evidence of impotency, and no request for instruction on defense of impotency was tendered, it was not fundamental error on trial court's part to fail to instruct on its own motion on the defense, in view of confession and statements made by defendant admitting the act giving rise to the statutory rape prosecution. *State v. Johnson*, 1958-NMSC-046, 64 N.M. 83, 324 P.2d 781.

Coercion not element in fourth degree criminal sexual penetration. — Subsection D (now G) does not include an element of force or coercion, and there is no basis for construing it to require nonconsent by the child as an element of the crime. 1988 Op. Att'y Gen. No. 88-69.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For article, "Rape Law: The Need For Reform," see 5 N.M.L. Rev. 279 (1975).

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 law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

For note, "New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine - State v. Campos," see 28 N.M.L. Rev. 535 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 1 to 30; 70A Am. Jur. 2d Sodomy §§ 1 to 24.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904, 6 A.L.R.4th 1066.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy, 62 A.L.R.2d 1083.

Assault with intent to commit unnatural sex act upon minor as affected by the latter's consent, 65 A.L.R.2d 748.

Applicability of rape statute concerning children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Rape by fraud or impersonation, 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

Impotency as defense to charge of rape, attempt to commit rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

Statutory rape of female who is or has been married, 32 A.L.R.3d 1030.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 A.L.R.3d 907.

Consent as defense in prosecution for sodomy, 58 A.L.R.3d 636.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

Fact that rape victim's complaint or statement was made in response to question as affecting res gestae character, 80 A.L.R.3d 369.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 A.L.R.3d 1228.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of rape laws limited to protection of females only, 99 A.L.R.3d 129.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Validity of statute making sodomy a criminal offense, 20 A.L.R.4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-New York Times cases, 57 A.L.R.4th 404.

Intercourse accomplished under pretext of medical treatment as rape, 65 A.L.R.4th 1064.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 A.L.R.4th 1147.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 A.L.R.5th 856.

Propriety of publishing identity of sexual assault victim, 40 A.L.R.5th 787.

Sufficiency of allegations or evidence of victim's mental injury or emotional distress to support charge of aggravated degree of rape, sodomy, or other sexual offense, 44 A.L.R.5th 651.

Mistake or lack of information as to victim's age as defense to statutory rape, 46 A.L.R.5th 499.

Defense of mistake of fact as to victim's consent in rape prosecution, 102 A.L.R.5th 447.

75 C.J.S. Rape §§ 1 to 35; 81 C.J.S. Sodomy §§ 1 to 8.

30-9-12. Criminal sexual contact.

A. Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts.

B. Criminal sexual contact does not include touching by a psychotherapist on his patient that is:

(1) inadvertent;

(2) casual social contact not intended to be sexual in nature; or

(3) generally recognized by mental health professionals as being a legitimate element of psychotherapy.

C. Criminal sexual contact in the fourth degree consists of all criminal sexual contact perpetrated:

(1) by the use of force or coercion that results in personal injury to the victim;

(2) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons; or

(3) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

D. Criminal sexual contact is a misdemeanor when perpetrated with the use of force or coercion.

E. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

History: 1953 Comp., § 40A-9-22, enacted by Laws 1975, ch. 109, § 3; 1981, ch. 8, § 1; 1991, ch. 26, § 2; 1993, ch. 177, § 3.

ANNOTATIONS

Cross references. — For provision that testimony of victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* 29-11A-1 NMSA 1978.

The 1993 amendment, effective July 1, 1993, deleted the former second sentence of Subsection A, which defined "intimate parts"; added present Subsections B and E, redesignating the succeeding subsections accordingly; and made stylistic changes in Subsections A, C, and E.

The 1991 amendment, effective June 14, 1991, designated the formerly undesignated first paragraph as present Subsection A and redesignated former Subsections A and B as present Subsections B and C and, in present Subsection A, substituted "unlawful and intentional" for "intentionally" and deleted "and someone other than one's spouse" following "birthday" in two places in the first sentence and made a minor stylistic change in the second sentence.

Legislative intent. — The legislative intent in defining "intimate parts" with a listing of five separate protected areas was to protect the victim from intrusions to each

enumerated part; separate punishments are sustainable where evidence shows distinctly separate touchings of different parts. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

Statutory enumeration of different aggravating factors, or alternative methods of committing fourth degree criminal sexual contact, does not evince a legislative intent to authorize multiple punishments for the same act; where alternative methods of committing criminal sexual contact are submitted to the jury, the accused may be found guilty of only one offense. *State v. Williams*, 1986-NMCA-122, 105 N.M. 214, 730 P.2d 1196, cert. denied, 105 N.M. 111, 729 P.2d 1365.

Section compared with 30-9-11 NMSA 1978. — This section is a general statute prohibiting a touching of intimate parts, whereas 30-9-11 NMSA 1978 is a specific statute which prohibits a touching of the penis with the lips or tongue. Section 30-9-11 NMSA rather than this section was the applicable statute in a prosecution for fellatio because the specific statute prevails over the general statute. *State v. Gabaldon*, 1978-NMCA-077, 92 N.M. 93, 582 P.2d 1306.

Instruction on lesser included offense not warranted by the facts. — Where defendant was charged with aggravated sexual abuse; defendant broke into the victim's house; defendant, who was not wearing pants and who had a knife in defendant's hand, climbed on top of the victim, and ordered the victim to remove the victim's underwear; the victim felt defendant's erection; and the victim was told to tell the victim's friend who had entered the room that the victim was alright; during that time, defendant was continually using the knife to cut the victim's throat, defendant was not entitled to a jury instruction on the lesser included offense of sexual contact by use of a deadly weapon resulting in personal injury. *United States v. Dennison*, 937 F.2d 559 (10th Cir. 1991).

Evidence of "force". — The evidence was sufficient to establish the element of force necessary to sustain convictions for felony criminal sexual contact where the victim testified that the defendant, in the first incident, grabbed and squeezed her breasts causing her pain and discomfort and, in the second incident, squeezed her breasts so tightly that she was unable to breathe, became dizzy, and was unable to extricate herself from his grip. *State v. Huff*, 1998-NMCA-075, 125 N.M. 254, 960 P.2d 342, cert. denied, 125 N.M. 146, 958 P.2d 104.

"Groin" defined. — Not having defined "groin" in this section as it read prior to 1993 amendment, and nothing to the contrary appearing, the legislature is presumed to use the common meaning of "groin," which is the fold or depression marking the line between the lower part of the abdomen and the thigh; also, the region of this line. *State v. Doe*, 1979-NMCA-021, 93 N.M. 206, 598 P.2d 1166.

Evidence sufficient to sustain conviction. — A touching of the upper, inner thigh is a touching in the region of the line between the lower part of the abdomen and the thigh; the touching is a touching of the groin and, therefore, sufficient evidence to sustain a

conviction of criminal sexual contact. *State v. Doe*, 1979-NMCA-021, 93 N.M. 206, 598 P.2d 1166.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Assault and Battery §§ 24 to 30, 41, 42, 55, 67, 106, 119, 156, 229.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

Sexual nature of physical contact as aggravating offense of assault and battery, 63 A.L.R.3d 225.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

30-9-13. Criminal sexual contact of a minor.

A. Criminal sexual contact of a minor is the unlawful and intentional touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

B. Criminal sexual contact of a minor in the second degree consists of all criminal sexual contact of the unclothed intimate parts of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses that authority to coerce the child to submit;

(b) the perpetrator uses force or coercion that results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact of a minor in the second degree is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of Sections 31-18-17, 31-18-25 and 31-18-26 NMSA 1978.

C. Criminal sexual contact of a minor in the third degree consists of all criminal sexual contact of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(b) the perpetrator uses force or coercion which results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact of a minor in the third degree is guilty of a third degree felony for a sexual offense against a child.

D. Criminal sexual contact of a minor in the fourth degree consists of all criminal sexual contact:

(1) not defined in Subsection C of this section, of a child thirteen to eighteen years of age perpetrated with force or coercion; or

(2) of a minor perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-9-23, enacted by Laws 1975, ch. 109, § 4; 1987, ch. 203, § 2; 1991, ch. 26, § 3; 2001, ch. 161, § 3; 2003 (1st S.S.), ch. 1, § 4.

ANNOTATIONS

Cross references. — For sexual exploitation of children, *see* 30-6A-3 NMSA 1978.

For provision that testimony of victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

The 2003 (1st S.S.) amendment, effective February 3, 2004, designated the formerly undesignated introductory language as Subsection A, inserted present Subsection B, redesignated former Subsections A and B as present Subsections C and D, added "for a sexual offense against a child" at the end of Subsection C, and substituted "C" for "A" in Paragraph (1) of Subsection D.

The 2001 amendment, effective July 1, 2001, inserted "of a minor" in the last paragraph in Subsection A; and in Subsection B inserted the Paragraph (1) designation and added Paragraph (2).

The 1991 amendment, effective June 14, 1991, rewrote the first sentence which read "Criminal sexual contact of a minor is unlawfully and intentionally touching or applying force to the intimate parts of a minor other than one's spouse, or unlawfully and intentionally causing a minor other than one's spouse, to touch one's intimate parts"; in Paragraph (2) of Subsection A, substituted "the perpetrator uses" for "by the use of" at the beginning of subparagraphs (b) and (c) and made related stylistic changes; and made a stylistic change in the second sentence of the section.

The 1987 amendment, effective June 19, 1987, inserted "not defined in Subsection A of this section" in the first paragraph of Subsection B.

Second degree criminal sexual contact of a minor. — Second degree criminal sexual contact of a minor as defined in Subsection B of Section 30-9-13 NMSA 1978 is limited to instances in which a defendant touches or applies force to the unclothed intimate parts of a minor. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

Sufficient evidence of third degree criminal sexual contact of a minor. — Where defendant caused the ten-year-old victim to touch defendant’s unclothed penis while in bed; the trial court instructed the jury using the language of the uniform jury instruction in effect at the time for third degree criminal sexual contact of a minor; and defendant was found guilty of and was sentenced for second degree criminal sexual contact of a minor, defendant’s conduct was a third degree felony under Subsection C, not a third degree felony under Subsection B. *State v. Trujillo*, 2012-NMCA-092, 287 P.3d 344, cert. denied, 2012-NMCERT-008.

Sufficient evidence. — Where defendant, who was the spiritual leader of a religious group that lived together, was convicted of criminal sexual contact of a minor based on an unclothed experience with a teenage child who was a member of defendant's religious community; defendant claimed that the experience was a purely spiritual healing experience; the teenage child visited defendant alone and lay in bed naked with defendant; and the child testified that defendant kissed the child on the breast, there was sufficient evidence to support defendant's conviction of criminal sexual contact of a minor. *State v. Bent*, 2013-NMCA-108, cert. denied, 2013-NMCERT-012.

Where defendant was charged with two counts of criminal sexual contact of a minor that occurred between January 1, 2009 and February 12, 2009; most of the evidence related to an incident that occurred on February 11, 2009; the victim testified that defendant had touched the victim inappropriately prior to February 11, 2009; defendant testified on cross-examination that inappropriate things had been going on between defendant and the victim about for about a week; and a police officer testified that defendant admitted touching the victim inappropriately twice within the last week, there was sufficient evidence for the jury to conclude that defendant inappropriately touched the victim on February 11, 2009 and on another occasion between January 1, 2009 and February 12, 2009. *State v. Garcia*, 2013-NMCA-064, 302 P.3d 111, cert. denied, 2013-NMCERT-004.

Where the evidence showed that the defendant and the victim went to the trash dump two to three times per month during the period from October 2001 through May 2005; that the defendant sexually molested the victim on each trip when the defendant and the victim were alone; and that although the defendant's step-daughter accompanied the defendant and the victim to the trash dump on some occasions, there was no evidence that the step-daughter accompanied the defendant and the victim to the trash dump during the period from October 2001 through March 2002, the evidence was sufficient to support the state's charges of one count of criminal sexual contact of a minor for each month between October 2001 and March 2002. *State v. Gipson*, 2009-NMCA-053, 146 N.M. 202, 207 P.3d 1179.

Where the victim testified that defendant touched the victim's vulva and patted the victim's buttocks; the touching left the victim upset and sad; when confronted with accusations of improper sexual contact by one parent, defendant apologized, and when confronted by the victim's other parent defendant said that defendant had been forgiven, sufficient evidence supported defendant's convictions for criminal sexual contact with a minor. *State v. Kerby*, 2005-NMCA-016, 138 N.M. 232, 118 P.3d 740, *aff'd*, 2007-NMSC-014, 141 N.M. 413, 156 P.3d 704.

Where defendant was convicted of numerous counts of criminal sexual contact of a minor perpetrated on his eight-year-old daughter and four-year-old stepdaughter; the four-year-old victims' testimony that defendant twice forced her to place her hand on defendant's penis, which was corroborated by the eight-year-old child victim, the evidence was sufficient to support convictions for criminal sexual contact of a minor. *State v. Tapia*, 2015-NMCA-048, cert. denied, 2015-NMCERT-004 and cert. denied, 2015-NMCERT-004.

Sufficient evidence of attempt to commit second-degree criminal sexual contact of a minor. — Where defendant was charged with attempt to commit second-degree criminal sexual contact of a minor, and where the child victim testified at trial that defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating, then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her clothing, and further testified that she was afraid that defendant was going to touch her private parts, there was substantial evidence to support defendant's conviction for attempted criminal sexual contact of a minor. *State v. Notah*, 2022-NMCA-005, cert. denied.

The district court did not err in denying defendant's proposed jury instruction for attempt to commit third-degree CSCM as a lesser included offense. — Where defendant was charged with attempt to commit second-degree criminal sexual contact of a minor (CSCM), and where the child victim testified at trial that defendant entered the room where she was sleeping, lifted the blanket off her, pulled down her pajama pants and underwear, pulled down his own pants, and rubbed her arm while masturbating, then walked to the other side of the bed, laid down next to her, and continued masturbating while rubbing her upper ribs over her clothing, and further

testified that she was afraid that defendant was going to touch her private parts, and where defendant requested a jury instruction for a lesser included offense of attempt to commit third-degree CSCM, claiming that the evidence tended to better prove an intent to touch the child's breast area, which remained clothed, thus supporting a third-degree rather than a second-degree charge, the district court did not err in denying defendant's proposed jury instruction, because the elements of the crime differ in such a way that each may be committed without necessarily committing the other. Third-degree CSCM is not a lesser included offense of second-degree CSCM, because the element distinguishing between the two degrees of CSCM under thirteen years of age is whether the child victim's intimate part was clothed or unclothed, and in this case there was no reasonable view of the evidence that would support a jury finding that defendant partially undressed the child in an attempt to touch a clothed intimate part of her body but not an unclothed intimate part. *State v. Notah*, 2022-NMCA-005, cert. denied.

Position of authority. — Where the defendant and the victim were neighbors; the victim's mother worked with the defendant and the families were good friends; the families did things together; the defendant fixed things at the victim's house and took the trash to the trash dump as requested by the victim's mother; the victim thought of the defendant as a father figure; the victim spent the night at the defendant's house on a regular basis; the victim's mother entrusted the defendant with the victim's care; the defendant allowed the victim to earn money at the defendant's place of business, the jury could reasonably conclude that the defendant was in a position of authority over the victim. *State v. Gipson*, 2009-NMCA-053, 146 N.M. 202, 207 P.3d 1179.

Where the minor victims believed that the defendant, who was a massage therapist, was a professional healthcare provider; the victims had never had a massage; the defendant told the victims that a breast and buttock massage was part of a normal body massage, the defendant was in a position of authority over the victims. State v. Haskins, 2008-NMCA-086, 144 N.M. 287, 186 P.3d 916, cert. denied, 2008-NMCERT-005, 144 N.M. 331, 187 P.3d 677.

"Position of authority" interpreted. — In 30-9-10(E) NMSA 1978, the legislature has designated certain relationships with a child that represent a "position of authority," and the language "who, by reason of that position, is able to exercise undue influence over a child" does not pertain to each of the types of position of authority listed in the definition. Under the definition of "position of authority", a household member is presumed to be able to exercise undue influence over a child such that additional proof concerning a perpetrator's use or possession of such authority is not required. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Where defendant, who was charged with criminal sexual contact of a child thirteen to eighteen years of age, did not dispute the evidence that he was a household member, but claimed that the state failed to prove that he used this position of authority to coerce the child to submit to sexual contact, the state was not required to prove that defendant, by reason of his position as a household member, was able to exercise undue influence over the child, because the legislature has designated certain relationships with a child,

including a household member, that represent a position of authority for purposes of prosecution under 30-9-13 NMSA 1978. *State v. Erwin*, 2016-NMCA-032, cert. denied.

Trustworthiness doctrine. —- The mere fact that defendant made multiple confessions or that he was suffering from Huntington's Disease when he made the confessions that he had inappropriately touched his daughter, who was two year old, and had made her touch him was not sufficient to establish the trustworthiness of his statements which the state relied upon to establish the corpus delicti of criminal sexual contact of a minor. *State v. Weisser*, 2007-NMCA-015, 141 N.M. 93, 150 P.3d 1043.

The mere fact that defendant's daughter, who was two years old, exhibited two of sixteen behaviors that could be corroborative of sexual abuse was not sufficient to establish the trustworthiness of the defendant's statements that he had inappropriately touched his daughter and had made her touch him which the state relied upon to establish the corpus delicti of criminal sexual contact of a minor. *State v. Weisser*, 2007-NMCA-015, 141 N.M. 93, 150 P.3d 1043.

Denial of severance motion. — Where the trial court denied defendant's motion to sever the counts in the indictment relating to each of two female victims, with the result that the jury heard and was allowed to consider the evidence pertaining to both victims, and the evidence relating to each victim would not have been cross-admissible in separate trials to show defendant's plan to commit the offenses of criminal sexual contact of a minor in the third degree by a person in a position of authority and aggravated indecent exposure, the trial court abused its discretion when it denied defendant's severance motion for two trials. *State v. Gallegos*, 2005-NMCA-142, 138 N.M. 673, 125 P.3d 652, cert. granted, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1137, *aff'd in part, rev'd in part*, 2007-NMSC-007, 141 N.M. 185, 152 P.3d 828.

Deportation as consequence of guilty plea. — The district court was not constitutionally required to advise defendant that his guilty plea to criminal sexual contact of a minor almost certainly would result in his deportation. *State v. Paredez*, 2004-NMSC-036, 136 N.M. 533, 101 P.3d 799.

Guilty plea entered knowingly and voluntarily. — In prosecution for criminal sexual contact of a minor in the third degree, where defendant understood the charges, understood the penalties, understood his constitutional rights and that he was waiving them, understood the factual basis on which the charges were brought, agreed with the facts, and fully intended to enter a plea of guilty, and at no time did defendant say anything that would indicate that he was reluctant to plead guilty, that he had been unduly rushed into agreeing to enter a plea, or that he was entering the plea based on fear or concern that, even though he was innocent, his attorney was not prepared for trial and he would likely be convicted although innocent, plea was entered knowingly and voluntarily. *State v. Moore*, 2004-NMCA-035, 135 N.M. 210, 86 P.3d 635.

Not vague or overbroad. — The statutory crime of criminal sexual contact of a minor is not unconstitutionally vague. *State v. Benny E*., 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408; *State v. Scott*, 1991-NMCA-081, 113 N.M. 525, 828 P.2d 958, cert. quashed, *sub nom*. *Gibson v. State*, 113 N.M. 524, 828 P.2d 957 (1992).

Double jeopardy. — Where defendant massaged the child's nude body, touching the child's breasts, buttocks, and vagina, was one continuous course of conduct, and there was no lapse in time between the times defendant touched the child's different body parts and no intervening events, there was one continuous course of conduct that was not capable of being split into three charges merely because defendant touched three different body parts and defendant's conviction for three counts of criminal sexual contact of a minor violated the Double Jeopardy Clause. *State v. Ervin*, 2008-NMCA-016, 143 N.M. 493, 177 P.3d 1067, cert. denied, 2008-NMCERT-001, 143 N.M. 398, 176 P.3d 1130.

Where defendant attempted to move child's hand toward his groin area twice within a few minutes, one of his two convictions for attempted third degree criminal sexual contact of a minor violated double jeopardy. *State v. Segura*, 2002-NMCA-044, 132 N.M. 114, 45 P.3d 54, cert. denied, 132 N.M. 193, 46 P.3d 100.

Specific intent not element. — The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. *State v. Pierce*, 1990-NMSC-049, 110 N.M. 76, 792 P.2d 408.

Unlawfulness as element. — By defining criminal sexual contact of a minor as "unlawfully and intentionally" touching a child's intimate parts, the legislature properly intended that the state must establish the unlawfulness of the touching as a distinct element of the offense. *State v. Osborne*, 1991-NMSC-032, 111 N.M. 654, 808 P.2d 624.

Lack of consent is not an element of criminal sexual contact of a minor. — Where defendant was convicted of one count of criminal sexual contact of a minor for forcibly touching the breast of a sixteen-year-old female victim, and where the evidence at trial established that defendant, a thirty-three year old man, who appeared intoxicated, entered a candy shop where the victim was working alone, that defendant lingered and made lewd comments of a sexual nature to the victim, that defendant repeatedly asked the victim to give him a hug, that when the victim instead extended her hand across the counter in an attempt to shake the defendant's hand, defendant took her hand and forcibly pulled her into a hug, and that as defendant released the victim from the hug, he brushed his hand over her chest and squeezed her breast, and where defendant claimed that fundamental error occurred because of the failure to instruct the jury on lack of consent, claiming that surveillance video footage of his encounter with the victim

was evidence of the victim's consent to his actions, fundamental error did not occur, because lack of consent is not an element of criminal sexual contact of a minor. Consent of a child between the ages of thirteen and sixteen to engage in sexual contact is irrelevant where force occurred. *State v. Begaye*, 2022-NMCA-012, cert. denied.

Contributing to delinquency of a minor is separate offense. — The legislature intended for the crimes of criminal sexual contact of a minor and contributing to the delinquency of a minor to be separate crimes, punishable separately even when unitary conduct violates both statutes. Therefore, convictions under both statutes do not violate double jeopardy principles. *State v. Trevino*, 1993-NMSC-067, 116 N.M. 528, 865 P.2d 1172.

Merger of attempted criminal sexual penetration and criminal sexual contact of minor from unitary conduct. — Despite the state's contention that the conduct underlying the offenses charged against the defendant was not unitary, in that the defendant's action of lying on the victim constituted criminal sexual contact of a minor and his action of preparing to "hump" her constituted attempted criminal sexual penetration of a minor, the actions can only reasonably be deemed to constitute unitary conduct; the contact and attempted penetration all took place within the same short space of time, with no physical separation between the illegal acts. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

Criminal sexual contact of minor is not lesser included offense of attempted criminal sexual penetration. — For purposes of double jeopardy, the offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser included and greater inclusive crimes because they each contain different elements and stand independently in relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237.

Sufficiency of notice of crime charged. — Where a child was charged with unlawfully and intentionally touching or applying force to the intimate parts of his sister, and the charging document contained not only a time frame, but the name of the alleged victim, the child was given adequate notice to enable him to prepare a defense and to assure that any conviction or acquittal would be res judicata against a subsequent prosecution for the same offense. *State v. Benny E*., 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

Statements part of res gestae. — In prosecution for sexual assault upon four year old female child, statements made by victim within 45 minutes after awaking, crying and scared, upon being discovered in bed with defendant, could be seen as contemporaneous with shocked condition and as spontaneous utterances, and were properly admitted under the res gestae exception to the hearsay rule. *State v. Apodaca*, 1969-NMCA-038, 80 N.M. 244, 453 P.2d 764.

Similar prior acts. — Admission into evidence of prior sexual acts between defendant and prosecuting witness similar to those charged in conviction for indecent handling and

touching of girl under age of 16 was not an abuse of trial court's discretion as a matter of law. *State v. Minns*, 1969-NMCA-035, 80 N.M. 269, 454 P.2d 355, cert. denied, 80 N.M. 234, 453 P.2d 597.

In a prosecution for criminal sexual contact with a minor, the admission of evidence of prior "bad" acts, including uncharged sexual battery dating back to the victim's early childhood, was not error. The evidence corroborated the victim's testimony and placed the charged acts in context. The evidence of defendant's treatment of the victim was relevant to the issue of credibility and not merely offered to show defendant's character and propensity to commit the crime. *State v. Landers*, 1992-NMCA-131, 115 N.M. 514, 853 P.2d 1270, *overruled on other grounds by State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

Physical evidence is not required to support a conviction under this section. *State v. Landers*, 1992-NMCA-131, 115 N.M. 514, 853 P.2d 1270, cert. quashed, 115 N.M. 535, 854 P.2d 362, *overruled on other grounds by State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

Circumstantial evidence was sufficient to allow a jury to find accused guilty under this section beyond a reasonable doubt. *Mora v. Williams*, 111 Fed. Appx. 537 (10th Cir. 2004).

Child's testimony sufficient. — The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

Corroboration was not essential to conviction in a prosecution for indecent handling and touching of a minor under 18 years of age. *State v. Trujillo*, 1955-NMSC-094, 60 N.M. 277, 291 P.2d 315.

Use of a position of authority to coerce sexual contact may be proven inferentially and although the position of employer in and of itself does not necessarily establish the use of that position as coercion, where there exists sufficient connection between the employment and the sexual contact, the jury can appropriately infer that the employer used coercion. *State v. Trevino*, 1991-NMCA-085, 113 N.M. 804, 833 P.2d 1170, *aff'd sub nom*. *State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Coercion by a person in a position of authority is not negated where victim resists the defendant's attempts to force sexual contact. — Where defendant was found guilty of two counts of criminal sexual contact of a minor by a person in a position of authority, where the evidence at trial established that defendant grabbed his thirteen-year-old niece's clothed buttocks while she walked past him, and later placed his hand directly on the "outer lip" of her genital area while she was sleeping, and where defendant argued that the child was not coerced to submit to sexual contact because she immediately resisted his attempts to force sexual contact, there was sufficient

evidence for a jury to infer defendant was in a position of authority over the child and used that authority to coerce the child to submit to sexual contact because of the nature of the relationship between defendant and the child and the child's testimony that she felt pressure not to interfere with the family dynamics given the close relationship between her family and her uncle's family. Though a child's resistance may have some relevance to the element of coercion, the primary focus of the analysis should be on the perpetrator's actions, not the victim's. *State v. Arvizo*, 2018-NMSC-026, *rev'g* No. 33,697, mem. op. (N.M. Ct. App. June 28, 2016) (non-precedential).

Instruction on position of authority. — The defendant’s requested jury instruction that "[t]he fact the defendant was in a position of authority does not alone establish that he used that authority to coerce sexual contact" was not a correct statement of the law because coercion for the purposes of this section occurs when a defendant occupies a position which enables that person to exercise undue influence over the victim and that influence is the means of compelling submission to the contact. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Defendant’s motivation irrelevant. — A defendant who unlawfully and intentionally touches an intimate part of a minor’s body is guilty of criminal sexual contact of a minor, regardless of whether the defendant was motivated by a desire to obtain sexual gratification or by some other desire. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Implicit waiver of right to confrontation. — Where defendant at trial did not file a response to the state's motion for a videotaped deposition, nor did he object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence, but, to the contrary, defendant relied on both the deposition tape and the interview tape in his opening and closing arguments, defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

On appeal from a prosecution for criminal sexual contact of a minor, where defendant argued that the district court was constitutionally required to make specific findings justifying its substitution of videotaped testimony for face-to-face confrontation, even though defendant never objected to the substitution, defendant waived his Confrontation Clause claim by failing to raise the confrontation issue at trial and there is no fundamental error. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

Instruction on time limitation properly refused. — Where time limitation was not an essential element of the offenses of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 1990-NMSC-088, 110 N.M. 705, 799 P.2d 574.

Instruction on intoxication improperly refused. — Where trial court by instruction fixed specific intent as an essential ingredient of offense charged, sexual assault of female under the age of 16, refusal to instruct on defense of intoxication was reversible error. *State v. Rayos*, 1967-NMSC-008, 77 N.M. 204, 420 P.2d 314.

No instruction on touchings' lawfulness absent evidence. — Although the defendant contended that all touching of the victim was colorably lawful, there was no evidence from which the jury could infer that the particular touchings that the state sought to prove were lawful. The only way to view the defendant's evidence was that he did not touch the victim whatsoever in the manner the state alleged and that all of his other touchings were lawful. Because the defendant did not allege that the particular touchings forming the basis for the charges were lawful, the issue of the lawfulness of those touchings was not at issue, and the trial court's failure to give a lawfulness instuction was not fundamental error. *State v. Landers*, 1992-NMCA-131, 115 N.M. 514, 853 P.2d 1270, cert. quashed, 115 N.M. 535, 854 P.2d 362, *overruled on other grounds by State v. Kerby*, 2005-NMCA-106, 138 N.M. 232, 118 P.3d 740.

Attempt. — Reversal of defendant's convictions under this section was required because the attempt aspect of the charge needed to be connected with the underlying crime in a manner that made it clear to the jury that the initiatory crime of attempt applied to all elements of the underlying crime. *State v. Segura*, 2002-NMCA-044, 132 N.M. 114, 45 P.3d 54, cert. denied, 132 N.M. 193, 46 P.3d 100.

Sufficient evidence of criminal sexual contact. — Where defendant was charged with criminal sexual contact of a minor and where the minor child, at trial, testified that defendant unzipped her pajamas and positioned his hand in the her underwear and touched the skin underneath her underwear in a rubbing motion, a jury could reasonably believe that defendant touched or applied force to the child’s unclothed groin area, and thus there was sufficient evidence of criminal sexual contact of a minor. *State v. Pitner*, 2016-NMCA-102, cert. denied.

Evidence sufficient to support conviction. — Father's conviction on two counts of criminal sexual contact of a minor was supported by substantial evidence, including the testimony of the child and a therapist who interviewed the child. *State v. Newman*, 1989-NMCA-086, 109 N.M. 263, 784 P.2d 1006, cert. denied, 109 N.M. 262, 784 P.2d 1005.

Evidence consisting of the testimony of the victim's counselor and the victim herself was sufficient to support convictions of criminal sexual contact with a minor and criminal sexual penetration of a minor. *State v. Ortiz-Burciaga*, 1999-NMCA-146, 128 N.M. 382, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823.

Evidence was sufficient to demonstrate that defendant coerced a 16-year old boy to submit to sexual contact by using his position as employer, where defendant, who had hired the boy to help repair appliances, closed the doors and windows when the boy indicated a desire to leave after defendant made sexual advances. *State v. Corbin*,

1991-NMCA-021, 111 N.M. 707, 809 P.2d 57, cert. denied, 111 N.M. 720, 809 P.2d 634.

Jury could infer coercion resulted from the employment relationship. First, the sexual contact took place on a job site owned by defendant, who had sole supervisory control not only over the premises but also over the victim. Second, defendant assigned victim to a small ticket booth where all of the incidents of sexual contact took place. *State v. Trevino*, 1991-NMCA-085, 113 N.M. 804, 833 P.2d 1170, *aff'd sub nom*. *State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Where four students testified that the defendant, an assistant principal, had on various occasions while at school touched their breasts and/or buttocks, the testimony was sufficient for a reasonable mind to conclude that the unlawful contact was at least in part a result of the defendant's position of authority. *State v. Gardner*, 2003-NMCA-107, 134 N.M. 294, 76 P.3d 47, cert. denied, 134 N.M. 179, 74 P.3d 1071.

Sufficient evidence of criminal sexual contact of a minor for purposes of retrial. — Where defendant was convicted of one count of criminal sexual penetration of a minor and twenty-one counts of criminal sexual contact of a minor, and where defendant's convictions were overturned based on the state's violation of defendant's constitutional right against self-incrimination, there was sufficient evidence to support each of defendant's convictions for purposes of retrial where, at trial, the state presented evidence from the child victim that defendant committed multiple instances of criminal sexual contact and at least one instance of criminal sexual penetration over a four-month period and defendant's admission that he had put the child's penis in his mouth at least once and had touched the child's penis between twenty and thirty times. *State v. Atencio*, 2021-NMCA-061, cert. granted.

Disjunctive in instruction not error. — It was not error for the district court to instruct the jury that in order to convict defendant of criminal sexual contact of a minor under the age of 13, it must conclude that defendant touched or applied force either to the vagina or breast of the victim, as the essential element of the crime is touching an intimate part of the child. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500.

Special probation condition did not terminate parental rights. — Where defendant pleaded guilty to eight counts of criminal sexual contact of a minor in the fourth degree, the charges stemming from a series of incidents that occurred over the course of several months between defendant and one of his adopted daughters, and after the sentencing hearing, the district court imposed nine conditions of probation, with one condition prohibiting defendant from having direct or indirect contact with all children under the age of 18, including the victim of his crimes, absent a court order, the special condition did not amount to a "de facto" termination of parental rights, necessitating jurisdiction within the children's court. *State v. Garcia*, 2005-NMCA-065, 137 N.M. 597, 113 P.3d 867.

Law reviews. — For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 A.L.R.3d 8.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 A.L.R.3d 1286.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

6A C.J.S. Assault and Battery § 123.

30-9-14. Indecent exposure.

A. Indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view.

B. As used in this section, "primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

C. Whoever commits indecent exposure is guilty of a misdemeanor.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing indecent exposure to participate in and complete a program of professional counseling at his own expense.

History: 1953 Comp., § 40A-9-24, enacted by Laws 1975, ch. 109, § 5; 1996, ch. 84, § 1.

ANNOTATIONS

Cross references. — For provision that testimony of victim hereunder need not be corroborated, *see* 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, *see* 30-9-16 NMSA 1978.

The 1996 amendment, effective July 1, 1996, rewrote and designated the existing language as Subsections A through C, and added Subsection D.

Vehicle on public street as "public view". — The cab of a pickup truck parked on a public street in daylight hours is open to the public view and the actions of a defendant in calling an 11 year-old girl to a window on the pretext of asking directions consequently fall within the meaning of indecent exposure under this section. *State v. Artrip*, 1991-NMCA-035, 112 N.M. 87, 811 P.2d 585, cert. denied, 112 N.M. 21, 810 P.2d 1241.

No exposure to "public view". — The defendant, who deliberately displayed his genital area before a minor child in the household wherein he was living, did not indecently expose himself to "public view" as proscribed by this section. *State v. Romero*, 1985-NMCA-096, 103 N.M. 532, 710 P.2d 99, cert. denied, 103 N.M. 525, 710 P.2d 92.

Prosecutrix' prior sexual conduct. — In prosecution for indecent exposure before female child under 18, where questions asked of prosecutrix on cross-examination relating to specific prior acts of sexual misconduct were allowed by the trial court on theory that they were an attack upon her credibility, the permitting or limiting of extent of such questioning was well within discretion of the court. *State v. McKinzie*, 1963-NMSC-060, 72 N.M. 23, 380 P.2d 177.

Contributing to delinquency of a minor is separate offense. — An element of indecent exposure is that the defendant's acts take place in "public view;" there is no such element in contributing to delinquency of a minor, and the trial court's refusal to give the instruction as a lesser included offense was proper. *State v. Henderson*, 1993-NMSC-068, 116 N.M. 537, 865 P.2d 1181, *overruled in part on other grounds by State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

Prior offenses. — In prosecution for indecent exposure before female child under age of 18, question to defendant's wife regarding a prior second degree rape charge filed against her husband, posed after she testified that his sexual morality had never been called into question, related only to the character of defendant, which he himself had placed in issue by taking the stand, and claimed prejudice was unavailing to him. *State v. McKinzie*, 1963-NMSC-060, 72 N.M. 23, 380 P.2d 177.

Cross-examination prejudicial. — It was an abuse of discretion for trial court to permit the cross-examination of defendant in prosecution for indecent demonstration or exposure in presence of female under 16, to be conducted to the extent and in the manner disclosed by the record, where for purpose of attacking defendant's credibility the prosecutor asked about specified lewd acts with his young daughter, describing the acts, unnecessarily repeating his questions, framing his interrogations as assertions and challenging defendant's denials, with result that defendant was denied a fair trial. *State v. Hargrove*, 1970-NMCA-006, 81 N.M. 145, 464 P.2d 564.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Lewdness, Indecency and Obscenity §§ 2, 17.

Criminal offense predicated upon indecent exposure, 93 A.L.R. 996, 94 A.L.R.2d 1353.

Topless or bottomless dancing or similar conduct as offense, 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

Indecent exposure: what is "person", 63 A.L.R.4th 1040.

Regulation of exposure of female, but not male breasts, 67 A.L.R.5th 431.

Constitutionality of state statutes banning distribution of sexual devices, 94 A.L.R.5th 497.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place, 95 A.L.R.5th 229.

30-9-14.1. Indecent dancing.

Indecent dancing consists of a person knowingly and intentionally exposing his intimate parts to public view while dancing or performing in a licensed liquor establishment. "Intimate parts" means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, "female breast" means the areola, and "exposing" does not include any act in which the intimate part is covered by any nontransparent material.

Whoever commits indecent dancing is guilty of a petty misdemeanor.

A liquor licensee, his transferee or their lessee or agent who allows indecent dancing on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act [60-3A-1 NMSA 1978].

History: Laws 1979, ch. 403, § 1; 1981, ch. 41, § 1.

ANNOTATIONS

Constitutionality. — The state's regulatory power under the twenty-first amendment outweighs any first amendment interest in nude dancing and therefore this section is constitutional insofar as it applies to the prohibition of indecent dancing in licensed liquor establishments. *Nall v. Baca*, 1980-NMSC-138, 95 N.M. 783, 626 P.2d 1280.

Law reviews. — For note, "Constitutional Law - Regulating Nude Dancing in Liquor Establishments - The Preferred Position of the Twenty-First Amendment - Nall v. Baca," see 12 N.M.L. Rev. 611 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Topless or bottomless dancing or similar conduct as offense, 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

30-9-14.2. Indecent waitering.

Indecent waitering consists of a person knowingly and intentionally exposing his intimate parts to public view while serving beverage or food in a licensed liquor establishment. "Intimate parts" means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, "female breast" means the areola and "exposing" does not include any act in which the intimate part is covered by any nontransparent material.

Whoever commits indecent waitering is guilty of a petty misdemeanor.

A liquor licensee or his lessee or agent who allows indecent waitering on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act [60-3A-1 NMSA 1978].

History: Laws 1979, ch. 403, § 2; 1981, ch. 41, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

67 C.J.S. Obscenity § 5.

30-9-14.3. Aggravated indecent exposure.

A. Aggravated indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view in a lewd and lascivious manner, with

the intent to threaten or intimidate another person, while committing one or more of the following acts or criminal offenses:

(1) exposure to a child less than eighteen years of age;

(2) assault, as provided in Section 30-3-1 NMSA 1978;

(3) aggravated assault, as provided in Section 30-3-2 NMSA 1978;

(4) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(5) battery, as provided in Section 30-3-4 NMSA 1978;

(6) aggravated battery, as provided in Section 30-3-5 NMSA 1978;

(7) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978; or

(8) abuse of a child, as provided in Section 30-6-1 NMSA 1978.

B. As used in this section, "primary genital area" means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

C. Whoever commits aggravated indecent exposure is guilty of a fourth degree felony.

D. In addition to any punishment provided pursuant to the provisions of this section, the court shall order a person convicted for committing aggravated indecent exposure to participate in and complete a program of professional counseling at his own expense.

History: Laws 1996, ch. 84, § 2.

ANNOTATIONS

Effective dates. — Laws 1996, ch. 84, § 3 makes the act effective on July 1, 1996.

Am. Jur. 2d, A.L.R. and C.J.S. references.— Constitutionality of state statutes banning distribution of sexual devices, 94 A.L.R.5th 497.

What constitutes "public place" within meaning of state statute or local ordinance prohibiting indecency or commission of sexual act in public place, 95 A.L.R.5th 229.

30-9-15. Corroboration.

The testimony of a victim need not be corroborated in prosecutions under Sections 2 through 5 [30-9-11 to 30-9-14 NMSA 1978] of this act and such testimony shall be entitled to the same weight as the testimony of victims of other crimes under the Criminal Code.

History: 1953 Comp., § 40A-9-25, enacted by Laws 1975, ch. 109, § 6.

ANNOTATIONS

Compiler's notes. — For case law requiring corroboration prior to enactment of this section, *see* notes under 30-9-11 NMSA 1978.

Weight of evidence. — In prosecutions for criminal sexual penetration, the testimony of the victim need not be corroborated and lack of corroboration has no bearing on weight to be given to the testimony. *State v. Nichols*, 2006-NMCA-017, 139 N.M. 72, 128 P.3d 500; *State v. Hunter*, 1984-NMSC-017, 101 N.M. 5, 677 P.2d 618, cert. denied, 469 U.S. 838, 105 S. Ct. 137, 83 L. Ed. 2d 77 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 65 Am. Jur. 2d Rape §§ 94 to 99; 70A Am. Jur. 2d Sodomy §§ 70 to 76.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 A.L.R.4th 120.

75 C.J.S. Rape § 78.

30-9-16. Testimony; limitations; in camera hearing.

A. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

B. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of a patient's psychological history, emotional condition or diagnosis obtained by an accused psychotherapist during the course of psychotherapy shall not be admitted unless, and only to the extent that, the court finds that the evidence is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

C. If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

History: 1953 Comp., § 40A-9-26, enacted by Laws 1975, ch. 109, § 7; 1993, ch. 177, § 4.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "30-9-11 through 30-9-15 NMSA 1978" for "2 through 6 of this act" near the beginning of Subsection A; added present Subsection B, redesignating former Subsection B as present Subsection C; in Subsection C, inserted "referred to in Subsection A or B of this section" in the first sentence, inserted "or B" in the second and third sentences, and deleted "under Subsection A of this section" from the end of the third sentence; and made stylistic changes throughout Subsections A and C.

Victim's past allegations against a third party. — Where the trial court excluded evidence of the victim's past allegations against a third party which related to the victim's reputation for past sexual conduct, the victim made the allegations against the third party in the past; the circumstances of the prior incident in no way resembled the allegations that led to the charges against the defendant; the defendant did not show that the circumstances of the prior allegations were clearly relevant to any material issue in the defendant's case other than propensity; and the defendant did not show how the prior allegations related to the defendant's defense, the trial court properly excluded the evidence. *State v. Casillas*, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 2009-NMCERT-003, 146 N.M. 603, 213 P.3d 507.

Accused's right of confrontation denied. — Where the defendant's sole defense in his rape trial was that the child victim consented to sexual intercourse with him and then fabricated an allegation of rape because her parents, who were opposed to premarital sex because of their deeply religious convictions, had previously punished the victim for engaging in consensual sex with someone else, the defendant was denied his constitutional right of confrontation when the trial court prohibited the defendant from cross-examining the victim and her parents about the prior sexual encounter and the punishment the victim had received from her parents as a result of that encounter and the error was not harmless beyond a reasonable doubt. *State v. Stephen F.*, 2008-NMSC-037, 144 N.M. 360, 188 P.3d 84, *aff'g*, 2007-NMCA-025, 141 N.M. 199, 152 P.3d 842.

Prior sexual abuse of a child. — To rebut the natural assumption that a young victim of sexual abuse is sexually naive and could only have learned about it because the victim was victimized by the defendant, the defendant may introduce the fact that the victim had been previously sexually abused to show an alternative source of sexual knowledge. *State v. Payton*, 2007-NMCA-110, 142 N.M. 385, 165 P.3d 1161, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

In order to present evidence of victim's alleged prostitution, defendant had to establish that the evidence was material and that its prejudicial effect did not outweigh its probative value. *State v. Maestas*, 2005-NMCA-062, 137 N.M. 477, 112 P.3d 1134, *rev'd on other grounds*, 2007-NMSC-001, 140 N.M. 836, 149 P.3d 933.

Section is not unconstitutional on its face. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

The fact that this section attempts to regulate practice and procedure in district courts in regard to a victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

This section was intended to encourage reporting of rapes by minimizing intrusive inquiry into the personal affairs of the victim. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Section protects victim against unwarranted invasions of her privacy. — In addition to its effect in insulating the jury from prejudicial material, this section serves to protect the victim of the crime against unwarranted invasions of her privacy. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Purpose of statute. — The statute is designed to minimize intrusive inquiry into a rape complainant's private life. *State v. Ramos*, 1993-NMCA-072, 115 N.M. 718, 858 P.2d 94, cert. denied, 115 N.M. 602, 856 P.2d 250.

Section not in conflict with rules. — The procedures in this section do not conflict, but rather are consistent, with Rule 36, N.M.R. Crim. P. (now Rule 5-603 NMRA), regarding pretrial hearings. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

The balancing approach to be applied in admitting evidence concerning past sexual conduct under this section does not conflict, but rather is consistent, with Rule 403, N.M.R. Evid. (now Rule 11-403 NMRA). *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. (now Rule 11-403 NMRA) is to be applied in determining admissibility. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

There is no conflict between this section and Rule 405, N.M.R. Evid. (now Rule 11-405 NMRA), regarding methods of proving character, because the balancing approach of Rule 403, N.M.R. Evid. (now Rule 11-403 NMRA) is also applicable to evidence admissible under Rule 405, N.M.R. Evid. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972.

Section is not limited to sex by consent; rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *State v. Montoya*, 1978-NMCA-052, 91 N.M. 752, 580 P.2d 973, cert. denied, 91 N.M. 751, 580 P.2d 972.

Section does not protect against waiver of privilege not to disclose medical records. — In a prosecution for criminal sexual penetration, this section did not apply to give the victim the right to release her medical and psychotherapy records to the police and state's attorneys and then invoke an absolute privilege against *in camera* inspection by the court or subsequent disclosure to other parties. *State v. Gonzales*, 1996-NMCA-026, 121 N.M. 421, 912 P.2d 297.

Discretion of trial court. — In prosecution for indecent exposure before female child under 18, where questions asked of prosecutrix on cross-examination relating to specific acts of sexual misconduct were allowed by the court on theory that they were an attack upon her credibility, the permitting or limiting of extent of such questioning was well within discretion of the trial court. *State v. McKinzie*, 1963-NMSC-060, 72 N.M. 23, 380 P.2d 177.

Limited psychiatric examination of victim permissible. — Insofar as a psychiatric examination probes the past sexual behavior of the victim, it is within the terms of this section. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Prior accusations of sexual misconduct. — In a prosecution for sexual misconduct, the trial court did not err in denying the defendant's request to call the victim's stepfather and the defendant's wife to testify that the victim had previously falsely accused the stepfather of sexual misconduct. *State v. Scott*, 1991-NMCA-081, 113 N.M. 525, 828 P.2d 958, cert. quashed, *sub nom*. *Gibson v. State*, 113 N.M. 524, 828 P.2d 957 (1992).

Victim's past sexual conduct not admissible. — Even though evidence of a victim's prior sexual conduct may be admissible to show bias, motive to fabricate or for other purposes consistent with the constitutional right of confrontation, the trial court did not err in rejecting such evidence where defendant failed to show that it was material and

relevant, and that its probative value equaled or outweighed its inflammatory nature. *State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Victim's past sexual conduct in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 1978-NMCA-048, 92 N.M. 7, 582 P.2d 384, cert. denied, 91 N.M. 751, 580 P.2d 972; *see State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by*, *State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Victim's virginity relevant if consent at issue. — Evidence of a victim's virginity is relevant in cases involving alleged forcible criminal sexual penetration where the consent of the victim is at issue. *State v. Singleton*, 1984-NMCA-110, 102 N.M. 66, 691 P.2d 67.

Previous chastity immaterial. — Ordinarily the previous chastity of prosecuting witness is immaterial in a statutory rape case. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

Probative value of evidence of victim's past sexual activity must be weighed against its prejudicial effect, and its prejudicial effect is great. *State v. Romero*, 1980-NMCA-011, 94 N.M. 22, 606 P.2d 1116, *overruled on other grounds by State v. Johnson*, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869.

Confrontation of witness. — The discretion of the trial court to exclude evidence of sexual conduct must be weighed against a criminal defendant's constitutional right to confront witnesses. *Manlove v. Sullivan*, 1989-NMSC-029, 108 N.M. 471, 775 P.2d 237.

Victim's past sexual history. — Evidence of a minor's past sexual history was properly excluded since that evidence was not relevant to the charge of contributing to the delinquency of a minor. *State v. Lucero*, 1994-NMCA-129, 118 N.M. 696, 884 P.2d 1175, cert. denied, 118 N.M. 731, 885 P.2d 1325.

Past conduct negativing defendant's paternity. — Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such condition. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

Issue of penetration. — Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, where sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 1958-NMSC-108, 64 N.M. 431, 329 P.2d 785.

De novo review is the proper standard of review for analyzing cases implicating both the rape shield rule and the Confrontation Clause. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Analysis of cases implicating both the rape shield rule and the Confrontation Clause. — When a defendant makes a claim that the rape shield law bars evidence implicating the defendant's confrontation rights, the district court must first identify a theory of relevance implicating the defendant's constitutional right to confrontation and then weigh whether evidence elicited under that theory would be more prejudicial than probative. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Application of rape shield rule violated Confrontation Clause. — Where defendant and the victim, who had a sexual relationship for two years, began arguing about a telephone call that defendant had received; during the argument, defendant indicated to the victim that defendant wanted sex; defendant and the victim went into defendant's bedroom where defendant got on top of the victim and tried to remove the victim's clothes; the victim told the defendant "no" several times and pushed and kicked defendant until defendant stopped making sexual advances; defendant was indicted for kidnapping with intent to commit a sexual offense; the district court refused to allow defendant on cross-examination to ask the victim whether the victim and defendant had a long-standing sexual relationship and whether they had a history of engaging in sex after an argument as "make-up sex" to resolve disputes for the purpose of showing that defendant never intended to sexually assault the victim but was pursuing consensual "make-up sex" as defendant and the victim had done after arguments in the past; the victim was the sole material witness against defendant and the only witness who could provide testimony necessary for defendant's theory of the case; and the evidence was relevant to defendant's defense and would not have had a prejudicial impact on the victim, the district court's ruling violated defendant's confrontation right because it denied defendant an opportunity to present a full and fair defense. *State v. Montoya*, 2014-NMSC-032, *rev'g* 2013-NMCA-076, 306 P.3d 470.

Standard of review for cases involving the rape shield rule and the Confrontation Clause. — There are three steps and three standards of review that relate to the application of the rape shield rule. First, the court reviews de novo whether a defendant has presented a theory of admissibility that implicates the defendant's confrontation rights. If the defendant has, the court undertakes a de novo balancing of the state's interest in excluding the evidence against the defendant's constitutional rights to determine if the district court acted within the wide scope of its discretion to limit cross-examination. If the Confrontation Clause is not implicated or if there has been no Confrontation Clause violation, the court examines whether the district court has abused its discretion in its application of the rule itself. *State v. Montoya*, 2013-NMCA-076, *rev'd* by 2014-NMSC-032.

Application of the rape shield rule did not implicate the Confrontation Clause. — Where defendant and the victim had been arguing; defendant wanted to have sex with the victim, but the victim refused; defendant got on top of the victim and attempted to

remove the victim's clothing; the victim pushed and kicked defendant until defendant stopped; defendant did not force the victim to have sex; defendant was charged with kidnapping and attempt to commit criminal sexual penetration; to show that defendant did not have specific intent to commit the crimes, defendant sought to introduce evidence of the sexual history of the victim and defendant to show that the defendant's intent and the victim's belief was that defendant was trying to have sex to "make-up" just as they had done in the past; the district court precluded defendant from inquiring into the party's sexual history; at trial, the victim testified that defendant and the victim had been friends for two years, the victim believed that defendant would not penetrate the victim unless the victim consented, and the victim perceived defendant's actions as an attempt to obtain the victim's consent to have sex; defendant claimed that defendant's confrontation rights had been violated because defendant was unable to challenge an opposing version of the facts, the district court's exclusion of the evidence did not implicate or violate the Confrontation Clause, because defendant sought not to confront the victim, but to use the victim's testimony as evidence unrelated to the truth or accuracy of the victim's testimony and the district court did not abuse its discretion in excluding of evidence of the history of victim's and defendant's sexual relationship. *State v. Montoya*, 2013-NMCA-076, *rev'd* by 2014-NMSC-032.

Prior acts with defendant. — Admission into evidence of prior sexual acts between defendant and prosecuting witness similar to those charged in prosecution for indecent handling and touching of girl under age of 16 was not an abuse of trial court's discretion as matter of law. *State v. Minns*, 1969-NMCA-035, 80 N.M. 269, 454 P.2d 355, cert. denied, 80 N.M. 234, 453 P.2d 597.

Trial court did not err in allowing a child-victim to testify about his sexual conduct with defendant while in California and before moving to New Mexico, where the California episodes were relevant to the episodes in New Mexico. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Impeachment evidence did not violate rape shield statute. — Where defendant was charged with kidnapping in the first degree, and where, at trial, defendant sought to elicit testimony from the complaining witness about her delay in reporting a sexual assault that allegedly occurred during the kidnapping, and also attempted to impeach her credibility by asking about her failure to disclose to law enforcement and medical personnel her ongoing, consensual sexual relationship with defendant, and where the state objected on relevancy grounds, the district court abused its discretion in limiting cross-examination of the complaining witness under the rape shield statute, because defense counsel's questions were not about the witness's sexual conduct or reputation for past sexual conduct, the cross-examination was designed to impeach the witness's credibility for truthfulness, not to establish her propensity to have consensual sex with him or for some other purpose generally prohibited by the rape shield statute. Moreover, the error was not harmless, because given the importance of the complaining witness's credibility to the state's case, defendant was prejudiced by the district court's ruling. *State v. Salazar*, 2023-NMCA-026.

Evidence of past sexual encounter of victim and third party. — Trial court acted within its discretion in suppressing evidence of a past sexual encounter of the victim and a third party during which the victim allegedly affixed the ropes found on the bed to restrain the third party in the course of consensual sexual activity, where such evidence was irrelevant to defendant's culpability for the crimes charged, advanced no legitimate defense, excuse, or justification for the crimes charged, and were likely to inject false issues and confuse the jury. *State v. Swafford*, 1989-NMCA-069, 109 N.M. 132, 782 P.2d 385, cert. denied, 109 N.M. 54, 781 P.2d 782.

Testimony offered for fabrication defense. — Testimony that the prosecutrix made up stories of rape and abduction in the past that resembled the facts alleged in the case, that prosecutrix had once recanted such a story, and that prosecutrix was the sort of person who would willingly see an innocent person put in jail, was not evidence of sexual conduct precluded by the Rape Shield Law but rather went to the prosecutrix's proclivity for truthfulness and was relevant both to impeach the prosecutrix's credibility and as direct evidence in the petitioner's fabrication defense. The testimony was closely enough related to sexual conduct to be barred by this section, but the court's discretion to exclude such evidence must be weighed against a defendant's constitutional right to confront witnesses. *Manlove v. Tansy*, 981 F.2d 473 (10th Cir. 1992).

Law reviews. — For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For note, "Striking the Right Balance in New Mexico's Rape Shield Law - State v. Johnson," see 28 N.M.L. Rev. 611 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Lewdness, Indecency and Obscenity § 34 et seq.; 65 Am. Jur. 2d Rape §§ 82 to 87; 70A Am. Jur. 2d Sodomy §§ 54 to 57.

Evidence of complaint by victim of rape who is not a witness, 157 A.L.R. 1359.

Validity and construction of constitution on statute authorizing exclusion of public in sex offense cases, 39 A.L.R.3d 852.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 A.L.R.4th 283.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

75 C.J.S. Rape §§ 63; 81 C.J.S. Sodomy § 10.

30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence [Rule 11-611 NMRA]. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act.

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: 1953 Comp., § 40A-9-27, enacted by Laws 1978, ch. 98, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Implicit waiver of right to confrontation. — Where defendant at trial did not file a response to the state's motion for a videotaped deposition, nor did he object at the time of the taking of the deposition or at the time that the district court admitted the deposition tape as evidence, but, to the contrary, defendant relied on both the deposition tape and the interview tape in his opening and closing arguments, defendant's actions indicate that he implicitly waived his right to face-to-face confrontation by conduct. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

Defendant absent from trial voluntarily. Factors articulated in State v. Clements, 1988-NMCA-094, 108 N.M. 13, 765 P.2d 1195, cert. denied, 107 N.M. 785, 765 P.2d 758, as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 1992-NMCA-088, 114 N.M. 265, 837 P.2d 459.

Record insufficient to justify denial of right to confront victim. — Where a child was charged with criminal sexual contact with his sister, and, at trial, the victim testified in chambers with only counsel and the judge present and the accused observed the victim testify on a video monitor located in another room, the procedure was invalid without particularized findings of special harm to the particular child witness which are supported by substantial evidence, because the accused child's right of confrontation requires that he be permitted to confront each of the witnesses against him, including the child victim. *State v. Benny E.*, 1990-NMCA-052, 110 N.M. 237, 794 P.2d 380.

Right of confrontation not denied. — In a prosecution for criminal sexual contact with a minor, use of the victim's videotaped deposition did not deny the defendant the right of confrontation: the defendant was not deprived of his right to fairly and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. *State v. Vigil*, 1985-NMCA-103, 103 N.M. 583, 711 P.2d 28.

Videotaping depositions of victims of sex crimes, while defendant was required to remain in a control room instead of the room in which the testimony was given, was

consistent with this section and Rule 5-504 NMRA, and no violation of defendant's right to confrontation occurred. *State v. Tafoya*, 1988-NMCA-082, 108 N.M. 1, 765 P.2d 1183, cert. denied, 107 N.M. 785, 765 P.2d 758, cert. denied, 489 U.S. 1097, 109 S. Ct. 1572, 103 L. Ed. 2d 938 (1989).

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, as he made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. *State v. Fairweather*, 1993-NMSC-065, 116 N.M. 456, 863 P.2d 1077.

Showing of traumatic effect. — Showing a traumatic effect upon the child is sufficient to render the child unavailable to testify. *Vigil v. Tansy*, 917 F.2d 1277 (10th Cir. 1990), cert. denied, 498 U.S. 1100, 111 S. Ct. 995, 112 L. Ed. 2d 1078 (1991).

Deposition need not be taken to charging paper on which defendant ultimately tried. — There is nothing in Rule 5-504 NMRA requiring a deposition to be taken pursuant to the charging paper upon which defendant is ultimately tried. A deposition may be taken pursuant to a complaint and then introduced at a trial on an indictment or information. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101, cert. denied, 107 N.M. 74, 752 P.2d 789.

Second deposition admitted into evidence. — While it appears that the procedure outlined in this section and Rule 5-504 NMRA contemplates only one deposition, at which defense counsel should be on notice that this is his chance to confront the victim, although defendant never alerted the trial court why, following a deposition, a new video deposition was necessary, and he never specifically informed the appellate court, with references to the record, why a new video deposition was necessary, it could not be said that the trial court erred in allowing defendant to take a second deposition and then allowing both the first and second videotaped depositions into evidence. *State v. Larson*, 1988-NMCA-019, 107 N.M. 85, 752 P.2d 1101, cert. denied, 107 N.M. 74, 752 P.2d 789.

Mistrial declared where tape inaudible at trial. — Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a manifest necessity for declaring a mistrial so that double jeopardy did not bar defendant's retrial. *State v. Messier*, 1984-NMCA-085, 101 N.M. 582, 686 P.2d 272.

Consideration of whether evidence subject to public inspection. — Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Waiver of required state showing. — In a prosecution for criminal sexual penetration of a minor, since in order to gain a continuance the defendant had agreed to allow the admission of videotaped depositions at trial, he could not complain on appeal that the state failed to make the requisite showing for admissibility of the depositions. *State v. Trujillo*, 1995-NMCA-008, 119 N.M. 772, 895 P.2d 672, cert. quashed, 120 N.M. 394, 902 P.2d 76.

On appeal from a prosecution for criminal sexual contact of a minor, where defendant argued that the district court was constitutionally required to make specific findings justifying its substitution of videotaped testimony for face-to face confrontation, even though defendant never objected to the substitution, defendant waived his confrontation clause claim by failing to raise the confrontation issue at trial and there is no fundamental error. *State v. Herrera*, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 696, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

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

For article, "The Interpretation of the Confrontation Clause: Desire to Promote Perceived Societal Benefits and Denial of the Resulting Difficulties Produces Dichotomy in the Law," see 26 N.M. L. Rev. 353 (1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Closed-circuit television witness examination, 61 A.L.R.4th 1155.

30-9-17.1. Victims; polygraph examinations; prohibited actions.

A law enforcement officer, prosecuting attorney or other government official shall not ask or require an adult, youth or child victim of a sexual offense provided in Sections 30-9-11 through 30-9-13 NMSA 1978 to submit to a polygraph examination or other truth-telling device as a condition for proceeding with the investigation, charging or prosecution of the offense. The victim's refusal to submit to a polygraph examination or other truth-telling device shall not prevent the investigation, charging or prosecution of the offense.

History: Laws 2008, ch. 10, § 1.

ANNOTATIONS

Effective dates. — Laws 2008, ch. 10, § 2 made this section effective July 1, 2008.

30-9-18. Alleged victims who are under thirteen years of age; psychological evaluation.

In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, if the alleged victim is under thirteen years of age, the court may hold an

evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the issue of competency is in sufficient doubt that the court requires expert assistance, then the court may order a psychological evaluation of the alleged victim, provided however, that if a psychological evaluation is ordered it shall be conducted by only one psychologist or psychiatrist selected by the court who may be utilized by either or both parties; further provided that if the alleged victim has been evaluated on the issue of competency during the course of investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement officials, the psychological evaluation, if any, shall be conducted by a psychologist or psychiatrist selected by the court upon the recommendation of the defense.

History: Laws 1987, ch. 118, § 1.

ANNOTATIONS

Victim's past allegations against a third party. — Where the trial court excluded evidence of the victim's past allegations against a third party which related to the victim's reputation for past sexual conduct, the victim made the allegations against the third party in the past; the circumstances of the prior incident in no way resembled the allegations that led to the charges against the defendant; the defendant did not show that the circumstances of the prior allegations were clearly relevant to any material issue in the defendant's case other than propensity; and the defendant did not show how the prior allegations related to the defendant's defense, the trial court properly excluded the evidence. *State v. Casillas*, 2009-NMCA-034, 145 N.M. 783, 205 P.3d 830, cert. denied, 2009-NMCERT-003, 146 N.M. 603, 213 P.3d 507.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Witnesses: child competency statutes, 60 A.L.R.4th 369.

30-9-19. Sexual assault; law enforcement agency policies; submission of DNA samples by law enforcement and laboratories.

A. By October 1, 2017, every law enforcement agency shall develop and implement a policy that:

(1) prescribes how the agency handles a sample of biological material collected pursuant to a medical examination of a sexual assault victim who reported the sexual assault to law enforcement that is received by the agency;

(2) provides how the agency prioritizes a sample for DNA testing by the agency's servicing laboratory; and

(3) requires the agency to send a sample of biological material collected pursuant to a medical examination of a sexual assault victim who reported the sexual assault to law enforcement to that agency's servicing laboratory for DNA testing as soon

as practicable after receiving the sample and, in all cases, within thirty days of the agency's receipt of the sample.

B. Records derived from DNA testing that qualify for insertion into CODIS shall be submitted by the servicing laboratory to the administrative center.

C. By November 1 of each year, a law enforcement agency's servicing laboratory shall report to the legislature if, at the end of the immediately preceding fiscal year, the laboratory had in its possession three hundred or more untested samples of biological material collected pursuant to medical examinations of sexual assault victims.

D. As used in this section:

(1) "administrative center" means the law enforcement agency or unit that administers and operates the DNA identification system pursuant to the provisions of the DNA Identification Act;

(2) "biological material" means material that is derived from a human body and includes bodily fluids, hair and skin cells;

(3) "CODIS" means the federal bureau of investigation's "combined DNA index system", a national DNA index system for storage and exchange of DNA records submitted by forensic DNA laboratories;

(4) "DNA" means deoxyribonucleic acid;

(5) "DNA testing" means a forensic DNA analysis that includes restriction fragment length polymorphism, polymerase chain reaction or other valid methods of DNA typing performed to obtain identification characteristics of samples; and

(6) "sample" means a sample of biological material sufficient for DNA testing.

History: Laws 2006, ch. 104, § 10; 2017, ch. 99, § 1.

ANNOTATIONS

Cross references. — For the collection of samples of certain sex offenders, *see* 29-16-6 NMSA 1978.

For the Sex Offender Registration and Notification Act, *see* Chapter 29, Article 11A NMSA 1978.

Severability. — Laws 2006, ch. 104, § 11, effective January 1, 2007, provided that if any part or application of this act is held invalid, the remainder or its application to other situations or persons shall not be affected.

The 2017 amendment, effective June 16, 2017, required law enforcement agencies to develop and implement policies related to handling and testing of sexual assault examination kits, and required law enforcement agencies' servicing laboratories to report to the legislature on an annual basis the number of untested samples of biological material collected pursuant to medical examinations of sexual assault victims; in the catchline, added "law enforcement agency policies"; in Subsection A, deleted "Samples from" and added the remainder of the introductory clause and Paragraphs A(1) and A(2), and added paragraph designation "(3)" preceding the remaining language of the first sentence from former Subsection A, in Paragraph A(3), added "requires the agency to send a sample of", after the first occurrence of "sexual assault victim", deleted "shall be submitted by the investigating law enforcement agency" and added "who reported the sexual assault to law enforcement", and after "DNA testing", added "as soon as practicable after receiving the sample and, in all cases, within thirty days of the agency's receipt of the sample"; added subsection designation "B." preceding the remaining language of the second sentence from former Subsection A; added new Subsection C and redesignated former Subsection B as Subsection D; and in Subsection D, Paragraph D(3), after "investigation's", added "'combined DNA index system', a".

30-9-20. Voyeurism prohibited; penalties.

A. Voyeurism consists of intentionally using the unaided eye to view or intentionally using an instrumentality to view, photograph, videotape, film, webcast or record the intimate areas of another person without the knowledge and consent of that person:

(1) while the person is in the interior of a bedroom, bathroom, changing room, fitting room, dressing room or tanning booth or the interior of any other area in which the person has a reasonable expectation of privacy; or

(2) under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

B. Whoever commits voyeurism is guilty of a misdemeanor, except if the victim is less than eighteen years of age, the offender is guilty of a fourth degree felony.

C. As used in this section:

(1) "intimate areas" means the primary genital area, groin, buttocks, anus or breasts or the undergarments that cover those areas; and

(2) "instrumentality" means a periscope, telescope, binoculars, camcorder, computer, motion picture camera, digital camera, telephone camera, photographic camera or electronic device of any type.

History: Laws 2007, ch. 238, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 238, § 2 made this section effective on July 1, 2007.

30-9-21. Sexual assault survivor's bill of rights.

A. A health care provider who examines and collects a sexual assault examination kit from a survivor of sexual assault shall:

(1) obtain contact information for the survivor;

(2) provide the survivor with:

(a) a consent form by which the survivor may authorize the release of the kit to the relevant law enforcement agency and information about how the survivor may authorize the release of the kit to the agency at a later date;

(b) a copy of the provider's kit release policy;

(c) provide the survivor with contact and descriptive information regarding free and low-cost human immunodeficiency virus and sexually transmitted disease testing, prevention and treatment services including options and services provided by the department of health; and

(d) provide the survivor contact and descriptive information regarding the department of public safety statewide sexual assault examination kit tracking system;

(3) if the survivor consents, notify the relevant law enforcement agency of the sexual assault and collection of the kit;

(4) upon the survivor's request, notify the survivor when the kit is released to a law enforcement agency; and

(5) provide the survivor's contact information to the law enforcement agency when the survivor's kit is transferred to that agency.

B. No costs incurred by a health care provider for the collection of a sexual assault examination kit shall be charged directly or indirectly to the survivor of the sexual assault.

C. A law enforcement agency or crime laboratory that receives a sexual assault examination kit shall:

(1) confirm the sexual assault survivor's contact information and request that the survivor inform the agency of any changes to that information;

(2) inform the survivor of the survivor's right to have the kit tested within one hundred eighty days and have the right to the following information from the agency:

(a) whether the survivor's kit has been tested and the date on which test results are expected, which information shall be provided to the survivor; and

(b) whether the agency was able to develop a DNA profile using the samples of biological material in the kit;

(3) inform the survivor of the survivor's right to the following information from the agency:

(a) information regarding the statewide sexual assault examination kit tracking system;

(b) upon completion of the law enforcement investigation, whether a DNA profile was developed using the samples of biological material in the kit; and

(c) upon completion of the law enforcement investigation, whether a DNA profile match was identified through comparison of the DNA profile;

(4) in a case in which the alleged sexual assault offender has not been identified, notify the survivor in writing at least one hundred eighty days before destruction of a kit, if the law enforcement agency intends to destroy the survivor's kit, and provide information on how the survivor may appeal the agency's decision to destroy the kit; and

(5) with the consent of the survivor, enter designated information from the sexual assault examination kit into the department of public safety statewide sexual assault examination kit tracking system within fourteen days of obtaining consent.

D. A crime laboratory shall complete the processing of a sexual assault examination kit within one hundred eighty days of receipt of the kit.

E. Before commencing an interview of a sexual assault survivor, a law enforcement officer or prosecutor shall inform the survivor of the following:

(1) the survivor's rights pursuant to this section and other relevant law by providing the survivor with a document to be developed by the department of public safety, which document shall be signed by the survivor to confirm receipt;

(2) the survivor's right to consult with a counselor or advocate who specializes in sexual assault services or a support person designated by the survivor during any interview by a law enforcement officer, prosecutor or defense attorney, and the counselor shall be summoned by the interviewer before the commencement of the interview, unless no counselor or advocate who specializes in sexual assault services or

a support person designated by the survivor can be summoned in a reasonably timely manner;

(3) the survivor's right to have a support person of the survivor's choosing present during an interview by a law enforcement officer, prosecutor or defense attorney; and

(4) for interviews by a law enforcement officer, the survivor's right to request a different officer if the survivor believes the officer to be unsupportive or inadequately trained.

F. A law enforcement officer or prosecutor shall not, for any reason, discourage a sexual assault survivor from undergoing an examination or allowing the collection of a sexual assault examination kit.

G. In a civil or criminal case relating to a sexual assault, a sexual assault survivor has the right to:

(1) be reasonably protected from the defendant and persons acting on behalf of the defendant;

(2) not be required to submit to a polygraph examination as a prerequisite to filing an accusatory pleading or participating in any part of the criminal justice system;

(3) be heard through a survivor impact statement at any proceeding relevant to the sexual assault; and

(4) provide a sentencing recommendation to the official conducting a pre-sentence investigation.

H. A sexual assault survivor retains the right to have an advocate present during all stages of any medical examination, interview, investigation or other interaction with representatives from the legal or criminal justice systems within New Mexico. Treatment of the survivor shall not be affected or altered in any way as a result of the survivor's decision to exercise the survivor's right to have an advocate present as provided in this section.

I. A law enforcement agency may require a sexual assault survivor's requests for information pursuant to Subsection C of this section to be made in writing, and the agency shall communicate its responses to those requests in writing.

J. For the purpose of notifications and other communications provided for in this section, a sexual assault survivor may designate another person to receive notifications and information on the survivor's behalf and the survivor shall provide the designee's contact information to a medical provider or law enforcement agency required to communicate with the survivor pursuant to this section.

K. In the case of a sexual assault survivor who is deceased, the following persons shall have the right to receive notifications and information required to be communicated to a survivor pursuant to this section:

(1) a person who was the deceased sexual assault survivor's spouse at the time of the survivor's death; or

(2) the deceased sexual assault survivor's parent or sibling or child who is eighteen years of age or older.

L. A prosecutor shall not prosecute a sexual assault survivor for a criminal offense that is not a felony, including underage consumption of alcohol, drug use or prostitution, if the evidence of the commission of the offense is obtained through the examination of and collection of a sexual assault examination kit from the survivor or is obtained through the investigation of the sexual assault.

M. For the purposes of this section:

(1) "health care provider" means a sexual assault examination nurse or another health care provider authorized to examine and collect samples of biological material from a survivor of sexual assault following the assault; and

(2) "sexual assault examination kit" means samples of biological material derived from a human body, including bodily fluid, hair and skin cells, collected during a medical examination of a survivor following a sexual assault.

History: Laws 2019, ch. 102, § 1.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 102, § 2 made Laws 2019, ch. 102, § 1 effective July 1, 2019.

ARTICLE 9A
Animal Sexual Abuse

30-9A-1. Short title.

Chapter 30, Article 9A NMSA 1978 may be cited as the "Animal Sexual Abuse Act".

History: 1978 Comp., § 30-9A-1, enacted by Laws 2023, ch. 42, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 42 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

30-9A-2. Definitions.

As used in the Animal Sexual Abuse Act:

A. "animal" means any wild or domestic fauna, including livestock, alive or dead, in any setting, that is not a human being;

B. "coerce" means the use of threat, physical force or violence against another person to commit an act of bestiality;

C. "manipulate" means the use of persuasion, extortion, retaliation, deceit or other acts not involving force or coercion to cause another person to commit an act of bestiality;

D. "orifice" means the mouth, vulva or anus;

E. "sexual contact with an animal" means:

(1) the intentional insertion of the genitals or mouth of an animal into an orifice of a human's body;

(2) the intentional insertion of the genitals or mouth of a human into an orifice of an animal's body;

(3) the intentional insertion of an object into the genitals or anus of an animal; and

(4) contact, handling or stimulation of the genitals or anus of an animal by a human.

"Sexual contact with an animal" does not include accepted veterinary medical practices; accepted animal husbandry, care and grooming practices in the caretaking of animals; accepted practices related to the insemination of animals for the purpose of procreation; or accepted practices related to conformation judging; and

F. "solicit" means to entice, induce, encourage or attempt to persuade another person to commit an act of bestiality.

History: 1978 Comp., § 30-9A-2, enacted by Laws 2023, ch. 42, § 2.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 42 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

30-9A-3. Bestiality; aggravated bestiality; penalties.

A. Bestiality consists of a person engaging in sexual contact with an animal. A person who commits bestiality is guilty of a fourth degree felony.

B. Promoting bestiality consists of a person:

(1) coercing, soliciting or manipulating a human to commit bestiality; or

(2) selling or transferring, offering to sell or transfer, advertising for sale or transfer, purchasing or offering to purchase, possessing or otherwise obtaining an animal with the intent that the animal be used for bestiality.

A person who commits promoting bestiality is guilty of a fourth degree felony.

C. Aggravated bestiality consists of a person:

(1) committing bestiality or promoting bestiality in the presence of a minor; or

(2) committing bestiality or promoting bestiality in which a minor is a participant.

A person who commits aggravated bestiality is guilty of a third degree felony.

D. Emission by a human or animal is not required to prove sexual contact with an animal.

E. If a person has been convicted of a crime pursuant to this section, in addition to any other penalties, the sentencing court shall include in the judgment and sentence all of the following:

(1) that all animals under the direct care and control of the convicted person be seized and turned over to an agent of the New Mexico livestock board or to an animal control agency operated by the state or a local government or an animal shelter or other animal welfare organization designated by the animal control agency. The receiver of seized animals has the authority to determine the disposition of seized animals, but shall not return the animals to the convicted person; and

(2) that the convicted person shall not be allowed to own, possess, reside with or exercise control over any animal or engage in any occupation or profession, whether paid or unpaid, at any place where animals are kept or cared for, for a definite period not less than three years and not more than fifteen years; provided that the time

the person spent in actual confinement serving a criminal sentence shall be excluded from the calculation of the definite period.

F. If a person has been convicted of a crime pursuant to this section, in addition to criminal penalties and other penalties specified in Subsection E of this section, the sentencing court may order:

(1) that the convicted person submit to a psychological assessment and participate in appropriate counseling; and

(2) that the convicted person pay restitution for incurred costs of veterinary care, boarding, food and other reasonable costs of care for an animal as a result of the crime.

G. A person shall not be convicted of a crime specified in this section if the person's sexual contact with an animal was coerced or manipulated.

History: 1978 Comp., § 30-9A-3, enacted by Laws 2023, ch. 42, § 3.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 42 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

ARTICLE 10
Marital and Familial Offenses

30-10-1. Bigamy.

Bigamy consists of knowingly entering into a marriage by or with a person who has previously contracted one or more marriages which have not been dissolved by death, divorce or annulment. Both parties may be principals.

Whoever commits bigamy is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-10-1, enacted by Laws 1963, ch. 303, § 10-1.

ANNOTATIONS

Elements. — Knowledge is an element of the crime of bigamy. Evidence of defendant’s legal knowledge is admissible to rebut a defense that defendant did not know he was not divorced when he remarried. *State v. Ashley*, 1997-NMSC-049, 124 N.M. 1, 946 P.2d 205.

Cohabitation without marriage contrary to public policy. — Prior to its repeal, 30-10-2 NMSA 1978 declared cohabitation a criminal offense. *In re Estate of Bivians*, 1982-NMCA-132, 98 N.M. 722, 652 P.2d 744, cert. quashed, 98 N.M. 762, 652 P.2d 1213 (decided under prior law).

Meaning clear. — The meaning of "bigamy" as used in Code 1915, § 1775 was universally understood, and no language could have been employed which would have made clearer the intention of the legislature. *State v. Lindsey*, 1921-NMSC-004, 26 N.M. 526, 194 P. 877 (decided under prior law).

Indictment. — It was not necessary to allege knowledge or intention in an indictment for bigamy. *State v. Lindsey*, 1921-NMSC-004, 26 N.M. 526, 194 P. 877 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 10 Am. Jur. 2d Bigamy §§ 1 to 5.

Common-law marriage, prosecution based on, 70 A.L.R. 1036.

Validation of marriage by death of former spouse, 95 A.L.R. 1292.

Mistake as to validity or effect of divorce as defense to, 56 A.L.R.2d 915.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

10 C.J.S. Bigamy § 2 et seq.

30-10-2. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 32, § 1 repealed 30-10-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 10-2, relating to unlawful cohabitation and the penalties subscribed thereto, effective June 15, 2001. For provisions of former section, *see* the 2000 NMSA 1978 on *NMOneSource.com.*

30-10-3. Incest.

Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews.

Whoever commits incest is guilty of a third degree felony.

History: 1953 Comp., § 40A-10-3, enacted by Laws 1963, ch. 303, § 10-3.

ANNOTATIONS

Purpose of section. — This section is directed toward prohibiting sexual intercourse between specific relations within the blood line. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Term "consanguinity" admits of only one plain meaning. It is the relationship by descent from the same stock or common ancestor, related by blood. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Elements of offense. — The purpose of Laws 1917, ch. 50, § 1 (former 40-7-3, 1953 Comp.) was to prevent sexual intercourse between close relatives, and the free act of the one being tried, with knowledge of the relationship, was all that was required, it being immaterial that the same testimony would have sustained a conviction for rape. *State v. Hittson*, 1953-NMSC-018, 57 N.M. 100, 254 P.2d 1063.

The free act of the one being tried, who has knowledge of the relationship, is required to convict one of incest. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Failure to instruct the jury that it had to find beyond a reasonable doubt that defendant had knowledge of the prohibited blood relationship was reversible error, where defendant's testimony that he believed he did not father his "adopted daughter" demonstrated that he did not concede that at the time they had intercourse he knew she was his biological daughter. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Uncle/niece marriages. — New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in the best interests of the children, and mother and uncle intended to reside in California. *Leszinske v. Poole*, 1990-NMCA-088, 110 N.M. 663, 798 P.2d 1049, cert. denied, 110 N.M. 533, 797 P.2d 983.

Separate counts of incest and criminal sexual penetration. — There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 1989-NMSC-012, 108 N.M. 233, 771 P.2d 166.

Polygraph test results. — In prosecution for incest, it was reversible error for trial court to admit into evidence the results of a polygraph test over objection of the defendant, despite the fact that defendant had signed a waiver agreeing to be bound by the results of the test. *State v. Trimble*, 1961-NMSC-076, 68 N.M. 406, 362 P.2d 788.

Double jeopardy. — There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual

penetration arising out of the same act. *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223.

Law reviews. — For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 41 Am. Jur. 2d Incest § 1 et seq.

Adoption, relationship created by, as within statute regarding incest, 151 A.L.R. 1146.

Consent as element of incest, 36 A.L.R.2d 1299.

Prosecutrix in incest case as accomplice or victim, 74 A.L.R.2d 705.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused, 97 A.L.R.3d 967.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

Sexual intercourse between persons related by half blood as incest, 34 A.L.R.5th 723.

42 C.J.S. Incest §§ 2 to 6.

ARTICLE 11
Crimes Against Reputation

30-11-1. Libel.

Libel consists of making, writing, publishing, selling or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business or occupation of another, or which exposes another to hatred, contempt, ridicule, degradation or disgrace.

Whoever commits libel is guilty of a misdemeanor.

The word "malicious," as used in this article, signifies an act done with evil or mischievous design and it is not necessary to prove any special facts showing ill-feeling on the part of the person who is concerned in making, printing, publishing or circulating a libelous statement against the person injured thereby.

A. A person is the maker of a libel who originally contrived and either executed it himself by writing, printing, engraving or painting, or dictated, caused or procured it to be done by others.

B. A person is the publisher of a libel who either of his own will or by the persuasion or dictation, or at the solicitation or employment for hire of another, executes the same in any of the modes pointed out as constituting a libel; but if anyone by force or threats is compelled to execute such libel he is guilty of no crime.

C. A person is guilty of circulating a libel who, knowing its contents, either sells, distributes or gives, or who, with malicious design, reads or exhibits it to others.

D. The written, printed or published statement to come within the definition of libel must falsely convey the idea either:

(1) that the person to whom it refers has been guilty of some penal offenses;

(2) that he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons;

(3) that he has some moral vice or physical defect or disease which renders him unfit for intercourse with respectable society, and as such should cause him to be generally avoided;

(4) that he is notoriously of bad or infamous character; or

(5) that any person in office or a candidate therefor is dishonest and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place.

E. It shall be sufficient to constitute the crime of libel if the natural consequence of the publication of the same is to injure the person defamed although no actual injury to his reputation need be proven.

F. No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and for malicious purposes, comes within the definition of libel.

History: 1953 Comp., § 40A-11-1, enacted by Laws 1963, ch. 303, § 11-1.

ANNOTATIONS

Cross references. — For constitutional provision guaranteeing freedom of speech and of the press, and making truth a defense in criminal prosecutions for libel, *see* N.M. Const., art. II, § 17.

For provision allowing a special motion to dismiss an unwarranted or specious lawsuit against a person for conduct or speech in a public setting, *see* 38-2-9.1 and 38-2-9.2 NMSA 1978.

For the Uniform Single Publication Act, *see* 41-7-1 NMSA 1978 et seq.

For defamation by radio and television, *see* 41-7-6 NMSA 1978.

Definition of libel. — The statutory definition of libel governed where there was a statute on the subject, and it was immaterial whether the words alleged to be libelous were libelous per se. *State v. Elder*, 1914-NMSC-074, 19 N.M. 393, 143 P. 482.

Statement involving matter of public concern. — This statute is unconstitutional insofar as it applies to a public statement involving a matter of public concern. Such statements can be subject to criminal penalty only if made with actual malice. *State v. Powell*, 1992-NMCA-086, 114 N.M. 395, 839 P.2d 139.

Charges libelous. — Charging a person in a newspaper with being "an unprincipled son," a "moral coward," "an imbecile" and "one who has about as much regard for the truth as an infidel has for the Bible," was libelous. *State v. Elder*, 1914-NMSC-074, 19 N.M. 393, 143 P. 482 (decided under prior law).

Article not privileged. — Where an alleged libelous article did not refer to the several branches of government, but to a particular assessor, it was not privileged under Laws 1889, ch. 11, § 17 (former 40-27-13, 1953 Comp.) making publications as to the government or its branches privileged. *State v. Ogden*, 1915-NMSC-074, 20 N.M. 636, 151 P. 758 (decided under prior law).

Indictment sufficient. — An indictment which charged that the alleged defamatory matter was false was sufficient on demurrer, negative averments not being necessary. The indictment need not allege that if true the matters were not published with good motives or justifiable ends. *State v. Elder*, 1914-NMSC-074, 19 N.M. 393, 143 P. 482.

Law reviews. — For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For note, "The Defenses of Fair Comment and Qualified Privilege," see 11 N.M.L. Rev. 243 (1981).

For note, "Libel Law - New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure: Marchiondo v. Brown," see 13 N.M.L. Rev. 715 (1983).

For note, "Criminal Libel Statute Held Unconstitutional as Applied to Public Statements Involving Public Concerns: *State v. Powell*," see 24 N.M.L. Rev. 495 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Libel and Slander § 520 et seq.

Character of libel or slander for which criminal prosecution will lie, 19 A.L.R. 1470.

Words as criminal offense other than libel or slander, 48 A.L.R. 83.

Liability of partners or partnership for libel, 88 A.L.R.2d 474.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages, 91 A.L.R.3d 1015.

Actionability of false newspaper report that plaintiff has been arrested, 93 A.L.R.3d 625.

Libel by newspaper headlines, 95 A.L.R.3d 660.

Liability of commercial printer for defamatory statement contained in matter printed for another, 16 A.L.R.4th 1372.

Libel and slander: attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged, 23 A.L.R.4th 932.

Defamation: loss of employer's qualified privilege to publish employee's work record or qualification, 24 A.L.R.4th 144.

Criticism or disparagement of attorney's character, competence, or conduct as defamation, 46 A.L.R.4th 326.

Libel or slander: defamation by gestures or acts, 46 A.L.R.4th 403.

Validity of criminal defamation statutes, 68 A.L.R.4th 1014.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Who is "public figure" for purposes of defamation action, 19 A.L.R.5th 1.

Libel and slander: charging one with breach or nonperformance of contract, 45 A.L.R.5th 739.

Defamation: publication of letter to editor in newspaper as actionable, 54 A.L.R.5th 443.

53 C.J.S. Libel and Slander; Injurious Falsehood §§ 7 to 9.

ARTICLE 12
Abuse of Privacy

30-12-1. Interference with communications; exception.

Interference with communications consists of knowingly and without lawful authority:

A. displacing, removing, injuring or destroying any radio station, television tower, antenna or cable, telegraph or telephone line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto;

B. cutting, breaking, tapping or making any connection with any telegraph or telephone line, wire, cable or instrument belonging to or in the lawful possession or control of another, without the consent of such person owning, possessing or controlling such property;

C. reading, interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without the consent of a sender or intended recipient thereof;

D. preventing, obstructing or delaying the sending, transmitting, conveying or delivering in this state of any message, communication or report by or through telegraph or telephone; or

E. using any apparatus to do or cause to be done any of the acts hereinbefore mentioned or to aid, agree with, comply or conspire with any person to do or permit or cause to be done any of the acts hereinbefore mentioned.

Whoever commits interference with communications is guilty of a misdemeanor, unless such interference with communications is done:

(1) under a court order as provided in Sections 30-12-2 through 30-12-11 NMSA 1978; or

(2) by an operator of a switchboard or an officer, employee or agent of any communication common carrier in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his services or to the protection of rights or property of the carrier of such communication; or

(3) by a person acting under color of law in the investigation of a crime, where such person is a party to the communication, or one of the parties to the communication has given prior consent to such interception, monitoring or recording of such communication.

History: 1953 Comp., § 40A-12-1, enacted by Laws 1963, ch. 303, § 12-1; 1973, ch. 369, § 1; 1979, ch. 191, § 1.

ANNOTATIONS

Section 30-12-1 NMSA 1978 is not violated when telephone calls placed from a jail are recorded after the caller has been given notice that the recording will occur. *State v. Johnson*, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

Recordings of telephone calls from jail. — Where defendant made telephone calls from jail requesting that defendant's friends be present at defendant's trial ostensibly to influence the testimony of the state's witnesses; and when a call was placed at the jail, a digital message informed both parties to the call that the call may be recorded and monitored, the trial court properly admitted the recordings into evidence. *State v. Johnson*, 2010-NMSC-016, 148 N.M. 50, 229 P.3d 523.

Speaking in code. — In the absence of evidence that the defendant had actual notice that his telephone calls made in the booking area of the jail might be monitored, the defendant's talking in code is not sufficient to establish his implied consent to monitor the calls. Tape recordings of the defendant's telephone calls made in jail should have been suppressed. *State v. Templeton*, 2007-NMCA-108, 142 N.M. 369, 165 P.3d 1145.

Right of media access to judicial records. — The right of media access to judicial records serves the important function of ensuring the integrity of judicial proceedings and the law enforcement process. This right of access and inspection, however, may be limited by special circumstances and the exercise of sound discretion of the trial court. The right of inspection by the media does not extend beyond that available to the public generally. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Materials not subject to disclosure unless used as evidence. — Except those matters actually introduced into evidence or utilized in open court, materials intercepted pursuant to this article are not subject to disclosure. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Legislature did not intend to expose every person with telephone extension to criminal liability who allowed someone else to listen to his conversation. *Robison v. Katz*, 1980-NMCA-045, 94 N.M. 314, 610 P.2d 201, cert. denied, 94 N.M. 675, 615 P.2d 992.

Transmittal of face-to-face conversation. — Subsection C of this section pertains to telephone conversations or telegraph messages, and was not applicable to a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation. *State v. Hogervorst*, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

Voluntary conversation invites risk of recording and transmission. — One who voluntarily enters into a conversation with another takes the risk that the other person on the line may memorize, record or even transmit the conversation. *State v. Arnold*, 1979-NMCA-087, 94 N.M. 385, 610 P.2d 1214, *rev'd on other grounds*, 1980-NMSC-030, 94 N.M. 381, 610 P.2d 1210.

Civil action permitted whether or not conviction achieved. — Section 30-12-11 NMSA 1978 provides a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use, such communications, without lawful authority to do so, regardless of whether that person has been convicted under this section. *Templin v. Mountain Bell Tel. Co*., 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

Monitoring telephone calls made from jail. — Proof of consent to the interception of electronic communications may be shown by circumstantial evidence; thus, the defendant consented to interception of his phone calls from jail since he was aware of a written notice that calls were monitored and recorded. *State v. Coyazo*, 1997-NMCA-029, 123 N.M. 200, 936 P.2d 882, cert. denied, 123 N.M. 168, 936 P.2d 337.

Antecedent justification. — The United States Supreme Court has held that there must be antecedent justification to a court, governed by precise procedures and guidelines, before wiretapping is employed. 1971 Op. Att'y Gen. No. 71-37.

Law reviews. — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 74 Am. Jur. 2d Telecommunications §§ 36, 207, 211, 213, 214, 217.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

Permissible warrantless surveillance, under state communications interception statute, by state or local law enforcement officer or one acting in concert with officer, 27 A.L.R.4th 449.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

"Caller ID" system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections, 9 A.L.R.5th 553.

Applicability, in civil action, of provisions of Omnibus Crime Control and Safe Streets Act of 1968, prohibiting interception of communications (18 USCS § 2511 (1)), to interception by spouse, or spouse's agent, of conversations of other spouse, 139 A.L.R. Fed. 517.

Construction and application of provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. § 2520) authorizing civil cause of action by person whose wire, oral, or electronic communication is intercepted, disclosed, or used in violation of Act, 164 A.L.R. Fed. 139.

86 C.J.S. Telegraphs, Telephones, Radio and Television §§ 120, 122.

30-12-2. Grounds for order of interception.

An ex parte order for wiretapping, eavesdropping or the interception of any wire or oral communication may be issued by any judge of a district court upon application of the attorney general or a district attorney, stating that there is probable cause to believe that:

A. evidence may be obtained of the commission of:

(1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;

(2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than one year; or

(3) an organized criminal conspiracy to commit any of the aforementioned crimes; or

B. the communication, conversation or discussion is itself an element of any of the above specified crimes.

History: 1953 Comp., § 40A-12-1.1, enacted by Laws 1973, ch. 369, § 2; 1979, ch. 191, § 2.

ANNOTATIONS

Law reviews. — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

30-12-3. Form of application.

Each application for wiretapping, eavesdropping or the interception of any wire or oral communication shall be made in writing upon oath or affirmation to a judge of a district court and shall state the applicant's authority to make such application. Each application shall include:

A. the identity of the investigative or law enforcement officer making the application and the officer authorizing the application;

B. a complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including:

(1) details as to the particular offense that has been, is being or is about to be committed;

(2) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

(3) a particular description of the type of communication sought to be intercepted; and

(4) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

C. a complete statement as to whether other investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or appear to be too dangerous;

D. a statement of the period of time for which the interception is required to be maintained; if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter shall be required;

E. a complete statement of the facts concerning all previous applications known to the individuals authorizing and making the application, which were made to any judge for authorization to intercept or for approval of interceptions of wire or oral communications involving any of the same persons, facilities or places specified in the application and the action taken by the judge on each such application; and

F. where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

History: 1953 Comp., § 40A-12-1.2, enacted by Laws 1973, ch. 369, § 3.

ANNOTATIONS

Requirement for oath or affirmation. — A notary public is not required to administer the formalities of an oath embodied in Section 14-13-1 NMSA 1978 or an affirmation under Section 14-13-2 NMSA 1978 in order for a sworn statement to be deemed as given under oath or affirmation in accordance with this section. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

When Paragraph E of Rule 5-211 NMRA is read together with this section, it is clear that the latter only requires that an application be "in writing upon oath or affirmation" and directed to a district court judge. The affiant need not make the oath or affirmation in front of a judge. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

30-12-4. Entry of order; determination.

Upon application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving wiretapping, eavesdropping or the interception of wire or oral communications within the district in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

A. there is probable cause for belief that a person is committing, has committed or is about to commit a particular offense enumerated in 30-12-2 NMSA 1978;

B. there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

C. normal investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or appear to be too dangerous; and

D. there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted is being used or is about to be used in connection with the commission of such offense, or is leased to, listed in the name of or commonly used by the person alleged to be involved in the commission of the offense.

History: 1953 Comp., § 40A-12-1.3, enacted by Laws 1973, ch. 369, § 4.

ANNOTATIONS

Requirement for probable cause. — An affidavit was deficient with respect to an unnamed informant because, although it established the informant's reliability by stating that he had provided information in the past that led to a determination of probable cause for a search warrant and to arrests and prosecution of narcotics felons, the informant's basis of knowledge was lacking. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, overruled on other grounds by *State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

An affidavit met the basis of the knowledge requirement because it related in detail the informant's meetings and conversations with the subject, and clearly described the underlying circumstances upon which the informant's information was based. *State v. Knight*, 2000-NMCA-016, 128 N.M. 591, 995 P.2d 1033, cert. denied, 128 N.M. 689, 997 P.2d 821, *overruled on other grounds by State v. Williamson*, 2009-NMSC-039, 146 N.M. 488, 212 P.3d 376.

Am. Jur. 2d, A.L.R. and C.J.S. references. — When do facts shown as probable cause for wiretap authorization under 18 USCS § 2518(3) become "stale," 68 A.L.R. Fed. 953.

30-12-5. Contents of order.

A. Each order authorizing or approving wiretapping, eavesdropping or interception of wire or oral communications shall specify:

(1) the identity, if known, of the person whose communications are to be intercepted;

(2) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;

(3) a particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(4) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(5) the period of time during which such interception is authorized, including a statement as to whether the interception automatically terminates when the described communication has been first obtained.

B. An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and

with a minimum of interference with the services that such carrier, landlord, custodian or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

History: 1953 Comp., § 40A-12-1.4, enacted by Laws 1973, ch. 369, § 5.

30-12-6. Order; extension; requirements.

No order entered under this act [30-12-1 to 30-12-11 NMSA 1978] may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension, made in accordance with Section 30-12-3 NMSA 1978, and if the court makes the findings required by Section 30-12-4 NMSA 1978. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted, and in no event longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception under this act and shall terminate upon attainment of the authorized objective, or in any event within thirty days. Whenever an order authorizing interception is entered pursuant to this act, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at such times as the judge may require.

History: 1953 Comp., § 40A-12-1.5, enacted by Laws 1973, ch. 369, § 6.

ANNOTATIONS

Interception of nonrelevant conversations. — This section does not forbid interception of all nonrelevant conversations, but, like the federal statute, mandates the government to conduct the surveillance so as to minimize the interception of such conversations. Factors to be considered in determining whether the government acted reasonably in a given case may include, but are not limited to, the complexity of the criminal operation, whether the callers are using ambiguous or coded language, whether the applicable telephone is public or residential, the length of time of the wiretap and of the telephone calls, and the extent of judicial supervision. *State v. Manes*, 1991-NMCA-025, 112 N.M. 161, 812 P.2d 1309, cert. denied, 112 N.M. 77, 811 P.2d 575, and cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

The defendant argued that the police, who wiretapped his phone, failed to properly minimize the interception of unauthorized communications, those involving his wife, mother, and children. To prevail, he had to show a pattern of interception of innocent conversations which developed over the period of the wiretap; it was insufficient if he

merely identified particular calls which he contended should not have been intercepted. *State v. Manes*, 1991-NMCA-025, 112 N.M. 161, 812 P.2d 1309, cert. denied, 112 N.M. 77, 811 P.2d 575, and cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

Law reviews. — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

30-12-7. Method of recording communication; custody.

A. The contents of any wire or oral communication intercepted by any means authorized by this act [30-12-1 to 30-12-11 NMSA 1978] shall, if possible, be recorded on tape, wire or other comparable device. The recording shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order or extension thereof, such recording shall be made available to the judge issuing the order and sealed under his directions. Custody of the recording shall be wherever the judge orders. A recording shall not be destroyed except upon the order of the judge, and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of this act. The presence of the seal, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived under this act.

B. Applications made and orders granted under this act shall be sealed by the judge and custody of them shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction, and shall not be destroyed except on order of the judge to whom presented, and in any event shall be kept for ten years.

C. Any violation of the provisions of this section may be punished as a contempt of court.

D. Within a reasonable time, but not later than ninety days after the filing of an application for an order of approval which is denied, or after the termination of the period of an order or extensions thereof, the judge to whom the application was presented shall cause to be served on the persons named in the order or the applications and on such other parties to intercepted communications as the judge may determine is in the interest of justice, notice of:

(1) the fact of the entry of the order or application;

(2) the date of the entry and the period of authorized, approved or disapproved interception or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. The judge, upon the filing of a motion, may, in his discretion, make

available to any such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge the serving of the matter required by this subsection may be postponed.

History: 1953 Comp., § 40A-12-1.6, enacted by Laws 1973, ch. 369, § 7.

ANNOTATIONS

Cross references. — For contempt of court, *see* 34-1-2 to 34-1-5 NMSA 1978.

Right of press to evidentiary materials arises when materials become public. — The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Procedure upon pretrial motion for disclosure of wiretap records. — A pretrial motion for disclosure of federal and state wiretap records, which claimed that a telephone call had been subject to surveillance, triggered the government's duty to affirm or deny the existence of such evidence, but since the government's denial was adequate and no evidence of an illegal surveillance beyond the unsupported allegations in the motion was presented, it was unnecessary to conduct a further hearing on the motion. *United States v. Alvillar*, 575 F.2d 1316 (10th Cir. 1978).

30-12-8. Use of contents as evidence; disclosure; motion to suppress.

A. The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a state court unless each party, not less than ten days before the trial, hearing or proceeding has been furnished with a copy of the court order and accompanying application, under which interception was authorized or approved. This ten-day period may be waived by the court if it finds that it was not possible to furnish the party with such information ten days before the trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving such information.

B. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication on the grounds that:

(1) the communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(3) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing or proceeding unless there has been no opportunity to make such motion, or the person has not been aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received as evidence. In addition to any other right of appeal, the state shall have the right to appeal from an order granting a motion to suppress made under this subsection, or to appeal the denial of an application for an order of approval, if the person making or authorizing the application shall certify to the judge granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order is entered and shall be diligently prosecuted.

History: 1953 Comp., § 40A-12-1.7, enacted by Laws 1973, ch. 369, § 8.

ANNOTATIONS

Cross references. — For motion to suppress, *see* Rule 5-212 NMRA.

Applicability. — Provisions of this section regulating admissibility of evidence authorized by court order were not applicable, even where there was no court order, to situation where overheard communication was a face-to-face conversation transmitted to a listener by concealed device. *State v. Hogervorst*, 1977-NMCA-057, 90 N.M. 580, 566 P.2d 828, cert. denied, 90 N.M. 636, 567 P.2d 485.

Purpose of disclosure requirement. — The purpose of the timely disclosure provision is to afford an aggrieved party an opportunity to file a pretrial motion to suppress. *State v. Anderson*, 1989-NMCA-096, 110 N.M. 382, 796 P.2d 603, cert. denied, 109 N.M. 232, 784 P.2d 419.

Distinction between Subsections A and B. — Subsection A precludes the use of the evidence at a particular hearing or trial, unless the defendant has had an opportunity to review the appropriate documents and to move to suppress the evidence. Subsection B precludes the use of such evidence at any proceeding involving the defendant. *State v. Anderson*, 1989-NMCA-096, 110 N.M. 382, 796 P.2d 603, cert. denied, 109 N.M. 232, 784 P.2d 419.

State delaying in providing information. — In determining whether the right to a speedy trial was violated by pre-indictment delay, where the preliminary hearing was continued because the state did not provide the defendant with wiretap information at least ten days prior to the hearing, as required by this section, this delay was weighed against the state. *State v. Manes*, 1991-NMCA-025, 112 N.M. 161, 812 P.2d 1309, cert. denied, 112 N.M. 77, 811 P.2d 575, and cert. denied, 502 U.S. 942, 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

Remedy for Subsection A violation. — The proper course of action for a court faced with a claim of violation of Subsection A is to decide whether the purposes of the statute have been or can be fulfilled so that the evidence can be used in the particular proceeding at issue, or whether the evidence should be excluded, but only from that proceeding. *State v. Anderson*, 1989-NMCA-096, 110 N.M. 382, 796 P.2d 603, cert. denied, 109 N.M. 232, 784 P.2d 419.

Right of press to evidentiary materials arises when materials become public. — The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Determination of whether evidence subject to public inspection. — Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Law reviews. — For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

30-12-9. Disclosure; when and by whom allowed.

A. Any investigative or law enforcement officer who, by any means authorized by this act [30-12-1 to 30-12-11 NMSA 1978], has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may:

(1) disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure; or

(2) use such contents to the extent such use is appropriate in the official performance of his official duties.

B. Any person who has received, by any means authorized by this act, any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in accordance with the provisions of this act, may disclose the contents of that communication or such derivative evidence while giving testimony in any criminal proceeding in any court of this state or in any grand jury proceeding.

History: 1953 Comp., § 40A-12-1.8, enacted by Laws 1973, ch. 369, § 9.

ANNOTATIONS

Right of press to copies of evidentiary material arises where materials become public. — The right of the press to copies of evidentiary materials does not arise until

the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

30-12-10. Interception of privileged or unauthorized communications.

A. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act [30-12-1 to 30-12-11 NMSA 1978] shall lose its privileged character.

B. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized in this act, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof and evidence derived therefrom may be disclosed or used as provided in Subsection A of Section 30-12-9 NMSA 1978. Such contents and evidence derived therefrom may be used under Subsection B of Section 30-12-9 NMSA 1978 when authorized or approved by a judge of competent jurisdiction, when such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this act. Such application shall be made as soon as practicable.

History: 1953 Comp., § 40A-12-1.9, enacted by Laws 1973, ch. 369, § 10.

ANNOTATIONS

Determination of whether evidence subject to public inspection. — Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 1982-NMSC-059, 98 N.M. 109, 645 P.2d 982.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

30-12-11. Right of privacy; damages.

A. Any person whose wire or oral communication is intercepted, disclosed or used in violation of this act [30-12-1 to 30-12-11 NMSA 1978] shall:

(1) have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use such communications; and

(2) be entitled to recover from any such person actual damages, but not less than liquidated damages computed at the rate of one hundred dollars ($100) for each

day of violation or one thousand dollars ($1,000), whichever is higher; punitive damages; and a reasonable attorney's fee and other litigation costs reasonably incurred.

B. A good faith reliance on a court order or on the provisions of this act shall constitute a complete defense to any civil or criminal action.

C. Any communications common carrier which in good faith acts in reliance upon a court order or in compliance with any of the provisions of this act shall not be liable for any civil or criminal action.

History: 1953 Comp., § 40A-12-1.10, enacted by Laws 1973, ch. 369, § 11.

ANNOTATIONS

Severability clauses. — Laws 1973, ch. 369, § 12, provided for the severability of the act if any part or application thereof is held invalid.

"Any person who intercepts" construed. — The meaning of "any person who intercepts" includes persons who have participated in the steps necessary to effectuate an unauthorized interception of communications which results in the violation of an individual's privacy. *Templin v. Mountain Bell Tel. Co*., 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

Civil action permitted whether or not conviction achieved. — The civil cause of action provided for in this section may be pursued regardless of whether the defendant has been convicted under 30-12-1 NMSA 1978. *Templin v. Mountain Bell Tel. Co*., 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

Corporations as well as individuals may be liable in damages if they participate in setting up unauthorized interceptions of a customer's telephone communications. *Templin v. Mountain Bell Tel. Co*., 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

Duty of telephone company. — A telephone company has a duty to obtain the valid consent of a customer before placing an extension of the customer's phone in another person's residence. *Templin v. Mountain Bell Tel. Co*., 1982-NMCA-024, 97 N.M. 699, 643 P.2d 263, cert. quashed, 98 N.M. 51, 644 P.2d 1040.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62A Am. Jur. 2d Privacy §§ 54, 254.

Limitation of actions: invasion of right of privacy, 33 A.L.R.4th 479.

Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statutes, 33 A.L.R.4th 506.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

Application to extension telephones of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.), pertaining to interception of wire communications, 58 A.L.R. Fed. 594.

30-12-12. Disturbing a marked burial ground.

Disturbing a marked burial ground consists of knowingly and willfully disturbing or removing the remains, or any part of them, or any funerary object, material object or associated artifact of any person interred in any church, churchyard, cemetery or marked burial ground or knowingly and willfully procuring or employing any other person to disturb or remove the remains, or any part of them, or any funerary object, material object or artifact associated with any person interred in any church, churchyard, cemetery or marked burial ground, other than pursuant to an order of the district court, the provisions of Section 24-14-23 NMSA 1978 or as otherwise specifically permitted by law. As used in this section "marked burial ground" means any interment visibly marked according to traditional or customary practice.

Whoever commits disturbing a marked burial ground is guilty of a fourth degree felony and shall be punished by a fine not to exceed five thousand dollars ($5,000) or by imprisonment for a definite term of eighteen months or both.

History: 1953 Comp., § 40A-12-2, enacted by Laws 1963, ch. 303, § 12-2; 1989, ch. 267, § 3.

ANNOTATIONS

Cross references. — For permit for disinterment and reinterment, *see* 24-14-23 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "a marked burial ground" for "the remains of a dead person" in the catchline; in the first paragraph, substituted the present first sentence for "Disturbing the remains of a dead person consists of knowingly disturbing or removing the remains, or any part thereof, of any person permanently interred in any church, churchyard or cemetery, other than pursuant to an order of the district court", and added the second sentence; and substituted the present language of the second paragraph for "Whoever commits disturbing the remains of a dead person is guilty of a misdemeanor."

No private right of action. — There is no private right of action to enforce this section. *Eisert v. Archdiocese of Santa Fe*, 2009-NMCA-042, 146 N.M. 179, 207 P.3d 1156, cert. denied, 2009-NMCERT-004, 146 N.M. 641, 213 P.3d 791.

This section is in pari materia with § 58-17-3 and should be construed with reference to the definition of "cemetery" supplied by Section 58-17-3 NMSA 1978. 1987 Op. Att'y Gen. No. 87-31.

Property held not to be cemetery. — Private property discovered to contain human remains presumed to be soldiers killed in the battle of Glorieta on March 28, 1862, is not a cemetery within the meaning of this section so as to require the museum division of the office of cultural affairs to petition the district court prior to excavating the site and disinterring the remains pursuant to the Cultural Properties Act, Sections 18-6-1 to 18-6-7 NMSA 1978. 1987 Op. Att'y Gen. No. 87-31.

Necessary party to disinterment actions. — Since when a district court orders disinterment a legal interest of the health department (now the department of health) will of necessity be directly affected, the department is a necessary or indispensable party in disinterment actions brought in the district courts of this state. 1966 Op. Att'y Gen. No. 66-116.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Dead Bodies § 107.

Dead bodies: liability for improper manner of reinterment, 53 A.L.R.4th 394.

Liability for desecration of graves and tombstones, 77 A.L.R.4th 108.

25A C.J.S. Dead Bodies § 10.

30-12-13. Defacing tombs.

Defacing tombs consists of either:

A. intentionally defacing, breaking, destroying or removing any tomb, monument or gravestone erected to any deceased person or any memento, memorial or marker upon any place of burial of any human being or any ornamental plant, tree or shrub appertaining to the place of burial of any human being; or

B. intentionally marking, defacing, injuring, destroying or removing any fence, post, rail or wall of any cemetery or graveyard or erected within any cemetery or graveyard or any marker, memorial or funerary object upon any place of burial of any human being.

Whoever commits defacing a tomb is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year or both.

History: 1953 Comp., § 40A-12-3, enacted by Laws 1963, ch. 303, § 12-3; 1989, ch. 267, § 4.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "memorial or marker upon any place of burial of any human being" for "any memorial" in Subsection A, added all of the language of Subsection B beginning with "or any marker", and substituted all of the language of the undesignated last paragraph beginning with "misdemeanor" for "petty misdemeanor".

Multiple counts. — Damage to ten gravestones during a single criminal episode, with a single intent, constitutes only ten violations of the statute. Each gravestone represents distinct interests protected by the statute. Injury to each gravestone causes injury to the memory of a different person and is likely to cause emotional distress to a different collection of living persons. That circumstance is a strong indicator that destruction to each gravestone is a distinct offense. *State v. Morro*, 1999-NMCA-118, 127 N.M. 763, 987 P.2d 420.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Cemeteries § 44.

Liability for desecration of graves and tombstones, 77 A.L.R.4th 108.

14 C.J.S. Cemeteries §§ 34, 35.

30-12-14. Unlawful burial.

Unlawful burial consists of the using of any land or lands as a burial place of interment within fifty yards from either side of the bank or border of any stream, river or any body of water, by a person or persons, society of persons, order, corporation or corporations.

Whoever commits unlawful burial is guilty of a misdemeanor.

History: 1953 Comp., § 40A-12-4, enacted by Laws 1963, ch. 303, § 12-4.

ANNOTATIONS

Cross references. — For burial of unclaimed dead, *see* 24-12-1 to 24-12-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22A Am. Jur. 2d Dead Bodies § 46.

Liability of cemetery in connection with conducting or supervising burial services, 42 A.L.R.4th 1059.

25A C.J.S. Dead Bodies § 10.

ARTICLE 13
Violation of Civil Rights

30-13-1. Disturbing lawful assembly.

Disturbing lawful assembly consists of:

A. disturbing any religious society or any member thereof when assembled or collected together in public worship; or

B. disturbing any meeting of the people assembled for any legal object.

Whoever commits disturbing lawful assembly is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-13-1, enacted by Laws 1963, ch. 303, § 13-1.

ANNOTATIONS

Due process. — The language of Subsection B of this section conveys a sufficiently definite warning of the conduct proscribed and is therefore not void for vagueness. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Intent of legislature. — Contention that legislature did not intend this section to apply to conduct formerly covered by 40-12-7, 1953 Comp., was incorrect. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Meaning of "disturbing". — Since the statutory word "disturbing" is not defined, its ordinary meaning was properly applied by the trial court in instruction that term "disturb" meant "to throw into disorder or confusion, to interrupt." *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Meaning of "meeting". — Subsection B of this section forbids the disturbance of any meeting of the people assembled for any legal object, that is, any gathering for business, social or other purposes if the object of the gathering is legal. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Basketball game spectators as "meeting". — The people assembled to view a basketball game constituted a "meeting" within meaning of this section. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Basketball game players as "meeting". — Players in basketball game were a meeting of people assembled for a lawful object. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Evidence sufficient. — Evidence that basketball game was delayed 35 to 40 minutes by necessity of removing debris and liquids from playing surface was substantial evidence that meeting of the players and meeting of the spectators to view the game were interrupted. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent could be reasonably inferred, was sufficient for the issue of aiding and abetting those who threw far enough so that objects landed on the playing surface of the courts to be submitted to the jury. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Aiding and abetting. — Although charged with disturbing meeting under this section, defendants could be convicted of aiding and abetting that disturbance. *State v. Orzen*, 1972-NMCA-006, 83 N.M. 458, 493 P.2d 768.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Disturbing Meetings §§ 1 to 11.

Conduct amounting to offense of disturbing religious meeting, 12 A.L.R. 650.

Prohibition or limitation on display of signs by employees as unfair labor practices, 86 A.L.R. Fed. 321.

27 C.J.S. Disturbance of Public Meetings § 1.

30-13-2. Denial of service by a utility.

Denial of service by a utility consists of any utility refusing to furnish service to another in the area served by such utility. Utility as used in this section is defined as any person furnishing to the public: water, power, telephone or gas. Provided such utility may lawfully refuse its services if:

A. the person to be served has not tendered an amount of money required for the expense of construction, if construction is necessary for furnishing the utilities; or

B. the person has not tendered the amount of money due for the use of such utilities.

Whoever commits denial of services [service] by a utility is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-13-2, enacted by Laws 1963, ch. 303, § 13-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Disputed claim. — A public service corporation could not cut off a supply of water or electricity to enforce payment of a disputed claim. *Miller v. Roswell Gas & Elec. Co*., 1917-NMSC-034, 22 N.M. 594, 166 P. 1177 (decided under prior law).

Section assumes that customer has right to demand service. — If a customer's installation has not passed or would not pass electrical inspection, he has no right to demand service of utility. 1969 Op. Att'y Gen. No. 69-81.

Duty to refuse service. — A utility has a positive duty to refuse service to a customer whose wiring is known by the utility to be in a dangerous or defective condition. 1969 Op. Att'y Gen. No. 69-81.

Defense to prosecution. — Compliance with rules of the public service commission permitting a public utility to discontinue service immediately in the event of a condition determined by the utility to be hazardous would be a defense to a criminal action upon a refusal to render electric service, but the burden would be upon the utility to produce some evidence that the condition was actually hazardous and to prove the existence of the rule itself. 1969 Op. Att'y Gen. No. 69-81.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 74 Am. Jur. 2d Telecommunications §§ 61, 62; 78 Am. Jur. 2d Waterworks and Water Companies § 15, 47 to 49.

Discontinuance: right of public utility to discontinue line or branch on ground that it is unprofitable, 10 A.L.R.2d 1121.

29 C.J.S. Electricity § 25; 38A C.J.S. Gas § 46 et seq.; 86 C.J.S. Telegraphs, Telephones, Radio and Television §§ 65, 68, 69; 94 C.J.S. Waters §§ 278 to 280.

30-13-3. Blacklisting.

Blacklisting consists of an employer or his agent preventing or attempting to prevent a former employee from obtaining other employment.

Whoever commits blacklisting is guilty of a misdemeanor.

Upon request, an employer may give an accurate report or honest opinion of the qualifications and the performance of a former employee. An employer is defined as any person employing labor or the agent of such person.

History: 1953 Comp., § 40A-13-3, enacted by Laws 1963, ch. 303, § 13-3.

ANNOTATIONS

Cross references. — For criminal libel, *see* 30-11-1 NMSA 1978.

For constitutional provision guaranteeing freedom of speech and of the press, and making truth a defense in criminal prosecutions for libel, *see* N.M. Const., art. II, § 17.

Union affiliation. — Workers could not be dismissed from employment because of their labor union affiliations. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

Law reviews. — For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48 Am. Jur. 2d Labor and Labor Relations § 669.

Blacklist, libel or slander, 66 A.L.R. 1499.

Publication of libel by blacklist for purpose of statute of limitation, 42 A.L.R.3d 807.

Validity, construction, and operation of state blacklisting statutes, 95 A.L.R.5th 1.

Federal pre-emption of whistleblower's state-law action for wrongful retaliation, 99 A.L.R. Fed. 775.

Who has "participated" in investigation proceeding or hearing and is thereby protected from retaliation under § 704(a) of Title VII of Civil Rights Act of 1964 (42 USCA § 2000e-3(a)), 149 A.L.R. Fed. 431.

51 C.J.S. Labor Relations § 8; 30 C.J.S. Employer-Employee § 58.

30-13-4. Unlawful payment of wages in script.

Unlawful payment of wages in script consists of any person selling, giving or delivering, or in any manner issuing, directly or indirectly, to any person employed by him, and in payment for wages due, any script, draft, order or other evidence of indebtedness payable or redeemable otherwise than in lawful money of the United States.

Whoever commits unlawful payment of wages in script is guilty of a misdemeanor.

History: 1953 Comp., § 40A-13-4, enacted by Laws 1963, ch. 303, § 13-4.

ANNOTATIONS

Cross references. — For payment of wages, *see* 50-4-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 48A Am. Jur. 2d Labor and Labor Relations § 4196 et seq.

51B C.J.S. Labor Relations § 1179.

30-13-5. Unlawful coercion of employees.

Unlawful coercion of employees consists of any person employing labor, or any agent of such employer, compelling or coercing, directly or indirectly, any employee to buy goods or trade with any particular store, business or person.

Whoever commits unlawful coercion of employees is guilty of a misdemeanor.

History: 1953 Comp., § 40A-13-5, enacted by Laws 1963, ch. 303, § 13-5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 51 C.J.S. Labor Relations § 9; 51B C.J.S. Labor Relations § 1009.

ARTICLE 14
Trespass

30-14-1. Criminal trespass.

A. Criminal trespass consists of knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land. The provisions of this subsection do not apply if:

(1) the owner or person in control of the land has entered into an agreement with the department of game and fish granting access to the land to the general public for the purpose of taking any game animals, birds or fish by hunting or fishing; or

(2) a person is in possession of a landowner license given to him by the owner or person in control of the land that grants access to that particular private land for the purpose of taking any game animals, birds or fish by hunting or fishing.

B. Criminal trespass also consists of knowingly entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. Notice of no consent to enter shall be deemed sufficient notice to the public and evidence to the courts, by the posting of the property at all vehicular access entry ways.

C. Criminal trespass also consists of knowingly entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof.

D. Any person who enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, is guilty of a misdemeanor, and he shall be liable to the owner, lessee or person in lawful possession for civil damages in an amount equal to double the value of the damage to the property injured or destroyed.

E. Whoever commits criminal trespass is guilty of a misdemeanor. Additionally, any person who violates the provisions of Subsection A, B or C of this section, when in connection with hunting, fishing or trapping activity, shall have his hunting or fishing license revoked by the state game commission for a period of not less than three years, pursuant to the provisions of Section 17-3-34 NMSA 1978.

F. Whoever knowingly removes, tampers with or destroys any "no trespass" sign is guilty of a petty misdemeanor; except when the damage to the sign amounts to more than one thousand dollars ($1,000), he or she is guilty of a misdemeanor and shall be subject to imprisonment in the county jail for a definite term less than one year or a fine not more than one thousand dollars ($1,000) or to both such imprisonment and fine in the discretion of the judge.

G. This section, as amended, shall be published in all issues of "Big Game Hunt Proclamation" as published by the department of game and fish.

History: 1953 Comp., § 40A-14-1, enacted by Laws 1963, ch. 303, § 14-1; 1975, ch. 52, § 1; 1979, ch. 186, § 1; 1981, ch. 34, § 1; 1983, ch. 27, § 2; 1991, ch. 58, § 1; 1995, ch. 164, § 1.

ANNOTATIONS

Cross references. — For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

For trespass on state lands, *see* 19-6-3 NMSA 1978 et seq.

For criminal damage to property, *see* 30-15-1 NMSA 1978.

For detention or arrest of trespassers upon restricted areas, *see* 30-21-3 NMSA 1978.

For removal or destruction of plants near highway, *see* 76-8-1 NMSA 1978 et seq.

For livestock trespass, *see* 77-14-3 NMSA 1978 et seq.

The 1995 amendment, effective June 1, 1995, added the second sentence in Subsection B and added Subsections F and G.

The 1991 amendment, effective July 1, 1991, added Subsection A; redesignated the subsequent subsections accordingly; in Subsection B inserted "also" and "unposted"; in Subsection D added the language beginning with "and he shall be liable"; and added the second sentence in Subsection E.

The 1983 amendment deleted "petty" preceding "misdemeanor" in Subsections C and D.

Crime defined. — Trespassing, both at common law and by statute, is the entry onto another's property without permission of the owner. *State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264.

Unauthorized entry. — Where an unauthorized entry merely consists of climbing over a fence, businesses and other open property are protected under the criminal trespass statute. *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329.

Elements of offense. — For a conviction, Section 30-14-1D NMSA 1978 requires that the defendant both "entered" property "without permission" and "damaged" an improvement on the property. *State v. Contreras*, 2007-NMCA-119, 142 N.M. 518, 167 P.3d 966.

Instruction on lesser included offense. — When criminal trespass is factually based solely on unlawful entry, not on unlawfully remaining without consent, then criminal trespass is necessarily included within the offense of aggravated burglary of a dwelling house and a defendant is entitled to an instruction on the lesser included offense. *State v. Romero*, 1998-NMCA-057, 125 N.M. 161, 958 P.2d 119,

Knowledge requirement. — While criminal trespass can, under some circumstances, require knowledge that the trespasser does not have permission to be on the land, New Mexico law also defines other trespass-type offenses that require knowledge only of the trespasser's actions, not of their illegality. *Tanberg v. Shlotis*, 401 F.3d 1151 (10th Cir. 2005).

Private land not properly posted. — If private land is not properly posted under the statutory requirements, then a person can only commit criminal trespass by entering or remaining upon the property knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. *State v. Merhege*, 2017-NMSC-016, *rev'g* 2016-NMCA-059, 376 P.3d 867.

Proof of knowledge element of criminal trespass. — Where defendant was charged with criminal trespass for running through the front yard of a private residence that was enclosed by a three foot high wall and for attempting to jump over an adjoining fence into the back yard of the residence while fleeing from a police officer at 3:40 a.m., there

was sufficient circumstantial evidence for the jury to find that defendant knew that he did not have consent to enter the property based on the wall surrounding the property's front yard, the purpose of defendant's entry, and the time of his entry on the property. *State v. Merhege*, 2017-NMSC-016, *rev'g* 2016-NMCA-059, 376 P.3d 867.

Knowledge of lack of consent to enter land required. — In defendant's trial for criminal trespass, there was insufficient evidence to support defendant's conviction where the private land did not have a "no trespassing" sign, and the landowner did not place defendant on notice that he was not permitted on his property by denying or withdrawing consent to enter his land. *State v. Merhege*, 2016-NMCA-059, cert. granted.

Uniform jury instruction does not accurately describe the mens rea for criminal trespass. — Where defendant was charged with breaking and entering, attempt to commit breaking and entering, criminal trespass, and resisting, evading, or obstructing an officer, and where, at trial, the jury was instructed that in order to find defendant guilty of criminal trespass, they must find beyond a reasonable doubt that defendant *knew or should have known* that permission to enter the land had been denied, in accordance with UJI 14-402 NMRA; § 30-14-1(B) NMSA 1978, however, requires a finding beyond a reasonable doubt that a defendant "*knowingly* entered or remained upon the unposted lands of another *knowing* that such consent to enter or remain was denied or withdrawn by the owner or occupant thereof." The "should have known" language in the instruction adds civil negligence as an alternative to the statute's requirement of actual knowledge, and thus allows a jury to improperly convict based on its belief that a reasonable person would have understood that access was barred. New Mexico law requires proof beyond a reasonable doubt of actual knowledge that permission to enter the land had been denied. *State v. Ancira*, 2022-NMCA-053, cert. denied.

This section requires general criminal intent. *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

When one commits burglary of dwelling house one commits criminal trespass based on that entry. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

Unlawfully entering lands of another. — The only "act" involved in criminal trespass, as a lesser offense included within burglary of a dwelling house, is entry upon the lands of another, which requires a "malicious intent." *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160 (decided under prior law).

Unlawful entry is entry not authorized by law, without excuse or justification. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

"Lands," in Subsection B, includes buildings and fixtures and is synonymous with real property. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

Subsection B applies to federal government land. — Where land is owned and operated by the federal government as a proprietor, the state has sovereignty over the land, provided it does not interfere with the use of the federal government, and Subsection A applies. *State v. McCormack*, 1984-NMSC-006, 100 N.M. 657, 674 P.2d 1117.

Damage to property not required to show malicious intent. — While damage to property would be evidence of malicious intent, such is not required inasmuch as malicious intent may be established by evidence of an intent to vex or annoy or do a wrongful act. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160 (decided under prior law).

Trespass in watermelon patch. — Trespass of group of boys on land occupied by another and stealing of watermelons thereon, with minor injury to fence, did not constitute a violation of former 40-47-12, 1953 Comp., relating to unlawful injury of fence and crops, a felony, but rather, of former 40-47-5, 1953 Comp., relating to trespassing on improved land with intent to cut, take, etc., trees or crops growing there, a misdemeanor. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Injuring house. — An opening of four inches was sufficient to complete the offense of injuring house for purpose of entering and molesting occupant under Laws 1875-1876, ch. 9, § 2, former 40-47-19, 1953 Comp. *Territory v. Gallegos*, 1913-NMSC-002, 17 N.M. 409, 130 P. 245 (decided under prior law).

Civil liability to injured trespasser. — As a matter of law the use of a gun by owner while stopping trespass or theft of watermelons by group of boys was not permissible, and when owner fired gun he became liable to injured boy. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152 (decided under prior law).

Application to journalist not abridgement of rights. — Application of this section to a journalist who crossed a barricade at a federal government nuclear waste disposal plant did not abridge the first amendment right to peaceably assemble or the right of the press to gather and report news. *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

Criminal trespass not a lesser included offense of breaking and entering. — Trial court did not err in refusing to give lesser included-offense instructions on criminal trespass and breaking and entering. *State v. Andrade*, 1998-NMCA-031, 124 N.M. 690, 954 P.2d 755, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Evidence sufficient. — Evidence that defendant repeatedly trespassed onto victim's property and that defendant was the party who looked into victim's windows and followed her was sufficient to support convictions for stalking, harassment and criminal trespass. *State v. Duran*, 1998-NMCA-153, 126 N.M. 60, 966 P.2d 768, cert. denied, 126 N.M. 533, 972 P.2d 352, *overruled on other grounds by State v. Laguna*, 1999-NMCA-152, 128 N.M. 345, 992 P.2d 896, cert. denied, 128 N.M. 149, 990 P.2d 823.

Insufficient evidence of criminal trespass. — Where defendant was charged with criminal trespass after he was seen by an officer jumping over a fence surrounding a residence, but where, at trial, the state failed to present any evidence to the jury as to the specific location where the trespass allegedly occurred, there was insufficient evidence to establish beyond a reasonable doubt each element of the crime charged. *State v. Fierro*, 2024-NMCA-016.

Access to public waters. — A private landowner cannot prevent persons from fishing in a public stream that flows across the landowner's property, provided the public stream is accessible without trespass across privately owned adjacent lands. 2014 Op. Att'y Gen. 14-04.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trespass §§ 162, 163, 167, 181, 182, 185.

Right to enter land to remove timber cut before revocation of license, 26 A.L.R.2d 1194.

Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Liability of private citizen, calling on police for assistance after disturbance or trespass, for false arrest by officer, 98 A.L.R.3d 542.

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.

87 C.J.S. Trespass §§ 144 to 147.

30-14-1.1. Types of trespass; injury to realty; civil damages.

A. Any person who enters and remains on the lands of another after having been requested to leave is guilty of a misdemeanor.

B. Any person who enters upon the lands of another when such lands are posted against trespass at every roadway or apparent way of access is guilty of a misdemeanor.

C. Any person who drives a vehicle upon the lands of another except through a roadway or other apparent way of access, when such lands are fenced in any manner, is guilty of a misdemeanor.

D. In the event any person enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, he shall be liable to the owner, lessee or person in lawful possession for damages in an amount equal to double the amount of the appraised value of the damage of the property injured or destroyed.

History: Laws 1979, ch. 186, § 2; 1983, ch. 27, § 3.

ANNOTATIONS

The 1983 amendment deleted "petty" preceding "misdemeanor" in Subsections A to C.

Surface lessee of land had no standing to sue for trespass and unjust enrichment. — Where plaintiff leased land for purposes of ranching and defendants pumped salt water from beyond the boundaries of the land into a disposal well on the land without the knowledge or consent of plaintiff, plaintiff did not have standing to sue defendants for trespass or unjust enrichment. *McNeill v. Rice Eng. & Operating, Inc*., 2010-NMSC-015, 148 N.M. 16, 229 P.3d 489.

Owner of land had no standing to sue for trespass for use of land prior to owner's acquisition of the land. — Where defendants pumped salt water from beyond the boundaries of plaintiff's land into a disposal well on plaintiff's land without the knowledge or consent of plaintiff or plaintiff's predecessor in interest, plaintiff did not have standing to sue defendants for trespass for acts that occurred prior to the time plaintiff owned the land. *McNeill v. Rice Eng. & Operating, Inc*., 2010-NMSC-015, 148 N.M. 16, 229 P.3d 489.

Noneconomic damages are available in trespass and private nuisance actions. — Trespass is a direct infringement of another's right of possession, and private nuisance, which is akin to trespass, is an in personam action for tortious interference with one's use and enjoyment of land. Noneconomic damages, including damages to compensate for annoyance, discomfort, and inconvenience, are available in trespass and private nuisance actions, both of which seek to remedy invasions of property rights. It is for the trier of fact to determine the amount of damages, in view of the discomfort or annoyance to which the plaintiffs have been subjected. 2024 Op. Atty Gen. No. 2024-05.

Subsection D does not apply to trespass by substances beneath the surface of the land. *Hartman v. Texaco, Inc*., 1997-NMCA-032, 123 N.M. 220, 937 P.2d 979.

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.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 A.L.R.4th 530.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

30-14-2. Consent required for key duplication [of educational institutions].

No person shall knowingly make or cause to be made any key or duplicate key for any building, laboratory, facility, room, dormitory, hall or any other structure, or part thereof, owned or leased by the state, any political subdivision, or by the board of regents or other governing body of any college or university, which is supported wholly or in part by the state, without the prior written consent of the state, political subdivision, board of regents or other governing body.

History: 1953 Comp., § 40A-14-3, enacted by Laws 1965, ch. 115, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

30-14-3. Penalty.

Any person who violates Section 1 [30-14-2 NMSA 1978] of this act is guilty of a misdemeanor.

History: 1953 Comp., § 40A-14-4, enacted by Laws 1965, ch. 115, § 2.

30-14-4. Wrongful use of public property; permit; penalties.

A. Wrongful use of public property consists of:

(1) knowingly entering any public property without permission of the lawful custodian or his representative when the public property is not open to the public;

(2) remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the

public property is being used or occupied contrary to its intended or customary use or that the public property may be damaged or destroyed by the use; or

(3) depriving the general public of the intended or customary use of public property without a permit.

B. Permits to occupy or use public property may be obtained from the lawful custodian or his representative upon written application which:

(1) describes the public property to be occupied or used; and

(2) states the period of time during which the public property will be occupied or used. The applicant shall pay in advance a reasonable fee or charge for the use of the public property. The fee or charge shall be prescribed by the lawful custodian or his representative.

C. The lawful custodian or his representative may issue the permit if he believes that the use or occupation of the public property will not unreasonably interfere with the intended or customary use of the public property by the general public and that the use will not damage or destroy the public property.

D. Any person occupying or using public property under the authority of a permit shall submit to a search for firearms or other weapons and surrender any firearms or other weapons to any peace officer, who has jurisdiction, upon request.

E. As used in this section, "public property" means any public building, facility, structure or enclosure used for a public purpose or as a place of public gathering, owned or under the control of the state or one of its political subdivisions or a religious, charitable, educational or recreational association.

F. Any person who commits wrongful use of public property is guilty of a petty misdemeanor.

G. Any person who commits wrongful use of public property after having been requested to leave by the lawful custodian or his representative or any peace officer, who has jurisdiction, is guilty of a misdemeanor.

History: 1953 Comp., § 40A-14-5, enacted by Laws 1969, ch. 61, § 1.

ANNOTATIONS

Unconstitutional delegation of power. — Paragraph A(2) of this section, proscribing the act of remaining in or occupying any public property after having been requested to leave by the lawful custodian or his representative upon determination that the public property is being used or occupied contrary to its intended or customary use, is without sufficiently definite standards to be enforceable, and is thus an unconstitutional

delegation of legislative power. *State v. Jaramillo*, 1972-NMCA-071, 83 N.M. 800, 498 P.2d 687.

Serious doubts on constitutionality. — Because of the many constitutional infirmities in this section, there are serious doubts as to whether it is a valid law. 1969 Op. Att'y Gen. No. 69-21.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

30-14-5. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 186, § 4, repealed 30-14-5 NMSA 1978, as enacted by Laws 1969, ch. 195, § 1, relating to the short title of the Property Posting Act.

30-14-6. No trespassing notice; sign contents; posting; requirement; prescribing a penalty for wrongful posting of public lands.

A. The owner, lessee or person lawfully in possession of real property in New Mexico, except property owned by the state or federal government, desiring to prevent trespass or entry onto the real property shall post notices parallel to and along the exterior boundaries of the property to be posted, at each roadway or other way of access in conspicuous places, and if the property is not fenced, such notices shall be posted every five hundred feet along the exterior boundaries of such land.

B. The notices posted shall prohibit all persons from trespassing or entering upon the property, without permission of the owner, lessee, person in lawful possession or his agent. The notices shall:

(1) be printed legibly in English;

(2) be at least one hundred forty-four square inches in size;

(3) contain the name and address of the person under whose authority the property is posted or the name and address of the person who is authorized to grant permission to enter the property;

(4) be placed at each roadway or apparent way of access onto the property, in addition to the posting of the boundaries; and

(5) where applicable, state any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," "no fishing," "no digging" or any other specific prohibition.

C. Any person who posts public lands contrary to state or federal law or regualtion [regulation] is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-14-7, enacted by Laws 1969, ch. 195, § 2; 1979, ch. 186, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Failure to post notices not a valid defense to liability for trespass at common law. — Where plaintiffs filed a complaint against defendants seeking injunctive relief and damages arising from claims for common law trespass based on allegations that defendants performed certain earthwork on plaintiffs' land, the district court did not err in denying defendants' jury instruction modeled on the text of the criminal trespass statute, 30-14-16 NMSA 1978, which imposed a duty on landowners to post notices on the boundaries of their property in order to subject individuals to trespass liability for any entries thereon, because this section cannot be fairly read to change the common law of trespass, which does not require posting of property in order for an unauthorized entry to constitute a trespass. *Holcomb v. Rodriguez*, 2016-NMCA-075, cert. denied.

30-14-7. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 186, § 4, repealed 30-14-7 NMSA 1978, as enacted by Laws 1969, ch. 195, § 3, relating to penalties for trespassing and double damages for injury to realty. For present penalty and damages provisions, *see* 30-14-1.1 NMSA 1978.

30-14-8. Breaking and entering.

A. Breaking and entering consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the vehicle, watercraft, aircraft, dwelling or other structure, or by the breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure.

B. Whoever commits breaking and entering is guilty of a fourth degree felony.

History: Laws 1981, ch. 34, § 2.

ANNOTATIONS

Sufficient evidence. — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; and defendant pushed the occupants back into the apartment about a foot and stepped into the apartment, there was sufficient evidence to support defendant's conviction of breaking and entering. *State v. Sorrelhorse*, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Sufficient evidence of "unauthorized entry". — An "entry", for purposes of the breaking and entering statute, occurs whenever there is an invasion into an enclosed, private, prohibited space. To determine the boundaries of enclosures, the proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusions. *State v. Holt*, 2016-NMSC-011, *aff'g* 2015-NMCA-073, 352 P.3d 702.

Where the evidence established that defendant placed his fingers behind a window screen affixed to a residential dwelling and beyond the boundary created by the window screen, defendant's actions constituted an intrusion into an enclosed, private, prohibited space and constituted an "entry" for the purposes of New Mexico's breaking and entering statute. There was sufficient evidence to support defendant's conviction for breaking and entering. *State v. Holt*, 2016-NMSC-011, *aff'g* 2015-NMCA-073, 352 P.3d 702.

Sufficient evidence of breaking and entering. — Where defendant was charged with first-degree murder in the shooting death of two victims, tampering with evidence and breaking and entering, there was sufficient evidence to support his conviction for breaking and entering where the state presented a witness who testified that she saw defendant break a car window and rummage around inside the car, and where defendant acknowledged breaking into a vehicle, but claimed he entered the vehicle to retrieve his own property from the vehicle. It is immaterial that defendant was breaking in to retrieve his own property, because New Mexico's breaking and entering statute requires no intent to commit a crime upon entering, only the breaking and entering need be shown. *State v. Carrillo*, 2017-NMSC-023.

Sufficient evidence to support breaking and entering conviction. — Where defendant was charged with arson, breaking and entering and violating an order of protection, and where the state presented evidence that defendant had broken into the victim's house through her window on prior occasions, similar to the way the arsonist did on the night of the fire, that defendant's blood was found on a pair of pliers and pruning shears found near the victim's broken window on the night of the fire, tools which the victim did not recognize or notice when she had her window secured earlier that

morning, and that defendant had a motive to burn the victim's house down, jealousy following a breakup, there was sufficient evidence for a rational juror to find that defendant broke into the victim's house and set it on fire. *State v. Pamphille*, 2021-NMCA-002, cert. denied.

Intrusion into the space between a window screen and window is sufficient to warrant a finding of an unauthorized entry for the purposes of the breaking and entering statute. — Where defendant attempted to force entry into a home through a window by removing the window screen from its track, and while holding the screen, defendant's fingers penetrated the area between the window and the screen, there was sufficient evidence to support defendant's conviction of breaking and entering because the window screen was part of the enclosure around the home, and a reasonable person would expect the window screen to afford some protection from unauthorized intrusions. *State v. Holt*, 2015-NMCA-073, cert. granted, 2015-NMCERT-006.

Sufficient evidence of breaking and entering. — Where defendant was charged with breaking and entering, attempt to commit breaking and entering, criminal trespass, and resisting, evading, or obstructing an officer, and where, at trial the homeowner testified that he locked his back door, front door, and bathroom window, and that when he returned home, he found defendant asleep in the bathroom, the bathroom window wide open, the window crank that opens the bathroom window broken, the window screen to the window on the floor, and footprints outside the bathroom window, there was sufficient evidence to permit a reasonable jury to conclude beyond a reasonable doubt that defendant broke into the house through the bathroom window without permission. *State v. Ancira*, 2022-NMCA-053, cert. denied.

Criminal damage to property was a lesser included offense of breaking and entering. — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; defendant pushed the occupants back into the apartment about a foot and stepped into the apartment; while one occupant of the apartment attempted to call 911, defendant walked away; and when the other occupant opened the door to see which way defendant had gone, defendant returned and began kicking the door, defendant's initial act of trying to force open the door of the apartment and then returning minutes later to kick the door was unitary conduct and defendant's conviction of criminal damage to property, which was a lesser included offense of defendant's conviction of breaking and entering, violated defendant's right to be free from double jeopardy. *State v. Sorrelhorse*, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Not lesser included offense of aggravated burglary. — Breaking and entering is not a lesser included offense of aggravated burglary because each offense requires an element not included in the other and, by convicting defendant of breaking and entering when he only had notice of an aggravated burglary, the trial court violated his right to notice of the charges against him. *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156, cert. denied, 128 N.M. 149, 990 P.2d 823.

Criminal trespass not a lesser included offense of breaking and entering. — Trial court did not err in refusing to give lesser included-offense instructions on criminal trespass and breaking and entering. *State v. Andrade*, 1998-NMCA-031, 124 N.M. 690, 954 P.2d 755, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Mistake of fact instruction. — Where defendant was charged with breaking and entering a motel room and the evidence showed that defendant checked into the motel and was assigned room 125, subsequently defendant, who was very intoxicated, was discovered in room 121, in the bathroom, the key card for room 125 was on the ground outside near room 121, and the key card did not have a room number on it, defendant was entitled to an instruction on the defense of mistake of fact. *State v. Contreras*, 2007-NMSC-119, 142 N.M. 518, 167 P.3d 966.

Instructions. — Even though Subsection A of this section uses the phrase "unauthorized entry," while UJI 14-1410 uses the phrase "without permission," this variation from the strict language of the statute does not, by itself, make the instruction improper. *State v. Rubio*, 1999-NMCA-018, 126 N.M. 579, 973 P.2d 256.

Trial court's failure to instruct the jury on an "unauthorized entry" rather than an "entry without permission" was not reversible error where the evidence overwhelmingly supported the conclusion that defendant did not have blanket authority to enter the apartment, or that whatever authority he may have had was freely revocable by the renter. *State v. Rubio*, 1999-NMCA-018, 126 N.M. 579, 973 P.2d 256.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

ARTICLE 15
Property Damage

30-15-1. Criminal damage to property.

Criminal damage to property consists of intentionally damaging any real or personal property of another without the consent of the owner of the property.

Whoever commits criminal damage to property is guilty of a petty misdemeanor, except that when the damage to the property amounts to more than one thousand dollars ($1,000) he is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-15-1, enacted by Laws 1963, ch. 303, § 15-1.

ANNOTATIONS

Cross references. — For destruction of newspapers kept by county clerk, *see* 4-40-10 NMSA 1978.

For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

For polluting of water, *see* 30-8-2 NMSA 1978.

For destruction of cemetery property, *see* 30-12-13 NMSA 1978.

For criminal trespass, *see* 30-14-1 NMSA 1978.

For liability of parents for destruction of property by child, *see* 32A-2-27 NMSA 1978.

For flooding of highway, *see* 67-7-4 NMSA 1978.

For interference with or changing of water measuring devices, *see* 72-5-20 NMSA 1978.

For injury and interference with waterworks, *see* 72-8-1 and 72-8-3 NMSA 1978.

For interference with community ditches, *see* 73-2-64 NMSA 1978.

For injuring of survey marks, *see* 73-17-5 NMSA 1978.

For injuring of fence, *see* 77-16-10 NMSA 1978.

The replacement cost of irreparable items is an appropriate measure of the value of the items. *State v. Cobrera* 2013-NMSC-012, 300 P.3d 729.

The purchase price of an item was sufficient evidence of replacement cost. — Where defendant damaged household goods of defendant's estranged spouse; and the state's evidence showed that the purchase price of the irreparably damaged items was greater than $1,000, there was sufficient evidence from which the jury could conclude that the replacement cost of the items was greater than $1,000. *State v. Cobrera* 2013-NMSC-012, 300 P.3d 729.

Determining damage amount for felony criminal damage to property. — The damage amount for felony criminal damage to property is the cost of repair or replacement cost, whichever is less. The state bears the burden of proving the replacement cost of the damaged property. *State v. Fernandez*, 2015-NMCA-091.

Where defendant kicked victim's twelve-year-old pickup truck, causing a large dent in the door of victim's vehicle and then struck victim's truck with defendant's own vehicle, and the state presented evidence at trial that the cost of repair of victim's truck was between $1,500 and $1,600, but failed to offer evidence regarding replacement cost, there was insufficient evidence to convict defendant of felony criminal damage to property, because the state was required to submit evidence as to replacement cost so that the jury could reasonably determine whether it exceeded the cost of repair. *State v. Fernandez*, 2015-NMCA-091.

Criminal damage to property was a lesser included offense of breaking and entering. — Where defendant attempted to force entry into an apartment through the front door; the occupants of the apartment struggled to hold the door closed; defendant pushed the occupants back into the apartment about a foot and stepped into the apartment; while one occupant of the apartment attempted to call 911, defendant walked away; and when the other occupant opened the door to see which way defendant had gone, defendant returned and began kicking the door, defendant's initial act of trying to force open the door of the apartment and then returning minutes later to kick the door was unitary conduct and defendant's conviction of criminal damage to property, which was a lesser included offense of defendant's conviction of breaking and entering, violated defendant's right to be free from double jeopardy. *State v. Sorrelhorse*, 2011-NMCA-095, 150 N.M. 536, 263 P.3d 313, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Cost of repair. — The cost of repair alone is sufficient to support a conviction for criminal damage to property. *State v. Barreras*, 2007-NMCA-067, 141 N.M. 653, 159 P.3d 1138.

Insufficient evidence to establish damage was over $1,000. — Where defendant was charged with criminal damage to property over $1000, and where, at trial, the state presented evidence that after defendant was arrested and placed in the back of the officer's patrol car, defendant became erratic and kicked and cracked the plexiglass divider and that the estimated cost of repair was $1,710, which included a drive time and mileage charge for the transport of the patrol car from Carlsbad to Albuquerque, New Mexico, and back, the state erred in including the cost of the technician's travel to Carlsbad from Albuquerque to work on the police car, because nothing in the language of the statute or the uniform jury instruction, UJI 14-1510 NMRA, states that additional charges or costs can be included in the "repair or replacement cost" of the item damaged. Thus, there was insufficient evidence at trial for a jury to convict defendant of criminal damage to property over $1,000. *State v. Fierro*, 2024-NMCA-016.

Lesser included offenses. — Entrustment and conversion are not elements of criminal damage to property. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

Defendant charged under this section and vehicle tampering statute. — Where defendant caused damage in excess of $1000 to a vehicle, the general/specific rule did not apply to prevent a charge of criminal damage to property under this section, on the basis that defendant could only be charged under Section 66-3-506 NMSA 1978 (now Section 30-16D-5 NMSA 1978), prohibiting injuring or tampering with a vehicle. *State v. Arellano*, 1997-NMCA-074, 123 N.M. 589, 943 P.2d 1042, cert. quashed, 124 N.M. 589, 953 P.2d 1087 (1998).

Community property of defendant. — This section does not criminalize damage to community property one owns; such property is not "property of another" for purposes of this section. *State v. Powels*, 2003-NMCA-090, 134 N.M. 118, 73 P.3d 256.

Equitable owner of property. — The equitable owner of property under a real estate contract cannot be criminally charged with damaging that property. *State v. Earp*, 2014-NMCA-059.

Where defendant purchased a home pursuant to a real estate contract; when defendant failed to pay the balance due on the contract, the seller terminated the contract; prior to vacating the property, defendant removed a number of appliances and fixtures from the house and left the house in a state of disrepair; and defendant was charged with criminal damage to property, 30-15-1 NMSA 1978 did not apply to property in which defendant had an equitable ownership interest. *State v. Earp*, 2014-NMCA-059.

Defense of habitation. — Question whether force used by a person in defense of habitation exceeded what was reasonably necessary was for the jury to resolve upon appropriate instructions by the trial judge. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, gave householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

When one's home was attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants had, was not obliged to retreat but might pursue his adversaries until he found himself out of danger. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Resistance to commission of felony. — While no law countenanced wanton slaying, the protection and security of life being the most vital interest of society, the law of defense of habitation and the resistance to the commission of a felony thereon gave householder right to kill aggressor, if such killing was necessary or apparently necessary to prevent or repel the felonious aggression. *State v. Couch*, 1946-NMSC-047, 52 N.M. 127, 193 P.2d 405.

Tort liability for injury to trespasser. — As a matter of law the use of a gun by owner while stopping trespass or theft of watermelons by group of boys was not permissible, and when owner fired gun he became liable to injured boy. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Sufficiency of evidence. — Evidence was sufficient to support an inference that damages were at least $1,000. *State v. Haar*, 1990-NMCA-076, 110 N.M. 517, 797 P.2d 306, cert. denied, 110 N.M. 330, 795 P.2d 1022.

Sufficient evidence. — Where the evidence showed that defendant bashed out the windows of a truck with a baseball bat, threw rocks at the truck and through the windows of the truck, kicked the truck, tore the face plate off of the stereo in the truck in

an attempt to take the stereo, which damaged the entire stereo system, destroyed the rearview mirror in truck, and irreparably damaged the ignition column of the truck, the evidence was sufficient to support defendant's conviction of criminal damage to property. *State v. Dickert*, 2012-NMCA-004, 268 P.3d 515, cert. denied, 2011-NMCERT-012.

Insufficient evidence of intent to damage the property of another. — Where defendant was convicted of criminal damage to property based on DNA evidence found in a burglarized house, there was insufficient evidence to permit a rational jury to find the essential facts to establish each element of the crime of criminal damage to property beyond a reasonable doubt, because although there was evidence that defendant had entered the property without authorization, the state, without presenting any evidence linking defendant to the property damage, failed to establish, either directly or by circumstantial evidence, that defendant intentionally damaged the property of another. *State v. Ledbetter*, 2020-NMCA-046.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Malicious Mischief §§ 1 to 11.

Liability for injury to property occasioned by oil, water or the like flowing from well, 19 A.L.R.2d 1025.

Liability for damage to automobile left in parking lot or garage, 13 A.L.R.4th 442.

54 C.J.S. Malicious or Criminal Mischief or Damage to Property §§ 1 to 11.

30-15-1.1. Unauthorized graffiti on personal or real property.

A. Graffiti consists of intentionally and maliciously defacing any real or personal property of another with graffiti or other inscribed material inscribed with ink, paint, spray paint, crayon, charcoal or the use of any object without the consent or reasonable ground to believe there is consent of the owner of the property.

B. Whoever commits graffiti to real or personal property when the damage to the property is one thousand dollars ($1,000) or less is guilty of a petty misdemeanor and shall be required to perform a mandatory one hundred hours of community service within a continuous six-month period immediately following his conviction and shall be required to make restitution to the property owner for the cost of damages and restoration.

C. Whoever commits graffiti to real or personal property when the damage to the property is greater than one thousand dollars ($1,000) is guilty of a fourth degree felony and shall be required to perform a mandatory one hundred sixty hours of community service within a continuous eight-month period immediately following his conviction and shall be required to provide restitution to the property owner for the cost of damages

and restoration as a condition of probation or following any term of incarceration as a condition of parole.

D. When a single occurrence of graffiti is committed by more than one individual, the court may apportion the amount of restitution owed by each offender in accordance with each offender's degree of culpability.

History: Laws 1990, ch. 36, § 1; 1995, ch. 204, § 1.

ANNOTATIONS

The 1995 amendment, effective July 1, 1995, subdivided and rewrote former Subsection B into Subsections B and C and added Subsection D.

Law reviews.— For article, "Co-opting the Journalist's Privilege: Of Sources and Spray Paint," see 23 N.M. L. Rev. 435 (1993).

30-15-2. [Rocks, protected plants or trees within four hundred yards of highway.]

It is a petty misdemeanor to deface, without the written consent of the landowner, any rock, any plant defined in Section 76-8-1 NMSA 1978, or any dead or living tree within four hundred yards of any public highway.

History: 1953 Comp., § 40A-15-1.1, enacted by Laws 1971, ch. 3, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — What is considered property "involved" in money laundering offense, and thus subject to civil or criminal forfeiture, for purposes of Money Laundering Control Act (18 USCS § 981(a)(1)(A) and 982(a)(1)), 135 A.L.R. Fed. 367.

30-15-3. Damaging insured property.

Damaging insured property consists of intentionally damaging property which is insured with intent to defraud the insurance company into paying himself or another for such damage.

Whoever commits damaging insured property is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-15-2, enacted by Laws 1963, ch. 303, § 15-2.

ANNOTATIONS

Evidence of insurance. — Evidence that balance of fee for carrying out scheme to apparently burglarize and vandalize and then burn business was to be paid when insurance company paid for the supposed theft and vandalism, that undercover officer hired to carry out the scheme was told to be sure the burglar alarm was on or the company would refuse coverage and that conspirators stated the business was insured, was substantial evidence that the property to be damaged was insured and that the purpose of the conspiracy was to damage insured property. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Arson section not exclusive. — In conspiracy to damage business property by fire after making it appear to have been first burglarized and vandalized, where the conspiracy to burglarize and vandalize was directed to acts not covered by 30-17-5 NMSA 1978, the arson statute, that section did not act as a special provision prohibiting the prosecution of defendant under this section for the aspect of the conspiracy directed toward burglary and vandalism. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Single penalty for conspiracy to damage. — Where defendant was charged with one count of conspiracy to commit felony arson, and one count under this section, since scheme to damage business property by fire after making it appear to have been first burglarized and vandalized involved only one conspiracy, only one penalty could be imposed. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "vandalism" or "malicious mischief" within meaning of insurance policy specifically extending coverage to losses from such causes, 56 A.L.R.5th 407.

30-15-4. Desecration of a church.

Desecration of a church consists of willfully, maliciously and intentionally defacing a church or any portion thereof.

Whoever commits desecration of a church is guilty of a misdemeanor, except that when the damage to the church amounts to more than one thousand dollars ($1,000) he is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-15-3, enacted by Laws 1963, ch. 303, § 15-3; 1965, ch. 173, § 1.

ANNOTATIONS

Meaning of "church". — The sense in which "church" is used in this section is expressive of a place where persons regularly assemble for worship and is not limited to the Christian religion. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

Contents not included. — Absent any legislative intent to the contrary, "church or any portion thereof" does not include the movable contents of the building. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

No violation of establishment clause. — This section does not advance religion contrary to the First and Fourteenth Amendments of the United States Constitution. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

Equal protection not violated. — The differences in the elements of this section and 30-15-1 NMSA 1978 provide a rational basis for the difference in penalties imposed for damage amounting to less than $1,000, in that violation of 30-15-1 NMSA 1978 requires only intentional damage, while this section involves willful, malicious and intentional defacement; therefore, this section does not violate equal protection. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

Rational basis. — A rational basis for treating criminal damage to a church differently than criminal damage to other property is the role of religion in society as a whole. *State v. Vogenthaler*, 1976-NMCA-030, 89 N.M. 150, 548 P.2d 112.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of statute or ordinance prohibiting desecration of church, 90 A.L.R.3d 1119.

What is considered property "involved in" money laundering offense, and thus subject to civil or criminal forfeiture, for purposes of Money Laundering Control Act (18 USCS § 981(a)(1)(A) and 982(a)(1)), 135 A.L.R. Fed. 367.

30-15-5. Damaging caves or caverns unlawful.

It shall be unlawful for any person, without prior permission of the federal, state or private land owner, to willfully or knowingly break, break off, crack, carve upon, write or otherwise mark upon, or in any manner destroy, mutilate, injure, deface, remove, displace, mar or harm any natural material found in any cave or cavern, such as stalactites, stalagmites, helictites, anthodites, gypsum flowers or needles, flowstone, draperies, columns, tufa dams, clay or mud formations or concretions, or other similar crystalline mineral formations or otherwise; to kill, harm or in any manner or degree disturb any plant or animal life found therein; to otherwise disturb or alter the natural conditions of such cave or cavern through the disposal therein of any solid or liquid materials such as refuse, food, containers or fuel of any nature, whether or not malice is intended; to disturb, excavate, remove, displace, mar or harm any archaeological artifacts found within a cave or cavern including petroglyphs, projectile points, human remains, rock or wood carvings or otherwise, pottery, basketry or any handwoven articles of any nature, or any pieces, fragments or parts of any of the such articles; or to break, force, tamper with, remove or otherwise disturb a lock, gate, door or other structure or obstruction designed to prevent entrance to a cave or cavern, without the permission of the owner thereof, whether or not entrance is gained. For purposes of this section, "cave" means any natural geologically formed void or cavity beneath the

surface of the earth, not including any mine, tunnel, aqueduct or other manmade excavation, which is large enough to permit a person to enter.

History: Laws 1981, ch. 236, § 1.

30-15-6. Penalty.

Anyone violating the provisions of Section 1 [30-15-5 NMSA 1978] of this act shall be guilty of a misdemeanor.

History: Laws 1981, ch. 236, § 2.

30-15-7. Desecration of roadside memorials; penalty.

A. A person shall not knowingly or willfully deface or destroy, in whole or in part, a descanso, also known as a memorial, placed alongside a public road right of way to memorialize the death of one or more persons.

B. A person who violates the provisions of Subsection A of this section is:

(1) for a first offense, guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; and

(2) for a second and subsequent offense, guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. The provisions of this section shall not apply to law enforcement officials or other employees of the state or a political subdivision of the state who in the course of the lawful discharge of their duties move or remove a descanso that obstructs or damages any public road in this state or to an owner of private property upon which a descanso is located.

History: Laws 2007, ch. 35, § 1 and Laws 2007, ch. 242, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 242 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2007, 90 days after the adjournment of the legislature.

Compiler's notes. — Laws 2007, ch. 35, § 1 and Laws 2007, ch. 242, § 1 enacted identical sections. This section is set out as enacted by Laws 2007, ch. 242, § 1. *See* 12-1-8 NMSA 1978.

30-15-8. Criminal damage to property by theft or attempted theft of regulated material; penalty.

A. Criminal damage to property by theft or attempted theft of regulated material consists of the unlawful taking or attempted taking of any regulated material from another that results in any damage to real or personal property. Whoever commits criminal damage to property by theft or attempted theft of regulated material resulting in property damage or property loss, based on the fair market value of that damage or loss, in an amount of:

(1) less than one thousand dollars ($1,000) is guilty of a petty misdemeanor;

(2) one thousand dollars ($1,000) or more but less than two thousand five hundred dollars ($2,500) is guilty of a misdemeanor; or

(3) two thousand five hundred dollars ($2,500) or more is guilty of a fourth degree felony.

B. For the purposes of this section:

(1) "aluminum material" means wire or coil products made from aluminum, an aluminum alloy or an aluminum byproduct;

(2) "copper or brass material" means:

(a) insulated or noninsulated copper wire, hardware or cable of the type used by a public utility, commercial mobile radio service carrier or common carrier that consists of at least twenty-five percent copper; or

(b) a copper or brass item of a type commonly used in construction or by a public utility, commercial mobile radio service carrier or common carrier;

(3) "regulated material" means:

(a) aluminum material;

(b) copper or brass material;

(c) steel material;

(d) a utility access cover;

(e) a water meter cover;

(f) a road or bridge guard rail;

(g) a highway or street sign;

(h) a traffic directional or control sign or signal; or

(i) a catalytic converter that is not part of an entire motor vehicle; and

(4) "steel material" means infrastructure-grade or construction products made from an alloy of iron, chromium, nickel or manganese.

C. Nothing in this section shall be construed to preclude a claim made pursuant to any other section of law.

History: Laws 2022, ch. 56, § 50.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 56, § 50 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

ARTICLE 16
Larceny

30-16-1. Larceny.

A. Larceny consists of the stealing of anything of value that belongs to another.

B. Whoever commits larceny when the value of the property stolen is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits larceny when the value of the property stolen is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits larceny when the value of the property stolen is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits larceny when the value of the property stolen is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits larceny when the value of the property stolen is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Whoever commits larceny when the property of value stolen is livestock is guilty of a third degree felony regardless of its value.

H. Whoever commits larceny when the property of value stolen is a firearm is guilty of a fourth degree felony when its value is less than two thousand five hundred dollars ($2,500).

History: 1953 Comp., § 40A-16-1, enacted by Laws 1963, ch. 303, § 16-1; 1969, ch. 171, § 1; 1979, ch. 118, § 1; 1987, ch. 121, § 1; 2006, ch. 29, § 2.

ANNOTATIONS

Cross references. — For sheriff's duty to search for stolen livestock, *see* 29-1-2 NMSA 1978.

For description of cattle in indictment, *see* 31-7-1 NMSA 1978.

For provision making disposal of livestock levied upon grand larceny, *see* 39-6-3 NMSA 1978.

For provision on recovery of lost or stolen property from junk dealers, *see* 57-7-4 NMSA 1978.

For possession of livestock by person accused of theft without bill of sale being prima facie evidence of illegal possession, *see* 77-9-21 NMSA 1978.

For livestock board inspector's duty to search for stolen livestock, *see* 77-9-33 NMSA 1978.

For failure of person killing cattle or sheep to show hide to inspector as evidence of larceny or receipt of stolen livestock, *see* 77-17-14 NMSA 1978.

The 2006 amendment, effective July 1, 2006, increased the value of property in Subsection B from $100 or less to $250 or less; increased the value of property in Subsection C from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of property in Subsection D from more than $250 to more than $500.

The 1987 amendment, effective June 19, 1987, added the third paragraph, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fourth paragraph, and substituted "is over" for "exceeds" and "more than" for "over" in the fifth paragraph.

I. GENERAL CONSIDERATION.

Larceny of livestock category constitutional. — The portion of larceny statute, which made it a felony to steal livestock regardless of its value, applied to all persons who steal livestock in the state of New Mexico, and did not constitute special legislation contrary to N.M. Const., art. IV, § 24, nor did it deny defendant equal protection under the law. *State v. Pacheco*, 1969-NMCA-127, 81 N.M. 97, 463 P.2d 521 (decided under prior law).

Punishment under former law. — The punishment of the crime of stealing mules by not less than 30 lashes on the bare back was not "cruel and inhuman" under the United States constitution. *Garcia v. Territory*, 1869-NMSC-001, 1 N.M. 415 (decided under prior law).

Restitution does not wipe out crime of larceny and does not deprive state of the right to prosecute for the crime. *State v. Odom*, 1974-NMCA-118, 86 N.M. 761, 527 P.2d 802.

Legislature to define crimes. — It cannot be gainsaid that the hide of neat cattle is a part of the animal and its removal from the carcass without permission of the owner and subsequent appropriation thereof constitutes theft; under former law the legislature said it shall constitute the crime of larceny, and it is no part of the duty of the courts to inquire into the wisdom, the policy or the justness of an act of the legislature. *State v. Thompson*, 1953-NMSC-072, 57 N.M. 459, 260 P.2d 370 (decided under prior law).

Owner's consent to taking. — In order for an owner to consent to a theft, more than a passive assent to the taking is required. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

A person does not consent to his property being taken by purposely leaving it exposed, or failing to resist the taking, even though he may know that another intends to come and steal it. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

Pretended cooperation of an agent of an owner in effecting the theft from the owner is not consent. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

An owner's nonconsent to larceny may be established by the facts and circumstances in evidence. *State v. Ontiveros*, 1990-NMCA-112, 111 N.M. 90, 801 P.2d 672, cert. denied, 111 N.M. 77, 801 P.2d 659.

Authorized sentence unassailable. — Where defendant, who pleaded guilty to larceny of property worth over $2500, a third degree felony, was sentenced to the term authorized by law for a third degree felony his assertion that codefendants were sentenced for a fourth degree felony on the basis of "the same identical act" and that the state had reduced the charge against one codefendant to a fourth degree felony

provided no basis for post-conviction relief. *State v. Follis*, 1970-NMCA-083, 81 N.M. 690, 472 P.2d 655.

Ownership conclusively determined. — A defendant in a larceny case was, after conviction, barred from litigating the question of ownership of the stolen property with owner thereof as charged in the indictment. *Supulver v. Gilchrist & Dawson, Inc*., 1922-NMSC-060, 28 N.M. 339, 211 P. 595.

Evidence held sufficient to sustain larceny conviction. *State v. Davis*, 1982-NMCA-057, 97 N.M. 745, 643 P.2d 614.

Tort liability to thief. — The rules of law governing the liability of appellee for shooting and wounding appellant while stopping a trespass or the theft of watermelons are the same whether the proceedings be civil or criminal. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.

Larceny of firearm punishable as separate offense. — Under the structure of this section, where the property stolen includes both generic property and a firearm, larceny of the firearm is punishable as a separate offense. *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

Unit of prosecution under livestock larceny statute. — In consolidated appeals, where the state charged each defendant with one count of livestock larceny per animal allegedly stolen, resulting in multiple-count criminal informations, and where, prior to trial, defendants filed motions to merge or dismiss the multiple charges, asserting that they instead may only be prosecuted for each episode of theft, the district court did not err in granting the defendants' motions, because in the livestock larceny statute, the New Mexico legislature did not intend a unit of prosecution based on the number of animals stolen in an episode of theft. The livestock larceny statute, instead, expresses an intent to prosecute defendants for each episode of theft. *State v. Torres*, 2022-NMSC-024, *aff'g on other grounds*, 2021-NMCA-045, 495 P.3d 1141 and A-1-CA-38561, mem. op. (N.M. Ct. App., Sept. 30, 2020) (nonprecedential).

Single larceny doctrine. — The single larceny doctrine, also known as the single criminal intent doctrine, is a canon of construction used when the legislature's intent regarding multiple punishments is ambiguous. When several articles of property are stolen by the defendant from the same owner at the same time and at the same place, only one larceny is committed. *State v. Torres*, 2021-NMCA-045, cert. granted.

Single larceny doctrine applied to interpret the unit of prosecution for larceny of livestock. — In consolidated appeals, where defendants, in separate and unrelated incidents of cattle rustling, were each charged with multiple counts of larceny of livestock based on one count per head of cattle stolen, and where the district court dismissed multiple counts against each defendant, concluding that § 30-16-1(G) NMSA

1978, defined the unit of prosecution as a single offense regardless of the number of animals taken, reasoning that the term "livestock" is used by our legislature to refer to animals in the aggregate, and that the term "livestock" is plural and, accordingly, it is the aggregate of the parts such that a single offense exists irrespective of whether one or ten animals were taken, the district court did not err in dismissing multiple counts of larceny or in concluding that the unit of prosecution for larceny of livestock is a single offense regardless of the number of animals taken, because applying the single larceny doctrine, it clarifies that a taking of multiple head of cattle at the same time and place, or a series of takings from a single owner with a single criminal intent, constitutes but one larceny. *State v. Torres*, 2021-NMCA-045, cert. granted.

Larceny of several articles. — Under the "single larceny doctrine," as a matter of judicial policy, a taking of two or more articles of property from the same owner at the same time and place should be prosecuted as only one larceny, even though separate convictions would not be barred by double jeopardy. *State v. Boeglin*, 1977-NMCA-004, 90 N.M. 93, 559 P.2d 1220.

Nothing in the statutory language indicates that the legislature intended to create a separate offense for each taking of property belonging to different persons during a continuous episode. *State v. Brown*, 1992-NMCA-028, 113 N.M. 631, 830 P.2d 183, cert. denied, 113 N.M. 636, 830 P.2d 553.

Charge of larceny is necessarily included in charge of robbery. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

Grand larceny and armed robbery merged. — Where the act of grand larceny was necessary to, or incidental to, the crime of armed robbery which the defendant committed, the offense of grand larceny was merged with the graver offense of armed robbery, and hence although the defendant was properly convicted of both armed robbery and grand larceny, he cannot be doubly punished for both of those crimes. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

No merger of larceny and burglary. — There is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139.

Elements of larceny and burglary differ. — Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary; hence, these two crimes do not merge, and defendant could be convicted of and sentenced for both crimes. *State v. McAfee*, 1967-NMSC-139, 78 N.M. 108, 428 P.2d 647.

Larceny is not a lesser included offense of burglary, since each crime includes an element not contained in the other. Burglary requires entry into a dwelling, whereas

larceny does not, and larceny requires an actual taking, whereas burglary does not. *Yparrea v. Dorsey*, 64 F.3d 577 (10th Cir. 1995).

Assault and larceny separate offenses. — Assault with a deadly weapon, even though committed in connection with a larceny is a separate criminal act, as distinguished from a necessary ingredient of the crime of larceny, and, accordingly, there may be a conviction and punishment for both. *State v. Martinez*, 1967-NMSC-103, 77 N.M. 745, 427 P.2d 260.

Unlawful taking of motor vehicle not included offense. — Violation of 64-9-4A, 1953 Comp. (now repealed), by unlawful taking of a motor vehicle, is not necessarily included in offense of larceny, since the criminal intent requisite for the crime of larceny is the intent to deprive the owner of his property permanently, while a violation of 64-9-4A, 1953 Comp. (now repealed), does not require this intent. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law, statute repealed).

Receipt of stolen goods by thief himself. — A thief who holds on to stolen property cannot be guilty of receiving the stolen property because he cannot receive it from himself, nor can he violate the statute by retaining the stolen property because larceny is a continuing offense; the thief's disposition of the property, however, is action separate from the larceny, and it is neither absurd nor unreasonable to hold that the thief violates 30-16-11 NMSA 1978 when he disposes of the property that he stole. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

Asportation of stolen property. — Larceny was a continuing offense, and if property was stolen in one county and taken by the thief into another, he was guilty of a new caption and asportation in the latter county. *State v. McKinley*, 1924-NMSC-052, 30 N.M. 54, 227 P. 757; *State v. Meeks*, 25 N.M. 231, 180 P. 295.

Transporting stolen livestock and larceny of livestock. — Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violated his constitutional right to be free of double jeopardy. *State v. Clark*, 2000-NMCA-052, 129 N.M. 194, 3 P.3d 689, cert. denied, 129 N.M. 207, 4 P.3d 35.

Double jeopardy. — Because defendant's case was a single prosecution case, under which the single larceny doctrine was implicated, defendant's double jeopardy rights were violated by defendant's two punishments for violations of two clauses of this section. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286, *rev'd*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

Municipal court conviction of larceny is not the same offense for purposes of double jeopardy as a district court conviction of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

Theft of credit card. — Larceny is a lesser included offense of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

III. ELEMENTS OF OFFENSE.

Corpus delicti. — The corpus delicti of larceny is constituted of two elements: that the property was lost by the owner, and that it was lost by a felonious taking. *State v. Paris*, 1966-NMSC-039, 76 N.M. 291, 414 P.2d 512; *State v. Buchanan*, 1966-NMSC-045, 76 N.M. 141, 412 P.2d 565.

Ownership of another. — In cases of larceny and embezzlement, ownership of the property stolen or embezzled must be established in some person or entity capable of owning property. *State v. Parsons*, 1917-NMSC-084, 23 N.M. 520, 169 P. 475.

Ownership issues. — Every larceny included a trespass to possession, which could not exist unless the property was in possession of person from whom it was charged to have been stolen. *State v. Curry*, 1927-NMSC-015, 32 N.M. 219, 252 P. 994.

Particular ownership not essential. — Neither an allegation or proof of ownership in a particular person is an essential element of the offense of larceny, it being sufficient that the proof disclosed that property stolen belonged to one other than defendant. *State v. Ford*, 1969-NMCA-092, 80 N.M. 649, 459 P.2d 353.

Violence not an element. — Larceny, although an essential element of the offense of robbery, is distinguished primarily on the basis of the violence which precedes or accompanies the taking; robbery is a compound or aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

"Steal" connotes intent. — Under the statute using the term "steal," when that term is used in the instruction, it carries with it a meaning that the taking must have been with a felonious intent. *State v. Paris*, 1966-NMSC-039, 76 N.M. 291, 414 P.2d 512.

Specific intent to permanently deprive requisite. — One of the essential elements of larceny is that of intent on the part of defendant to permanently deprive the owners of their property; hence, a taking of property by defendant with the intent of using it temporarily and then returning it would not constitute larceny. *State v. Parker*, 1969-NMCA-056, 80 N.M. 551, 458 P.2d 803, cert. denied, 80 N.M. 607, 458 P.2d 859.

As distinguished from wrongful taking of car. — Larceny includes the concept of criminal intent, and in addition, the intention to permanently deprive the owner of possession of his property, such intention to permanently deprive is not an essential element of 64-9-4A, 1953 Comp., prohibiting intentional taking of a motor vehicle without consent of the owner. *State v. Austin*, 1969-NMCA-095, 80 N.M. 748, 461 P.2d 230 (decided under prior law, statute repealed).

Embezzlement. — A legislative intent to include the element of intent to permanently deprive the owner of his property in crime of embezzlement cannot be ascertained by comparing the embezzlement statute 30-16-8 NMSA 1978 with this section, because larceny is defined in terms of stealing and comparable language is not used in the embezzlement statute. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

Value of livestock immaterial. — Under former law, in prosecution for depriving owner of possession of certain sheep, value of the animals was not material, it did not need to be alleged and if alleged, did not need to be proved. *State v. Anaya*, 1922-NMSC-059, 28 N.M. 283, 210 P. 567; *see also State v. Jaramillo*, 1919-NMSC-013, 25 N.M. 228, 180 P. 286; *State v. Lucero*, 1913-NMSC-011, 17 N.M. 484, 131 P. 491 (prosecutions for larceny of cattle).

Theft from employer. — Since the physical control exercised by an employee over property entrusted to him by his employer is merely custody and not possession, an employee takes the property from his employer's possession, and thereby commits a trespass, when he converts it; he is accordingly guilty of larceny, without regard to whether he entertained such intent at the time he acquired custody, or not. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

Aiding and abetting. — To be an aider and abettor in the crime of larceny one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking. *State v. Duran*, 1974-NMCA-088, 86 N.M. 594, 526 P.2d 188, cert. denied, 86 N.M. 593, 526 P.2d 187.

Effect of intoxication on intent. — Voluntary intoxication alone is not a defense to a charge of larceny, but if a defendant claims he was so intoxicated as to be unable to form the necessary intent, the question of intent is a matter for the jury. *State v. Lucero*, 1962-NMSC-077, 70 N.M. 268, 372 P.2d 837.

Restitution no bar to conviction. — Fact that defendant turned himself in to owner and worked to make restitution for theft, that owner told defendant he would have larceny charges against him dismissed and that this was not done, if true, provided no legal basis for withdrawal of guilty plea. *State v. Odom*, 1974-NMCA-118, 86 N.M. 761, 527 P.2d 802.

IV. INDICTMENT AND INFORMATION.

Allegation of ownership. — In indictment charging embezzlement it is essential to aver the felonious conversion of the property of another; unless the rule is modified by statute, the allegation must be as accurate as in an indictment for larceny, and in case of an association, facts must be averred to show that the association could own property in its name. *State v. Parsons*, 1917-NMSC-084, 23 N.M. 520, 169 P. 475 (decided under prior law).

Laying ownership in representative. — Where owner of stolen mule was dead, indictment charging larceny was to lay the ownership in his representative and not in his estate. *Territory v. Valles*, 1909-NMSC-026, 15 N.M. 228, 103 P. 984.

Deprivation of owner's possession understood. — Where indictment charged that defendant "then and there, unlawfully and feloniously did take, steal and knowingly drive away, etc." the animal in question, it was not necessary to further allege that the owner was thereby deprived of the immediate possession of the animal. *State v. Roberts*, 1914-NMSC-004, 18 N.M. 480, 138 P. 208.

Describing stolen animal in indictment as a "cow" was sufficient. *Wilburn v. Territory*, 1900-NMSC-028, 10 N.M. 402, 62 P. 968.

Word "feloniously" unnecessary. — It was not necessary to use word "feloniously" in information charging larceny from house or other building, under Laws 1869-1870, ch. 26, §§ 1, 2 (former 40-45-6, 40-45-7, 1953 Comp.), to support sentence of three to five years. *State v. Jones*, 1930-NMSC-007, 34 N.M. 499, 285 P. 501.

Allegation of knowledge. — The third crime defined by 79, 1897 C.L. (former 40-4-17, 1953 Comp.), of knowingly killing or otherwise depriving the owners of animals of their immediate possession, was a purely statutory one; use of word "knowingly" made knowledge an element of the crime, and an indictment failing to allege it in words of statute or words of similar import failed to state the offense. *Territory v. Cortez*, 1909-NMSC-010, 15 N.M. 92, 103 P. 264 (decided under prior law).

Allegation that defendant "committed crime of larceny" would be sufficient where the crime constituted both statutory grand larceny and common-law larceny. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444 (decided under prior law).

Information adequate. — Information charging grand larceny, particularized by referring to section relating to grand larceny, was sufficient where crime was covered by that section. *State v. Lucero*, 1962-NMSC-077, 70 N.M. 268, 372 P.2d 837.

Particulars specified. — Where amendment of information which charged defendant with larceny of sheep apprised him of particulars he might have asked for in a bill of particulars, he suffered no injustice. *State v. Shroyer*, 1945-NMSC-014, 49 N.M. 196, 160 P.2d 444.

Defendant entitled to more definite specification. — Where charge simply alleged that defendant did steal and carry away certain articles of personal property of a stated value and being the property of a named individual, and there was not a single word to indicate the nature or character of the property, the charge was too vague and indefinite upon which to deprive defendant of his liberty when he had sought a more definite specification of what constituted the personal property which he was charged with stealing. *State v. Campos*, 1968-NMSC-177, 79 N.M. 611, 447 P.2d 20.

Selection of charges. — Where defendant was alleged to have stolen $400 in quarters from a change machine by using a rigged bill, he is potentially subject to being charged with both larceny and the misdemeanor offense of cheating a machine or device, and the preemption rationale of the general-specific rule did not preclude prosecution under either or both of the statutes. *State v. Davis*, 2000-NMCA-105, 129 N.M. 773, 14 P.3d 38, cert. denied, 130 N.M. 17, 16 P.3d 442.

Charging in alternative. — An indictment under Laws 1884, ch. 47, § 15 (former 40-4-17, 1953 Comp.), relating to larceny, embezzlement or killing of animals, could charge that accused committed the crime in each of the specified ways, so long as they were not repugnant. *State v. McKinley*, 1924-NMSC-052, 30 N.M. 54, 227 P. 757.

Some single offenses were of a nature to be committed by many means, and a count was not necessarily double which charged several of the means, if they were not repugnant. *Territory v. Harrington*, 1912-NMSC-006, 17 N.M. 62, 121 P. 613; *see also Territory v. Eaton*, 1905-NMSC-011, 13 N.M. 79, 79 P. 713.

Additional details surplusage. — Information charging defendant with stealing a washing machine belonging to a certain company, from the company warehouse, of the value of $300, which used the term "grand larceny" and referred to the statutory section defining grand larceny, sufficiently charged defendant of the crime of grand larceny, and not larceny from a warehouse, as defendant contended; the additional averment that the machine was stolen from the company's warehouse was surplusage, its effect, if any, being merely to place an additional burden on the state in proving the case. *State v. Johnson*, 1955-NMSC-070, 60 N.M. 57, 287 P.2d 247.

Variance not jurisdictional. — In conviction for burglary and larceny, variance between indictment and proof regarding name and address of victim was not jurisdictional and was cured by jury's guilty verdict. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, and cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

"Criminal complaint" insufficient to confer jurisdiction. — Order revoking a suspended sentence given defendant on a plea of guilty to charges of burglary and grand larceny contained in a "criminal complaint" filed by sheriff must be reversed, as the defendant's sentence was imposed without jurisdiction in the court, due to lack of a proper charge against him. *State v. Chacon*, 1957-NMSC-030, 62 N.M. 291, 309 P.2d 230.

Designation of crime in bond. — A recognizance which described the alleged offense against the principal as "having sold and thereby deprived the owner thereof of a horse, the same being the crime of larceny" sufficiently designated the crime to bind the sureties on the bond or recognizance. *Territory v. Minter*, 1907-NMSC-002, 14 N.M. 6, 88 P. 1130.

V. EVIDENCE.

A. IN GENERAL.

Proof of venue. — Venue, like any other fact in a case, could be proven by circumstantial evidence. *State v. Lott*, 1936-NMSC-024, 40 N.M. 147, 56 P.2d 1029; *State v. Mares*, 1921-NMSC-048, 27 N.M. 212, 199 P. 111.

Inference of intent to steal. — An intent to steal was an element to be inferred by the jury from the facts and circumstances established upon the trial. Such an inference might be drawn from facts showing that property was taken in one county and driven through several others and kept for 10 or 12 days before it was found and retaken by its owner. *State v. McKinley*, 1924-NMSC-052, 30 N.M. 54, 227 P. 757.

Exhibit relevant to intent. — Fifty foot cotton rope with pipe T's on one end taken from defendant's car, which was identified as device capable of being used in larceny of signal wire, was relevant and material to preparation and intent of defendant, even though there was no evidence that in fact the exhibit was so used. *State v. Hardison*, 1970-NMCA-043, 81 N.M. 430, 467 P.2d 1002.

Extra-judicial statements inadmissible. — In prosecution for larceny of scrap metal, defendant's out-of-court statements to witness that codefendant had bought some junk and that he (defendant) was going to haul the junk were properly disallowed as self-serving, and were not admissible as part of res gestae since proffered testimony of witness did not show that they were contemporaneous with a shocked condition or were spontaneous. *State v. Hunt*, 1972-NMCA-055, 83 N.M. 753, 497 P.2d 755, cert. denied, 83 N.M. 740, 497 P.2d 742.

B. LARCENY OF LIVESTOCK.

Circumstantial evidence. — In prosecution for larceny of cattle, the corpus delicti could be proved by circumstantial evidence. *State v. Ortega*, 1932-NMSC-003, 36 N.M. 57, 7 P.2d 943.

Direct evidence of nonconsent of the owner to the killing of an animal was not required as a matter of law, and such nonconsent could be shown by circumstantial evidence. *State v. Parry*, 1920-NMSC-096, 26 N.M. 469, 194 P. 864.

Establishing animal's identity. — It was equally as competent to establish the identity of a stolen animal by a brand as by its color or by any distinguishing mark. *Territory v. Valles*, 1909-NMSC-026, 15 N.M. 228, 103 P. 984.

Proof of ownership. — Where indictment alleged that animal unlawfully killed was the property of copartners, it was necessary to prove the ownership as laid out in the indictment beyond a reasonable doubt. *Territory v. Sais*, 1909-NMSC-021, 15 N.M. 171, 103 P. 980.

When brand required as evidence. — Only when the evidence of ownership of animals depended upon a brand was it necessary to introduce a certified copy of the recorded brand in evidence. *State v. Meeks*, 1919-NMSC-015, 25 N.M. 231, 180 P. 295.

Brand not conclusive. — In prosecution for larceny of a steer, the brand was but prima facie evidence of ownership, and did not prevent prosecution from introducing other evidence of true ownership of animal at time of offense. *Chavez v. Territory*, 1892-NMSC-014, 6 N.M. 455, 30 P. 903.

Brand not conclusive proof of ownership. — Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendants owned the animal, under statute providing that registration in brand book under seal of the cattle sanitary board (now New Mexico livestock board) constituted prima facie proof that person owning the recorded brand was owner of animal branded with such brand. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Disposal of meat as part of res gestae. — In prosecution for larceny of cattle, evidence as to hogs eating beef at ranch of a defendant was properly admitted as part of res gestae. *Territory v. Leslie*, 1910-NMSC-002, 15 N.M. 240, 106 P. 378.

Prima facie case. — In prosecution for larceny of cattle, proof of ownership in alleged owner, that the cattle were stolen, that shortly thereafter they were found near the ranch of defendant, bearing his brand, freshly put on, and that he then claimed to own them, was sufficient prima facie proof of an unlawful taking and asportation, and made a prima facie case of larceny, although other cattle of the owner grazed in the same locality where the stolen cattle were found. *State v. Liston*, 1921-NMSC-104, 27 N.M. 500, 202 P. 696.

In prosecution for larceny of mule, testimony tending to establish identity of mule, ownership by named person as administrator, and possession of mule by defendant was enough to make out a prima facie case of guilt. *Territory v. Valles*, 1909-NMSC-026, 15 N.M. 228, 103 P. 984.

Offense established. — Evidence of discovery of two calves belonging to others in weaning pen of ranch on which the defendant was foreman, along with other circumstances, afforded adequate support for larceny conviction. *State v. Compton*, 1953-NMSC-036, 57 N.M. 227, 257 P.2d 915.

Conviction justified. — Possession of hide, ears and hoofs of heifer stolen from ranch, and their concealment, together with other circumstances, justified conviction for the theft. *State v. Lott*, 1936-NMSC-024, 40 N.M. 147, 56 P.2d 1029.

C. VALUE.

Testimony of owner admissible. — An owner's testimony regarding the value of an item stolen is admissible and sufficient to withstand a motion for a directed verdict based on lack of evidence of value. *State v. Romero*, 1975-NMCA-017, 87 N.M. 279, 532 P.2d 208.

Store owner's calculations. — Testimony of store owner in the form of direct evidence of items taken and their value, based upon his own knowledge and a calculation of the value of the items stolen by determining how many items were in the bins before the theft and how many were left, was substantial evidence as to the value of the goods stolen. *State v. Landlee*, 1973-NMCA-143, 85 N.M. 726, 516 P.2d 697.

Cost of television set. — Evidence that stolen television set was purchased new in March or April prior to the December it was stolen, that the purchase price was $750 and that it was "working all right" before it was stolen, was substantial evidence of value, and further, as defendant elicited this information on cross-examination, he was not in a position to complain about it. *State v. Phillips*, 1971-NMCA-114, 83 N.M. 5, 487 P.2d 915.

Value of checks. — Defendant was not entitled to an instruction on fourth degree larceny as a lesser included offense of third degree larceny on the grounds that the $3,200 in checks he stole were neither endorsed nor stamped and therefore worthless. The value of a check, in the absence of proof to show a lesser value, is measured by what the owner of the check could expect to receive for the check at the time of the theft, i.e. the check's face value. *Gallegos v. State*, 1992-NMSC-014, 113 N.M. 339, 825 P.2d 1249.

Market value. — Testimony of expert witnesses that a fair market value of stolen scrap metal was in excess of $100 constituted substantial evidence to support conviction of defendants for larceny of property worth over $100. *State v. Hunt*, 1972-NMCA-055, 83 N.M. 753, 497 P.2d 755, cert. denied, 83 N.M. 740, 497 P.2d 742.

Cost or replacement value distinguished. — In prosecution for larceny of a plow, where jury was instructed to determine market value thereof, jury was not warranted in considering its cost or replacement value. *State v. Gallegos*, 1957-NMSC-052, 63 N.M. 57, 312 P.2d 1067.

Evidence sufficient. — Testimony that part of the item stolen, if it was considered as scrap, was worth $30, that its replacement cost was $110 and that its market value was $170 to $180 was sufficient for a conviction under this statute for larceny of an item in excess of $100 but less than $2500. *State v. Landlee*, 1973-NMCA-112, 85 N.M. 449, 513 P.2d 186.

D. SUFFICIENCY.

Identification adequate. — Where victim and witness of robbery perpetrated by two masked men described, on the night of the robbery, the robber and the clothes he was

wearing, and at trial identified clothes found in defendant's apartment and defendant himself on basis of his posture, size and stoop, there was sufficient evidence to establish that defendant was one of the men involved in the robbery. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *see also State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

Exclusion of every reasonable hypothesis save guilt. — Circumstantial evidence of defendant's aiding or abetting larceny was substantial and did not fail to exclude every reasonable hypothesis other than defendant's guilt, where he changed positions in car containing stolen property and helped reload a television set which fell off the roof of the vehicle, which actions excluded the defense hypothesis that defendant was asleep and knew nothing about the larceny. *State v. Phillips*, 1971-NMCA-114, 83 N.M. 5, 487 P.2d 915.

In prosecution for larceny of signal wire, tracks from car belonging to codefendant and along line of cut wire, which were shown to match those made by defendant's boots, along with unexplained flight from the scene and removal of some cut wire about 100 feet in the direction of the car excluded every reasonable hypothesis other than guilt. *State v. Hardison*, 1970-NMCA-043, 81 N.M. 430, 467 P.2d 1002.

"Exclusive" possession. — If the unexplained possession of stolen property found in defendant's apartment was within his "exclusive" possession, that circumstance coupled with other culpatory and incriminating circumstances is sufficient to sustain conviction of larceny. *State v. Flores*, 1966-NMSC-059, 76 N.M. 134, 412 P.2d 560.

The "exclusive" possession which creates an inference of guilt does not mean that the possession must be separate from all others provided there is other evidence to connect the defendant with the offense. *State v. Flores*, 1966-NMSC-059, 76 N.M. 134, 412 P.2d 560.

Proof of ownership. — In prosecuting larceny, the state need not prove ownership in a particular person; proof that the property belonged to someone other than the defendant is sufficient. *State v. Brown*, 1992-NMCA-028, 113 N.M. 631, 830 P.2d 183, cert. denied, 113 N.M. 636, 830 P.2d 553.

Sale of property. — While something more than possession alone must be shown to establish corpus delicti of larceny, where ring owned by woman was relinquished by her to jailer when she was confined in jail in which defendant was a trustee and defendant had the ring in his possession afterwards and sold it to another, the corpus delicti of larceny was established by circumstantial evidence. *State v. Buchanan*, 1966-NMSC-045, 76 N.M. 141, 412 P.2d 565.

Evidence that defendant employee took property belonging to corporate owner from the business where it had been repaired, sold the property to a third person and retained the proceeds of the sale, and that defendant had no authority either to obtain possession of the property or to sell it, was evidence of an unlawful taking with the

requisite intent. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

Taking money from lounge constituted larceny even where the person defendant took the money from was employed at the lounge, had custody of the money, and consented to the taking of the money, since the money belonged to the owner, not the employee and even if the employee had turned the money over to the defendant willingly, she had no authority to do so. *State v. Rhea*, 1974-NMCA-030, 86 N.M. 291, 523 P.2d 26, cert. denied, 86 N.M. 281, 523 P.2d 16.

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. *State v. Peterson*, 1985-NMCA-109, 103 N.M. 638, 711 P.2d 915, cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

Sufficient evidence to support conviction for larceny over $20,000. — Where defendant was convicted of larceny over $20,000 and burglary in connection with money stolen from a home improvement store in Farmington, New Mexico, where defendant formerly worked as a department manager, and where, at trial, the state presented video surveillance of the incident that showed an individual wearing "all black" using a key to enter the store through the front doors, disable the alarm system, enter the office, unlock a code-protected safe, take cash from the safe, and leave the store in a little over two minutes, and where defendant claimed that there was insufficient evidence to support his larceny conviction because witnesses could not agree on the exact amount that had been taken and that the amount taken was not established by documentary evidence, there was sufficient evidence to support defendant's conviction for larceny over $20,000 where the state presented testimony from a security officer and the investigating officer regarding the amount that was stolen. Although the two witnesses did not agree on the exact amount that had been taken, both witnesses testified that over $20,000 had been stolen from the home improvement store. *State v. Stalter*, 2023-NMCA-054, cert. denied.

Sufficient evidence to support retrial for larceny. — When reviewing whether sufficient evidence exists to support retrial, an appellate court includes in its review any erroneously admitted evidence, and if all the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred. *State v. Winters*, 2015-NMCA-050, cert. denied, 2015-NMCERT-004.

Following reversal of defendant’s conviction for larceny over $2,500, the court of appeals held that the evidence that defendant’s truck was found at the scene with the stolen property in the bed of the truck, combined with the erroneously admitted arresting officer’s opinion that shoe prints found at the scene matched shoe prints found at defendant’s residence, was sufficient to permit the jury to reasonably infer that defendant was at the scene and committed the theft; defendant is subject to retrial on remand. *State v. Winters*, 2015-NMCA-050, cert. denied, 2015-NMCERT-004.

Evidence insufficient. — Evidence that smooth soled tracks were found between area where wire was being larcenously cut and car belonging to one defendant, and that woman within the car was wearing smooth soled moccasins, where no attempt to match moccasins to tracks was made, was insufficient to exclude every reasonable hypothesis other than her guilt. *State v. Hardison*, 1970-NMCA-043, 81 N.M. 430, 467 P.2d 1002.

Where proof relied upon to establish defendant's guilt of breaking and entering and larceny was purely circumstantial and not incompatible with innocence on any rational theory, or incapable of explanation on any reasonable hypothesis, it was error for the court not to have directed a verdict of acquittal at the close of the state's case. *State v. Campos*, 1968-NMSC-177, 79 N.M. 611, 447 P.2d 20.

Insufficient evidence that value of stolen property over $2,500. *State v. Seward*, 1986-NMCA-062, 104 N.M. 548, 724 P.2d 756, cert. denied, 104 N.M. 522, 724 P.2d 231.

Insufficient evidence of intent to permanently deprive owner of stolen items. — Where defendant was convicted of larceny based on DNA evidence found in a burglarized house, there was insufficient evidence to permit a rational jury to find the essential facts to establish each element of the crime of larceny beyond a reasonable doubt, because although there was evidence that defendant had entered the property without authorization, the state, without presenting any evidence linking defendant to the stolen items, failed to establish, either directly or by circumstantial evidence, that defendant took or carried away the stolen items with the specific intent to permanently deprive the owner of those items. *State v. Ledbetter*, 2020-NMCA-046.

VI. INSTRUCTIONS.

Intent. — Where on appeal it was contended an error occurred for the district court to give a general intent instruction without instructing the jury that it did not apply to a specific intent crime, because the instruction substantially followed the applicable law, there was no fundamental error. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

Error in time period charged harmless. — Where crime of grand larceny was charged as having been committed on February 15, 1953, the information charging theft of a washing machine over the value of $20.00 was filed January 4, 1954, and meanwhile the statute defining the crime was amended on June 12, 1953, by substituting $50.00 in lieu of $20.00, fact that the court's instructions permitted jury to find that the offense had occurred on February 18, 1953, or at any time within the three years next preceding the date the information was filed was harmless, as the evidence conclusively showed that the offense had occurred prior to the effective date of the amendment, and moreover, the error was waived. *State v. Johnson*, 1955-NMSC-070, 60 N.M. 57, 287 P.2d 247.

Incorrect identification of victim not fundamental error. — Instructions to which defendant in prosecution for burglary and larceny made no objection, incorrectly setting forth the name and address of the victim, did not constitute fundamental error. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, and cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Charge on circumstantial evidence proper. — Instruction on circumstantial evidence concerning the stealing and unlawful branding of a bull calf was not erroneous because of inclusion of statement "that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Cumulative instruction. — The court was not required to give instruction on circumstantial evidence which was cumulative. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Instruction on larceny by employee incorrect. — 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 defendant's physical control of the equipment was no more than custody on behalf of an employer who retained possession. *State v. Robertson*, 1977-NMCA-044, 90 N.M. 382, 563 P.2d 1175, cert. denied, 90 N.M. 637, 567 P.2d 486.

Larceny as included offense. — Because robbery is an aggravated larceny, so that larceny is necessarily included within the offense of robbery, defendant had the right to have instructions on larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish that offense. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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 20 N.M.L. Rev. 265 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 50 Am. Jur. 2d Larceny § 1 et seq.

Should ownership of property be laid in the husband or the wife in an indictment for larceny, 2 A.L.R. 352.

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.

"Asportation" which will support charge of larceny, 19 A.L.R. 724, 144 A.L.R. 1383.

Appropriation of property after obtaining possession by fraud as larceny, 26 A.L.R. 381.

Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny, 29 A.L.R. 1031.

Individual criminal responsibility of officer or employee for larceny, through corporate act, of property of third person, 33 A.L.R. 787.

Larceny or embezzlement by one spouse of other's property, 55 A.L.R. 558.

"Larceny" within fidelity bond, 56 A.L.R. 967.

Sufficiency of verdict on conviction, which fails to state value of property, 79 A.L.R. 1180.

Dog as subject of larceny, 92 A.L.R. 212.

Larceny of gas, 113 A.L.R. 1282.

Distinction between larceny and embezzlement, 146 A.L.R. 532.

Gambling or lottery paraphernalia as subject of larceny, 51 A.L.R.2d 1396.

Relative rights, as between purchaser of chattel from one who previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Law as to cats, 73 A.L.R.2d 1032, 8 A.L.R.4th 1287, 55 A.L.R.4th 1080, 68 A.L.R.4th 823.

Carcass: stealing carcass as within statute making it larceny to steal cattle or livestock, 78 A.L.R.2d 1100.

Taking, and pledging or pawning, another's property as larceny, 82 A.L.R.2d 863.

Stolen money or property as subject of larceny, 89 A.L.R.2d 1435.

Entrapment or consent, 10 A.L.R.3d 1121.

Cotenant taking cotenancy property, 17 A.L.R.3d 1394.

Single or separate larceny predicated upon stealing property from different owners at same time, 37 A.L.R.3d 1407.

Rented vehicles: criminal liability in connection with rental of motor vehicles, 38 A.L.R.3d 949.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

Price tags: changing of price tags by patron of self-service store as criminal offense, 60 A.L.R.3d 1293.

Gambling: retaking of money lost at gambling as robbery or larceny, 71 A.L.R.3d 1156.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Criminal liability for wrongfully obtaining unemployment benefits, 80 A.L.R.3d 1280.

Instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 A.L.R.3d 824.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of computer programs, files, or systems, 51 A.L.R.4th 971.

Cat as subject of larceny, 55 A.L.R.4th 1080.

Consideration of sales tax in determining value of stolen property or amount of theft, 63 A.L.R.5th 417.

What constitutes violation of 15 USCS § 714m(c), proscribing larceny or conversion of property owned by or pledged to commodity credit corporation, 109 A.L.R. Fed. 871.

52A C.J.S. Larceny §§ 1 to 29.

30-16-2. Robbery.

Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.

Whoever commits robbery is guilty of a third degree felony.

Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

History: 1953 Comp., § 40A-16-2, enacted by Laws 1963, ch. 303, § 16-2; 1973, ch. 178, § 1.

ANNOTATIONS

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For aggravated assault, *see* 30-3-2 NMSA 1978.

For assault with intent to commit a violent felony, *see* 30-3-3 NMSA 1978.

I. GENERAL CONSIDERATION.

Specification of "anything of value". — Because the use of the phrase "anything of value" in Section 30-16-2 NMSA 1978 to describe the stolen property does not specify what type of property theft will be punished, the state's legal theory of the crime supplies the "anything of value" element of robbery in cases where that crime is charged. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

Specification of "anything of value" resulted in double jeopardy. — Where the child was charged with armed robbery for taking both an automobile and the keys to the automobile in violation of Section 30-16-2 NMSA 1978 and for the unlawful taking of a motor vehicle in violation of Section 30-16D-1 NMSA 1978, the child's conduct underlying both crimes was unitary; and both convictions required the same proof of the theft of the automobile, the unlawful taking of a motor vehicle conviction was subsumed by the robbery conviction and the child's conviction for both resulted in double jeopardy. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

Crime of violence. — The district court properly included defendant's state robbery conviction as a violent felony under 18 U.S.C. § 924, the Armed Career Criminal Act. *United States v. Lujan*, 9 F.3d 890 (10th Cir. 1993).

Increased penalty provision strictly construed. — A more severe punishment on conviction for a second offense is deemed highly penal and therefore must be strictly construed. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

Enhanced sentence not double jeopardy. — Validly increasing a defendant's sentence after conviction according to the provisions of the enhancement statute does not amount to double jeopardy. *State v. Stout*, 1981-NMSC-045, 96 N.M. 29, 627 P.2d 871.

Sentencing statutes not conflicting. — Former Section 31-18-4 NMSA 1978 does not conflict with this section in providing that the first year of the statutory sentence for a felony, other than a capital felony, in commission of which a firearm was used, shall not be suspended; the two statutes are in harmony, each expressing a separate legislative intent. *State v. Wilkins*, 1975-NMCA-069, 88 N.M. 116, 537 P.2d 1012, cert. denied, 88 N.M. 319, 540 P.2d 249 (decided under prior law, statute repealed).

Even though this section provides an increased penalty for second or subsequent armed robberies, it does not conflict with the Habitual Offender Statute, 31-18-5 NMSA 1978 (now repealed), which applies only to a current felony "not otherwise punishable by death or life imprisonment," since second or subsequent armed robberies are punishable by life imprisonment. *State v. Roland*, 1977-NMCA-043, 90 N.M. 520, 565 P.2d 1037, cert. denied, 90 N.M. 637, 567 P.2d 486 (decided under prior law, statute repealed).

Habitual Offender Statute, 31-18-5 NMSA 1978 (now repealed), does not apply to second or subsequent armed robberies. *State v. Roland*, 1977-NMCA-043, 90 N.M. 520, 565 P.2d 1037, cert. denied, 90 N.M. 637, 567 P.2d 486 (decided under prior law, statute repealed).

Intent of provision. — The fact that the defendant was convicted in one criminal proceeding of two armed robberies charged under separate counts of one indictment was not sufficient to invoke the increased penalty provision of this section, which is intended to serve as a warning to first offenders and to provide increased punishment for those who persist in violations of the law after having been formally convicted. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

When enhanced penalty proper. — Any armed robbery offense committed subsequent to a conviction for armed robbery is a first degree felony calling for the enhanced penalty contemplated by this section. *State v. Garcia*, 1978-NMSC-039, 91 N.M. 664, 579 P.2d 790.

Pretrial notice of enhanced sentence not required. — The state is not required to give a defendant notice before trial on the substantive offense that enhancement may be sought after conviction. By filing a pleading seeking to enhance the defendant's sentence after conviction, the state complies with due process requirements. *State v. Stout*, 1981-NMSC-045, 96 N.M. 29, 627 P.2d 871.

II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.

Single intent not applicable to robbery. — Robbery is not merely a property crime, but a crime against a person and the robbery statute is designed to protect citizens from violence and to punish the use of violence. The legislature intended to allow separate charges for each individual against whom violence or the threat of violence is separately used. The unit of prosecution for robbery is not based on the defendant's intent. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

Separate and discrete acts. — Where defendant had the intent to steal only one victim's property, but used separate and discrete acts of force and threats of force against two victims in an attempt to obtain that property, multiple attempted robbery charges do not violate double jeopardy. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

Single or multiple thefts. — Where property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act. *State v. Allen*, 1955-NMSC-015, 59 N.M. 139, 280 P.2d 298.

Question for jury. — Whether acts of defendant and companions in stealing victim's vodka and later returning, whipping victim and stealing money, constituted two offenses or only one was a question of fact for the jury under instructions to disregard testimony of more than one taking if they found the takings constituted separate offenses. *State v. Allen*, 1955-NMSC-015, 59 N.M. 139, 280 P.2d 298.

Two convictions for one conspiracy unconstitutional. — Because the defendant robbed two different victims but only one conspiracy to commit the robberies existed, it was violation of double jeopardy to convict the defendant for two conspiracies, as he was punished twice for the same offense. *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772, cert. denied, 115 N.M. 795, 858 P.2d 1274.

Charge of larceny is necessarily included in charge of robbery. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36.

Legislative intent for separate punishments. — As each offense includes one statutory element not included in the other, the presumption is that the legislature intended to punish separately the two offenses of aggravated assault and armed robbery. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Attempted robbery and conspiracy to commit robbery. — Convictions for attempted robbery and conspiracy to commit robbery did not violate the constitutional prohibition against double jeopardy. *State v. Carrasco*, 1997-NMSC-047, 124 N.M. 64, 946 P.2d 1075.

Unitary conduct in commission of murder and robbery. — Since the defendant's conduct in stabbing and robbing a cabdriver was unitary, the elements of armed robbery were subsumed by the elements of felony murder in the course of an armed robbery and conviction and sentencing of the defendant for both felony murder and the underlying felony of armed robbery violated double jeopardy. *State v. Contreras*, 1995-NMSC-056, 120 N.M. 486, 903 P.2d 228.

Double jeopardy. — *State v. Maes*, 1983-NMCA-073, 100 N.M. 78, 665 P.2d 1169 is no longer considered to be controlling authority, because the analysis contained therein predates, and has been replaced by, the two-pronged analysis of *Swafford v. State*, 1991-NMSC-043, 112 N.M. 3, 810 P.2d 1223 for determining whether a defendant's right to be free from double jeopardy is violated by his convictions. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Convictions for felony murder and robbery, because they arise out of unitary conduct, violate the defendant's right to be free from double jeopardy. *State v. Duffy*, 1998-NMSC-014, 126 N.M. 132, 967 P.2d 807.

Where armed robbery provided the underlying felony for defendant's first degree murder conviction, the elements of the former crime were subsumed within the elements of the murder offense and, therefore, reversal of defendant's conviction and sentence for armed robbery was required. *State v. Foster*, 1999-NMSC-007, 126 N.M. 646, 974 P.2d 140.

Plaintiff who was convicted in a justice of the peace court (now replaced by magistrate courts) of petty misdemeanor of receiving stolen property, and was later convicted in the district court of the second degree felony of armed robbery, was not placed in double jeopardy, and the state was not barred or estopped from prosecuting and convicting him for the armed robbery. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

The defendant's acts of taking truck keys and using them to drive the truck away supported separate convictions for armed robbery and unlawful taking of a vehicle, and his double jeopardy right to be free from multiple punishment was not violated by his sentence for unlawful taking. *State v. McGruder*, 1997-NMSC-023, 123 N.M. 302, 940 P.2d 150.

Grand larceny and armed robbery merged. — Where the act of grand larceny was necessary to, or incidental to, the crime of armed robbery which the defendant committed, the offense of grand larceny was merged with the graver offense of armed robbery, and hence although the defendant was properly convicted of both armed robbery and grand larceny, he could not be doubly punished for both of those crimes. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

Offense of receiving stolen property cannot be included within armed robbery. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

No bar to subsequent prosecution. — The facts necessary to sustain a conviction of receiving stolen property could not possibly sustain a conviction of armed robbery, which is essential to make a prior conviction a bar to a subsequent prosecution and conviction for a greater offense. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

The fact that defendant pleaded guilty, or at least indicated his guilt and was thereupon convicted of receiving stolen property, which property later turned out to be a portion of the property taken by him in the armed robbery, in no way clothed him with immunity from being charged, tried and convicted of the far more serious offense of which he was guilty. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

No bar to dual punishments. — The offenses of receiving stolen property and armed robbery fail to fall within the prohibition against punishment for more than one offense because the criminal intent essential to the felony of armed robbery is not an essential element of the petty misdemeanor of receiving stolen property. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

Merger with aggravated battery. — Aggravated battery merges with a robbery offense when the defendant's intent to take a victim's purse includes an intent to injure the victim. *State v. Gammil*, 1989-NMCA-005, 108 N.M. 208, 769 P.2d 1299, *overruled in part on other grounds*, *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

Offense of aggravated battery did not merge with armed robbery. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Separate punishment for armed robbery and aggravated battery is consistent with legislative intent and does not constitute double jeopardy. *State v. Fuentes*, 1994-NMCA-158, 119 N.M. 104, 888 P.2d 986, cert. denied, 119 N.M. 168, 889 P.2d 203 (1995).

Aggravated battery does not constitute lesser included offense. — The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Elements of aggravated battery and armed robbery differ. — Since taking the victim's purse was a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force was a fact required to be proved under the aggravated battery charge, while threatened use of force would be acceptable proof under the armed robbery charge, the elements of the two crimes were not the same. *State v. Sandoval*, 1977-NMCA-026, 90 N.M. 260, 561 P.2d 1353, cert. denied, 90 N.M. 637, 567 P.2d 486.

Sentences for robbery and aggravated burglary proper. — Since theft is a necessary element of robbery but it is not necessarily involved in aggravated burglary, which requires only the element of intent to commit felony or theft, while an unauthorized entry is an element of aggravated burglary but not of robbery, the crimes did not involve the same elements, and therefore, defendant could be sentenced for each of these crimes. *State v. Ranne*, 1969-NMCA-029, 80 N.M. 188, 453 P.2d 209.

Consecutive sentences for armed robbery and false imprisonment were proper; since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it was clear the crimes did not merge even when considered in light of the facts. *State v. Moore*, 1989-NMCA-073, 109 N.M. 119, 782 P.2d 91, cert. denied, 109 N.M. 54, 781 P.2d 782; *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Robbery of money and unlawful taking of vehicle not merged. — Unlawful taking of a vehicle in violation of 64-9-4A, 1953 Comp., was not a necessary ingredient of offense of robbery of money by use or threatened use of force and violence; hence, defendant committed two separate and distinct criminal offenses, and the fact that they were committed on the same day, or even that one succeeded the other as part of one episode of criminal activity, did not cause them to merge. *State v. Eckles*, 1968-NMSC-079, 79 N.M. 138, 441 P.2d 36 (decided under prior law, statute repealed).

Convictions for robbery and battery against a household member did not violate double jeopardy. — Where defendant, who was a former employee of a restaurant, had an intimate romantic relationship with the victim who was the assistant manager of the restaurant; under the guise of returning the victim's cell phone, defendant approached the victim outside the restaurant, grabbed two money bags containing receipts of the restaurant that the victim intended to deposit; and when defendant grabbed the money bags, defendant struck the victim in the face and fled the scene, defendant's conviction for robbery and battery against a household member did not violate double jeopardy. *State v. Gutierrez*, 2012-NMCA-095, 286 P.3d 608, cert. denied, 2012-NMCERT-008.

III. ELEMENTS OF OFFENSE.

Criminal intent. — Theft is an element of the crime of robbery and it includes the concept of criminal intent. *State v. Nelson*, 1971-NMCA-152, 83 N.M. 269, 490 P.2d 1242, cert. denied, 83 N.M. 259, 490 P.2d 1232.

Aggravated assault and armed robbery distinguished.— Aggravated assault contains an element that armed robbery does not: striking at a victim instead of just threatening him. Armed robbery contains an element that aggravated assault does not: taking victim's property with the intent to permanently deprive victim of the property. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Intent to steal. — A specific criminal intent, the intent to steal, is an essential element of the crime of robbery, and the use or threatened use of force or violence does not eliminate such an intent as an element of that crime. *State v. Puga*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075.

Element of "carrying away" may be satisfied without actual possession. — The instant that a cashier, under coercion from the defendant, removes money from a cash register, the element of "carrying away" the money is satisfied, even though the defendant is apprehended prior to his actually taking possession of the money. *State v. Williams*, 1982-NMSC-041, 97 N.M. 634, 642 P.2d 1093, cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

Larceny plus force. — The presence of violence, actual or constructive, is an essential ingredient of robbery, but not of larceny, so that robbery is a compound or aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

Use or threatened use of force is essential element of robbery under this section. *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402.

Armed robbery. — Armed robbery may involve the use of force or the threat of force. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Force or intimidation is gist of offense under this section. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

Amount or degree of force is not determinative factor in establishing the use of force in robbery. *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402; *State v. Segura*, 1970-NMCA-066, 81 N.M. 673, 472 P.2d 387, cert. denied, 81 N.M. 669, 472 P.2d 383.

Compulsion the issue. — Where force is charged under this section, the issue is not how much force was used, but whether the force was sufficient to compel the victim to part with his property. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

Force or intimidation is gist of offense. — Under this section the force or fear must be the moving cause inducing the victim to part unwillingly with his property. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

Amount or degree of force is not determinative factor. — The use or threatened use of force or violence is not, in and by itself, sufficient to sustain a conviction for robbery; it must be the lever by which the thing of value is separated from the person or immediate control of another. *State v. Baca*, 1971-NMCA-142, 83 N.M. 184, 489 P.2d 1182; *see also State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402.

Implicit threat. — Neither statutory language nor case law limit the term "threat" to explicit, verbal threats of force. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Force used for mere escape not sufficient. — Under the facts of the present case, the victim's money was removed and separated from his person by stealth, and the defendant's use of a weapon only after the money was separated from the victim was merely an action to hold victim at bay as he escaped from the motel. The use of force to retain property or to facilitate escape does not satisfy the force element necessary for the crime of robbery. Thus, there was insufficient evidence to support the defendant's conviction for armed robbery. *State v. Lewis*, 1993-NMCA-165, 116 N.M. 849, 867 P.2d 1231.

Intimidating reasonable man. — Under this section where fear or intimidation is charged, it is necessary to show that the circumstances were such as to cause a reasonable man to apprehend danger and that he could be reasonably expected to give up his property in order to protect himself. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

Assault and putting in fear. — It was not necessary that the assault be "with force and violence," if it was done by "assault and putting in fear." *Territory v. Abeita*, 1873-NMSC-001, 1 N.M. 545 (decided under prior law).

Armed robbery is not offense distinct from robbery; the offense is robbery whether or not armed, and whether or not one is an accessory; "armed robbery" is a way to commit "robbery" and, if done in that way, the penalty is greater but the basic offense remains robbery. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

Robbery of a deceased person. — Where defendant, with the assistance of others, robbed and then killed the victim, left the scene only to return several hours later to empty the victim’s pocket of cash and pour gasoline throughout the residence and on the victim’s body and set the residence on fire, defendant was properly convicted under the robbery statute for the second robbery, because the principle of law that one cannot be guilty of robbery if the victim is a deceased person does not apply where a robbery and homicide are a part of the same transaction and are so interwoven with each other as to be inseparable, and it is reasonable to conclude that defendant’s second robbery and the subsequent arson were directly connected with the original robbery and killing, and therefore the second robbery can rationally be linked to the murder that enabled the robbery. *State v. Montoya*, 2017-NMCA-033, cert. denied.

Degree of force a jury issue. — The question of whether or not the snatching of the purse from the victim was accompanied by sufficient force to constitute robbery is a factual determination, within the province of the jury's discretion. *State v. Clokey*, 1976-NMSC-035, 89 N.M. 453, 553 P.2d 1260.

Gun as deadly weapon. — There was no room for argument that gun with which defendant was armed when he committed assault and robbery was not a dangerous weapon, whether loaded or unloaded. *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

BB gun as a deadly weapon. — Although a BB gun is not a deadly weapon as a matter of law, where the state was prepared to show that defendant pointed what looked to the victim to be a handgun at the victim's stomach area and demanded money, a jury could reasonably conclude that the gun and the manner of use indicated that it was a weapon that could inflict a dangerous wound. *State v. Fernandez*, 2007-NMCA-091, 142 N.M. 231, 164 P.3d 112.

Ownership. — The crime of robbery requires that the property taken be in the immediate control of another; however, the property need not be owned by the person from whom it was taken. *State v. Kenny*, 1991-NMCA-094, 112 N.M. 642, 818 P.2d 420, cert. denied, 112 N.M. 499, 816 P.2d 1121.

IV. INDICTMENT AND INFORMATION.

Reference to statute sufficient. — Indictment charging defendant with "robbery while armed with a deadly weapon contrary to 40A-16-2, 1953 Comp. [Section 30-16-2 NMSA 1978]" was not deficient for failure to include phrase "by use or threatened use of violence" since such phrase was contained in the definition of, and was included in the word, robbery, and since an indictment was sufficient if it identified the crime charged by reference to the statute establishing the offense. *State v. Walsh*, 1969-NMCA-123, 81 N.M. 65, 463 P.2d 41.

Alternative charges. — Charge of both robbery and armed robbery in indictment was not duplicitous because all that was charged was that the one robbery was committed in two ways, namely, robbery without specification of the means and robbery by firearm, and such was not duplicity, but alternative pleading. *State v. Roque*, 1977-NMCA-094, 91 N.M. 7, 569 P.2d 417, cert. denied, 91 N.M. 4, 569 P.2d 414.

Bill of particulars. — Defendant's motion for bill of particulars should have been granted, furnishing name and type of store where the robbery allegedly occurred, whether a safe, vault or other depository was involved and the name of the person or persons allegedly intimidated or threatened, and failure to grant motion was reversible error. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635 (decided under prior law).

V. EVIDENCE.

A. IN GENERAL.

Admission of unavailable accomplice's tape recorded custodial police interview was not harmless error because it provided key evidence directly inculpating defendant

convicted of felony murder, and remaining circumstantial evidence against him, although strong, was disputed. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

Statement by defendant. — Testimony that defendant said, "I was going to do something but I was too scared," while hearsay, was admitted without objection and, therefore, was competent in robbery prosecution. *State v. Baca*, 1971-NMCA-142, 83 N.M. 184, 489 P.2d 1182.

Defendant's pecuniary condition. — In prosecution for robbery while armed with dangerous weapon under Laws 1921, ch. 20, § 1 evidence of accused's pecuniary condition, on the question of motive, was properly excluded. *State v. Tapia*, 1937-NMSC-077, 41 N.M. 616, 72 P.2d 1087.

Other crime. — In prosecution for aggravated burglary, armed robbery and rape it was proper to go into details of another rape some five blocks away about an hour later, in order to establish both characteristic conduct and possession of knife and flashlight involved in first crime. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Other offenses. — In armed robbery prosecution, reference in defendant's statement to two other offenses committed in a continuous sequence immediately preceding robbery, in light of alibi defense and identity issue was properly not deleted. *State v. Stout*, 1971-NMCA-028, 82 N.M. 455, 483 P.2d 510.

Polygraph test results. — Where armed robbery was committed in daylight in victim's home and took about 20 minutes, throughout which time victim was in presence of the perpetrator, and victim identified defendant as that person, admission into evidence of polygraph test results as per stipulation of the defense, without objection at trial, was not a denial of a fair trial or due process. *State v. Chavez*, 1969-NMCA-109, 80 N.M. 786, 461 P.2d 919 (decided under prior law).

Exhibits admissible. — There was no abuse of discretion on part of trial judge in admitting into evidence moneybags and contents stolen by robbers, along with jacket the same color as one worn by one robber and pistol which would match general description of robbery weapon, which items were found in car driven by defendant which he and companion abandoned, and checks stolen at same time, which were on person of companion. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

Weight of evidence. — Defense argument that items of stolen property were not shown to have been in possession of defendants went to the weight to be accorded this evidence and not its admissibility, where evidence indicated that defendants had possession of the property in cafe and attempted to destroy or conceal it. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

Absence of alibi witness. — Where defendant in trial for armed robbery proceeded to trial without objection, knowing that alibi witness was not present, without applying for writ of attachment or other process to secure her presence, and during hearing upon motion for new trial, trial court heard witness' testimony and concluded it was not probable that a different result would have been reached had her testimony been produced at trial, it could not be said that court abused its discretion in refusing to grant a new trial. *State v. Milton*, 1969-NMCA-099, 80 N.M. 727, 460 P.2d 257.

B. SUFFICIENCY.

Circumstantial evidence. — Circumstantial evidence may suffice to establish the corpus delicti, and it may also suffice as proof of the identity of the perpetrator of a crime. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

Corpus delicti plus identity of robber. — Proof sufficient to sustain a conviction of the crime of robbery involves proof of two distinct propositions, namely, the theft of something of value from the person of another or from the immediate control of another by use or threatened use of force or violence, and that such theft was done by the person or persons charged; in other words, proof of the corpus delicti and the identity of the accused. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

Corpus delicti proven. — Corpus delicti in prosecution for armed robbery was sufficiently proven by testimony of complaining witness that he was the victim of a robbery by some person armed with a dangerous weapon. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242, cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Threatened use of force. – Where a defendant points a note at the teller's cash drawer, keeps his other hand hidden from view, states that the teller should give him everything, and directs the teller not to use the alarm, a reasonable fact finder could conclude that this combination of actions threatened force and caused the teller to hand over the contents of the cash drawer *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Identification adequate. — Where victim and witness of robbery perpetrated by two masked men described, on the night of the robbery, the robber and the clothes he was wearing, and at trial identified clothes found in defendant's apartment and defendant himself on basis of his posture, size and stoop, there was sufficient evidence to establish that defendant was one of the men involved in the robbery. *State v. Quintana*, 1961-NMSC-108, 69 N.M. 51, 364 P.2d 120; *see also State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

Victim identification. — Where the victim positively identified the defendant, this testimony, alone, was held sufficient to sustain the conviction. *State v. Hunt*, 1972-NMCA-026, 83 N.M. 546, 494 P.2d 624.

Exact role of defendant immaterial. — Although evidence as to which of the robbers took the change was sparse and conflicting, this did not matter. The jury was instructed on aiding and abetting and the evidence was substantial that defendant was at least an aider and abettor of the robbery of the change. *State v. Urban*, 1974-NMCA-046, 86 N.M. 351, 524 P.2d 523.

Mere presence insufficient. — If proof disclosed only presence of defendant at scene of robbery it would not support a conviction. *State v. Santillanes*, 1970-NMCA-003, 81 N.M. 185, 464 P.2d 915.

Where state did not contend that defendant and his companions entered service station with any thought or intention of committing a crime, and acts relating to alleged robbery commenced after defendant had been shot and placed in his car, defendant could only have committed robbery as accessory or as aider and abettor and only if the record showed that defendant shared the criminal intent and purpose of the principals, mere presence without some outward manifestation of approval being insufficient. *State v. Salazar*, 1967-NMSC-187, 78 N.M. 329, 431 P.2d 62.

Defendant's participation not shown. — Evidence was insufficient to support verdict against individual who remained in back seat of car while two companions got out and beat and robbed person who had been given a ride, where there was no showing of a community of purpose to accomplish the crime, or any acts, words, signs or motions that would evince a design to encourage, incite or approve of the crime. *State v. Lucero*, 1957-NMSC-062, 63 N.M. 80, 313 P.2d 1052.

Driver of getaway car. — Testimony that complaining witness was beaten and robbed by two individuals with whom he had been riding, while driver of the car kept the motor running, saw what occurred and drove the getaway car was sufficient to find driver guilty as a principal. *State v. Lucero*, 1957-NMSC-062, 63 N.M. 80, 313 P.2d 1052.

Mere presence insufficient. — Verdict of attempted armed robbery was supported by substantial evidence where defendant was driver of car stationed outside liquor store and lounge awaiting commission of armed robbery by others, one of whom had pulled gun on manager and told him to lie down behind counter when robbery was abandoned after witness walked into store and started screaming. *State v. Paul*, 1972-NMCA-043, 83 N.M. 619, 495 P.2d 797.

Firing at police. — Shooting by defendant at police who were pursuing car in which he and robber were passengers which was fleeing scene of crime was evidence that defendant approved the robbery and shared the robber's criminal intent, and was sufficient to sustain armed robbery conviction. *State v. O'Dell*, 1973-NMCA-124, 85 N.M. 536, 514 P.2d 55.

Exclusive possession of stolen property. — Articles stolen from store by robbers which were found a short time later in front seat of car driven by defendant constituted evidence which would support conclusion that defendant was in exclusive possession of

the property, despite fact that another person accompanied defendant in the car. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

Possession insufficient absent other facts. — Although recently stolen property found in exclusive possession of defendant will not alone support a verdict of guilt, circumstances of flight, apprehension only minutes after robbery a short distance from scene of crime, and finding of clothing in car driven by defendant fitting description of eye witnesses, constituted sufficient circumstance of guilt in addition to possession of property stolen to support verdict. *State v. Beachum*, 1970-NMCA-119, 82 N.M. 204, 477 P.2d 1019.

Seizure of weapon during commission of robbery. — When defendant acquires a weapon during the commission of a robbery and then uses the weapon to harm or threaten the victim, or to acquire additional possessions from the victim, he is guilty of armed robbery. *State v. Hamilton*, 2000-NMCA-063, 129 N.M. 321, 6 P.3d 1043, cert. denied, 129 N.M. 249, 4 P.3d 1240.

The determination of whether a defendant who seizes a weapon during the commission of a robbery is armed "while" committing the robbery is highly fact sensitive. When the defendant acquires the weapon and how he uses it after its acquisition are paramount. *State v. Hamilton*, 2000-NMCA-063, 129 N.M. 321, 6 P.3d 1043, cert. denied, 129 N.M. 249, 4 P.3d 1240.

Codefendant's use of weapon. — Where several defendants were prosecuted for robbery, all tried as principals, proof that one was armed with dangerous weapon was sufficient to satisfy allegation of the information that all were so armed, and allegation that dangerous weapon was held in hands of one defendant was surplusage. *State v. Kimbell*, 1930-NMSC-075, 35 N.M. 101, 290 P. 792.

Deadly character of weapon not established. — In prosecution for robbery while armed with a deadly weapon, where defendant was convicted as an accessory, evidence that other man raised a tire tool, the size, length or weight of which was not described, over service station attendant's head "like a threat," without more, was insufficient for a determination that tire tool was capable of producing death or great bodily harm or a weapon with which dangerous wounds could be inflicted. *State v. Gonzales*, 1973-NMCA-153, 85 N.M. 780, 517 P.2d 1306.

Surprise not equivalent to force. — The defendant's motion for a directed verdict, questioning the sufficiency of the evidence for a conviction of armed robbery, should have been sustained, where witness only testified that he had been taken by surprise and not that by force or fear he had been induced to part with anything of value. *State v. Baca*, 1971-NMCA-142, 83 N.M. 184, 489 P.2d 1182.

Jostling victim. — Evidence of jostling or causing the victim to fall as property is taken is a sufficient showing to establish the use of force. *State v. Martinez*, 1973-NMCA-120, 85 N.M. 468, 513 P.2d 402.

Evidence sufficient. — Where the victim identified defendant in court and testified that defendant was in a white car that drove up alongside the victim, that defendant grabbed the victim's purse, and that the purse and its contents had value and a police officer testified that the victim's driver's license, which was in the purse, was found during an inventory search of a vehicle in which defendant was a passenger, there was sufficient evidence to support defendant's conviction for robbery. *State v. Verdugo*, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Where defendant approached an employee of a hotel in the hotel laundry room, struck the employee in the face with a closed fist, beat the employee over the head with a hard plastic tube, took the keys to the hotel office, and took money from the hotel cash drawer, there was sufficient evidence that defendant formed the intent to commit robbery before or during the time defendant committed the battery on the employee. *State v. Lopez*, 2011-NMCA-071, 150 N.M. 34, 256 P.3d 977, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Circumstantial evidence, sufficient to sustain the defendant's conviction for robbery, included evidence placing defendant and his distinctly colored car at the service station on the afternoon before the robbery, evidence that the robber departed the scene in this car after the robbery, the description of the robber given by a witness and defendant's own statement against his interest. *State v. Milton*, 1974-NMCA-094, 86 N.M. 639, 526 P.2d 436.

Where defendant had told witnesses before and after the murder that he was going to rob/had robbed someone and no money was found on murdered victim but there was evidence that victim had money, there was sufficient evidence introduced for jury to find that defendant committed armed robbery. *State v. Montoya*, 1984-NMSC-073, 101 N.M. 424, 684 P.2d 510.

Evidence was sufficient to support defendant's conviction as an accessory to armed robbery, where his confession, found to be voluntary, was corroborated by other evidence at trial. *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991).

Evidence that defendants intruded into husband and wife's home, beat and kicked the husband, and dragged both of them into a closet prior to absconding with money and jewelry, sufficed for a conviction for robbery. *State v. Ibarra*, 1993-NMCA-040, 116 N.M. 486, 864 P.2d 302, cert. quashed, 117 N.M. 744, 877 P.2d 44 (1994), and cert. denied, 513 U.S. 1157, 115 S. Ct. 1116, 130 L. Ed. 2d 1080 (1995).

Where there was evidence that defendant or accomplice or both assaulted victim and split the money taken from the victim, this is sufficient evidence for the conviction of robbery, as principal or as an accessory. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Rudy B.*, 2010-NMSC-045, 149 N.M. 22, 243 P.3d 726.

Credibility and weight of evidence for jury. — Where although the evidence concerning armed robbery was conflicting it substantially supported the verdict, the credibility of the witnesses and the weight to be given their testimony was for the jury to determine. *State v. Valles*, 1972-NMCA-027, 83 N.M. 541, 494 P.2d 619.

Jury to determine facts. — Whether defendant had gun in her hand as testified to by robbery victim was for the jury to resolve. *State v. Encee*, 1968-NMCA-012, 79 N.M. 23, 439 P.2d 240.

VI. INSTRUCTIONS.

Scope of appellate review regarding jury charge. — Comparing the elements of aggravated assault, a compound offense that has three alternate ways of being charged, with armed robbery, another offense for which the statute contains alternatives, the appellate court looks only to the statutes as charged to the jury and disregards the inapplicable statutory elements. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Instructions substantially following language of statute was sufficient. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

More clarity possible. — Court of appeals held that while an instruction in robbery prosecution on the requisite intent to steal would have been a clearer statement as to that element, an instruction in the language of the statute was legally sufficient. *State v. Puga*, 1973-NMCA-079, 85 N.M. 204, 510 P.2d 1075.

Use or threat of violence. — Since "use or threatened use of force or violence" is an essential element of this crime, a failure to instruct on this essential element is reversible error. *State v. Walsh*, 1969-NMCA-123, 81 N.M. 65, 463 P.2d 41.

Putting victim in fear. — Instruction requiring acquittal if jury believed that defendant did not with force and violence take the property would have been erroneous since jury might have been satisfied that there was an "assault and putting in fear," which with other essential ingredients of the offense was all that was requisite for a conviction. *Territory v. Abeita*, 1873-NMSC-001, 1 N.M. 545 (decided under prior law).

Intent adequately covered. — Defendant's argument that since he was charged with being accessory to an attempted armed robbery and where there was no evidence of a demand for money or goods, he was entitled to a specific intent instruction within the general intent instruction was without merit where a separate instruction on attempt was given as well as an instruction on armed robbery setting out requirement of specific intent. *State v. Paul*, 1972-NMCA-043, 83 N.M. 619, 495 P.2d 797.

Train hold-up. — The phrase "holding up," when used in instructions in relation to an attack upon a train, meant the forcible detention of a train with intent to commit a

robbery or some other felony. *Territory v. McGinnis*, 1900-NMSC-019, 10 N.M. 269, 61 P. 208, *overruled on other grounds by State v. Deltenre*, 1966-NMSC-187, 77 N.M. 497, 424 P.2d 782 (decided under prior law).

Fruits of crime. — Since a determination by jury that defendant had in his possession the fruits of the crime does not justify a finding of guilt unless there is evidence of other circumstances connecting the defendant with the offense, the jury should also be instructed as to the requirement of proof by the state of other circumstances by which the defendant is linked to the crime charged. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635.

Possession of unidentified money. — The court in its instructions in robbery case, must explain to the jury the rules of law with respect to possession of unidentified money, so that the jury will have a guide in making its determination of what weight, if any, is to be given to this type of evidence; the jury must be satisfied beyond a reasonable doubt that the defendant had in his possession the actual fruits of the crime, or a part thereof. *State v. Graves*, 1963-NMSC-183, 73 N.M. 79, 385 P.2d 635.

Entrapment. — Where there was no evidence that informer who drove getaway car either persuaded or induced defendant to commit armed robbery, defendant was not entitled to instruction on entrapment. *State v. Sweat*, 1972-NMCA-092, 84 N.M. 122, 500 P.2d 207.

Instruction on larceny required. — Because robbery is an aggravated larceny, larceny is necessarily included within the offense of robbery, so that defendant had the right to have instructions on the lesser included offenses of larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish larceny. *State v. Wingate*, 1975-NMCA-035, 87 N.M. 397, 534 P.2d 776.

An instruction on larceny should have been given since there was evidence that the defendant's shoving of the victim was part of his drunkenness, and that the purse was taken without force sufficient to constitute robbery. *State v. Curley*, 1997-NMCA-038, 123 N.M. 295, 939 P.2d 1103.

Charge on lesser offense not supported. — Where testimony of victim did not give rise to any other conclusion than that defendant committed the robbery while armed, defendant was not entitled to have the jury instructed on the lesser offenses because there was no evidence to establish them. *State v. Sweat*, 84 N.M. 122, 500 P.2d 207.

Directing verdict. — In a prosecution for unarmed robbery, a motion for a directed verdict is to be determined by viewing the evidence in the light most favorable to the state. *State v. Sanchez*, 1967-NMCA-009, 78 N.M. 284, 430 P.2d 781.

Self-defense instruction refused since defendant entered store with weapon, prepared to rob. — Where a murder defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only

reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

Voluntary intoxication. – Where the defendant presented no evidence that he was intoxicated to any degree, let alone to the point that it affected his ability to form the necessary mental state for robbery, a specific-intent crime, he was not entitled to an instruction on voluntary intoxication; mere evidence that the defendant consumed an intoxicant is not enough to warrant an intoxication instruction. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

VII. SUBSEQUENT ARMED ROBBERY OFFENSES.

Subsequent armed robbery offenses. — Proof of prior armed robbery convictions should be presented to the judge and established by a preponderance of the evidence. *State v. Villegas*, 2009-NMCA-023, 145 N.M. 592, 203 P.3d 123, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Prior armed robbery not also used with habitual offender statute. — A prior armed robbery conviction may not be used for ehancement under both this section and the habitual offender provision; accordingly, in the case of a defendant who has one prior burglary, one prior armed robbery, and one current armed robbery, the sentence for the current offense, discounting any reduction for mitigating circumstances, should be that for a second armed robbery plus a one-year enhancement for the prior burglary under the habitual offender statute. *State v. Keith*, 1985-NMCA-012, 102 N.M. 462, 697 P.2d 145, cert. denied, 102 N.M. 492, 697 P.2d 492.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

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 law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For note, "Search and Seizure - Automobile Inventory Search Exception to the Fourth Amendment Expanded by State v. Williams," see 13 N.M.L. Rev. 689 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 67 Am. Jur. 2d Robbery §§ 1 to 9.

Taking property from the person by stealth as robbery, 8 A.L.R. 359.

What constitutes attempt to commit robbery, 55 A.L.R. 714.

Other robberies, admissibility of evidence of, 42 A.L.R.2d 854.

Gambling or lottery paraphernalia as subject of robbery, 51 A.L.R.2d 1396.

Stolen money or property as subject of robbery, 89 A.L.R.2d 1435.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

Robbery by means of toy or simulated gun or pistol, 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery, 93 A.L.R.3d 643.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

"Intimidation" as element of bank robbery under 18 USCS § 2113(a), 63 A.L.R. Fed. 430, 163 A.L.R. Fed. 225.

77 C.J.S. Robbery § 1 et seq.

30-16-3. Burglary.

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-3, enacted by Laws 1963, ch. 303, § 16-3; 1971, ch. 58, § 1.

ANNOTATIONS

Cross references. — For assault with intent to commit burglary, *see* 30-3-3 NMSA 1978.

For instruction on the essential elements of burglary, *see* UJI 14-1630 NMRA.

For instruction on aiding or abetting as accessory to crime other than attempt and felony murder, *see* UJI 14-2822 NMRA.

I. GENERAL CONSIDERATION.

Rule of *ejusdem generis*. — Courts should use the *ejusdem generis* rule, which is codified in Section 12-2A-20 NMSA 1978, when interpreting the outer limits of the prohibited space that is protected by the burglary statute. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

Rule of lenity. — When deciding whether or not a burglary charge is appropriate, courts and district attorneys must consider whether or not this is the type of entry Section 30-16-3 NMSA 1978 was intended to deter. Any doubts about the construction of Section 30-16-3 NMSA 1978 must be resolved in favor of lenity. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

New rule, narrowing the scope of what conduct is prosecuted under the burglary statute, should be applied retroactively. — Where defendant was charged and convicted of felony burglary in 2010, and where, in 2015, defendant was again charged and convicted of numerous offenses, and where the state sought to enhance defendant's 2015 sentence pursuant to the Habitual Offender Act, § 31-18-17 NMSA 1978, relying on defendant's 2010 felony conviction, and where defendant claimed that his 2010 burglary conviction should not be used to enhance his 2015 sentence, based on the New Mexico supreme court's decision in *State v. Office of Public Defender ex rel. Muqqddin*, 2012-NMSC-029, which held for the first time that the act of penetrating a

vehicle's gas tank and removing gas therefrom did not constitute burglary under § 30-16-3 NMSA 1978, the district court erred in determining defendant to be a habitual offender as alleged by the state and enhancing defendant's sentence in the 2015 case, because Muqqddin announced a new rule that altered the range of conduct or the class of persons that the law punishes, and should therefore be applied retroactively. *State v. Wood*, 2022-NMCA-009.

Purpose to protect possessory rights. — The statutory offense of burglary is one against the security of property, and its purpose is to protect possessory rights. *State v. Sanchez*, 1987-NMCA-035, 105 N.M. 619, 735 P.2d 536, cert. denied, 105 N.M. 618, 735 P.2d 536.

Legislative consolidation intended. — A comparison of this section and the statutes concerning burglary and unlawful entry that existed prior to 1963 (40-9-1, 40-9-6, 40-9-7, 40-9-10, 1953 Comp.) indicates that the new section is a consolidation of the old statutes and does not evidence an intention of the legislature to exclude from the crime of burglary unauthorized entries to structures other than dwellings. It is clear that he legislature intended the term "other structure" to be construed in its literal sense and that it not be limited by the specific language preceding it. It is proper for the court to consider prior and subsequent statutes in pari materia to determine legislative intent. *State v. Gonzales*, 1967-NMSC-168, 78 N.M. 218, 430 P.2d 376.

Common law expanded. — Section 40-9-6, 1953 Comp., defines the offense of burglary so as to expand the common-law definition of that offense to include the breaking and entering of offices, shops and warehouses. *Martinez v. United States*, 295 F.2d 426 (10th Cir. 1961) (decided under prior law).

Crime of violence. — The offense defined under this section of breaking and entering a dwelling house or other building with intent to commit a felony therein was a crime of violence for purposes of former 15 U.S.C. § 902(e) relating to the transporting of a firearm in interstate commerce after conviction of a crime of violence. *Martinez v. United States*, 295 F.2d 426 (10th Cir. 1961) (decided under prior law).

The district court properly included defendant's state burglary conviction as a violent felony under 18 U.S.C. § 924, the Armed Career Criminal Act. *United States v. Lujan*, 9 F.3d 890 (10th Cir. 1993).

Prosecution of Indians limited. — Where a federal statute limiting the definition and punishment of burglary by an Indian within Indian country to the laws of the several states in force at the time of its enactment, and there was no law of New Mexico in effect at that time defining a crime of burglary as it was charged in the information, defendant's motion to dismiss the information was sustained. *United States v. Gomez*, 250 F. Supp. 535 (D.N.M. 1966).

II. MULTIPLE PROSECUTIONS.

Several burglaries. — The burglary of several businesses in one building at approximately the same time constitutes not one offense, but several, and a defendant may be prosecuted for all such offenses. *State v. Ortega*, 1974-NMCA-060, 86 N.M. 350, 524 P.2d 522.

When one commits burglary of dwelling house one commits criminal trespass based on that entry. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160, superseded by statute, *State v. McCormack*, 1984-NMCA-042, 101 N.M. 349, 682 P.2d 742.

Two crimes shown. — Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 1975-NMCA-126, 88 N.M. 561, 543 P.2d 1189, cert. denied, 89 N.M. 6, 546 P.2d 71.

Larceny not lesser included offense. — Larceny is not a lesser included offense of burglary, since each crime includes an element not contained in the other. Burglary requires entry into a dwelling, whereas larceny does not, and larceny requires an actual taking, whereas burglary does not. *Yparrea v. Dorsey*, 64 F.3d 577 (10th Cir. 1995).

Larceny and burglary not merged. — Prosecution for burglary and larceny arising out of the same event does not constitute double jeopardy since there is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. *State v. Deats*, 1971-NMCA-089, 82 N.M. 711, 487 P.2d 139.

Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary, and the two crimes do not merge, hence, defendant could be convicted of and sentenced for both crimes. *State v. McAfee*, 1967-NMSC-139, 78 N.M. 108, 428 P.2d 647.

Possession of burglary tools is not necessarily involved in burglary. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

Burglary and possession of burglary tools does not merge. — The crime of possession of burglary tools does not merge with the crime of burglary, and hence defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

As the "overt act" required in the general attempt statute 30-28-1 NMSA 1978 did not necessarily involve possession of burglary tools, the crime of attempt to commit a felony of burglary did not merge with the crime of possession of burglary tools, and hence, defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

Convictions for burglary and receiving improper. — The state cannot convict a person under one indictment or information of receiving stolen property, and then subsequently convict him under another indictment or information of burglary, if the burglary conviction is dependent upon a theft by him of the same property, and he is shown to have been the person who actually took and asported the property during the burglarious entry. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

"Disposal" shown. — Where the record supported the conclusion that the defendant "disposed of " property which he may have also stolen, as the theft and disposal were different acts, the principle that one who is a thief cannot be convicted of "receiving" the property he stole because the theft and receipt are the same act was inapplicable. *State v. Mitchell*, 1974-NMCA-057, 86 N.M. 343, 524 P.2d 206.

Entry of a vehicle. — The use of a nail to penetrate a vehicle's gas tank constitutes an entry under Section 30-16-3 NMSA 1978. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Where, without the permission of the owner of a van to enter the van, defendant used a nail to penetrate the gas tank to drain gas from the tank, defendant was guilty of burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289.

Entry into a retail store. — As a general rule, the court will presume that retail stores are open to the public during business hours and, therefore, an individual who enters a retail store with the intent to shoplift is not guilty of burglary. *State v. Baca*, 2014-NMCA-087, cert. granted, 2014-NMCERT-008.

Where a group of people, including defendant, entered Costco; no person in the group was a member of Costco, but one person showed the Costco greeter a membership card that belonged to another person; one person in the group placed items in a bag that other persons in the group pointed out; at the checkout line, the group purchased only water and ice cream; Costco was a membership warehouse; one had to be a member or a guest of a member to enter the store; and "member only" signs were posted outside Costco as notice to the public that only members could enter, defendant's entry into Costco, even assuming that defendant was aware that the person presenting the membership card was a non-member, was not sufficient as a matter of law to establish an unauthorized entry and the crime of burglary. *State v. Baca*, 2014-NMCA-087, cert. granted, 2014-NMCERT-008.

III. ELEMENTS OF OFFENSE.

Entry into separate residence of spouse. — Section 40-3-3 NMSA 1978 does not provide immunity from prosecution for burglary of a spouse's separate residence. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Where, because of domestic problems, defendant rented a separate apartment for defendant's spouse; the parties agreed that the apartment was the spouse's separate residence, that defendant would not have a key to the apartment, and that defendant did not have the spouse's permission to enter the apartment; and several months later, defendant entered the spouse's apartment through a window, 40-3-3 NMSA 1978 did not preclude defendant's conviction for burglary of the spouse's separate dwelling. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

The plain language of Section 40-3-3 NMSA 1978 renders inter-spousal burglary an impossibility, because the New Mexico burglary statutes protect the possessory right to exclude and Section 40-3-3 NMSA 1978 dictates that spouses have no such right to exclude the other spouse. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Entry into residence of estranged spouse. — Where defendant entered defendant's estranged spouse's apartment without permission, kidnapped the victim, and killed the victim, Section 40-3-3 NMSA 1978 prohibited defendant's spouse from excluding defendant from the spouse's apartment and defendant's entry into the apartment, even with felonious purpose, did not constitute burglary as a matter of law. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Parts of protected spaces. — An entry into a part of the enumerated structures in Section 30-16-3 NMSA 1978 is not equal to an entry of that structure itself. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

Protected spaces must be enclosed. — The right to exclude others is the possessory interest with which burglary is primarily concerned. For an area to be considered prohibited space under Section 30-16-3 NMSA 1978, it must have some sort of enclosure. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

A vehicle's gas tank and wheel wells are not protected spaces. — A vehicle's gas tank and wheel wells do not constitute a protected space under Section 30-16-3 NMSA 1978 and cannot be burglarized under the statute. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

A vehicle's gas tank is not a protected space. — Where defendant used a piece of metal to puncture a gas tank and took the gas, the defendants did not commit burglary. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622, *rev'g* 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412.

The use of a nail to penetrate a vehicle's gas tank constitutes an entry under Section 30-16-3 NMSA 1978. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Entry of a vehicle. — Where, without the permission of the owner of a van to enter the van, defendant used a nail to penetrate the gas tank to drain gas from the tank,

defendant was guilty of burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

A vehicle's wheel wells are not a protected space. — Where defendant removed the two rear wheels of a vehicle and the lug nuts of the front wheels, the defendants did not commit burglary. *State v. Office of the Public Defender*, 2012-NMSC-029, 285 P.3d 622.

Structure. — Where the defendant took items from a covered area that was open on three sides but directly attached to the wall of a store; the area was covered by a metal roof that was supported by metal posts; the area was used to store merchandise and equipment; a door from the main building led from the store to the covered area; and a chain-link fence topped with barbed wire abutted the open yard that surrounded the covered area, the covered area constituted a structure. *State v. Gonzales*, 2008-NMCA-146, 145 N.M. 110, 194 P.3d 725, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

Burglary is offense against security of building, and when that security is breached by the penetration of an instrument into the building there has been an entry within the meaning of this statute. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

Entry. — Although New Mexico no longer defines burglary in terms of a "breaking," the offense of burglary remains an offense against the security of the property which is entered. *State v. Ortiz*, 1978-NMCA-074, 92 N.M. 166, 584 P.2d 1306, cert. denied, 92 N.M. 79, 582 P.2d 1292.

In establishing a burglary, any penetration, however slight, of the interior space is sufficient to constitute entry. *State v. Reynolds*, 1990-NMCA-122, 111 N.M. 263, 804 P.2d 1082, cert. denied, 111 N.M. 164, 803 P.2d 253 (1991).

Unlawful entry of building in nighttime constitutes "burglary," the punishment being dependent upon the degree of the offense. *Miller v. Cox*, 1960-NMSC-108, 67 N.M. 414, 356 P.2d 231 (decided under prior law).

Breaking not required. — The requirement of a "breaking" is no longer included in New Mexico's statutory definition of burglary, which is not concerned with distinctions between evidence of breaking as opposed to evidence of entering. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

Entry plus intent. — The crime of burglary is complete when the defendant makes an unauthorized entry with intent to commit any felony or theft. *State v. Madrid*, 1972-NMSC-016, 83 N.M. 603, 495 P.2d 383; *State v. Gutierrez*, 1971-NMCA-058, 82 N.M. 578, 484 P.2d 1288, cert. denied, 82 N.M. 562, 484 P.2d 1272.

The crime of burglary is complete when there is an unauthorized entry with the intent to commit a felony or theft in the vehicle or structure entered. *State v. Wilkerson*, 1972-

NMCA-067, 83 N.M. 770, 497 P.2d 981; *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927; *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

In order to prove the crime of burglary, it is required to prove unlawful entry of a structure with the necessary intent. *State v. Hinojos*, 1967-NMCA-003, 78 N.M. 32, 427 P.2d 683.

The mere entry of an occupied dwelling house in the nighttime with intent to commit larceny is burglary. *State v. Ocanas*, 1956-NMSC-106, 61 N.M. 484, 303 P.2d 390.

Unauthorized entry required. — A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time, open to the public or the actor is licensed or privileged to enter. *State v. Sanchez*, 1987-NMCA-035, 105 N.M. 619, 735 P.2d 536, cert. denied, 105 N.M. 618, 735 P.2d 536.

Entry into locked office adjacent to public motel lobby constituted unauthorized entry. — Where defendant's accomplice entered a secured clerk's office, separate from the public motel lobby, by climbing over a chest-high counter top, broke the lock on a cash drawer and removed $250, the accomplice's conduct constituted an unauthorized entry under the burglary statute, because the clerk's office was designed to remain separate from the public lobby area, and the enclosure's physical characteristics were such that a reasonable person would expect some protection from unauthorized intrusions. *State v. Mestas*, 2016-NMCA-047.

Burden on state to prove unauthorized entry. — It is not necessary that every person who could consent to entry testifies that consent was given as the burden on the state is to prove unauthorized entry beyond a reasonable doubt. *State v. Mireles*, 1971-NMCA-027, 82 N.M. 453, 483 P.2d 508.

Types of unauthorized entry. — A trespassory entry would be an unauthorized entry, as would an entry without consent or on the basis of an unauthorized consent. *State v. Ortiz*, 1978-NMCA-074, 92 N.M. 166, 584 P.2d 1306, cert. denied, 92 N.M. 79, 582 P.2d 1292.

Unauthorized entry. — Entry by fraud, deceit or pretense, whether characterized as trespassory, without consent or without authorized consent, is an unauthorized entry, similar to the constructive "breaking" at common law. *State v. Ortiz*, 1978-NMCA-074, 92 N.M. 166, 584 P.2d 1306, cert. denied, 92 N.M. 79, 582 P.2d 1292.

Burglary statute intended to punish harmful entry. — The burglary statute has a greater purpose than merely protecting property, but it is also the invasion of privacy and the victim's feeling of being personally violated that is the harm caused by the modern burglar and the evil that our society is attempting to deter through the burglary statute; first and foremost, it is the harmful entry that is being punished under this

section. State v. Archuleta, 2015-NMCA-037, *overruling State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, and cert. granted, 2015-NMCERT-001.

Where defendant violated an order of no trespass by entering an otherwise open public shopping area with the intent to commit a theft, his conduct did not implicate the feeling of violation and vulnerability generally associated with the crime of burglary and did not constitute the type of harmful entry required for a violation of the burglary statute. State v. Archuleta, 2015-NMCA-037, *overruling State v.Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, and cert. granted, 2015-NMCERT-001.

Effect of trespass notice. — A defendant, previously given trespass notice by a store that any subsequent entry would be considered criminal trespass, who later enters the store for the purpose of shoplifting, may be charged and convicted for burglary, as the entry was unauthorized. *State v. Tower*, 2002-NMCA-109, 133 N.M. 32, 59 P.3d 1264, cert. denied, 133 N.M. 30, 59 P.3d 1262.

Burglary of vehicle separate offense from taking or tampering. — The offense of burglary of a motor vehicle requires an unauthorized entry. Unauthorized entry is not an element of either unlawful taking of a vehicle, Section 66-3-504 NMSA 1978 (now Section 30-16D-1 NMSA 1978) , or tampering with a vehicle, Section 66-3-506 NMSA 1978 (now Section 30-16D-5 NMSA 1978) . This difference in the elements of the offenses is sufficient ground to reject the defendant's contention that the statutes are the same and that he should not be charged with the more general burglary charge. *State v. Hernandez*, 1993-NMCA-132, 116 N.M. 562, 865 P.2d 1206, cert. denied, 116 N.M. 801, 867 P.2d 1183.

Penetration by instrument. — Evidence of a break-in by use of an instrument which penetrates into the building is evidence of entry into the building, and the sufficiency of this evidence is not destroyed by a failure to prove that the instrument was used to steal something from the building or to commit another felony. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

Unoccupied structure still "dwelling house". — A structure, even if unoccupied for a year, does not lose its character as a "dwelling house" for purposes of Subsection A, unless there is evidence that the last tenant has abandoned the structure with no intention of returning. *State v. Ervin*, 1981-NMCA-068, 96 N.M. 366, 630 P.2d 765.

Attached garage with no opening to house was part of dwelling house within the meaning of this section because the garage was a part of the habitation, directly contiguous to and a functioning part of the residence. *State v. Lara*, 1978-NMCA-112, 92 N.M. 274, 587 P.2d 52, cert. denied, 92 N.M. 260, 586 P.2d 1089.

"Other structure" construed literally. — Under this section the legislature intended the term "other structure" to be construed in its literal sense and that it not be limited by the specific language preceding it. *State v. Gonzales*, 1967-NMSC-168, 78 N.M. 218, 430 P.2d 376.

Food store included. — Under this section ejusdem generis is resorted to merely as an aid in determining legislative intent and does not foreclose the inclusion of a food store within the term "other structure." *State v. Gonzales*, 1967-NMSC-168, 78 N.M. 218, 430 P.2d 376.

Entry into soft drink vending machine. — The term "structure" as set forth in this section does not include the unauthorized entry into a soft drink vending machine located outside a building or other structure with intent to commit a felony or theft within. *State v. Bybee*, 1989-NMCA-071, 109 N.M. 44, 781 P.2d 316.

Entering open store. — A person who enters a store open to the public with intent to shoplift or commit larceny is not guilty of burglary. *State v. Rogers*, 1972-NMCA-053, 83 N.M. 676, 496 P.2d 169.

Entry into inner door. — Where there is lawful entry into a building, an unauthorized entry into an inner door of any unit with the necessary intent may be prosecuted for burglary. *State v. Ortega*, 1974-NMCA-060, 86 N.M. 350, 524 P.2d 522.

Reaching into bed of pickup truck with the intent to commit a felony may constitute a burglary within the meaning of this section. *State v. Rodriguez*, 1984-NMCA-034, 101 N.M. 192, 679 P.2d 1290, cert. denied, 101 N.M. 189, 679 P.2d 1287.

Post office box deemed "structure". — A post office box was a "structure" within the meaning of this section. The separately secured area that constituted the structure was the area consisting of the mail sorting room and the post office boxes, the backs of which opened into the sorting room. *State v. Gregory*, 1993-NMCA-146, 117 N.M. 104, 869 P.2d 292, cert. denied, 117 N.M. 215, 870 P.2d 753 (1994).

Fence does not constitute "structure" within the meaning of this section. *State v. Foulenfont*, 1995-NMCA-028, 119 N.M. 788, 895 P.2d 1329, cert. quashed, 120 N.M. 498, 903 P.2d 240.

Identity of place. — The identity of the place burglarized was an essential element of crime denounced by Laws 1853-1854, p. 100, §§ 11 (40-9-6, 1953 Comp., relating to breaking and entering into places other than dwellings). *State v. Salazar*, 1938-NMSC-021, 42 N.M. 308, 77 P.2d 633 (decided under prior law).

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

Specific intent to commit felony or theft is essential element of the state's case to be proved beyond a reasonable doubt, the gravamen of the offense of burglary being the intent with which the structure is entered. *State v. Elliott*, 1975-NMCA-087, 88 N.M.

187, 539 P.2d 207, *rev'd on other grounds*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352; *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

Intent to steal vehicle sufficient. — An intent to steal the car is an intent to commit a theft "therein." Theft of the car itself may be an offense committed within the vehicle. If one intends to commit in a car acts that accomplish the crime, then one intends to commit the crime in the car. Theft of a car can be accomplished from within the vehicle. *State v. Hernandez*, 1993-NMCA-132, 116 N.M. 562, 865 P.2d 1206, cert. denied, 116 N.M. 801, 867 P.2d 1183.

Intent measured at time of entry. — A specific intent to commit a felony must exist and may be measured at the time of the claimed unauthorized entry into the home of the prosecutrix. *State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207, *rev'd on other grounds*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352.

Entry without intent not burglary. — Absent any proof that entry had been made with an intent to commit a felony, the act of prying a lock did not constitute burglary. *State v. Grubaugh*, 1950-NMSC-044, 54 N.M. 272, 221 P.2d 1055.

Intoxication may be shown to negate existence of required intent in a prosecution for burglary, and where defendant claims absence of intent due to intoxication, the issue of intent is for the jury. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

Voluntary intoxication as defense. — Voluntary intoxication is not a defense to a charge of larceny unless defendant was so intoxicated as to be unable to form the necessary intent. *State v. Lucero*, 1962-NMSC-077, 70 N.M. 268, 372 P.2d 837.

Burglary requires that entry be with the specific intent to commit a felony or theft; intoxication may be shown to negate this specific intent. *State v. Ruiz*, 1980-NMCA-123, 94 N.M. 771, 617 P.2d 160.

Burglary does not depend upon actions after the entry, the crime being complete when there is an unauthorized entry with the intent to commit a felony or theft. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

Stealing is not necessary element of burglary. *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

Proof of theft unnecessary. — When entry is accomplished with intent to steal it is not a required element of proof to show that any property was actually taken. *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

To prove burglary, the state was not required to prove either that defendant stole something or ownership of any articles stolen. *State v. Gutierrez*, 1971-NMCA-058, 82 N.M. 578, 484 P.2d 1288, cert. denied, 82 N.M. 562, 484 P.2d 1272.

Possession of stolen property immaterial. — Proof that property was actually taken is not necessary nor is proof of possession of a stolen item. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981.

To prove burglary, the state was not required to prove defendant's possession of stolen articles. *State v. Ford*, 1970-NMCA-061, 81 N.M. 556, 469 P.2d 535.

Proof of burglary. — The state is not required to prove dominion, control or possession. Evidence of dominion, control or possession of the stolen property is admissible on the questions of entry and intent. *State v. Hinojos*, 1967-NMCA-003, 78 N.M. 32, 427 P.2d 683.

Possession of tools immaterial. — Although burglary tools are admissible in evidence in a prosecution for burglary, it is not necessary to have burglary tools in one's possession to violate this section. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

IV. INDICTMENT AND INFORMATION.

A. IN GENERAL.

Accessory prosecuted as principal. — Although defendant never entered burglarized building, he was an aider and abettor or he was an accessory as defined in 30-1-13 NMSA 1978 and could therefore be prosecuted as a principal. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

Allegation of ownership unnecessary. — An allegation or proof of ownership of a building or structure, the subject of a burglary charge, is unnecessary. *State v. Flores*, 1971-NMCA-036, 82 N.M. 480, 483 P.2d 1320.

Ownership for identification. — This section clearly does not require that ownership of the building or structure entered be alleged, nor is such allegation necessary to charge the offense. Accordingly, except as a means of identification, an allegation or proof of ownership of a building or structure the subject of a burglary charge is unnecessary. *State v. Ford*, 1969-NMCA-092, 80 N.M. 649, 459 P.2d 353.

Model and license of burglarized vehicle. — Where the essential elements of the crime of burglary of an automobile were established, the model and license of the vehicle were surplusage in the indictment which did not need to be proved, and failure to do so did not constitute reversible error. *State v. Newman*, 1971-NMCA-137, 83 N.M. 165, 489 P.2d 673.

Value of property. — Under 40-9-6, 1953 Comp., prescribing penalties for breaking and entering into places other than dwelling with intent to commit murder, rape, robbery, larceny or any felony, term "larceny" was not limited to "grand larceny" under 40-45-2, 1953 Comp., and since stealing property of any value was a felony, a value over $50.00

did not have to be specified in the information nor proved in a charge of attempt. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262 (decided under former law).

Charge sufficient. — Charge that defendant "burglarized" an outhouse belonging to a named individual in the nighttime was sufficient to invoke the jurisdiction of the court in that it charged a public offense. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

B. VARIANCE.

Material variance between places charged and proved. — Where proof identified burglarized shop as that of Joe Howard, and indictment charged burglary of "the Harvey Cleaners," and there was no showing of identity, there was a material variance. *State v. Salazar*, 1938-NMSC-021, 42 N.M. 308, 77 P.2d 633 (decided under former law).

Variance not jurisdictional. — Variance between indictment and proof regarding name and address of party and place burglarized was not jurisdictional because it can be cured by verdict of the jury. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973) (decided under former law).

Nature of building. — An indictment was not defective for calling a building where goods were sold a "shop," though witnesses at the trial called it a "store." *State v. Padilla*, 1914-NMSC-012, 18 N.M. 573, 139 P. 143 (decided under former law).

Raising variance. — Variance between charge and proof regarding nature of building burglarized could not be raised for the first time by motion in arrest of judgment or motion for a new trial. *State v. Mares*, 1956-NMSC-031, 61 N.M. 46, 294 P.2d 284 (decided under former law).

V. EVIDENCE.

A. IN GENERAL.

Ordinarily, burglary must be proved by circumstantial evidence sufficient to submit the issue to the jury, since such an offense can rarely be proved by witnesses who saw and recognized a defendant in the act of making an unauthorized entry with intent to commit a theft. *State v. Johnson*, 1972-NMCA-082, 84 N.M. 29, 498 P.2d 1372.

Exclusion of every reasonable hypothesis save guilt. — To support a conviction testimony must do more than raise a strong suspicion of guilt as the evidence and reasonable inferences that flow therefrom must exclude every reasonable hypothesis other than the guilt of the defendant. *State v. Heim*, 1971-NMCA-159, 83 N.M. 260, 490 P.2d 1233.

Circumstantial evidence. — Where circumstances alone are relied upon by the prosecution, the circumstances must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than defendant's guilt. *State v. Montano*, 1972-NMCA-021, 83 N.M. 523, 494 P.2d 185.

Specific intent to commit theft may be proven by inference from established facts and circumstances. *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

Breaking and entering justifies inference. — In the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary, grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose. *State v. Ortega*, 1968-NMCA-092, 79 N.M. 707, 448 P.2d 813.

Presence plus inferences. — Although presence alone is insufficient to sustain a conviction for burglary when the facts and reasonable inferences therefrom show much more than mere presence, there is substantial evidence to support the conviction. *State v. Sedillo*, 1971-NMCA-003, 82 N.M. 287, 480 P.2d 401.

Unauthorized presence in vehicle. — A jury might reasonably infer from a defendant's unauthorized presence in a vehicle that he had the necessary intent to commit a felony or theft therein. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981.

Possession of stolen property not enough. — Recently stolen property found in the possession of a defendant will not alone support a conclusion of guilt of the offense of burglary unless there is evidence of other circumstances connecting the defendant with the crime charged. *State v. Heim*, 1971-NMCA-159, 83 N.M. 260, 490 P.2d 1233.

Facts pointing unerringly to guilt. — Where the facts and circumstances do not unerringly point to defendant's guilt of burglary and do not establish inferentially or otherwise that defendant's entry was unauthorized, the judgment and sentence must be reversed. *State v. Slade*, 1967-NMCA-027, 78 N.M. 581, 434 P.2d 700.

Establishing aiding and abetting. — Aiding and abetting a burglary is established by evidence of a community of purpose or a shared criminal intent in the unlawful undertaking, such that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known that commission of an offense already undertaken had aider's support or approval. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

B. ADMISSIBILITY.

Character evidence. — Honesty and truthfulness are pertinent character traits that are admissible under Rule 11-404(A)(1) in a prosecution for solicitation to commit burglary. *State v. Martinez*, 2008-NMSC-060, 145 N.M. 220, 195 P.3d 1232.

Evidence of dominion, control or possession of stolen property is admissible on the questions of entry and intent. *State v. Hinojos*, 1967-NMCA-003, 78 N.M. 32, 427 P.2d 683.

Evidence of dominion, control or possession of stolen property is admissible on the question of intent. *State v. Montano*, 1972-NMCA-021, 83 N.M. 523, 494 P.2d 185.

Discovery of weapons relevant. — Where defendant was convicted of burglary as accessory, argument that testimony concerning weapons found in defendant's car after his arrest was irrelevant to issues raised by indictment was without merit. *State v. Gunzelman*, 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Proving unauthorized entry. — New Mexico does not restrict the method of proving unauthorized entry and it may be proved by circumstantial evidence. *State v. Mireles*, 1971-NMCA-027, 82 N.M. 453, 483 P.2d 508.

Substantial evidence of intent to commit burglary. — Where defendant was discovered lying underneath a van; next to defendant was a plastic container positioned under the van to catch fuel dripping from the gas tank of the van; defendant admitted that defendant had used a nail to create a hole in the tank so that gas could escape; and the owner of the van had not abandoned the van and had not given defendant permission to enter or remove gas from the van, there was substantial evidence to support the finding that defendant possessed the intent necessary to commit burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 943, 242 P.3d 1289.

C. SUFFICIENCY.

Substantial evidence of intent to commit burglary. — Where defendant was discovered lying underneath a van; next to defendant was a plastic container positioned under the van to catch fuel dripping from the gas tank of the van; defendant admitted that defendant had used a nail to create a hole in the tank so that gas could escape; and the owner of the van had not abandoned the van and had not given defendant permission to enter or remove gas from the van, there was substantial evidence to support the finding that defendant possessed the intent necessary to commit burglary. *State v. Muqqddin*, 2010-NMCA-069, 148 N.M. 845, 242 P.3d 412, cert. granted, 2010-NMCERT-008, 148 N.M. 942, 242 P.3d 1288.

Inference of intent permissible. — Defendant's motion for a directed verdict was properly denied because the jury could have properly inferred that defendant was the person who burglarized the building, and that the jacket and knife found in the vent,

therefore belonged to defendant. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, 34 P.3d 1157.

Inference of intent to commit felony. — Evidence that a store's burglary alarm system was triggered, that police officers responded within a minute after being called, that there was a four-by-eight-inch hole in a garage door near the opening mechanism, that defendant was found hiding in tires outside the building near the door, that the piece of door which had been removed in making the hole was found in the same area and that the store had been closed at 5:30 p.m., while the alarm went off shortly after 10:00 p.m. permitted an inference that defendant intended to commit a felony or theft inside the store. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

Inference of criminal intent. — Victim's house was broken into; defendant helped carry stolen items away over four foot fence in back of house; he was recognized by the victim's neighbor while carrying some of the stolen items; some stolen items were concealed; and defendant fled when discovered, although subsequently returned to the vicinity of the victim's house. These facts were evidence sufficient to sustain an inference of criminal intent. *State v. Peden*, 1973-NMCA-095, 85 N.M. 363, 512 P.2d 691.

Inference of intent. — Where defendant's companion completed crime of burglary by an unauthorized entry with the necessary intent, and defendant knew this fact, was present and participated, his intent could be inferred from his acts. *State v. Riley*, 1970-NMCA-015, 82 N.M. 298, 480 P.2d 693.

Where defendant was caught in a public schoolhouse on a Sunday afternoon by two police officers and upon being searched for weapons several items taken from desk or storage cabinet in principal's office were discovered, the evidence substantially supported a reasonable inference of defendant's intent to commit a theft in the schoolhouse which he had entered without authorization. *State v. Lujan*, 1970-NMCA-087, 82 N.M. 95, 476 P.2d 65.

In prosecution for burglary, larceny and unlawful taking of a vehicle, evidence of the time factors, distances, observations of defendants, locations and possession of stolen goods pointed unerringly to defendants and excluded every reasonable hypothesis other than guilt. *State v. Sanchez*, 1971-NMCA-065, 82 N.M. 585, 484 P.2d 1295.

Breaking of window indicative of intent. — Jury, after they found that defendant shattered the grocery store window, validly inferred that window was broken in an attempt to enter and unlawfully take property from inside the store, and that he acted with criminal intent. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262.

Intent absent. — Testimony by the prosecutrix that she engaged in sexual intercourse with defendant, along with his acquittal on rape charge, suggests that jury found that the sexual intercourse took place with consent of the prosecutrix and that defendant did not enter her home with intent to commit rape, and thus the evidence was insufficient to

sustain a conviction for burglary. *State v. Elliott*, 1975-NMCA-087, 88 N.M. 187, 539 P.2d 207, *rev'd on other grounds*, 1976-NMSC-030, 89 N.M. 305, 551 P.2d 1352.

Insufficient evidence of intent to commit a theft or criminal damage to property. — Where defendant was convicted of residential burglary based on DNA evidence found in the burglarized house, there was insufficient evidence to permit a rational jury to find the essential facts to establish each element of the crime of residential burglary beyond a reasonable doubt, because although there was evidence that defendant had entered the property without authorization, the state, without presenting any evidence linking defendant to the stolen items or the property damage, failed to establish, either directly or by circumstantial evidence, that defendant entered the dwelling with the intent to commit a theft or criminal damage to property when inside. *State v. Ledbetter*, 2020-NMCA-046.

Proof beyond reasonable doubt. — Where unlawful entry and a description of items stolen were proven beyond a reasonable doubt, this was sufficient to sustain the conviction under this statute. *State v. Baca*, 1974-NMCA-022, 86 N.M. 144, 520 P.2d 872.

Guilt as only reasonable hypothesis. — Defendant's flight when officers arrived indicated consciousness of guilt, and together with fact that he came to store with intent of breaking in and gave a false name when arrested, absent an explanation of his reasons or motive, permitted an inference of guilt, excluding every other reasonable hypothesis. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

Hypothesis in defense. — Defendant's hypothesis that actual burglar had been frightened away by appearance of defendant since there was no evidence introduced concerning fingerprints, defendant was not wearing gloves and officers found nothing on defendant classified as burglar tools, was not reasonable in the light of the jury verdict which necessarily determined that defendant was inside burglarized apartment, and in light of undisputed evidence of a torn screen, open door and "mess" inside the apartment. *State v. Madrid*, 1972-NMSC-016, 83 N.M. 603, 495 P.2d 383.

Unauthorized entry established. — Circumstantial evidence may be used to establish an unauthorized entry, and evidence showing that defendant and companions went to liquor store with intent to break in, taking a sledgehammer, that windows were broken, that the men fled the scene and that bottles of liquor were missing, pointed unerringly to an unauthorized entry. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

Slight penetration sufficient. — Evidence that an unidentified instrument penetrated one-half inch inside a building was sufficient evidence of entry to sustain a burglary conviction, since any penetration, however slight, of the interior space is sufficient. *State v. Tixier*, 1976-NMCA-054, 89 N.M. 297, 551 P.2d 987.

Evidence supporting conviction. — Evidence that a fingerprint lifted from a coke machine which had been broken into during a burglary was the same as that on defendant's fingerprint card, on the basis of a ten point comparison taken from defendant under controlled circumstances, and that although gas station operator testified that his son had access to key to machine he also stated that to his knowledge his son never opened it, was sufficient to support conviction. *State v. Douglas*, 1974-NMCA-087, 86 N.M. 665, 526 P.2d 807, cert. denied, 86 N.M. 656, 526 P.2d 798.

Sufficient evidence. — Where store manager testified that he had checked the building just before he left the previous evening and that it was securely locked, that a window found broken shortly after defendant's apprehension had not been broken the evening before and that no one, including the defendant, was authorized to enter the store after closing time, and evidence showed that defendant, seen near the store in the early morning when all the businesses were closed, ran when a police officer attempted to stop him for questioning, dropped two bags which contained merchandise from the store, evidence was sufficient, albeit circumstantial, for the jury to infer that defendant committed burglary. *State v. Lauderdale*, 1973-NMCA-035, 85 N.M. 157, 509 P.2d 1352, cert. denied, 85 N.M. 144, 509 P.2d 1339.

Evidence, including positive identification of defendant and testimony as to his presence in cab of burglarized pick-up, along with business papers kept in truck which were found on the ground near the pick-up and in the alley near which the defendant was apprehended, sustained burglary conviction. *State v. Wilkerson*, 1972-NMCA-067, 83 N.M. 770, 497 P.2d 981.

Where evidence was clear that the residence had been entered with an intent to commit theft as various items of personal property had been stolen and homeowner testified that to gain entrance the window would have had to be forced open, presence of defendant's prints on inside portion of the window was sufficient to point to defendant as the one who entered the house and stole the property. *State v. Mireles*, 1971-NMCA-027, 82 N.M. 453, 483 P.2d 508.

Evidence is sufficient to support a defendant's burglary conviction where the defendant, a security guard and associate member of a club, makes an unauthorized entry into the club after closing hours by breaking the club's door, then breaking into a bar cabinet and slot machine. *State v. Carter*, 1979-NMCA-117, 93 N.M. 500, 601 P.2d 733, cert. denied, 93 N.M. 683, 604 P.2d 821.

Where defendant admitted that he and accomplice "ransacked" the victim's residence and removed at least two pistols and three long firearms, this is sufficient evidence for the conviction of burglary. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by* State v. Frawley, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

"Dwelling house" construed. — To determine whether a structure constitutes a dwelling house, the court considers the evidence presented regarding the physical

characteristics of the structure to determine whether it is a type of structure customarily used for living quarters and in which possessory and privacy interests of habitation should be protected, and examines whether the structure was actually used for living quarters, whether its purpose was for habitation, and whether its use as living quarters was sufficient to warrant protection of the heightened privacy and possessory interests of habitation. *State v. Shelby*, 2021-NMCA-064, cert. denied.

Sufficient evidence of burglary of a "dwelling house". — Where defendant was convicted of burglary of a dwelling, larceny over $2,500, and criminal damage to property over $1,000, and where defendant claimed that his conviction for burglary of a dwelling was not supported by sufficient evidence because the interior of the house at issue was under construction, it lacked electricity and running water, and the evidence did not show that the owner "customarily used" the house "as living quarters" under the definition of "dwelling house," as set out in UJI 14-1631 NMRA, the evidence sufficiently established that the structure entered was a dwelling house within the meaning and purpose of the burglary statute and UJI 14-1631, because the state presented evidence that the structure was a house with an enclosed, finished exterior, the house was used for habitation in a regular, yet intermittent, way, and the apparent purpose of the house was for habitation. *State v. Shelby*, 2021-NMCA-064, cert. denied.

Sufficient evidence of burglary of a vehicle. — Where surveillance video evidence showed a dark-colored pickup truck enter a motel parking lot in the early morning hours and showed a person identified by the arresting officer as defendant forcibly entering and removing items from two vehicles, and where, during a custodial interview, defendant made statements to the effect that he did not remember what he took and did not know the whereabouts of the items taken from the vehicles, and where the arresting officer testified that he observed defendant forcibly enter two other vehicles at a different motel, there was sufficient evidence to support defendant’s convictions on four counts of burglary of a vehicle. *State v. Sweat*, 2017-NMCA-069, cert. denied.

Sufficient evidence of conspiracy to commit burglary. — Where defendant, a former employee of a motel, asked the motel desk clerk to attend to an internet problem in the motel by implying that he was a motel guest, which he was not, and where defendant remained in the lobby while his co-conspirator climbed over the desk clerk’s counter, broke the lock on a cash drawer and removed cash, and where defendant immediately followed the co-conspirator out of the motel lobby after the co-conspirator took the cash, there was sufficient evidence for a rational trier of fact to infer that defendant, as a former employee of the motel, knew the location of the cash drawer, that asking the desk clerk to reset the wireless router would require the clerk to be away from the office for a sufficient amount of time to create an opportunity to steal the cash and escape without notice, and that defendant and his accomplice agreed and intended to commit the crime of burglary. *State v. Mestas*, 2016-NMCA-047.

Circumstantial evidence sufficient. — Facts regarding the defendants' actions and the surrounding circumstances provided sufficient evidence from which a jury could infer that defendants intended to break into a building and commit a theft therein. *State v.*

Jennings, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882, cert. quashed, 102 N.M. 88, 691 P.2d 881.

Unexplained possession with other circumstances. — While unexplained possession of goods belonging to another does not raise presumption that a larceny has been committed and that the possessor is a thief, additional evidence being necessary to establish the corpus delicti, nevertheless additional evidence, consisting of the fact that a robbery had been committed, the early hour of the morning, the lack of identification, the giving of a false name and defendant's statement that he was on his way home which was in the southwest quadrant of the city when he was walking north, was sufficient to sustain a conviction for burglary. *State v. Rivera*, 1973-NMCA-145, 85 N.M. 723, 516 P.2d 694.

Sufficiency of evidence. — Evidence that defendant possessed recently stolen property which he acquired by theft, together with evidence of defendant's presence at the scene near the time of the crime with a person who knew the precise location of the property, permitted the inference that defendant stole the guns during an unauthorized entry of owner's residence, and was sufficient to sustain his conviction for burglary. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

Evidence, though partly circumstantial, supported conviction for burglary, where soda pop of kind and amount stolen was found in possession of defendant near the place where pop had been stolen, defendant had prevailed upon acquaintances to take him to the vicinity of the storage shed for the purpose of getting some pop, when being investigated defendant admitted the theft, and a footprint similar to defendant's was found in the burglarized shed. *State v. Waits*, 1966-NMSC-162, 76 N.M. 630, 417 P.2d 439.

Aiding and abetting shown. — Although defendant's witness testified that defendant was unaware that witness was removing stereo tape deck from automobile, where evidence showed that defendant and witness looked into another car before witness broke into the burglarized car and that defendant leaned on the door of the burglarized car and was "looking both ways as if observing for something," this evidence was sufficient to sustain defendant's conviction as an aider and abettor under this section. *State v. Sandoval*, 1972-NMCA-038, 83 N.M. 599, 495 P.2d 379.

Evidence insufficient. — Although similarity between footprints, and tire prints, along with defendant's locations, actions and statements, created a suspicion that he committed the offense charged, it could not be said that there were not other reasonable hypotheses which permitted a finding of his innocence and hence circumstantial evidence solely relied upon by state, failed to meet the standard required. *State v. Seal*, 1965-NMSC-154, 75 N.M. 608, 409 P.2d 128; *State v. Waits*, 1966-NMSC-162, 76 N.M. 630, 417 P.2d 439; *State v. Sharp*, 1967-NMSC-169, 78 N.M. 220, 430 P.2d 378; *State v. Williamson*, 1968-NMSC-033, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968); *Nance v. State*, 1969-NMCA-018, 80 N.M. 123, 452 P.2d 192.

Where at best the state showed that defendant had constructive possession of certain stolen jewelry by virtue of occupying along with another individual the same room in which it was found, but there was no evidence showing or tending to show that he had knowledge, control or voice in the power of disposal of the jewelry, evidence was insufficient to permit issue of defendant's guilt on burglary charge to go to the jury. *State v. Romero*, 1960-NMSC-047, 67 N.M. 82, 352 P.2d 781.

Raising insufficiency of evidence. — On appeal from denial of post-conviction relief, petitioner's contentions that he should not have been charged with and convicted of aggravated burglary, that the state failed to prove criminal intent and that he was intoxicated at the time of the offense and could not have had the requisite intent, not having been raised on direct appeal, did not provide a basis for post-conviction relief. *Andrada v. State*, 1971-NMCA-184, 83 N.M. 393, 492 P.2d 1010.

Where in a prosecution for burglary the question of sufficiency of the evidence was not presented to the trial court, defendant could not demand a review of the evidence as a matter of right, but in case at hand appellate court would examine the record to determine if fundamental error was committed. *State v. Sedillo*, 1969-NMCA-107, 81 N.M. 47, 462 P.2d 632, cert. denied, 81 N.M. 40, 462 P.2d 625.

VI. INSTRUCTIONS.

Instruction on specific intent required. — Since the crime of burglary is a crime requiring a specific mens rea, an instruction on specific intent or specific mens rea is required. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Failure to give instruction concerning criminal intent is jurisdictional and may be raised for the first time on appeal. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Language of statute adequate. — Since this section defines the element of intent constituting the crime of burglary, an instruction which follows the language of the statute adequately instructs the jury on the specific criminal intent required. *State v. Gunzelman*, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Sufficiency of instruction. — Instruction that any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of burglary of a dwelling house was sufficient on the element of criminal intent. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

Additional instruction on general criminal intent was unnecessary in prosecution for burglary as a person is presumed to intend the logical consequences of his actions.

State v. Gunzelman, 1973-NMSC-055, 85 N.M. 295, 512 P.2d 55, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Intoxication instruction properly refused. — Requested instruction telling jury to acquit defendant if he "did not have the intent to commit the unlawful act of burglary as a result of intoxication" was properly refused because of its wording, which would have required jury to accept, as a fact, the matter of intoxication which was for the jury to decide. *State v. Gonzales*, 1971-NMCA-007, 82 N.M. 388, 482 P.2d 252, cert. denied, 82 N.M. 377, 482 P.2d 241.

Presumption of innocence adequately covered. — In prosecution for burglary, where instructions were given on the presumption of innocence and the burden of proof, court's refusal to instruct that there was no presumption that defendant was an accessory and that he did not have the burden of proving that he was not an accessory was not error. *State v. Gunzelman*, 1973-NMCA-121, 85 N.M. 535, 514 P.2d 54, *overruled on other grounds by State v. Orosco*, 1992-NMSC-006, 113 N.M. 780, 833 P.2d 1146.

Submission of lesser offense unnecessary. — Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and not being an included offense, trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

Instruction on accomplice's testimony. — In trial for burglary, instruction that an accused may be convicted upon the testimony of an accomplice, even though it is uncorroborated, was proper. *State v. Baca*, 1973-NMCA-054, 85 N.M. 55, 508 P.2d 1352.

Instruction misstating victim's name and address. — Error in instruction misstating name and address of burglary victim, to which defendant did not object, was not preserved for review and did not constitute fundamental error. *State v. Jaramillo*, 1973-NMCA-029, 85 N.M. 19, 508 P.2d 1316, cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Failure to request instruction. — Counsel's failure to request an instruction to the effect that intoxication would relieve the defendant of criminal responsibility if he were unable to form the criminal intent required for the commission of the crime of burglary may have been no more than bad strategy on the part of counsel, so that it could not be said, as a matter of law, that representation was so inadequate as to deprive him of his constitutional right to effective assistance of counsel. *State v. Samora*, 1971-NMCA-001, 82 N.M. 252, 479 P.2d 532.

Attorney general opinions. — The phrase "or any other felony," in former 40-9-6, 1953 Comp., dealing with crime of breaking and entering into places other than

dwellings, was indicative that this section of the statute only applied to a breaking and entering with intent to commit a felony. 1955 Op. Att'y Gen. No. 55-6115.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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 law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

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

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary §§ 1 to 14.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A.L.R. 112.

Burglary without breaking, 23 A.L.R. 288.

Outbuilding or the like as part of "dwelling house," 43 A.L.R.2d 831.

Gambling or lottery paraphernalia as subject of burglary, 51 A.L.R.2d 1396.

Night, sufficiency of showing that burglary was committed at, 82 A.L.R.2d 643.

Entry through partly opened door or window as burglary, 70 A.L.R.3d 881.

Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

Minor's entry into home of parent as sufficient to sustain burglary charge, 17 A.L.R.5th 111.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 A.L.R.5th 125.

12A C.J.S. Burglary §§ 1 to 38.

30-16-4. Aggravated burglary.

Aggravated burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with intent to commit any felony or theft therein and the person either:

A. is armed with a deadly weapon;

B. after entering, arms himself with a deadly weapon;

C. commits a battery upon any person while in such place, or in entering or leaving such place.

Whoever commits aggravated burglary is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-4, enacted by Laws 1963, ch. 303, § 16-4.

ANNOTATIONS

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For battery, *see* 30-3-4 NMSA 1978.

For instruction as to essential elements of aggravated burglary, *see* UJI 14-1632 NMRA.

The unit of prosecution for aggravated burglary is an unlawful entry with intent to commit a felony. — When there is only one unauthorized entry, there can only be one aggravated burglary, even if defendant commits multiple aggravating acts. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462 and *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Convictions of aggravated burglary while committing a battery and aggravated burglary with a deadly weapon violated double jeopardy. — Where defendant, who was armed with a knife and who intended to steal a vehicle from the victims, entered the victims' home, stabbed one victim, and beat and stabbed the other victim; and defendant was convicted of aggravated burglary while committing a battery and aggravated burglary with a deadly weapon, defendant's convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462 and *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Double jeopardy. — Where the force used to complete aggravated burglary constituted the same force used to restrain a victim to accomplish CSP II there were insufficient

indicia of distinctness differentiating the acts and a conviction on both is impermissible on double jeopardy grounds. *State v. Armendariz*, 2006-NMCA-152, 140 N.M. 712, 148 P.3d 198, cert. quashed, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Lesser included offense. — Under the facts of this case, the aggravated burglary offense could not be committed without also committing the crime of dangerous use of explosives; the explosives offense does not have an element not included in the burglary offense. The explosives offense was an offense included within the aggravated burglary offense. *State v. Jacobs*, 1985-NMCA-054, 102 N.M. 801, 701 P.2d 400.

Instruction on lesser included offense. — When criminal trespass is factually based solely on unlawful entry, not on unlawfully remaining without consent, then criminal trespass is necessarily included within the offense of aggravated burglary of a dwelling house and a defendant is entitled to an instruction on the lesser included offense. *State v. Romero*, 1998-NMCA-057, 125 N.M. 161, 958 P.2d 119

Double jeopardy. — Section 30-16-4 NMSA 1978 is designed to address the heightened threat associated with possession of deadly weapons and to deter their possession in the course of burglaries even if no use is intended. By contrast, Subsection C of Section 30-16-4 NMSA 1978 is designed to address actual physical injury to persons during a burglary. Because these factors reinforce the presumption of distinct, punishable offenses, a defendant's convictions pursuant to these two separate statutory subsections do not offend double jeopardy principles. *State v. Swick*, 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462.

Legislative intent to deter firearm possession during crime. — The adoption of several statutes, one classifying aggravated burglary as a second degree felony, and the other specifying that simple burglary is a fourth-degree felony, evinces a clear legislative intention to deter the commission of burglaries and the possession of firearms during such crimes. *State v. Luna*, 1982-NMCA-150, 99 N.M. 76, 653 P.2d 1222, cert. denied, 99 N.M. 148, 655 P.2d 160.

Crucial factor in crime of aggravated burglary is whether the defendant has the intent to commit a felony on entering the dwelling, not whether the felony was actually committed, as the intent does not have to be consummated. *State v. Castro*, 1979-NMCA-023, 92 N.M. 585, 592 P.2d 185, cert. denied, 92 N.M. 621, 593 P.2d 62.

Meaning of "deadly weapon". — Deadly weapons shall be construed to mean any kind or class of pistol or gun, whether loaded or unloaded. *State v. Montano*, 1961-NMSC-174, 69 N.M. 332, 367 P.2d 95.

Theft is not a necessary element of aggravated burglary, which requires only the element of intent to commit any felony or theft. *State v. Ranne*, 1969-NMCA-029, 80 N.M. 188, 453 P.2d 209.

Elements of robbery and aggravated burglary are not the same, and therefore, defendant could be sentenced for each of these crimes. *State v. Ranne*, 1969-NMCA-029, 80 N.M. 188, 453 P.2d 209.

Breaking and entering not lesser included offense. — Breaking and entering is not a lesser included offense of aggravated burglary because each offense requires an element not included in the other and, by convicting defendant of breaking and entering when he only had notice of an aggravated burglary, the trial court violated his right to notice of the charges against him. *State v. Hernandez*, 1999-NMCA-105, 127 N.M. 769, 987 P.2d 1156, cert. denied, 128 N.M. 149, 990 P.2d 823.

Larceny of a firearm distinguished. — Aggravated burglary and larceny of a firearm are different crimes, with different elements: larceny of a firearm requires proof that the firearm was stolen but does not require proof of an unlawful entry. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

Aggravated burglary and sex offense separate crimes. — Since aggravated burglary and criminal sexual penetration in the third degree (30-9-11 NMSA 1978) each require proof of facts which the other does not and since neither offense necessarily involves the other, there would be no double jeopardy violation and no merger of the offenses despite the fact that the same evidence may go toward proving both. *State v. Young*, 1978-NMCA-040, 91 N.M. 647, 579 P.2d 179, cert. denied, 91 N.M. 751, 580 P.2d 972, and cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Where the victim awoke and found the defendant on top of her and the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. *State v. Archunde*, 1978-NMCA-050, 91 N.M. 682, 579 P.2d 808.

Where defendant's acts constituting battery for purposes of aggravated burglary charges and acts constituting criminal sexual penetration (CSP) were separate and distinct, convictions and consecutive sentences for both CSP and aggravated burglary did not violate double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Aggravated burglary and attempted criminal sexual penetration merged. — Defendant's conduct consisting of his entry into a dwelling with intent to commit a felony and attempted criminal sexual penetration (CSP II) was unitary, thus his convictions for both aggravated burglary and attempted CSP II violated double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Aggravated burglary and first degree murder not unitary. — First degree murder and aggravated burglary were not unitary acts, and imposition of sentences for both offenses did not violate double jeopardy. *State v. Livernois*, 1997-NMSC-019, 123 N.M. 128, 934 P.2d 1057.

Indictment adequate. — Indictment employing the name given the offense by statute and specifically referring to the section and subsection of the statute which created the offense sufficiently charged crime of aggravated burglary, despite failure to allege an entry with intent to commit a felony or theft. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151 (decided under prior law).

Unauthorized entry. — An allegation or proof of ownership of a building or structure, the subject of a burglary charge, is unnecessary. *State v. Flores*, 1971-NMCA-036, 82 N.M. 480, 483 P.2d 1320.

Entry into separate residence of spouse. — Section 40-3-3 NMSA 1978 does not provide immunity from prosecution for burglary of a spouse's separate residence. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

Where, because of domestic problems, defendant rented a separate apartment for defendant's spouse; the parties agreed that the apartment was the spouse's separate residence, that defendant would not have a key to the apartment, and that defendant did not have the spouse's permission to enter the apartment; and several months later, defendant entered the spouse's apartment through a window, 40-3-3 NMSA 1978 did not preclude defendant's conviction for burglary of the spouse's separate dwelling. *State v. Parvilus*, 2014-NMSC-028, *rev'g* 2013-NMCA-025, 297 P.3d 1228.

The plain language of Section 40-3-3 NMSA 1978 renders inter-spousal burglary an impossibility because the New Mexico burglary statutes protect the possessory right to exclude and Section 40-3-3 NMSA 1978 dictates that spouses have no such right to exclude the other spouse. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Entry into residence of estranged spouse. — Where defendant entered defendant's estranged spouse's apartment without permission, kidnapped the victim, and killed the victim, Section 40-3-3 NMSA 1978 prohibited defendant's spouse from excluding defendant from the spouse's apartment and defendant's entry into the apartment, even with felonious purpose, did not constitute aggravated burglary as a matter of law. *State v. Parvilus*, 2013-NMCA-025, 297 P.3d 1228, cert. granted, 2013-NMCERT-001.

Battery while unarmed not lesser crime. — The legislature made no distinction in severity of punishment between a defendant who commits a burglary while armed with a deadly weapon as opposed to an unarmed defendant who causes a victim physical harm by committing a battery. *State v. Romero*, 1994-NMCA-150, 119 N.M. 195, 889 P.2d 230, cert. denied, 119 N.M. 20, 888 P.2d 466.

Intent to steal vehicle sufficient. — Breaking into a car with the intent to steal the car qualifies as an intent to commit a theft "therein." *State v. Griffin*, 1993-NMSC-071, 116 N.M. 689, 866 P.2d 1156.

"Armed" defined. — "Armed" includes a stolen deadly weapon which is easily accessible and readily available for use during the commission of the burglary whether or not it is actually on the person of the accused. *State v. Padilla*, 1996-NMCA-072, 122 N.M. 92, 920 P.2d 1046, cert. denied, 122 N.M. 1, 919 P.2d 409.

Corroboration of use of gun. — In prosecution for aggravated burglary and aggravated battery testimony by victim that he was struck by defendant with a gun on and about his face was corroborated by fact that he recognized the gun in question, by defendant's testimony that he threw the gun away after leaving the scene and by photographs of victim showing facial cuts and abrasions; furthermore, corroboration was not required. *State v. Tafoya*, 1969-NMCA-073, 80 N.M. 494, 458 P.2d 98.

Possession of unloaded firearm sufficient. — Subsection B (Section 30–16–4 NMSA 1978) is violated by a person who in the commission of a burglary becomes armed with an unloaded firearm. Whether a defendant is in actual possession of a firearm within the contemplation of Subsection B (Section 30-16-4 NMSA 1978) or possesses the requisite intent to commit a felony may, however, present a factual issue to be determined by the trier of fact. *State v. Luna*, 1982-NMCA-150, 99 N.M. 76, 653 P.2d 1222, cert. denied, 99 N.M. 148, 655 P.2d 160.

"Leaving such place". — The legislature intended the word "leaving" in Subsection C (Section 30–16–4 NMSA 1978) to be given the ordinary meaning of "departing or going away from" and not "losing exterior contact with"; thus, when the burglarized area is an area of restricted access in an otherwise public building, a person will be deemed to be leaving the area so long as that person is still in the public portion of the building. *State v. Romero*, 1994-NMCA-150, 119 N.M. 195, 889 P.2d 230, cert. denied, 119 N.M. 20, 888 P.2d 466.

Collateral offenses admissible. — Testimony of victim and corroborating witness as to an assault on the same night and in same vicinity as the crimes of aggravated burglary and aggravated battery for which defendant was on trial, offered upon issue of identity, was admissible as an exception to rule prohibiting evidence of collateral offenses. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151.

In prosecution for aggravated burglary, armed robbery and rape, testimony of victim raped an hour after initial crime about five blocks away was admissible in order to establish characteristic conduct and defendant's possession of knife and flashlight which figured in first crime. *State v. Lopez*, 1969-NMCA-057, 80 N.M. 599, 458 P.2d 851, cert. denied, 80 N.M. 607, 458 P.2d 859, and cert. denied, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Conflicting evidence for jury. — Although based on certain deception tests (polygraph, sodium amytol and hypnosis) the experts considered defendant truthful in his denial, the testimony of the complaining witness presented on issue of fact for the jury, and defendant was not entitled to a directed verdict on charges of aggravated battery and aggravated burglary. *State v. Turner*, 1970-NMCA-024, 81 N.M. 450, 468 P.2d 421, cert. denied, 81 N.M. 506, 469 P.2d 151.

Intent established. — Where defendant made an unauthorized entry into an apartment, armed with a knife, and began to kiss and fondle the female occupant who was asleep, the evidence was sufficient to establish that defendant's intent upon entry was to commit an aggravated assault, and therefore he was guilty of aggravated burglary. *State v. Mata*, 1974-NMCA-067, 86 N.M. 548, 525 P.2d 908, cert. denied, 86 N.M. 528, 525 P.2d 888.

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

Charge of lesser offense not warranted. — Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and not being an included offense, trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

Breaking-and-entering, lesser included offense instruction rejected since no evidence to support. — Where defendant was charged with aggravated burglary, his tendered instruction on lesser included offense of breaking and entering was properly rejected because there was no evidence to support the commission of the lesser offense. *State v. Smith*, 1986-NMCA-089, 104 N.M. 729, 726 P.2d 883, cert. denied, 104 N.M. 702, 726 P.2d 856.

Insanity defense. — Trial court committed reversible error in refusing to instruct on defense of insanity, where expert medical testimony regarding defendant's heroin addiction injected reasonable doubt as to his mental illness at the time of the burglary. *State v. Flores*, 1971-NMCA-036, 82 N.M. 480, 483 P.2d 1320.

Juror present for police investigation. — Conviction for entering a dwelling with intent to commit a felony while armed with a deadly weapon should be reversed, where after verdict fact came to light that following commission of the crime and on the same day one juror was present in the dwelling in question with the complaining witness while two police officers who testified at trial sought latent fingerprints, on basis of which defendant was convicted. *Mares v. State*, 1971-NMSC-106, 83 N.M. 225, 490 P.2d 667.

Sufficient evidence based on testimony of an accomplice. — Where defendant was convicted of aggravated burglary based on the testimony of an accomplice, defendant’s

argument, that such testimony when uncorroborated by physical evidence is insufficient as a matter of law, was without merit, because the uncorroborated testimony of an accomplice is sufficient in law to support a verdict for aggravated burglary. *State v. Montoya*, 2016-NMCA-098, cert. denied.

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. *State v. Peterson*, 1985-NMCA-109, 103 N.M. 638, 711 P.2d 915, cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

Evidence, consisting of co-conspirator's testimony as to defendant's involvement in burglaries, was sufficient to support a conviction under this section; it is the province of the jury to determine a witness's credibility, and an appellate court will not substitute its judgment for that of the jury. *State v. Tisthammer*, 1998-NMCA-115, 126 N.M. 52, 966 P.2d 760, cert. denied, 126 N.M. 107, 967 P.2d 447.

There was sufficient evidence to uphold defendant's aggravated burglary conviction because (1) defendant's use of a tire iron to break into a house fell under the definition that defendant was "armed" with a weapon, pursuant to 30-1-12B NMSA 1978 and (the tire iron) was easily accessible and readily available for use, and (2) the use of a tire iron to break a window constituted "entry" under this section. *State v. Alvarez-Lopez*, 2003-NMCA-039, 133 N.M. 404, 62 P.3d 1286, *rev'd on other grounds*, *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary § 27.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

12A C.J.S. Burglary §§ 6, 7.

30-16-5. Possession of burglary tools.

Possession of burglary tools consists of having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary.

Whoever commits possession of burglary tools is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-5, enacted by Laws 1963, ch. 303, § 16-5.

ANNOTATIONS

This section is not void for vagueness, since it gives fair warning that possession of the type of instrument described in the statute, and under the circumstances described in the statute, is a crime. *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983.

Vagueness. — Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act is not void for indefiniteness and uncertainty under constitution. *State v. Lawson*, 1955-NMSC-069, 59 N.M. 482, 286 P.2d 1076.

No unlawful delegation of power. — Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act does not constitute an unlawful delegation of legislative power to the judiciary to prescribe in each case a different offense. *State v. Lawson*, 1955-NMSC-069, 59 N.M. 482, 286 P.2d 1076.

No merger with attempted burglary. — The crime of attempt to commit felony of burglary did not merge with the crime of possession of burglary tools, and hence, defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

Possession of burglary tools. — Possession of burglary tools is not necessarily involved in burglary. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

What conduct prohibited. — This section gives notice that one is exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary. *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983.

Possession of a burglary tool is alone insufficient to satisfy the statutory element of intent to commit burglary. — Where defendant was charged with possession of burglary tools, and where, at trial, the arresting officer testified that defendant was found in possession of "jiggle" or "bump" keys, which the officer testified are filed down car keys which may be used as universal keys to start vehicles and which are designed for or commonly used in the commission of a burglary, there was insufficient evidence to support defendant's conviction for possession of burglary tools, because although defendant was found to be carrying a tool that has no legitimate purpose and is

designed for burglary, proof of possession of a tool designed exclusively for use as a burglary tool is alone insufficient to satisfy the statutory element of intent to use that tool in the commission of a burglary. *State v. Montoya*, 2021-NMCA-006, cert. denied.

Whether items commonly used for burglary is jury question. — The issue of whether items are commonly used for burglary is a factual one to be decided by the jury upon any competent evidence tending to show the nature and purpose of the tools. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882, cert. quashed, 102 N.M. 88, 691 P.2d 881.

Criminal intent requisite. — Criminal intent is an element of crime of possession of burglary tools, and the phrase "under circumstances evincing an intent" is merely a directive that criminal intent may be shown by evidence of circumstances. *State v. Lawson*, 1955-NMSC-069, 59 N.M. 482, 286 P.2d 1076.

Nature of possession. — This section does not require possession of burglary tools on the person of the defendant. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767.

Indictment sufficient. — Indictment charging offense by reference to the section or subsection creating the offense was sufficient, and trial court properly treated allegation as to possession on defendant's person as surplusage. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767.

Evidence sufficient. — The evidence, which showed that defendant pried open an office door and committed a larceny, was sufficient to support a finding that defendant intended to use a pry device to make an unauthorized entry of a structure with the intent to commit a felony therein. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, 34 P.3d 1157.

Evidence of possession. — Evidence that burglary tools were taken by police from possession of defendants, weapons being found in the truck occupied by them on night of the burglary, substantially supported finding that defendants were in possession of the tools. *State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767.

Insufficient evidence of possession of burglary tools. — Where defendant was convicted of possession of burglary tools, and where the state presented evidence that a police officer witnessed defendant driving a vehicle that had been reported stolen and that the officer observed a screwdriver in the center console, there was insufficient evidence to support defendant's conviction, because there was no evidence that defendant had the screwdriver before he entered the vehicle or that he had any intent to use the screwdriver to obtain unauthorized entry to the vehicle. *State v. Ford*, 2019-NMCA-073.

Insufficient evidence to support defendant's conviction for possession of burglary tools. — Where defendant was convicted of non-residential burglary, breaking

and entering, and possession of burglary tools, and where defendant claimed that there was insufficient evidence to support his conviction for possession of burglary tools, specifically contending that the state did not present sufficient evidence to show that the gloves or the screwdriver found in his possession were items designed for or commonly used to gain entry during a burglary, or that he intended to use the items for the purpose of committing a burglary, there was insufficient evidence to support defendant's conviction for possession of burglary tools, because although there was testimony that the arresting officer found a screwdriver wrapped inside a pair of gloves in defendant's pocket, the state presented no other evidence that could establish that defendant used or intended to use the screwdriver at the time of entry, or that a screwdriver is designed for, or commonly used in, the commission of a burglary, and although the state explained to the jury why defendant might wear gloves to commit the burglary, there was no evidence from which a rational juror could determine that defendant was wearing gloves at the time of entry. *State v. Begaye*, 2022-NMCA-010, 505 P.3d 855, *rev'd by* 2023-NMSC-015.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 13 Am. Jur. 2d Burglary §§ 74 to 77.

Validity, construction and application of statute relating to burglars' tools, 33 A.L.R.3d 798.

12A C.J.S. Burglary §§ 43 to 48.

30-16-6. Fraud.

A. Fraud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations.

B. Whoever commits fraud when the value of the property misappropriated or taken is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits fraud when the value of the property misappropriated or taken is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits fraud when the value of the property misappropriated or taken is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits fraud when the value of the property misappropriated or taken is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits fraud when the value of the property misappropriated or taken exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Whoever commits fraud when the property misappropriated or taken is a firearm that is valued at less than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-6, enacted by Laws 1963, ch. 303, § 16-6; 1979, ch. 119, § 1; 1987, ch. 121, § 2; 2006, ch. 29, § 3.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increased the value of property in Subsection B from $100 or less to $250 or less; increased the value of property in Subsection C from more than $100 but less than $250 to more than $250 but less than $500; increased the value of property in Subsection D from more than $250 but less than $500 to more than $500 but less than $2,500; deleted the former provision that whoever commits fraud when the property misappropriated or taken is a firearm is guilty of a fourth degree felony; and added Subsection G to provide that whoever commits fraud when the property misappropriated is a firearm with a value of less than $2,500 is guilty of a fourth degree felony.

The 1987 amendment, effective June 19, 1987, added the third paragraph, substituted "two hundred fifty dollars ($250) for "one hundred dollars ($100)" in the fourth paragraph, and substituted "is over" for "exceeds" in the sixth paragraph.

I. GENERAL CONSIDERATION.

Significance of value. — The primary elements of fraud are an intentional misappropriation or taking of anything of value. Particular values are significant only for division of gravity from a petty misdemeanor ($100 or less) to a second degree felony (over $20,000). *State v. Lee*, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215, P.3d 42.

Intent. — Where the evidence supports a reasonable inference that defendant knew the representations he made were false, there is sufficient evidence of fraudulent intent. *State v. Gardner*, 1985-NMCA-084, 103 N.M. 320, 706 P.2d 862, cert. denied, 103 N.M. 287, 705 P.2d 1138.

Fraud and embezzlement are mutually exclusive, and although alternative charges are proper, a defendant cannot be convicted of both fraud and embezzlement. *State v. Hornbeck*, 2008-NMCA-039, 143 N.M. 562, 178 P.3d 847.

Section inapplicable to judicial proceedings. — If presentation of a false claim were made to a board constituting a court, proceedings before which would result in a judicial judgment or decree, there could be no prosecution for obtaining money for false pretenses; the remedy would be a prosecution for perjury. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

Conviction under general law improper. — Where one who sold one neat cattle, the property of another, was prosecuted under former law relating to sale of property without right, the conviction could not stand, for law relating to larceny, embezzlement or killing of domestic animals, applied specifically to that crime and should have been invoked. *State v. Blevins*, 1936-NMSC-052, 40 N.M. 367, 60 P.2d 208.

Jurisdiction. — Jurisdiction of prosecution for criminal false pretenses was in the county, district or state where the offense was consummated by the obtaining of the property, even though the inducing pretenses were made elsewhere and the consummation by delivery of the property was effected through the instrumentality of an innocent agent, without the personal presence of the principal. *State v. Faggard*, 1918-NMSC-133, 25 N.M. 76, 177 P. 748 (decided under prior law).

Effect of Worthless Check Act. — This section and the Worthless Check Act (30-36-1 to 30-36-9 NMSA 1978) prohibit different offenses, and it is inappropriate to view the Worthless Check Act as an exception to this section. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

Effect of Veterans' Benefits Act. — Where defendant was indicted for fraudulently obtaining reimbursements for travel to and from medical appointments which were reimbursable by the United States Department of Veterans' Affairs pursuant to the Veterans' Benefits Act, 38 U.S.C. §111, the act did not preempt the state's prosecution of defendant for violation of Section 30-16-6 NMSA 1978 or create an unavoidable conflict with state law. *State v. Herrera*, 2014-NMCA-003, cert. denied, 2013-NMCERT-011.

Place of crime. — Fraud of which defendant was convicted occurred in New Mexico where defendant issued drafts of an insurance company drawn on a bank in Colorado in payment of false claims. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241.

Convictions violated double jeopardy. — Where defendant was charged with four counts of fraud and, in the alternative, four counts of embezzlement, and on counts 2 and 4, she was convicted of both the fraud and embezzlement alternatives, although the state is authorized to charge in the alternative, defendant's convictions for both alternatives violate her right to be free from double jeopardy. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Multiple convictions of fraud violated defendant's double jeopardy rights. — Where defendant was charged with multiple counts of fraud and failure to disclose facts to obtain public assistance, related to her application for and receipt of several forms of public assistance benefits, including supplemental security income (SSI), social security disability insurance (SSDI), medicaid, and food stamps (SNAP), and where defendant claimed on appeal that her public assistance fraud convictions should be vacated because the conduct supporting those convictions was the same conduct supporting the general fraud convictions, defendant's double jeopardy rights were violated, because defendant's conduct supporting the fraud charges and the public assistance fraud charges was unitary, the general fraud was not complete before the public assistance fraud was committed, the time and space for each overlapped, the quality and nature of the acts were the same, the object and results of the acts were the same, and the mens rea for the general fraud and the public assistance fraud were the same, and, under the state's theory of the case, the public assistance fraud convictions were subsumed within the general fraud convictions. Punishment cannot be had for both fraud and public assistance fraud in this case. *State v. DeLaO*, 2022-NMCA-064, cert. denied.

Mistake of fact instruction not warranted. — Where defendant was charged with multiple counts of fraud and failure to disclose facts to obtain public assistance, related to her application for and receipt of several forms of public assistance benefits, including supplemental security income (SSI), social security disability insurance (SSDI), medicaid, and food stamps (SNAP), and where defendant claimed on appeal that the district court improperly refused to give a mistake of fact instruction based on defendant's theory that she mistakenly believed that by separately reporting her income to the human services department [health care authority department] to satisfy a child support obligation, she satisfied all of her reporting obligations, the district court properly denied defendant's requested instruction, because the general fraud instruction adequately apprised the jury of the intent element of the crime and allowed it to consider defendant's theory of the case. *State v. DeLaO*, 2022-NMCA-064, cert. denied.

Subsequent prosecutions not double jeopardy. — Dismissal of charge of passing forged instrument evidencing an indebtedness of a banking institution with intent to defraud for variance between allegation and proof, in that the instrument in question did not evidence an indebtedness of a bank, and subsequent prosecution for passing same forged bill of exchange with intent to defraud under the appropriate section, did not constitute double jeopardy as one information required proof of facts which the other did not. *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

Notice of lesser included offense. — Fraud over $250 is a lesser and necessarily included offense of fraud over $2,500, such that defendant was put on notice of the included offense when the state charged him with the greater offense. *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 861 P.2d 978, cert. denied, 116 N.M. 364, 862 P.2d 1223.

Prosecution for both fraud and making false public voucher permitted. — The double jeopardy clause does not prohibit the prosecution of an individual under both this section and 30-23-3 NMSA 1978. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Because the fraud statute does not require the making of a false voucher, and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

Alternative charging of fraud or embezzlement. — The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative, nor were the concepts of included offenses, same evidence or merger applicable. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Fraud and fraudulent securities practice separate offenses. — An analysis of the offense of fraud and the crime of fraudulent securities practice reveals that the two offenses have different elements; therefore, a defendant may be convicted and sentenced for both general fraud and securities fraud. *State v. Ross*, 1986-NMCA-015, 104 N.M. 23, 715 P.2d 471; *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

Convictions under this section and 58-11-65 NMSA 1978 improper. — Conviction under this section for fraud over $2500 and conviction under 58-11-65 NMSA 1978 for false written statement for the purposes of obtaining credit union funds violated defendant's double jeopardy rights. *State v. Montoya*, 1993-NMCA-097, 116 N.M. 297, 861 P.2d 978, cert. denied, 116 N.M. 364, 862 P.2d 1223.

Prosecution for violation of civil statute. — The question of whether a specific contractual provision is based on a valid statute or regulation is irrelevant in a criminal case for fraud. The prosecution here was directed at the alleged criminal fraud of each of the defendants rather than a civil action to enforce the contract. Under these circumstances, defendants' convictions for fraud were not invalid. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

Single larceny doctrine is inapplicable to fraud statute. *State v. Boergadine*, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert. denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

II. ELEMENTS OF OFFENSE.

Ownership of website. — Where an independent website designer created a website on the internet under contract with the defendant who was seeking to use the website

for commercial purposes; the contract recognized the designer's legal ownership of the copyright to the web pages; the contract provided that upon payment to the designer, the defendant would receive a license to use the web pages; the contract never transferred any interest in the web page design or ownership of the web site to the defendant; in breach of the contract, the defendant never paid the designer; the defendant locked out the designer from access to the website by changing the password; the designer was the owner of the website and the defendant was properly convicted of criminal fraud by taking property that belonged to someone other than the defendant. *State v. Kirby*, 2007-NMSC-034, 141 N.M. 838, 161 P.3d 883.

Fraud is complete once misappropriation or taking occurs by means stated in statute. *State v. Thoreen*, 1978-NMCA-024, 91 N.M. 624, 578 P.2d 325, cert. denied, 91 N.M. 610, 577 P.2d 1256.

Completion of the act of fraud. — The act of fraud is complete at the time of the taking or misappropriation. Obtaining title is not necessary. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

Meaning of false pretense. — A false pretense was such a fraudulent representation of an existing or past fact, by one who knew it not to be true, as was adapted to induce the person to whom it was made to part with something of value. *State v. Tanner*, 1917-NMSC-017, 22 N.M. 493, 164 P. 821.

To convict defendant of fraud, state had to prove beyond a reasonable doubt that defendant, by any words or conduct, made a promise that she had no intention of keeping or misrepresented a fact to the victims, intending to deceive or cheat them, and, because of the promise or misrepresentation and the victim's reliance on it, defendant obtained money belonging to someone other than the defendant. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Intent to cheat and defraud required. — To do an act fraudulently is to do it with intent to cheat and defraud; therefore, because an intent to cheat and defraud is required, this is a specific intent crime and the language of this section sets forth the requisite intent. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

Intent to defraud essential element of crime. — Intent to cheat and defraud was an essential and constituent element of offense prescribed under Laws 1882, ch. 20, § 1 (40-21-3, 1953 Comp.) relating to obtaining property with intent to cheat or defraud. *State v. Ferguson*, 1952-NMSC-052, 56 N.M. 398, 244 P.2d 783.

Intent to defraud provable by inferences. — An essential element of fraud or embezzlement is intent, which is seldom provable by direct testimony, and must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Intent to defraud must exist at time of taking. — Contention of defendant, convicted of embezzlement under 30-16-8 NMSA 1978, that this section specifically applied to his case was without merit, where facts showed that he sold a motorcycle to complaining witness, who subsequently loaned it back to him, and thereafter although requested to do so defendant did not return the motorcycle but sold it to a third person, since there was no evidence of any fraudulent intent on the part of defendant when motorcycle was loaned to him by complaining witness. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

Intent to defraud inferred from actions. — Where the defendant conveyed an interest in real property which she knew she did not possess, it can be reasonably inferred that the defendant intended to make false representations and intended to misappropriate the victims' money. *State v. Martinez*, 1979-NMCA-104, 95 N.M. 795, 626 P.2d 1292.

Separate intent to defraud for each act. — The fact that defendant specifically requested three additional cash payments for different purposes, which he accompanied by various assurances and justifications, supports the jury's finding that on each occasion, he had a separate intent to defraud. *State v. Boergadine*, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Silence may form basis for criminal misrepresentation, where the defendant has a legal duty to speak or where such silence is calculated to deceive. *State v. Stettheimer*, 1980-NMCA-023, 94 N.M. 149, 607 P.2d 1167.

Sufficient evidence of reliance on misrepresentation of fact. — In defendant's trial for fraud, where the jury was presented with evidence that defendant, by misrepresenting that she was the victim's girlfriend, induced the victim, an eighty year old man, to allow defendant access to his bank accounts and that he would not have allowed such access had he known either that she had married or that she never truly considered herself the victim's girlfriend, a jury could reasonably infer that the victim's willingness to allow defendant access to his accounts was grounded on the misrepresentation that she was his girlfriend, and therefore the jury's finding of reliance was supported by substantial evidence. *State v. Garcia*, 2016-NMSC-034, *rev'g* 2015-NMCA-094, 356 P.3d 45.

Reliance on misrepresentation required. — A misrepresentation for purposes of criminal fraud may include a deceptive silence or omission. The state must also present evidence sufficient to prove that because of the victim's reliance on the misrepresentation, the defendant obtained the thing of value. *State v. Garcia*, 2015-NMCA-094, cert. granted, 2015-NMCERT-008.

Where defendant, a woman in her fifties, misrepresented her marital status to victim, a man in his mid-eighties, and convinced victim to provide her with access to victim's bank accounts, where defendant transferred funds from victim's accounts to defendant's own bank account for personal use, and where victim testified at trial that he allowed

defendant access to his bank accounts because it would be easier for defendant to help him with his personal finances, that he wanted to help defendant out with her children and family, and that he was helping defendant out because he felt sorry for her, the evidence was insufficient to sustain defendant's conviction for fraud because the state failed to carry its burden of proving beyond a reasonable doubt that victim relied on defendant's misrepresentation, that he would not have given defendant access to his bank accounts but for his impression that she was romantically available to him. *State v. Garcia*, 2015-NMCA-094, cert. granted, 2015-NMCERT-008.

Reliance necessary. — Under 40-21-1, 1953 Comp., relating to the obtaining of money under false pretenses, it was necessary that the prosecution establish that the victim relied on the false representation and surrendered her money to appellant on the strength of the false representation. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398 (decided under prior law, statute repealed).

Actual damage to victim is not element of fraud. — Although damages are essential to recover on a civil claim for fraud, monetary loss is not a requisite of a criminal conviction. *State v. McCall*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068, *rev'g* 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958.

Pecuniary loss by victim unnecessary. — A criminal conviction for fraud does not require the victim suffer a pecuniary loss. Sufficient evidence was presented at trial of an intentional misappropriation or taking of something of value belonging to another by means of fraudulent conduct, practices or representations. Thus, the jury could have reasonably inferred defendants intentionally misappropriated funds invested by their partners and these funds were received due to misrepresentations. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

Making false claim through agent. — Evidence that bank was instructed by defendant to submit items for payment established relation of principal and agent, and submission of bond for consideration and refunding necessarily constituted the false representation as to its legality and validity. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

Repayment will not mitigate completed offense. — Once a misappropriation or taking occurs by means stated in this section, the crime of fraud is complete, and repayment will not mitigate the offense. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

III. INDICTMENT AND INFORMATION.

Joinder appropriate. — Where the 12 counts of fraud charged were in the execution of a general fraudulent scheme, extending from September 1968 to January 1969, the method of operation in each count was identical and in each instance it was the property of the same insurance company that was misappropriated or taken, the trial court's refusal to sever was proper. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Severance properly denied. — The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Alternative charging permissible. — There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Allegation of ownership. — Indictment for false pretenses was to allege ownership of the property, unless there was some legal excuse for omitting such allegation. *State v. Faggard*, 1918-NMSC-133, 25 N.M. 76, 177 P. 748; *Territory v. Hubbell*, 1906-NMSC-033, 13 N.M. 579, 86 P. 747.

Degree of crime measured by value of property obtained. — The degree of crime under this section must be measured by the value of the property obtained by the defendant as a result of the deception, rather than the value of any property received by the victim. *State v. Martinez*, 1979-NMCA-104, 95 N.M. 795, 626 P.2d 1292.

Information adequate. — Amended information charging defendant with unlawfully obtaining money under false pretenses with intent to defraud, which enumerated the section defining the offense and fixing the penalty, was sufficient. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

Defective indictment. — An indictment for securing money by false pretense was fatally defective where it was alleged that the means employed were certain bogus bills of sale and a mortgage attached to a draft drawn on the defrauded party, but which failed to allege that draft was ever honored by such party, and money paid by such party on the faith of such representation. *State v. Faggard*, 1918-NMSC-133, 25 N.M. 76, 177 P. 748.

Information fatally defective. — Failure to allege intent to cheat and defraud in information charging accused with obtaining money by false representations rendered the information fatally defective and any judgment based thereon became a nullity. *State v. Ferguson*, 1952-NMSC-052, 56 N.M. 398, 244 P.2d 783.

Variance not material. — Even if there was a variance between amended information charging defendant with having obtained $500 from named individual, while the proof showed that the $500 check was drawn on the laundry and cleaner's account and signed by the named individual, one of the owners of the laundry, the variance if any

was not such as would impair the substantial rights of defendant. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

IV. EVIDENCE.

A. IN GENERAL.

Related incidents admissible. — In the case of fraud, related incidents of accused's acts are admissible to establish motive, absence of mistake or accident, common scheme or plan or the identity of the person charged with various crimes. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

Other acts evidencing intent. — The fact that defendant entered into many contracts which he failed to complete showed that either he was aware of the risks, that he was aware of his capabilities or that he could not have believed that he would complete the contracts, and so his proceeding to contract in spite of his awareness was evidence of his fraudulent intent. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

Repayment will not mitigate completed offense. — Repayment of a loan obtained by fraud so that the lender suffered no damages is not a defense against a charge of fraud under this section. *State v. McCall*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068, *rev'g* 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958.

Failure to return money. — Testimony showing a nonreturn of the money was proper to show the intent of defendant, charged with obtaining money under false pretenses. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

Proof of false pretenses. — False pretense could be established by conduct and acts as well as by written or spoken words. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

Confession alone inadequate proof. — Proof that a crime of fraud was committed cannot be established solely by the extrajudicial confession of the accused. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

Imputation of guilty knowledge. — Guilty knowledge of a brother of one accused of selling property belonging to another was not imputable to defendant. *State v. Hughes*, 1938-NMSC-077, 43 N.M. 109, 86 P.2d 278.

When directed verdict appropriate. — Only where there are no reasonable inferences or sufficient surrounding circumstances establishing defendant's intent can it be said, as a matter of law, that a motion for a directed verdict should have been granted or that a

charge should not have been presented to the jury. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Question for jury. — It was for the jury to decide whether defendant obtained the $500 by fraud or converted to his own use the money with which he had been entrusted. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Whether defendant received property as loan or for investment jury question. — In a trial for fraud and embezzlement where the evidence was conflicting, whether the money and checks given to the defendant were loans, as he claimed, or were for investments, as his alleged victims claimed, was for the jury to decide. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Subsequent representations admissible to show intent. — Evidence of representations made to the victims after the defendant had obtained their money, which went into specific details of alleged investments, was properly admitted in defendant's trial for fraud since the evidence explained his "investment" representations and tended to show his intent. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Sufficient evidence. — Where defendant refinanced the marital home without the knowledge or consent of defendant’s spouse for $32,635, there was sufficient evidence that the amount of the fraud was greater than $20,000, notwithstanding defendant’s argument that because the home was community property, half of the loan proceeds belonged to defendant. *State v. Turner*, 2007-NMCA-105, 142 N.M. 460, 166 P.3d 1114, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

Where defendant presented a check for cashing at a store; the check was made payable to defendant in an amount that exceeded $250; the check was drawn on the victim’s business account for labor; and the victim testified that the victim had not employed defendant or written a check to defendant in payment for labor, the evidence was sufficient to support defendant’s conviction for fraud. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

Evidence sufficient to convict. — Testimony of a witness which is not inherently improbable because of a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions is sufficient to convict. *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870.

Evidence is sufficient when elements of offense are established beyond a reasonable doubt by direct or circumstantial evidence. Fraudulent intent may be inferred from defendant's conduct and words.; *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Separate convictions for each act. — Where defendant first took a $350 check from the customer on February 11, 2002, and six days later, on February 17, 2002, customer gave defendant $300 in cash and two months later, on April 16, 2002, defendant requested more money from customer and on April 18, 2002, defendant received another $1,200 in cash, each time the defendant took money from the customer for repair of her car's transmission, he had not done any work on her car. Therefore, the lengthy stretches of time between these acts and the individual false requests for additional sums of money for parts supports three separate convictions for defendant's acts. *State v. Boergadine*, 2005-NMCA-028, 137 N.M. 92, 107 P.3d 532, cert denied, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

B. SUFFICIENCY.

Child support payments. — Where defendant's words and conduct included his claim that he had already tendered child support payments to his ex-wife and his offer of the photocopied non-carbon records to his ex-wife's attorney to bolster that claim, the intent was to evade payment of the amount he owed. The fact that he did not succeed results only in the lessening of the conviction to attempted fraud. It does not show an absence of an intent to defraud. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-003, 137 N.M. 290, 110 P.3d 506.

Misappropriation of drafts. — A charge of misappropriation of money may be established by showing that drafts or checks were misappropriated. *State v. Archuleta*, 1970-NMCA-131, 82 N.M. 378, 482 P.2d 242, cert. denied, 82 N.M. 377, 482 P.2d 241.

False accounts. — Where defendant made out false accounts in the name of a plumber for work purportedly done on plumbing system of courthouse and submitted them to board of county commissioners, knowing that the work had not been done and securing the proceeds for himself, evidence was sufficient to support conviction of obtaining money under false pretenses. *State v. Garcia*, 1953-NMSC-026, 57 N.M. 166, 256 P.2d 532.

Proof of value. — The defendant, who had opened an account, deposited a check he knew was not backed by sufficient funds, and wrote a number of checks, some of which were accepted by local businesses in exchange for merchandise, was improperly convicted of fraud. There was no testimony establishing the "false balance" ever had the values on which the jury was instructed. Proof of value is critical in a fraud prosecution. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

Loan. — There was sufficient evidence to support defendant's conviction of fraud; the evidence showed that defendant borrowed money from the victim after giving the victim a check in repayment of a previous debt, that the check was returned for insufficient funds, and that the borrowed money was not used for defendant's stated purpose. *State v. Curry*, 2002-NMCA-092, 132 N.M. 602, 52 P.3d 974, cert. denied, 132 N.M. 397, 49 P.3d 76.

Spurious claim to loan board. — False pretense could be predicated upon spurious claim presented to board of loan commissioners established to refund, pursuant to provision of Enabling Act, debts and obligations of the territory and its counties into state bonds. *State v. Kelly*, 1921-NMSC-073, 27 N.M. 412, 202 P. 524.

Obtaining automobile through fraud. — Evidence substantially supported a finding that defendant obtained an automobile from victim motor company by means of fraudulent conduct, practices or representations which were relied on by the company. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

Victims' inability to specify alleged investment no help to defendant. — The fact that the victims did not know the type of investment their money was to be put into did not aid the defendant because the evidence showed that he had obtained the money by fraudulently representing that it would be invested. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Fraudulent construction contract. — Evidence, viewed in the light most favorable to support the verdict, showing that the defendant entered into a contract with fraud victim to do certain construction work, which was not done, and that defendant even gave the victim a promissory note, evidencing an indebtedness, which was never paid, taken together with the evidence of other similar transactions, constituted substantial evidence to convict him of fraud. *State v. McCallum*, 1975-NMCA-030, 87 N.M. 459, 535 P.2d 1085, cert. denied, 87 N.M. 457, 535 P.2d 1083.

Defrauding noninnocent victim. — One could be convicted of obtaining money by false representations whose part in a fraudulent scheme was to sell cases of cotton, which were represented to be cigarettes, to a victim, although the victim understood he was helping to defraud either owners or insurers. *State v. Foster*, 1934-NMSC-083, 38 N.M. 540, 37 P.2d 541.

Fraudulent obtainment of loan may be basis for conviction of criminal fraud. *State v. Stettheimer*, 1980-NMCA-023, 94 N.M. 149, 607 P.2d 1167.

Fraudulent land development project. — Where defendants were charged with fraud after convincing an elderly couple to invest in a fraudulent investment scheme, evidence that defendants received over $78,000 from the victims for the purpose of investing in a land development project, that the money was instead placed in a bank account in defendants' names, that the money was disbursed by defendants for their personal benefit, and that the land project was never completed, was sufficient to show that defendants misrepresented facts to the victims, intending to deceive or cheat them, and that because of the victims' reliance on defendants' misrepresentations, defendants obtained more than $20,000. *State v. Maxwell*, 2016-NMCA-082, cert. denied.

Sufficient evidence of securities fraud. — Where defendants were charged with securities fraud after convincing an elderly couple to invest in a phony real estate investment project, evidence that defendants received $270,000 from the victims for the

purpose of investing in a land development project and over $50,000 for the purpose of investing in commodities, that the money was instead placed in accounts solely owned by defendants, that the money was disbursed by defendants for their personal benefit, and that the money was never invested in the real estate project or in commodities, was sufficient to show that defendants sold or offered to sell a security and that in connection with the offer or sale of the security, defendants purposefully used a plan or scheme to deceive or cheat the victims. S*tate v. Maxwell*, 2016-NMCA-082, cert. denied.

Sufficient evidence to support defendant's conviction for fraud. — Where defendant was convicted of one count of fraud over $20,000, one count of conspiracy to commit fraud over $20,000, one count of securities fraud, one count of sale of a security by an unlicensed agent and one count of offer or sale of an unregistered security, and where defendant claimed that there was insufficient evidence to support his fraud conviction, there was sufficient evidence to support his conviction where the state presented evidence that defendant misrepresented his own personal investment in the company, misrepresented the minimum investment requirement, omitted the fact that he would be paid upon the victims' investment, and misrepresented how the investment money was used. These facts support the jurors' reasonable inference that defendant intended to deceive the victims with his misrepresentations and omissions. Additionally, the state presented evidence that the victims would not have made a $25,000 investment if they were aware that defendant misrepresented the amount that he personally invested or that he would be paid based upon their investment. *State v. Hixon*, 2023-NMCA-048, cert. denied.

Sufficient evidence to support conspiracy to commit securities fraud. — There was sufficient evidence to support defendant's conviction for conspiracy to commit fraud over $20,000 where the state presented evidence of repeated dealings between defendant and his co-defendant where defendant knew that he would be paid from people's investments, that defendant encouraged friends and family to invest in the internet programming company, that defendant introduced several victims to his co-defendant, that defendant misrepresented and omitted relevant information regarding his own investments in the company and the financial benefits he received from inducing others to invest in the company, and that the investments were not used for the purpose defendant indicated when inducing the investments. The record shows sufficient evidence to establish a mutually implied understanding between defendant and his co-defendant. *State v. Hixon*, 2023-NMCA-048, cert. denied.

Evidence sufficient to sustain conviction of attempted fraud. *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

V. INSTRUCTIONS.

Definition of fraudulent conduct unnecessary. — Absent a clearly expressed legislative intent requiring otherwise, fraudulent conduct is to be given its usual, ordinary

meaning, and hence, there was no jurisdictional error in failing to define fraudulent conduct in an instruction; if defendant desired the term to be defined, he should have submitted a requested instruction. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

Instruction on victim's intelligence not required. — According to the majority view, statutes covering the crime of obtaining money under false pretenses were designed to protect not only the ordinarily wary and prudent, but also the ignorant, credulous and foolish; hence, trial court did not err in refusing to grant defendant's instruction to the effect that the jury had a right to consider the intelligence of the prosecuting witnesses. *State v. Jones*, 1964-NMSC-028, 73 N.M. 459, 389 P.2d 398.

Instruction on gambling properly denied. — Requested instruction that if victim was gambling the defendants must be found not guilty of fraud was properly denied as this section does not exempt fraud perpetrated while gambling. *State v. Dosier*, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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 20 N.M.L. Rev. 265 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 32 Am. Jur. 2d False Pretenses § 1 et seq.

Telephone conversation as false pretense, 8 A.L.R. 656.

Obtaining money for goods not intended to be delivered as false pretenses, 17 A.L.R. 199.

Presentation of and attempt to establish fraudulent claim against governmental agency, 21 A.L.R. 180.

Loans and renewals thereof, false pretenses, 24 A.L.R. 397, 52 A.L.R. 1167.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense, 95 A.L.R. 1249, 128 A.L.R. 1520.

Offense of obtaining property by false pretenses predicated upon transaction involving conditional sale, 134 A.L.R. 874.

Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses, 20 A.L.R.2d 1266.

Encumbrance: false statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215.

Intent: admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempt on other occasions, 78 A.L.R.2d 1359.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 A.L.R.2d 570.

Repairs: criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 A.L.R.2d 925.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses and the like, 6 A.L.R.3d 241.

Admissibility in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 A.L.R.3d 572.

Partner: embezzlement, larceny, false pretenses or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Fraud actions: right to recover for mental or emotional distress, 11 A.L.R.5th 88.

Criminal liability of pharmacy or pharmacist for welfare fraud in connection with supplying prescription drugs, 16 A.L.R.5th 390.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 A.L.R.5th 125.

Computer fraud, 70 A.L.R.5th 647.

35 C.J.S. False Pretenses §§ 1 to 28; 37 C.J.S. Fraud § 154.

30-16-7. Unlawful dealing in federal food coupons or WIC checks.

A. Unlawful dealing in federal food coupons or WIC checks consists of a person buying, selling, trading, bartering or possessing food coupons or WIC checks issued by the United States department of agriculture with the intent to obtain an economic benefit to which the person is not entitled under the rules of the human services department [health care authority department] pertaining to the food stamp program or of the department of health pertaining to the special supplemental food program for women, infants and children.

B. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. For the purposes of this section, "federal food coupons or WIC checks" includes electronic benefit transfer cards or any other method through which food stamps or WIC benefits may be obtained.

History: 1953 Comp., § 40A-16-6.1, enacted by Laws 1971, ch. 282, § 1; 1987, ch. 121, § 3; 2003, ch. 251, § 1; 2006, ch. 29, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2006 amendment, effective July 1, 2006, increased the value of food coupons or WIC checks in Subsection B from $100 or less to $250 or less; increased the value of

food coupons or WIC checks in Subsection C from more than $100 but less that $250 to more than $250 but less than $500; increased the value of food coupons or WIC checks in Subsection D from more than $250 to more than $500.

The 2003 amendment, effective June 20, 2003 added the present Subsection A through F designations; in present Subsection A deleted "and regulations" following "under the rules" near the middle, substituted "department of health" for "health and environment department" following "food stamp program or of the" near the end; substituted "two thousand five" for "twenty-five" preceding "hundred dollars" near the end of present Subsection D; substituted "two" for "twenty-five" preceding "thousand five hundred" near the middle of present Subsection E; and added Subsection G.

The 1987 amendment, effective June 19, 1987, added "or WIC checks" following "coupons" in several places throughout the section, substituted all of the language in the first paragraph following "regulations" for "of the health and social services department pertaining to the food stamp program," added the third and last paragraphs, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fourth paragraph, and substituted "is over twenty-five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000)" for "exceeds twenty-five hundred ($2,500)" in the fifth paragraph.

Single intent crime. – The single intent crime doctrine applies to the crime of unlawful dealing in food coupons. *State v. Johnson*, 1996-NMCA-017, 121 N.M. 337, 911 P.2d 231, cert. denied 121 N.M. 242, 910 P.2d 318.

Evidence sufficient for conviction. — Evidence that the defendant purchased four booklets of food stamps, each booklet with a face value of $65, on two separate occasions, was sufficient evidence from which the jury could infer the coupons had a value in excess of $250 and was sufficient for conviction. *State v. Buendia*, 1996-NMCA-027, 121 N.M. 408, 912 P.2d 284.

30-16-8. Embezzlement.

A. Embezzlement consists of a person embezzling or converting to the person's own use anything of value, with which the person has been entrusted, with fraudulent intent to deprive the owner thereof.

B. Whoever commits embezzlement when the value of the thing embezzled or converted is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits embezzlement when the value of the thing embezzled or converted is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits embezzlement when the value of the thing embezzled or converted is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits embezzlement when the value of the thing embezzled or converted is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits embezzlement when the value of the thing embezzled or converted exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-7, enacted by Laws 1963, ch. 303, § 16-7; 1987, ch. 121, § 4; 1995, ch. 131, § 1; 2006, ch. 29, § 5; 2007, ch. 256, § 1.

ANNOTATIONS

Cross references. — For embezzlement by county officers, *see* 4-44-32 NMSA 1978.

For appropriation of trade secrets, *see* 57-3A-1 NMSA 1978 et seq.

The 2007 amendment, effective July 1, 2007, deleted the second sentence that provided that each separate incident of embezzlement or conversion constituted a separate offense.

The 2006 amendment, effective July 1, 2006, increased the value of the thing embezzled or converted in Subsection B from $100 or less to $250 or less; increased the value of the thing embezzled or converted in Subsection C from more than $100 but less than $250 to more than $250 but less than $500; increased the value of the thing embezzled or converted in Subsection D from more than $250 to more than $500.

The 1995 amendment, effective July 1, 1995, added the second sentence in the first paragraph, and substituted "two thousand five hundred dollars" for "twenty five hundred dollars" in the fourth and fifth paragraphs.

The 1987 amendment, effective June 19, 1987, added the third and last paragraphs, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fourth paragraph, while inserting "dollars" following "twenty-five hundred" in that same paragraph, and substituted "is over twenty-five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000)" for "exceeds twenty-five hundred dollars ($2,500)" in the fifth paragraph.

I. IN GENERAL.

Equitable owner of property. — The equitable owner of property under a real estate contract cannot be criminally charged with embezzling that property. *State v. Earp*, 2014-NMCA-059.

Where defendant purchased a home pursuant to a real estate contract; when defendant failed to pay the balance due on the contract, the seller terminated the contract; prior to vacating the property, defendant removed a number of appliances and fixtures from the house and left the house in a state of disrepair; and defendant was charged with embezzlement, 30-16-8 NMSA 1978 did not apply to property in which defendant had an equitable ownership interest. *State v. Earp*, 2014-NMCA-059.

Jury deliberatons. — The trial court did not abuse its discretion in acquiescing to the jury's request for the use of a calculator during its deliberations in a trial for 148 counts of embezzlement. *State v. Lihosit*, 2002-NMCA-006, 131 N.M. 426, 38 P.3d 194, cert. denied, 131 N.M. 564, 40 P.3d 1008.

Entrustment. — In order to be guilty of embezzlement, a defendant must have been entrusted with lawful possession of the property prior to its conversion. A showing that a defendant was given mere access to the property converted is insufficient. *State v. Kovach*, 2006-NMCA-122, 140 N.M. 430, 143 P.3d 192.

Elements of offense. — The concept that the property belong to someone other than the defendant is implicit in the current statute. *State v. Cramer*, 1977-NMCA-010, 90 N.M. 157, 560 P.2d 948, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Failure to instruct the jury on an essential element of embezzlement , fraudulent intent, is reversible error under Rule 5-608A NMRA. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

Fraud and embezzlement are mutually exclusive, and although alternative charges are proper, a defendant cannot be convicted of both fraud and embezzlement. *State v. Hornbeck*, 2008-NMCA-039, 143 N.M. 562, 178 P.3d 847.

Offense of embezzlement is purely statutory crime and does not exist at common law. *State v. Bryant*, 1982-NMCA-178, 99 N.M. 149, 655 P.2d 161.

Conviction as bar to further prosecution. — A conviction for embezzling a sum as county clerk and ex-officio clerk of the district court barred further prosecution for embezzling another sum as county clerk and ex-officio probate clerk where state was unable to show conversion of any particular sum at any particular time. *State v. Romero*, 1928-NMSC-023, 33 N.M. 314, 267 P. 66.

Convictions violated double jeopardy. — Where defendant was charged with four counts of fraud and, in the alternative, four counts of embezzlement, and on counts 2 and 4, she was convicted of both the fraud and embezzlement alternatives, although the state is authorized to charge in the alternative, defendant’s convictions for both

alternatives violate her right to be free from double jeopardy. *State v. Mercer*, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Exercise of police power. — Section 40-45-22, 1953 Comp., relating to embezzlement by public officials of public funds, was a proper exercise of the police power. *State v. Nolan*, 1955-NMSC-059, 59 N.M. 437, 285 P.2d 798 (decided under prior law, statute repealed).

Purpose of legislation. — The state's legitimate interest in the protection of public funds may be expressed in penal sanctions the purpose of which is the prevention of certain manifest or anticipated evil, or the preservation of the public health, safety, morals or general welfare. *State v. Nolan*, 1955-NMSC-059, 59 N.M. 437, 285 P.2d 798.

Presumption of embezzlement constitutional. — Provision in former law making existence of a shortage in the money or property for which public officials were accountable prima facie evidence of embezzlement did not violate constitutional rights of accused as there was a rational connection between the facts and the fact presumed, and the defendant was not precluded from presenting his defense to the presumed fact. *State v. Chavez*, 1954-NMSC-114, 58 N.M. 802, 277 P.2d 302 (decided under prior law).

Defendant can be convicted of third-degree felony where series of takings totals more than $2,500, although each individual taking is less, if the takings are associated with a single, sustained criminal intent. *State v. Pedroncelli*, 1984-NMSC-009, 100 N.M. 678, 675 P.2d 127.

Child attempting to honor probation commitments. — If in refusing to purchase marijuana with money entrusted to him by a law enforcement officer, but instead keeping the money for himself, a child on probation was attempting to honor his probation commitments, affirming an order revoking probation based on charges of embezzlement would be inconsistent with the purposes of the Children's Code (Section 32A-1-1 NMSA 1978], since the child had not been aware that the person giving him the money was an undercover officer involved in a sting operation. *In re Danny R*., 1992-NMCA-056, 114 N.M. 315, 838 P.2d 469, cert. denied, 114 N.M. 123, 835 P.2d 839.

II. ELEMENTS OF OFFENSE.

Conversion. — Conversion occurs when a person who has been entrusted with another's property treats the property as his own and uses it for his own purpose. *State v. Curry*, 2002-NMCA-092, 132 N.M. 602, 52 P.3d 974, cert. denied, 132 N.M. 397, 49 P.3d 76.

To convict of embezzlement, state had to prove beyond a reasonable doubt that defendant was entrusted with money that she converted to her own use and, at the time defendant converted the money, she fraudulently intended to deprive the owner of it.

State v. Mercer, 2005-NMCA-023, 137 N.M. 36, 106 P.3d 1283, cert. denied, 2005-NMCERT-002, 137 N.M. 265, 110 P.3d 73.

Essential element of fraud or embezzlement is intent, which is seldom provable by direct testimony, and must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Embezzlement requires proof that defendant entertained specific intent to deprive owner of property. — Embezzlement is a crime which requires proof that at the time of the conversion of the property, the defendant entertained a specific intent to deprive the owner of the property. *State v. Gonzales*, 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 99 N.M. 644, 662 P.2d 645, and cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

"Entrust" defined. — "Entrust" means to commit or surrender to another with a certain confidence regarding his care, use or disposal of that which has been committed or surrendered. *State v. Stahl*, 1979-NMCA-054, 93 N.M. 62, 596 P.2d 275, cert. denied, 93 N.M. 8, 595 P.2d 1203.

Specific or technical fiduciary relationship is not necessary to sustain an embezzlement conviction. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

Intent to "permanently" deprive is not requisite element of embezzlement. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

A legislative intent to include the element of intent to permanently deprive the owner of his property in the crime of embezzlement cannot be ascertained by comparing this section with the larceny statute (30-16-1 NMSA 1978), because larceny is defined in terms of stealing while comparable language is not used in the embezzlement statute. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

Time of formation of intent. — It would not be fatal to conviction, resting on entrustment, that the fraudulent intent existed or was formed coincidentally with receipt of the money or property. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785.

Persons capable of entrustment. — That one is an agent, servant or employee does not deny that "entrustment" may characterize the custody of money or property in his possession as such agent, servant or employee. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785.

Money to be proved missing. — If money cannot be proved missing by reliable, competent testimony or documentary evidence, an embezzlement charge must be dropped. *State v. Konviser*, 1953-NMSC-057, 57 N.M. 418, 259 P.2d 785.

Court trying embezzlement not concerned with amount owed victims. — In a trial for embezzlement, the court is not concerned with the amount owed to the victims by the defendant but with the amount converted in violation of this section. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Failure to pay on demand. — Proof of a demand and a failure to return the property may be evidence of embezzlement because such proof is material to the questions of conversion of the property and a fraudulent intent to deprive the owner of his property, but such a demand and failure to return is not a separate element of the crime. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

A demand and failure to pay over the money was necessary, both by way of allegation and proof, before a public official could be convicted of embezzlement under Code 1915, § 1546. *State v. Davisson*, 1923-NMSC-045, 28 N.M. 653, 217 P. 240, appeal dismissed, 267 U.S. 574, 45 S. Ct. 229, 69 L. Ed. 795 (1925) (decided under prior law).

Restitution does not prevent conviction for completed embezzlement. — Embezzlement is complete when the defendant converts the victim's checks, and restitution does not allow the embezzler to escape prosecution and conviction. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Value not jurisdictional. — Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. *Roehm v. Woodruff*, 1958-NMSC-083, 64 N.M. 278, 327 P.2d 339(decided under prior law).

III. INDICTMENT AND INFORMATION.

Grand jury instructions must include definitions. — The definitional instructions that are included within the essential UJI elements instruction for a crime shall be given to the grand jury. *State v. Bradford*, 2013-NMCA-071, 305 P.3d 975.

Failure to give definitional instructions to grand jury. — Where defendant was charged with embezzlement and the instructions to the grand jury failed to include the definitions of "fraudulent intent" and "converted" in UJI 14-1641 NMRA, the jury instructions were insufficient. *State v. Bradford*, 2013-NMCA-071, 305 P.3d 975.

Charging in alternative not double jeopardy. — The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative, nor were the concepts of included offenses, same evidence or merger applicable. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Charging in alternative not unfair. — There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Indictment proper although lesser offense also applicable. — Where there was sufficient evidence to support a conviction for embezzlement, prosecution therefor was proper, even though the charges might have been covered by the lesser crime of criminal damage to property. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

Indictment in exact language of statute was sufficiently specific to require no amplification. *State v. Probert*, 1914-NMSC-025, 19 N.M. 13, 140 P. 1108.

Means or elements of offense. — There is no necessity to set forth means or elements of the statutory offense of embezzlement in an information. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010.

Failure to meet demands. — Indictment was to charge that accused was not able to meet the demands of any person lawfully demanding the allegedly embezzled property. *Territory v. Abeyta*, 1907-NMSC-011, 14 N.M. 56, 89 P. 254.

Allegation of value. — Where indictment described embezzlement as being of a certain number of dollars, it was not necessary to state further the value. *Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583 (decided under prior law).

Indictment was sufficient both as to description of money and value thereof where it alleged "having then and there in his possession the sum of . . . (a certain number of dollars), a better description of the kinds and character of which is to the grand jurors unknown." *Territory v. Hale*, 1905-NMSC-021, 13 N.M. 181, 81 P. 583 (decided under prior law).

Since much property embezzled was never seen by the employer, it was not necessary to exactly describe it in indictment, and money need only have been described in the best way which the circumstances permitted, in the indictment and on trial. *Territory v. Maxwell*, 1882-NMSC-010, 2 N.M. 250 (decided under prior law).

Allegation of ownership. — In indictment charging embezzlement it is essential to aver the felonious conversion of the property of another; unless the rule is modified by statute, the allegation must be as accurate as in an indictment for larceny, and in case of an association, facts must be averred to show that the association could own property in its name. *State v. Parsons*, 1917-NMSC-084, 23 N.M. 520, 169 P. 475 (decided under prior law).

Embezzlement by employee. — An indictment under Code 1915, § 1544, which did not allege that property embezzled came into possession of accused by virtue of his employment was not fatally defective. *State v. Hill*, 1918-NMSC-046, 24 N.M. 344, 171 P. 790 (decided under prior law).

Embezzlement of sheep. — An indictment under Laws 1921, ch. 123, § 1 (40-4-17, 1953 Comp.), alleging that on a day certain the defendant, having been entrusted with certain number of sheep belonging to named person, embezzled and fraudulently converted the same to his own use, stated an offense. *State v. Anaya*, 1922-NMSC-059, 28 N.M. 283, 210 P. 567 (decided under prior law).

Citation of wrong section. — Petitioner was not deprived of liberty without due process of law nor denied equal protection of the law under this section merely because an information charging defendant with embezzlement incorrectly refers to a repealed section since the offense was otherwise sufficiently charged. *Smith v. Abram*, 1954-NMSC-061, 58 N.M. 404, 271 P.2d 1010.

IV. EVIDENCE AND ISSUES.

Single criminal intent doctrine inapplicable. — Court did not commit fundamental error by refusing to instruct jury that the state was required to prove that each instance of embezzlement charged was the result of a distinct criminal impulse; the single criminal intent doctrine no longer applies to embezzlement cases, in light of the 1995 amendment of this section (adding the second sentence in the first paragraph). *State v. Faubion*, 1998-NMCA-095, 125 N.M. 670, 964 P.2d 834, cert. denied, 125 N.M. 322, 961 P.2d 167 (decided under prior law).

Testimony of C.P.A. — In an embezzlement prosecution, a certified public accountant may testify as to his findings from an examination of books and records not in evidence and not produced at the trial. *State v. Schrader*, 1958-NMSC-056, 64 N.M. 100, 324 P.2d 1025.

Factual question as to ownership of funds. — Where there was evidence that the victims gave checks to the defendant, knowing they had insufficient funds in the bank to cover the checks, on the defendant's representations that he wanted the checks to show to investors and that the checks would not be cashed, this evidence raised a factual question as to whether ownership of the funds represented by the checks passed or was intended to pass to defendant. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

No mistake-of-fact instruction unless employee believed he was authorized to expend employer's funds. — The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence

that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales*, 1983-NMCA-041, 99 N.M. 734, 663 P.2d 710, cert. denied, 99 N.M. 644, 662 P.2d 645, and cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Question of entrustment is a question of fact for the jury. *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Jury to be instructed on ordinary meaning of term. — The usual, ordinary meaning of "entrusted" was applicable to this section, and defendant therefore was not entitled to an instruction defining entrustment as a designated fiduciary relationship. *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

Since defendant not entrusted with money, offense not embezzlement. — Although a defendant is in charge of an entire store, where the undisputed facts show that money in a drop-box is not committed or surrendered to the defendant's care, use or disposal, that the money is to be handled exclusively by the manager, and where the defendant is excluded from having anything to do with that money, his offense, as to taking the money in the drop-box, is larceny, not embezzlement, because he had not been entrusted with that money. *State v. Stahl*, 1979-NMCA-054, 93 N.M. 62, 596 P.2d 275, cert. denied, 93 N.M. 8, 595 P.2d 1203.

Entrustment established. — Where defendant, for some five years, acted as executive secretary of state association and, in effect, operated the business transactions of the association, including the making of bank deposits and submitting reports to the board of directors, evidence supported the jury finding of entrustment of the money of the association. *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Sufficiency of evidence. — There was sufficient evidence to support defendant's conviction of embezzlement; the evidence showed that defendant was entrusted with the victim's money, the victim asked for it back, and defendant, having converted the money for his own use, knowingly wrote a check to the victim that defendant knew would be returned for insufficient funds. *State v. Curry*, 2002-NMCA-092, 132 N.M. 602, 52 P.3d 974, cert. denied, 132 N.M. 397, 49 P.3d 76.

District court did not err in denying defendant’s motion for directed where there was sufficient evidence of embezzlement. — Where defendant was charged with embezzlement, and where, at trial, evidence was established that in December of 2019, a customer brought a 2008 Chevrolet pick-up truck into an automotive shop operated by defendant for repairs, that defendant told the customer that the truck needed a new transmission and that he could order one, that the customer gave defendant a check for $3,630, that the check’s memo line stated "2008 Silverado Transmission", that defendant cashed the check, that over the next several months defendant gave the customer inconsistent explanations about the transmission’s status, that in May 2020,

the customer had the truck towed from defendant's shop, and that the truck had been damaged and was missing parts, and where, after the state's case, defendant moved for a directed verdict, the district court did not err in denying defendant's motion for a directed verdict, because there was sufficient evidence from which the jury could reasonably infer that the $3,630 had been earmarked to be used for a particular purpose, that defendant was entrusted with the money to purchase a transmission, and that based on the truck's condition upon recovery and the inconsistent explanations about the status and location of the transmission that defendant never intended to complete the work for which he was paid, and that defendant, therefore, converted the money to his own use. *State v. Ferguson*, 2023-NMCA-029, cert. denied.

Insufficient evidence of entrustment to support embezzlement conviction. — Where defendant, a homebuilder hired to build homes in a luxury golf community in Santa Fe, was charged with embezzlement for his failure to finish several construction projects, and where evidence at trial established that defendant's clients paid initial deposits to defendant to be used toward construction costs of their new homes, there was insufficient evidence to convict defendant of embezzlement because contractors cannot be convicted of embezzlement of down payment of funds upon a failure to complete a project because deposit money is legally the property of the contractor at the time it is paid. Consequently, at the time defendant used the deposit money for purposes other than the construction of the properties, the deposits already legally belonged to defendant; he could not be found to have converted deposits because they were his property, not the property of another. *State v. Kalinowski*, 2020-NMCA-018, cert. denied.

Electronic monitoring devices covered by embezzlement statute. — Defendant probationer was entrusted with an electronic monitoring device (EMD) within the meaning of this section, and his disposal of the EMD in an effort to end the state's ability to monitor his movements was evidence that he used it for his own purpose and evidence of his fraudulent intent. *State v. Archie*, 1997-NMCA-058, 123 N.M. 503, 943 P.2d 537.

Fraud or embezzlement for jury. — It was for the jury to decide whether defendant obtained the $500 by fraud or converted to his own use the money with which he had been entrusted. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Whether defendant received property as loan or for investment jury question. — In a trial for fraud and embezzlement where the evidence was conflicting, whether the money and checks given to the defendant were loans, as he claimed, or were for investments, as his alleged victims claimed, was for the jury to decide. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Evidence of amount owed victims not dispositive of case. — In a trial for a third-degree embezzlement felony, the fact that the victims eventually "lost" an amount less than $2,500 was not dispositive, as there was substantial evidence that the defendant, with the requisite fraudulent intent, negotiated for his own use checks in the amount of

$3,900, which he had been entrusted to hold and not cash. *State v. Schifani*, 1978-NMCA-080, 92 N.M. 127, 584 P.2d 174, cert. denied, 92 N.M. 180, 585 P.2d 324.

Sale of borrowed property. — Evidence that defendant sold a motorcycle to complaining witness, that subsequently, motorcycle was loaned back to defendant, and that although requested to do so, defendant did not return motorcycle but sold it to a third person established an embezzlement as defined in this section. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

Evidence of intent inconsistent with innocence. — While evidence was circumstantial, once the jury determined that defendant who sold motorcycle to third party had already sold it to complaining witness, circumstantial evidence of intent was inconsistent with any reasonable theory of innocence. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

Embezzlement of checks. — The state satisfied its burden as to the embezzlement when it showed that two checks were cashed and the other two were deposited in the defendant's personal checking account, and it made very little difference whether other funds were used, as defendant sought to imply, to make up the discrepancy; the embezzlement occurred at the moment of the cashing of the checks. *State v. Peke*, 1962-NMSC-033, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Failure to account for fine. — A justice of the peace (now magistrate) could be indicted for the embezzlement of a fine imposed and collected for which he never accounted, either before or after expiration of his term of office. *Territory v. Heacock*, 1889-NMSC-006, 5 N.M. 54, 20 P. 171.

No evidence to support attempt charge. — Evidence that defendant was loaned a car and hadn't returned it more than three days later, shows that he was guilty of embezzlement or no crime at all, and did not support an issue of "attempt." *State v. Moss*, 1971-NMCA-117, 83 N.M. 42, 487 P.2d 1347.

Breach of trust not embezzlement. — Defendant who was guilty of nothing more serious than a breach of trust could not be convicted for embezzlement. *Territory v. Eyles*, 1911-NMSC-068, 16 N.M. 657, 119 P. 1127.

Unexplained comparison of computer printouts and defendant's records violates right of confrontation. — Defendant was denied her constitutional right of confrontation at her trial for embezzlement, where the only evidence of shortages attributable to her was obtained by an unexplained comparison of computer printouts with her own records and there was no evidence that the state's only witness understood how the printouts were prepared. *State v. Austin*, 1985-NMCA-118, 104 N.M. 573, 725 P.2d 252, cert. quashed, 104 N.M. 632, 725 P.2d 832.

When directed verdict proper. — If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the jury, and only where there are no reasonable inferences or sufficient surrounding circumstances can it be said, as a matter of law, that a motion for a directed verdict should have been granted or that a charge should not have been presented to the jury. *State v. Ortiz*, 1977-NMCA-036, 90 N.M. 319, 563 P.2d 113.

Circumstantial evidence supported store manager's conviction of embezzlement, where the state presented evidence of discrepancies between the daily sales reports and deposit slips indicating shortages on six days, and the facts relied upon by defendant were not uncontroverted and consisted of issues of credibility to be resolved by the jury as finders of fact. *State v. James*, 1989-NMCA-089, 109 N.M. 278, 784 P.2d 1021, cert. denied, 109 N.M. 262, 784 P.2d 1005.

Jury instruction on single larceny doctrine appropriate. — Single larceny doctrine recognizes either that a taking at one time or place of property belonging to several people may constitute a single crime, or, that a series of takings from one owner may also constitute a single crime and therefore these crimes cannot be separately punished. Since the facts and circumstances showed a series of acts that cannot be said as a matter of law to be either a single taking or separate takings, for a defendant to be separately convicted and sentenced for each taking, the state also had to show separate intent. Under the aforementioned circumstances, it is fundamental error for the trial court not to instruct the jury on the single criminal intent doctrine. *State v. Brooks*, 1994-NMSC-062, 117 N.M. 751, 877 P.2d 557 (decided under prior law).

Mistake of fact instruction. — Since there was a question whether defendant rightfully applied certain construction payments to the balance allegedly due him by the plaintiff, defendant was entitled to an instruction on mistake of fact, the omission of which constituted reversible error. *State v. Bunce*, 1993-NMSC-057, 116 N.M. 284, 861 P.2d 965.

Jury instruction on intent deficient. — Jury instruction which omitted the essential element of fraudulent intent required by this section was deficient, and required reversal of defendant's conviction for embezzlement. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

Fraudulent intent instruction. — Failure to instruct the jury on an essential element of embezzlement, fraudulent intent, is reversible error and can never be corrected by including the concept elsewhere in the instructions. *State v. Clifford*, 1994-NMSC-048, 117 N.M. 508, 873 P.2d 254.

Essential elements of embezzlement. — The essential elements of the offense of embezzlement are that the property belonged to someone other than the accused, that the accused occupied a designated fiduciary relationship, that the property came into his possession by reason of his employment or office, and that there was a fraudulent intent to deprive the owner of his property. 1954 Op. Att'y Gen. No. 54-6053.

Law reviews. — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico – State v. Santiallanes," see 32 N.M. L. Rev. 313 (2002).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 26 Am. Jur. 2d Embezzlement §§ 1, 6, 7, 8, 9, 24.

Variance between allegation and proof as to the capacity in which one charged with embezzlement received the property, 12 A.L.R. 603.

Individual criminal responsibility of officer or employee for embezzlement, through corporate act, of property of third person, 33 A.L.R. 787.

Embezzlement by one spouse of other's property, 55 A.L.R. 558.

"Embezzlement" within fidelity bond, 56 A.L.R. 967.

Misappropriation of executor, administrator, guardian or trustee as embezzlement, 75 A.L.R. 299.

Sufficiency of verdict on conviction, which fails to state value of property, 79 A.L.R. 1180.

Larceny and embezzlement distinguished, 146 A.L.R. 532.

Embezzlement by independent collector or collection agency working on commission or percentage, 56 A.L.R.2d 1156.

Criminal responsibility for embezzlement from corporation by stockholder owning entire beneficial interest, 83 A.L.R.2d 791.

Conversion by promoter of money paid for preincorporation subscription for stock shares as embezzlement, 84 A.L.R.2d 1100.

Drawing of check on bank account of employer payable to accused's creditor as constituting embezzlement, 88 A.L.R.2d 688.

Motor vehicles, criminal liability in connection with rental of, 38 A.L.R.3d 949.

Partner: embezzlement, larceny, false pretenses or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Retailer's failure to pay to government sales or use tax funds as constituting larceny or embezzlement, 8 A.L.R.4th 1068.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Who is "officer, director, agent, or employee" of bank, or is "connected in any capacity" with bank and therefore subject to prosecution and punishment for misapplication of bank funds under 18 USCS § 656, 57 A.L.R. Fed. 537.

Bankruptcy: what constitutes embezzlement of funds giving rise to nondischargeable debt under 11 USCS § 523(a)(4), 99 A.L.R. Fed. 124.

29A C.J.S. Embezzlement § 1 et seq.

30-16-9. Extortion.

Extortion consists of the communication or transmission of any threat to another by any means whatsoever with intent thereby to wrongfully obtain anything of value or to wrongfully compell [compel] the person threatened to do or refrain from doing any act against his will.

Any of the following acts shall be sufficient to constitute a threat under this section:

A. a threat to do an unlawful injury to the person or property of the person threatened or of another;

B. a threat to accuse the person threatened, or another, of any crime;

C. a threat to expose, or impute to the person threatened, or another, any deformity or disgrace;

D. a threat to expose any secret affecting the person threatened, or another; or

E. a threat to kidnap the person threatened or another.

Whoever commits extortion is guilty of a third degree felony.

History: 1953 Comp., § 40A-16-8, enacted by Laws 1963, ch. 303, § 16-8.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Language of section does not require showing of consented-to taking. *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545.

Extortion is completed crime when defendant's threat is communicated to the victim with the requisite statutory intent. *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545; *State v. Wheeler*, 1980-NMCA-185, 95 N.M. 378, 622 P.2d 283.

"Threats" included in section. — This section includes both written and oral threats and also includes actions constituting threats. *State v. Barber*, 1979-NMCA-137, 93 N.M. 782, 606 P.2d 192, cert. denied, 94 N.M. 628, 614 P.2d 545.

Allegation of nature of threat. — Indictment under Laws 1853-1854, p. 94 (former 40-46-1, 1953 Comp.) was insufficient where it simply charged that defendant threatened another, without alleging that such threat was to injure the person or property of another. *State v. Strickland*, 1916-NMSC-008, 21 N.M. 411, 155 P. 719.

Threat of injury is extortion. — Where defendant was given a psychological evaluation; defendant asked to see the evaluation report and became angry upon reading the report; subsequently, defendant asked again for a copy of the report; the custodian of the report refused to give defendant a copy of the report because of defendant’s mental state; defendant wrote letters to the custodian in which defendant threatened to harm the custodian if the custodian did not give defendant a copy of the report; and defendant has a right to receive a copy of the report, defendant was guilty of extortion. *Rael v. Sullivan*, 918 F.2d 874 (10th Cir. 1990), cert. denied, 499 U.S. 928, 111 S. Ct. 1328, 113 L. Ed. 2d 260 (1991).

"Unlawful injury" as breach of contract is question for legislature. — Whether "unlawful injury" within the meaning of Subsection A encompasses a mere breach of contract is a question which the legislature may wish to clarify. *State v. Ashley*, 1989-NMCA-018, 108 N.M. 343, 772 P.2d 377, cert. denied, 108 N.M. 433, 773 P.2d 1240.

Phrase "to wrongfully compel" refers to the manner in which the defendant compels an act, rather than the legitimacy of the defendant's objective. *Rael v. Sullivan*, 918 F.2d 874 (10th Cir. 1990), cert. denied, 499 U.S. 928, 111 S. Ct. 1328, 113 L. Ed. 2d 260 (1991).

Wrongfully compelling an act. — A bank's policy of requiring execution of a forgery affidavit and prosecution of an alleged forgery as a condition precedent to reimbursement of a customer's account did not constitute extortion under this section. *Sunwest Bank v. Deskalos*, 1995-NMCA-100, 120 N.M. 637, 904 P.2d 1062.

Defendant's threat to close victim's health club unless victim gave defendant money to help him buy the building in which the club was operated was a threat of "unlawful injury" within the meaning of Subsection A because the act threatened was a tort. *State*

v. Ashley, 1989-NMCA-018, 108 N.M. 343, 772 P.2d 377, cert. denied, 108 N.M. 433, 773 P.2d 1240.

Law reviews. — For comment on Landavazo v. Credit Bureau, 72 N.M. 456, 384 P.2d 891 (1963), see 4 Nat. Resources J. 584 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 31A Am. Jur. 2d Extortion, Blackmail and Threats §§ 1 to 6.

Extortion predicated upon statements or intimations regarding criminal liability in connection with attempt to collect or settle a claim which defendant believed to be valid, 135 A.L.R. 728.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Injury to reputation or mental well-being as within penal extortion statutes requiring threat of "injury to the person," 87 A.L.R.5th 715.

35 C.J.S. Extortion §§ 1 to 6; 86 C.J.S. Threats and Unlawful Communications §§ 2 to 6.

30-16-10. Forgery.

A. Forgery consists of:

(1) falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or

(2) knowingly issuing or transferring a forged writing with intent to injure or defraud.

B. Whoever commits forgery when there is no quantifiable damage or when the damage is two thousand five hundred dollars ($2,500) or less is guilty of a fourth degree felony.

C. Whoever commits forgery when the damage is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

D. Regardless of value, whoever commits forgery of a will, codicil, trust instrument, deed, mortgage, lien or any other instrument affecting title to real property is guilty of a third degree felony.

E. Whoever commits forgery when the damage is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-9, enacted by Laws 1963, ch. 303, § 16-9; 2006, ch. 29, § 6.

ANNOTATIONS

Cross references. — For forgery of lottery ticket, *see* 6-24-31 NMSA 1978.

For forgery of credit card, *see* 30-16-31 NMSA 1978.

The 2006 amendment, effective July 1, 2006, added Subsection B to provide that if the quantifiable damage is $2,500 or less the crime is a fourth degree felony; added Subsection C to provide that if the damages is more than $2,500 but less than $20,000, the crime is a third degree felony; added Subsection D to provide that regardless of value whoever commits forgery of a will, codicil, trust instrument, deed, mortgage, lien or other instrument affecting title to real property is guilty of a third degree felony; and added Subsection E to provide that if the damage is more than $20,000, the crime is a second degree felony.

I. GENERAL CONSIDERATION.

Request for false notations. — Although the defendant admittedly told the maker of the checks to put false notations on them indicating that the defendant received the checks in the course of his employment, rather than for personal goods and services, which represented a misrepresentation upon the face of the checks that cast doubt on his general truthfulness and moral character, the notations did not support a logical inference that petitioner knew the checks were forged, since the purpose of the notations was to facilitate cashing the third-party checks, and they served the same purpose regardless of whether the checks were good or were forged. *Stallings v. Tansy*, 28 F.3d 1018 (10th Cir. 1994).

Writing one's true name in payee line. — Defendant's alteration of a traveler's check by writing his name in the second payee line after the rightful owner had signed the first payee line did not alter the legal effect of the traveler's check. Any subsequent holder of the check should have known that it was not negotiable. Thus, defendant did not commit forgery. *State v. Carbajal*, 2002-NMSC-019, 132 N.M. 326, 48 P.3d 64.

Physical act not always a transfer. — It is possible to have a physical act which is an attempt to transfer one's interest but to have such an attempt thwarted at some stage of perpetration. *State v. Tooke*, 1970-NMCA-068, 81 N.M. 618, 471 P.2d 188, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Presentation of check a complete transfer. — Where defendant presented a forged check to a bank teller for cashing, fact that the teller, somewhat suspicious, took the check to her supervisor, whereupon the police were called and defendant was arrested, did not convert the crime into an attempt, since the transfer of interest by the defendant had already occurred; the fact that defendant received nothing and that there was no

injury or loss was immaterial. *State v. Linam*, 1977-NMCA-082, 90 N.M. 729, 568 P.2d 255, cert. denied, 91 N.M. 3, 569 P.2d 413, *overruled on other grounds by*, *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Signing brother's name to traffic citation. — Motorist who gave officer brother's name and signed brother's name to three traffic citations could be prosecuted for forgery; there was no requirement under the forgery laws that he intended to injure or defraud his brother or that he actually succeed in injuring or defrauding someone. *State v. Wasson*, 1998-NMCA-087, 125 N.M. 656, 964 P.2d 820, cert. denied, 125 N.M. 322, 961 P.2d 167.

Endorsement of own name without authorization not forgery. — Where defendant endorsed or caused his name to be endorsed to a check, this was not a false endorsement, only an endorsement without authorization; and, thus, not forgery as defined in this section. *State v. Deutsch*, 1985-NMCA-123, 103 N.M. 752, 713 P.2d 1008, cert. denied, 103 N.M. 740, 713 P.2d 556, and cert. denied, 476 U.S. 1183, 106 S. Ct. 2918, 91 L. Ed. 2d 547 (1986).

Consecutive sentences proper. — Trial court did not err in imposing consecutive sentences on three counts of forgery, since the common law gave trial courts the discretion to make sentences consecutive or concurrent. *State v. Crouch*, 1965-NMSC-131, 75 N.M. 533, 407 P.2d 671.

If defendant assumes name and identity of deceased person, goes into the military and obtains identification under his assumed name, uses the identification to open a checking account, and then writes and signs checks under his assumed name and tenders them to various stores in return for valuable merchandise, such acts do not purport to be those of another and therefore forgery has not been committed. *State v. Cook*, 1979-NMCA-070, 93 N.M. 91, 596 P.2d 860.

Unauthorized alteration of instrument. — Unauthorized alteration of a genuine instrument, of the kind contemplated by the statute, with the requisite fraudulent intent, is forgery under this section. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

Where defendant came into possession of a check validly signed (such that it was bearer paper) but not filled in, his unauthorized filling in of the blank spaces of the check was an alteration within the purview of the forgery statute. *State v. Smith*, 1981-NMCA-003, 95 N.M. 432, 622 P.2d 1052.

Alteration of invoice. — Unauthorized addition to the invoice of items not purchased by the customer and a change of the amount which the customer had directed to be charged to his account constituted an alteration of the instrument within forgery offense. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

II. ELEMENTS.

A. IN GENERAL.

Elements. — Both knowledge and intent are essential elements of forgery. *State v. Morales*, 2000-NMCA-046, 129 N.M. 141, 2 P.3d 878, cert. denied, 129 N.M. 207, 4 P.3d 35.

Signing documents with a false name is not a forgery when the signatory has assumed the name as his own identity and when the signed document only imposes liability on the person signing it. *State v. Sandoval*, 2007-NMCA-103, 142 N.M. 412, 166 P.3d 473, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

Elements of offense. — A forgery is completed when a defendant possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy; (2) physically delivers a forged writing; or (3) passes an interest in a forged writing. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

"Issuing" and "transferring". — The terms "issuing" and "transferring" encompass a delivery to one who is a holder with the passing of interests from one to another. *State v. Tooke*, 1970-NMCA-068, 81 N.M. 618, 471 P.2d 188, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

A defendant may issue or transfer a forged writing either by a physical delivery of the forged instrument for action by a third party or by passing an interest in the forged instrument to a third party. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

A defendant issues a forged writing when he or she knowingly physically delivers the false instrument, offers the false instrument, or otherwise makes the false instrument available for action. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

A defendant transfers a forged writing when he or she knowingly conveys an interest contained in the false instrument. For instance, a stock certificate may be forged to indicate a false owner. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Each forged instrument a separate offense. — This section makes each act of forgery, each forged instrument, a separate offense. *State v. Baca*, 1997-NMSC-018, 123 N.M. 124, 934 P.2d 1053.

B. LEGAL EFFICACY.

Legal efficacy of doctor's note and order for tests. — A doctor's note and order for diagnostic tests that were used to create an excuse for the defendant's non-appearance at a court-ordered appointment are not instruments purporting to have legal efficacy and cannot be made the foundation for a forgery conviction. *State v. Scott*, 2008-NMCA-

075, 144 N.M. 231, 185 P.3d 1081, cert. denied, 2008-NMCERT-004, 144 N.M. 47, 183 P.3d 932.

Non-commercial documents. — A non-commercial document purports to have legal efficacy if it is a document required by law to be filed or recorded or necessary or convenient to the discharge of a public official's duties and if it is an instrument which upon its face could be made the foundation of liability and if it is an instrument good and valid for the purpose for which it was created. *State v. Martinez*, 2008-NMCA-058, 144 N.M. 50, 183 P.3d 935, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

The act of signing an intake fingerprint card with an assumed name when being booked into jail constitutes forgery. *State v. Martinez*, 2008-NMCA-058, 144 N.M. 50, 183 P.3d 935, cert. denied, 2008-NMCERT-003, 143 N.M. 682, 180 P.3d 1181.

An employment application lacks legal efficacy. — *State v. Sandoval*, 2007-NMCA-103, 142 N.M. 412, 166 P.3d 473, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

Employment eligibility verification forms, known as Form I-9; W-4 forms; social security cards; and resident alien cards have legal efficacy. *State v. Sandoval*, 2007-NMCA-103, 142 N.M. 412, 166 P.3d 473, cert. quashed, 2008-NMCERT-004, 144 N.M. 49, 183 P.3d 934.

Phrase not unconstitutionally vague. — Phrase "legal efficacy" as applied in forgery statute to a writing is not so vague and uncertain in meaning as to offend constitutional requirements of certainty as it means an instrument which upon its face could be made the foundation of liability or an instrument good and valid for the purpose for which it was created. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

Objects of forgery. — Bingo cards purport to have legal efficacy which can be the object of a forgery. *State v. Nguyen*, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

Legal efficacy is an essential element of the forgery offense and a purely legal issue. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

Interpretation of legal efficacy requirement that would expand forgery to encompass the falsification or alteration of any item with potential evidentiary value is not supported. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

The element of forgery requiring that the defendant has falsely made or altered an instrument purporting to have legal efficacy should not be expanded to include instances where the sole legal value of the instrument is its potential use as evidence.

State v. Cearley, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

Inauthentic document that has been presented to opposing counsel during discovery in civil matter and that has no legal efficacy apart from its potential evidentiary value cannot be the subject of a forgery prosecution. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

"Legal efficacy" of postdated checks. — Where the forged writing involved an endorsement made or attempted of the name of the payee, the checks, although postdated, upon their face possessed sufficient legal efficacy to defraud and were properly the subject of forgery. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Changing legal effect of check. — Where defendant found a check written out to "Cash" and, when he presented the check to a credit union teller to cash it, he added his name on the payee line next to "Cash," and endorsed the check, his actions did not change the legal effect of the check from a bearer instrument into an order instrument under 55-3-109 NMSA 1978, and he did not commit the crime of forgery. *State v. Herrera*, 2001-NMCA-007, 130 N.M. 85, 18 P.3d 326, cert. denied, 130 N.M. 153, 20 P.3d 810.

"Legal efficacy" of receipts. — Documents consisting of a receipt for money purporting to show that defendant had paid cash to the immigration and naturalization service (INS) as a processing fee for immigration applications and a return receipt from the United States postal service indicating INS had received the applications were "of legal efficacy" as required by this section. *State v. Torres*, 2000-NMCA-038, 129 N.M. 51, 1 P.3d 433, cert. denied, 129 N.M. 208, 4 P.3d 36.

Non-carbon records of checks do not purport to have legal efficacy in and of themselves. *State v. Cearley*, 2004-NMCA-079, 135 N.M. 710, 92 P.3d 1284, cert. quashed, 2005-NMCERT-007, 137 N.M. 280, 110 P.3d 506.

C. INTENT.

Intent. — According to the forgery statute, the appropriate mens rea is that the defendant have actual knowledge that the document is a forgery. *State v. Garvin*, 2005-NMCA-107, 138 N.M. 164, 117 P.3d 970, cert. denied, 2005-NMCERT-008, 138 N.M. 328, 119 P.3d 1265.

Acceptance of forged instrument is unnecessary to complete the crime of forgery. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Gain or loss not required. — Forgery is complete when the false instrument is issued or transferred with the requisite intent, regardless of its acceptance. The forgery statute does not require that the defendant gain, or that the prospective victim experience a loss or injury to complete the crime. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

One commits forgery when he makes up check (assuming the requisite knowledge and intent), whether he or someone else places a false signature on it. *State v. Saavedra*, 1979-NMCA-096, 93 N.M. 242, 599 P.2d 395.

Section requires intent to injure or defraud. *State v. Thurman*, 1975-NMCA-049, 88 N.M. 31, 536 P.2d 1087, cert. denied, 88 N.M. 29, 536 P.2d 1085, *overruled on other grounds by* State v. Ellenberger, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Intent to injure in general sufficient. — General intent to injure or defraud was sufficient for conviction of forgery; it was not necessary to allege or prove intent to injure or defraud a particular person. *State v. Smith*, 1927-NMSC-012, 32 N.M. 191, 252 P. 1003.

Actual injury not required. — For there to be an intent to defraud, an injury or loss need not have actually resulted and for such an intent it is immaterial that no one was in fact deceived, or that the defendant did not intend to or did not make any financial gain as it is sufficient if the intent was to defraud any person on whom the counterfeit is passed. *State v. Nation*, 1973-NMCA-087, 85 N.M. 291, 511 P.2d 777.

Sufficient evidence of knowledge and intent. — Where defendant successfully cashed a check ostensibly signed by defendant's parent on the parent's closed account; when defendant later attempted to cash another check on the same account at the same store, when defendant learned that the police had been called, defendant ran out of the store and entered a waiting car behind the store; and defendant's parent testified that the parent had not authorized defendant to sign checks on the closed account, the evidence was to establish knowledge and intent elements for forgery. *State v. Morrales*, 2000-NMCA-046, 129 N.M. 141, 2 P.3d 878, cert. denied, 129 N.M. 207, 4 P.3d 35.

Intent to injure or defraud. — The crime of forgery was completed when the false making of the signature with intent to injure or defraud had been accomplished, and an injury or loss need not actually have resulted. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444.

III. INDICTMENT AND INFORMATION.

Severance. — Failure to sever two counts of forgery arising from two separate incidents involving alteration of bingo cards did not prejudice the defendant since the evidence of the two offenses would be independently admissible in separate trials to prove the essential elements of intent and knowledge. *State v. Nguyen*, 1997-NMCA-037, 123 N.M. 290, 939 P.2d 1098.

Indictment sufficient. — An indictment for forgery, alleging that the act was unlawfully, falsely and feloniously done, sufficiently excluded authorization by the person whose act it purported to be. *State v. Smith*, 1927-NMSC-012, 32 N.M. 191, 252 P. 1003.

IV. EVIDENCE.

Circumstantial evidence of knowing forgery. — Where the state elicited circumstantial evidence of defendant's knowledge that the checks he cashed were forged, which included his failure to make arrangements to pay the merchant after being advised that the checks had not been honored, his prior felony conviction, and his admitted requesting false notations on the checks, which indicated they were given him by employers with whom the merchant was familiar, and that he did so in order to make the checks easier to cash, this was sufficient to support an inference that defendant knew the checks were forged. *State v. Stallings*, 1986-NMCA-086, 104 N.M. 660, 725 P.2d 1228, cert. denied, 104 N.M. 632, 725 P.2d 832.

Sufficient evidence. — Where defendant presented a check for cashing at a store; the check was drawn on the victim's business account, payable to defendant in payment for labor; the victim testified that the victim had never employed defendant or written a check to defendant for labor; and a bank employee testified that the signature on the check was not the victim's signature, the evidence was sufficient to support defendant's conviction for forgery. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2000-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

Evidence sufficient to find defendant signed checks. — Although the state did not offer a handwriting expert to match the signature on counterfeit traveller's checks with that of the defendant, the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant did sign several of the checks; the checks were counterfeit, a hotel room registration card for a room checked out to an accomplice in the fraud bore the defendant's signature; the defendant was identified by several of the store clerks involved as the person who had passed the counterfeit checks in purchasing items; and many of the items purchased were found in the room where the defendant stayed. *State v. Rotibi*, 1994-NMCA-003, 117 N.M. 108, 869 P.2d 296, cert. denied, 117 N.M. 215, 870 P.2d 753.

Proving forgery of check. — The court held that proof of forgery of a check need not include a showing that the drawee bank would not have honored it. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Lack of account or authority. — Evidence that the company attempted to be drawn on did not have an account with the drawee bank or that the person who signed the check was not authorized to sign checks on behalf of the corporation were not elements of proof prerequisite to defendant's conviction involving a false endorsement with intent to defraud. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81

N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Inference of nonauthorization warranted. — Representations that defendants were the persons named as payees of the checks made for the purpose of inducing the respective clerks to cash the checks, reasonably warranted the inference that defendants did not have the right to use the names of payees of the checks, and were not, in fact, such payees and that they did not have authority to endorse the checks in the names of payees. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Substantial evidence supported forgery convictions. — Where defendant, a franchisee, wrote checks provided by franchisor payable to herself and co-defendant, neither of whom was authorized to receive these funds, in amounts totaling over $200,000, and where defendant was charged with forgery, conspiracy to commit forgery, fraud, conspiracy to commit fraud and embezzlement, and co-defendant was charged with forgery, conspiracy to commit forgery, fraud (over $2,500 but less than $20,000) and fraud (over $20,000), and where defendants claimed that substantial evidence did not support their forgery convictions because the checks and signature stamps used in the scheme were genuine and defendant endorsed the checks with her own genuine signature, there was sufficient evidence to support the forgery convictions because defendant's use of a signature stamp and the checks outside the scope of their authorization were acts which, when combined with the required intent to injure or defraud, constituted forgery. *State v. Candelaria*, 2019-NMCA-032, cert. denied.

Aiding and abetting check forgery. — The fact that defendant was not the person who passed an interest in forged checks did not preclude defendant's conviction under this section if the evidence of defendant's aiding and abetting of unidentified woman who actually passed the checks was sufficient. *State v. Martinez*, 1973-NMCA-075, 85 N.M. 198, 510 P.2d 916.

Mere presence not aiding and abetting. — The fact that defendant accompanied the forger of certain checks at the time that she cashed them was not sufficient to support a finding of aiding and abetting, for mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

Endorsing and vouching for forged check. — To be an aider or abettor to a forgery, defendant must have shared an intent to injure or defraud, and where uncontradicted evidence was that defendant vouched for and endorsed check forged by unidentified companion, such evidence, although circumstantial, was sufficient to show such intent. *State v. Martinez*, 1973-NMCA-075, 85 N.M. 198, 510 P.2d 916.

Guilty knowledge not shown. — Where the woman who forged signature on certain checks testified that the defendant, who drove her to two different branches of a bank in

a three-hour period to cash them, and deposited them in the bank's drawer and cylinder respectively, did not know that the checks were forged, and the only other fact upon which a finding of defendant's guilty knowledge could be based was his presence in a car next to the owners at the time the checks may have been stolen, the evidence did not form a sufficient basis upon which to rest a conclusion of defendant's guilty knowledge. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

Reasonable hypotheses of innocence. — Circumstantial evidence was insufficient to allow a finding that defendant aided forger by procuring checks for her because there were too many other explanations to account for her possession of the checks, so that the evidence was not 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. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

Check forgery substantiated. — Despite discrepancies in testimony of certain witnesses, there was sufficient corroborated and uncontradicted testimony to substantiate verdict of guilty on three counts of check forgery. *State v. Crouch*, 1965-NMSC-131, 75 N.M. 533, 407 P.2d 671.

No evidence of check forgery. — Where there was ample evidence that the maker of check cashed by defendant, which he claimed to have received in payment for three days of work, did not have an account in the bank on which it was drawn, but not one iota of evidence that check was a forgery, conviction of knowingly uttering a forged instrument with intent to defraud was reversed. *State v. Bibbins*, 1960-NMSC-006, 66 N.M. 363, 348 P.2d 484.

No basis for a charge of forgery when defendant did not make or manufacture a false document. — Where defendant was convicted of forgery, conspiracy to commit forgery, and perjury, and where the evidence presented indicated that defendant signed an affidavit of New Mexico residency, under penalty of perjury, declaring that he was a friend of a foreign national who sought a driver’s license from the motor vehicle division (MVD) and that the foreign national lived with defendant in Albuquerque, when in fact, the foreign national did not live at the address as attested to by defendant in the affidavit, the evidence was insufficient to support forgery or conspiracy to commit forgery, because a forgery statute punishes those who falsely make an affidavit, whereas a perjury statute punishes those who make and certify a false affidavit; if a person includes false statements in an affidavit that the person signs under oath, that person has made and certified a false affidavit, which cannot be the basis of a forgery conviction, and defendant did not make or manufacture a false document, but used a genuine MVD affidavit form and signed it with his actual name. *State v. Leong*, 2017-NMCA-070, cert. denied.

Transfer of forged prescription. — Evidence that a physician's signature had been forged on one of his prescription blanks and that defendant presented this forged prescription to a pharmacist and obtained the drug identified in the prescription, was

sufficient to show defendant knowingly transferred a forged prescription with an intent to injure or defraud. *State v. Nation*, 1973-NMCA-087, 85 N.M. 291, 511 P.2d 777.

Forging signature on assignment of title. — Falsely signing name of automobile owner to assignment of title and notarizing same, where evidence amply supported finding of intent to injure or defraud, constituted crime of forgery. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444.

Intent to wrongfully deprive another. — Evidence was sufficient to support a finding of intent to wrongfully or fraudulently deprive another of a lawful right, interest or property, where car and false assignment were delivered to third-party purchaser who used same for at least nine days, vehicle was sold for less than worth and at private sale rather than public sale to which owner was entitled, and difference between amount owing and purchase price was not paid to owner; furthermore, even if it could be said that defendant, as secured party, legally took possession of car and was thus entitled to dispose of it by private sale, still he failed to give reasonable notification of the time after which sale would be made, or to account for the surplus money received from the sale. *State v. Weber*, 1966-NMSC-164, 76 N.M. 636, 417 P.2d 444.

Substantial evidence of intent required. — Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence, but this does not remove the obligation to examine the evidence to determine whether there was substantial evidence to support a finding of intent. *State v. Hermosillo*, 1975-NMCA-113, 88 N.M. 424, 540 P.2d 1313.

Admissibility of exhibits. — Envelope containing money found in defendant's possession shortly after cashing second of two forged checks tended to throw light on the transaction, and considered with the time and distance factors involved, circumstantially connected defendant with the criminal offense. *State v. Belcher*, 1971-NMCA-135, 83 N.M. 130, 489 P.2d 410.

Red plastic wallet identified by witnesses as belonging to defendant, containing identification card bearing the name of the payee named in two forged checks, which was found around the corner from business where second check was cashed, was admissible, despite weakness of evidence of chain of custody after it was found and as to whether the contents were in the same condition at trial as when found; doubt concerning the exhibit would go to the weight to be accorded it. *State v. Belcher*, 1971-NMCA-135, 83 N.M. 130, 489 P.2d 410.

Cashier's description of contents of forged check was sufficient proof, and the state's failure to introduce the forged check at trial did not preclude a conviction for forgery. *State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

V. INSTRUCTIONS.

Instruction regarding type of intent. — Where on appeal it was contended an error occurred for the district court to give a general intent instruction without instructing the jury that it did not apply to a specific intent crime, because the instruction substantially followed the applicable law, there was no fundamental error. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003, 135 N.M. 321, 88 P.3d 261.

VI. DOUBLE JEOPARDY.

Double jeopardy. — A forgery offense may be subsumed within an attempted fraud offense. *State v. Lee*, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Convictions for fraud and forgery may not violate double jeopardy. *State v. Caldwell*, 2008-NMCA-049, 143 N.M. 792, 182 P.3d 775, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

Where sufficient evidence exists to establish that each false signing was distinct from the others a defendant's acts are separated by sufficient indicia of distinctness to justify multiple punishments under the same statute. *State v. Glascock*, 2008-NMCA-006, 143 N.M. 328, 176 P.3d 317, cert. quashed, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43.

Forgery and attempted fraud. — Where defendant was convicted for forgery and attempted fraud over $250 arising out of the unitary conduct of cashing a forged check, the additional element of the attempted fraud offense that the writing have a value over $250 was not sufficiently material to preclude the conclusion that the forgery offense was subsumed within the attempted forgery offense. *State v. Lee*, 2009-NMCA-075, 146 N.M. 605, 213 P.3d 509, cert. denied, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Multiple documents. — Where defendant signed multiple documents in connection with the refinancing of the marital home without his wife’s permission or knowledge, the defendant’s conduct was one continuous action rather than three distinct acts with respect to each closing document and constituted one act of forgery. *State v. Turner*, 2007-NMCA-105, 142 N.M. 460, 166 P.3d 1114, cert. denied, 2007-NMCERT-008, 142 N.M. 434, 166 P.3d 1088.

Multiple prosecutions not double jeopardy. — Where charge of violation of former law relating to passing of forged evidence of debt of government, or of banking institution, was dismissed for variance on grounds that the forged instrument was not a document evidencing an indebtedness of a banking institution, and defendant was subsequently charged and convicted of passing the same forged bill of exchange with intent to defraud in violation of statute relating to uttering of forged document, his plea of double jeopardy was without merit as for double jeopardy, the test in determining whether the offenses charged are the same is whether the facts offered in support of

one charge would sustain a conviction of the other, and if either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. *Owens v. Abram*, 1954-NMSC-096, 58 N.M. 682, 274 P.2d 630, cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955); *see also Owens v. Swope*, 227 F.2d 796 (10th Cir.), cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

Conviction for same facts under different theories constituted double jeopardy. — Defendant's conviction on two separate counts of forgery on the same check, the only difference between the two counts being the theory of forgery charged, constituted double jeopardy. Although different subsections of this section provide for alternative means of prosecution, the legislature intended only one conviction for each forgery related to the same facts involving the same check. *State v. Orgain*, 1993-NMCA-006, 115 N.M. 123, 847 P.2d 1377, cert. denied, 115 N.M. 145, 848 P.2d 531.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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. — 36 Am. Jur. 2d Forgery §§ 1 to 26.

Genuine making of instrument for purpose of defrauding as constituting forgery, 41 A.L.R. 229, 46 A.L.R. 1529, 51 A.L.R. 568.

Invalid instrument as subject of forgery, 174 A.L.R. 1300.

Admissibility, in forgery prosecution, of other acts of forgery, 34 A.L.R.2d 777.

Use of fictitious or assumed name, 49 A.L.R.2d 852.

Alteration of figures indicating amount of check, bill, or note without change in written words, as forgery, 64 A.L.R.2d 1029.

Fees: amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying, 86 A.L.R.2d 1283.

Stolen money or property as subject of larceny or robbery, 89 A.L.R.2d 1435.

Credit charge or credit sales slip, signing of, 90 A.L.R.2d 822.

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

37 C.J.S. Forgery §§ 1 to 42.

30-16-11. Receiving stolen property; penalties.

A. Receiving stolen property means intentionally to receive, retain or dispose of stolen property knowing that it has been stolen or believing it has been stolen, unless the property is received, retained or disposed of with intent to restore it to the owner.

B. The requisite knowledge or belief that property has been stolen is presumed in the case of a dealer who:

(1) is found in possession or control of property stolen from two or more persons on separate occasions;

(2) acquires stolen property for a consideration that the dealer knows is far below the property's reasonable value. A dealer shall be presumed to know the fair market value of the property in which the dealer deals; or

(3) is found in possession or control of five or more items of property stolen within one year prior to the time of the incident charged pursuant to this section.

C. For the purposes of this section:

(1) "dealer" means a person in the business of buying or selling goods or commercial merchandise; and

(2) "stolen property" means any property acquired by theft, larceny, fraud, embezzlement, robbery or armed robbery.

D. Whoever commits receiving stolen property when the value of the property is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

E. Whoever commits receiving stolen property when the value of the property is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

F. Whoever commits receiving stolen property when the value of the property is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

G. Whoever commits receiving stolen property when the value of the property is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

H. Whoever commits receiving stolen property when the value of the property exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

I. Whoever commits receiving stolen property when the property is a firearm is guilty of a fourth degree felony when its value is less than two thousand five hundred dollars ($2,500).

History: 1953 Comp., § 40A-16-11, enacted by Laws 1963, ch. 303, § 16-11; 1969, ch. 171, § 2; 1972, ch. 77, § 1; 1975, ch. 232, § 1; 1983, ch. 253, § 1; 1987, ch. 121, § 5; 2006, ch. 29, § 7.

ANNOTATIONS

Cross references. — For failure to show proper authority, hides and pelts of cattle or sheep killed being evidence of larceny or receiving stolen property, *see* 77-17-14 NMSA 1978.

For evidentiary rule regarding presumptions in criminal cases, *see* Rule 11-302 NMRA.

The 2006 amendment, effective July 1, 2006, increased the value of the property in Subsection D from $100 or less to $250 or less; increased the value of the property in Subsection E from more than $100 but less than $250 to more than $250 but less than $500; increased the value of the property in Subsection F from more than $250 to more than $500.

The 1987 amendment, effective June 19, 1987, added present Subsections E and H, while redesignating former Subsections E, F and G as present Subsections F, G and I.

The 1983 amendment, effective June 17, 1983, in Subsection C, divided the formerly undivided language into an introductory paragraph and Paragraph (1), added "and" at the end of Paragraph (1) and added Paragraph (2).

I. IN GENERAL.

Unit of prosecution. — A defendant's possession of a stolen firearm is a separate offense from simultaneous possession of other stolen items. *State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951, cert. denied, 2008-NMCERT-003, 143 N.M. 681, 180 P.3d 1180.

The purpose of Subsection B was not to create a separate crime where several items of property, including a firearm or firearms, were stolen or received together with other stolen property, but was to increase the penalty for the offense where a firearm was the subject of the theft or receiving of stolen property regardless of the value of the firearm. *State v. Smith*, 1983-NMCA-077, 100 N.M. 352, 670 P.2d 963, *overruled by State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951.

Evidence that a defendant was in possession of numerous items of recently stolen personal property, wrongfully taken from different owners at different times, gives rise to a reasonable inference that defendant knew the property was stolen. *State v. Smith*,

1983-NMCA-077, 100 N.M. 352, 670 P.2d 963, *overruled by State v. Watkins*, 2008-NMCA-060, 144 N.M. 66, 183 P.3d 951.

Validity. — Even if Subsection B renders this section partially invalid, as trial court had held, Subsection A is valid absent Subsection B. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

Section inapplicable to embezzled property. — In the absence of a statutory provision which expressly declares the offense of embezzlement to be embraced within the offense of larceny, the crime of receiving stolen property, knowing it to have been stolen, does not include property which was embezzled. *State v. Bryant*, 1982-NMCA-178, 99 N.M. 149, 655 P.2d 161 (decided under prior law).

II. MULTIPLE PROSECUTIONS.

Multiple charges. — Even where only one building is burglarized, multiple burglary charges are proper when the security interests of multiple victims are involved. *State v. Soto*, 2001-NMCA-098, 131 N.M. 299, 35 P.3d 304, cert. denied, 131 N.M. 64, 33 P.3d 284.

Receiving not included in armed robbery. — Offense of receiving stolen property cannot be included within the offense of armed robbery. *State v. Mares*, 1968-NMCA-042, 79 N.M. 327, 442 P.2d 817.

Prosecution for armed robbery not barred. — Plaintiff who was convicted in a justice of the peace court (now replaced by magistrate courts) of the petty misdemeanor of receiving stolen property, and was later convicted in the district court of the second degree felony of armed robbery, was not placed in double jeopardy, nor was the state barred or estopped from prosecuting and convicting him for the armed robbery. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

Conviction for receiving as bar to burglary prosecution. — New Mexico cannot convict a person under one indictment or information of receiving stolen property, and then subsequently convict him under another indictment or information of burglary, if the burglary conviction is dependent upon a theft by him of the same property, and he is shown to have been the person who actually took and asported the property during the burglarious entry. *State v. Gleason*, 1969-NMCA-054, 80 N.M. 382, 456 P.2d 215.

Theft inconsistent with receiving. — The felonious receiving of stolen property, knowing the same to have been stolen, was a substantive offense, and distinct from larceny. Where evidence showed defendant guilty of the theft, he could not be convicted of feloniously receiving it. *Territory v. Graves*, 1912-NMSC-027, 17 N.M. 241, 125 P. 604.

Disposition separate from larceny. — A thief who holds on to stolen property cannot violate this section by receiving the stolen property because he cannot receive it from

himself, nor can the thief violate the statute by retaining the stolen property because larceny is a continuing offense; the thief's disposition, however, is action separate from the larceny, and it is neither absurd nor unreasonable to hold that the thief violates this section when he disposes of the property that he stole. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

Principle that one who is a thief cannot be convicted of "receiving" property he stole since the theft and receipt are the same act was inapplicable where defendant was convicted of "disposing of" property which he may also have stolen although he was acquitted of the theft. *State v. Mitchell*, 1974-NMCA-057, 86 N.M. 343, 524 P.2d 206.

Meaning of "disposing" shown by legislative history. — Since the legislature is presumed to have known the law when it added the "disposing" provision by the 1972 amendment, and is presumed to have intended to change it, so that, even if prior law prohibited conviction for both theft and disposing of the same property the legislative history supports the view that the law has been changed. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

Simultaneous possession of stolen items owned by different individuals is a single act constituting one offense. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

Property taken from more than one owner or at more than one time cannot be combined together into one count, thereby combining the values of the stolen items to increase the penalty. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

The defendant may be charged with a separate count for each separate transaction of disposal. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

Conviction for receipt back of property stolen. — If a thief steals property, turns that property over to someone and subsequently receives the property back from that person, a receiving conviction based on receipt of the stolen property by the thief would not be prohibited. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

Each separate "receiving" is a separate crime. *State v. Bell*, 1977-NMCA-014, 90 N.M. 160, 560 P.2d 951, cert. denied, 90 N.M. 254, 561 P.2d 1347.

If defendant received the stolen pistol at a time different from the time that he received the other stolen properties, then there were two offenses for which two sentences would be imposed even though at the time of discovery defendant possessed all the stolen property involved. *State v. Bell*, 1977-NMCA-014, 90 N.M. 160, 560 P.2d 951, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Dual prosecutions alleging different ownership of same property. — A former acquittal under an indictment for buying and receiving stolen property, charged to be the

property of A, was no bar to a prosecution for buying and receiving the same property charged to be the property of B. This was true where difference in name of owner of property was "railroad" and "railway." *State v. Jacoby*, 1919-NMSC-012, 25 N.M. 224, 180 P. 462.

III. ELEMENTS OF OFFENSE.

Purpose. — An obvious purpose of this section was to inhibit the movement and disposition of stolen property, and the holding that the section applies to a thief who disposes of stolen property is consistent with that purpose. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

Meaning of "dispose". — The ordinary meaning of the language "dispose of stolen property" is to transfer, relinquish or get rid of stolen property, which language does not show an intent to exclude the thief from the prohibition against disposing of stolen property. *State v. Tapia*, 1976-NMCA-042, 89 N.M. 221, 549 P.2d 636, cert. denied, 89 N.M. 206, 549 P.2d 284.

The ordinary meaning of "dispose" is "to transfer, relinquish or get rid of;" thus, when the defendant gave stolen money to friends, he transferred it to them. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Money is "property". – The legislature intended that "property" include "anything of value;" common sense supports the conclusion that "anything of value" includes money. *State v. Hernandez*, 2003-NMCA-131, 134 N.M. 510, 79 P.3d 1118, cert. denied, 2003-NMCERT-002, 134 N.M. 723, 82 P.3d 533.

Several methods of committing offense. — Prior to 1972 amendment, this section provided four methods by which offense could be committed, namely, buying, procuring, receiving or concealing stolen property; proof of any one of these methods, coupled with requisite knowledge, was sufficient to sustain a conviction. *State v. Carlton*, 1971-NMCA-019, 82 N.M. 537, 484 P.2d 757, cert. denied, 82 N.M. 534, 484 P.2d 754.

This section contemplates that a person may commit "receiving stolen property" in one of three ways. The property may be "received," or the property may be "retained," or the property may be "disposed" of by a defendant. Proof of any one of these methods, coupled with the requisite knowledge, is sufficient to sustain a conviction. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

Actual theft and knowledge thereof required. — To establish the crime of receiving and concealing stolen property it is incumbent upon the state to prove that the property in this case was stolen; and that the accused received the property with knowledge that they were stolen. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Knowledge required. — To constitute the crime of receiving stolen goods, it was essential that accused have knowledge that goods were stolen. *State v. Floyd*, 1918-NMSC-057, 24 N.M. 31, 172 P. 188.

Lost property not "stolen property". — Defendant could not be charged with receiving stolen property based on his possession of a lost traveler's check. *State v. Carbajal*, 2001-NMCA-015, 130 N.M. 284, 24 P.3d 316, *rev'd on other grounds*, 2002-NMSC-019, 132 N.M. 326, 48 P.3d 64.

Specific intent is not essential element of the crime of receiving stolen property. *State v. Viscarra*, 1972-NMCA-125, 84 N.M. 217, 501 P.2d 261.

"Dishonest intent" is not essential element. — "Dishonest intent" is not an element of the statutory crime of receiving stolen property. *State v. Viscarra*, 1972-NMCA-125, 84 N.M. 217, 501 P.2d 261.

Nature of presumption herein. — Rule 303(c), N.M.R. Evid. (now Rule 11-302 NMRA), abolishes "true" presumptions in criminal cases and puts the presumptions found in Subsection B of this section into the category of permissible inference, so that that subsection must be read to say that requisite knowledge or belief that property has been stolen may be, rather than is, presumed to exist upon proof of the basic facts. *State v. Jones*, 1975-NMCA-078, 88 N.M. 110, 537 P.2d 1006, cert. denied, 88 N.M. 318, 540 P.2d 248.

IV. EVIDENCE.

Possession not inferred solely from access. — When persons other than the defendant had equal or greater access to the place where the illicit goods were discovered, possession may not be inferred solely from defendant's access. Something more is necessary to establish a link between the items and the defendant before the jury can properly infer that defendant could control the items. *State v. Sizemore*, 1993-NMCA-079, 115 N.M. 753, 858 P.2d 420, cert. denied, 115 N.M. 709, 858 P.2d 85.

Circumstantial evidence of guilty knowledge. — Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Unless a defendant admits knowledge of the fact that goods he has received are stolen, this knowledge, of necessity, must be established by circumstantial evidence. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Exclusion of reasonable hypotheses of innocence. — Where circumstantial evidence alone is relied upon for a conviction such evidence must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation

upon any reasonable hypothesis of the defendant's innocence. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Mere presence insufficient. — Although defendant was present in the house where the stolen bits were found, his presence alone is insufficient evidence on which to base a conviction. *State v. Browder*, 1971-NMCA-150, 83 N.M. 238, 490 P.2d 680.

Mere possession insufficient. — Mere possession of recently stolen property is not sufficient to warrant conviction on a charge of receiving stolen property, but possession, if not satisfactorily explained, is a circumstance to be taken into consideration with all of the other facts and circumstances in the case in determining guilt or innocence. *State v. Follis*, 1960-NMSC-074, 67 N.M. 222, 354 P.2d 521; *State v. Olloway*, 1980-NMCA-119, 95 N.M. 167, 619 P.2d 843.

Inference of possession or knowlege. — Although knowledge that the property is stolen may be circumstantially proved by unexplained possession, knowledge should not be inferred from possession or possession from knowledge without having some basis in fact for the initial inference. *State v. Sizemore*, 1993-NMCA-079, 115 N.M. 753, 858 P.2d 420, cert. denied, 115 N.M. 709, 858 P.2d 85.

Possession of stolen property is circumstance to be considered in determining whether the offense has been committed. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

False explanation of possession. — Any false explanation of possession of stolen property is a circumstance indicative of guilt. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

Manner of purchase and sale. — Evidence that defendant had the stolen goods in his possession within a few days after the theft, and both purchased and sold them at prices disproportionately low in comparison with their value, directing that the check in payment of the goods be written so as to exclude his name from the transaction, met the test of substantiality and justified the inference that the goods were received by defendant with knowledge that they were stolen. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

Concealment and falsifying. — Evidence that defendant used different names in operating his business, that he used an embosser to obliterate the seals on the stolen books and that he told different stories about his acquisition of the stolen property was sufficient, even apart from evidence of possession, to sustain a conviction under this section. *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189, cert. denied, 86 N.M. 593, 526 P.2d 187.

Evidence of value. — The victim’s testimony of the value of the stolen items, together with photographic and physical exhibits of the items was sufficient to allow the jury to

conclude that the market value of the items possessed by defendant exceeded $500. *State v. Archuleta*, 2012-NMCA-007, 269 P.3d 924, cert. denied, 2011-NMCERT-012.

Motel manager's testimony that he was familiar with the value of the television sets that are sold to motels and testified that a used set like the one involved was worth between $150 and $200 was competent and meets the substantial evidence test. *State v. Williams*, 1972-NMCA-011, 83 N.M. 477, 493 P.2d 962.

Facsimile of bill of sale. — Introduction of a photocopy of a bill of sale for an electric typewriter sold by defendant to a witness, the original of which was claimed to have been lost, was not error, despite fact that counsel for defendant speculated the original might have been signed "(owner's name) by (defendant)." *State v. Chacon*, 1969-NMCA-112, 80 N.M. 799, 461 P.2d 932.

Credibility and weight of evidence for jury. — The jury was not required to accept a suggested source of acquisition of television set, disregarding all the evidence which supported a finding that defendant knew the set was stolen, since it was for the jury to weigh the evidence and pass on the credibility of the witness. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Review of evidence on appeal. — In considering the question whether defendant knew property was stolen, the court will view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences in favor of the verdict of conviction of receiving and concealing stolen goods. *State v. Zarafonetis*, 1970-NMCA-064, 81 N.M. 674, 472 P.2d 388, cert. denied, 81 N.M. 669, 472 P.2d 383.

V. PROCEDURE.

Venue proper. — Venue was properly laid in county where concealment of stolen riding equipment occurred. *State v. Carlton*, 1971-NMCA-019, 82 N.M. 537, 484 P.2d 757, cert. denied, 82 N.M. 534, 484 P.2d 754.

Allegation of ownership was essential in indictment for buying and receiving stolen property, and a departure in the proof from the allegation in the indictment was necessarily fatal to the proceedings. *State v. Jacoby*, 1919-NMSC-012, 25 N.M. 224, 180 P. 462.

Allegation of source unnecessary. — It was not necessary that indictment set out from whom the stolen goods were received. *Territory v. Claypool*, 1903-NMSC-002, 11 N.M. 568, 71 P. 463.

Charging in alternative. — An indictment which charged buying, receiving or concealing in the alternative, through the use of the word "or," was established by proof

of any one of them, although they were charged in a single count. *Territory v. Neatherlin*, 1906-NMSC-023, 13 N.M. 491, 85 P. 1044.

Indictment adequate. — Where the indictment charged defendant with receiving and concealing stolen property contrary to statutory provisions, further alleging that: "On diverse dates between March 20, 1965, and the 19th day of March, 1968 . . . [the defendant] did buy, procure, receive, or conceal things of value knowing the same to have been stolen or acquired by fraud or embezzlement" the indictment was in substantially the form prescribed by statute, and, insofar as form is concerned, no greater degree of conformity was required. *State v. Lindsey*, 1969-NMCA-121, 81 N.M. 173, 464 P.2d 903, cert. denied, 81 N.M. 140, 464 P.2d 559, and cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Unclear indictment to be dismissed. — Where the defendant cannot tell whether he is being charged with "receiving," "retaining" or "disposing" of stolen property, nor can it be determined whether the charges are being "stacked" to enhance the penalty, the indictment is faulty and must be dismissed. *Sanchez v. State*, 1982-NMSC-012, 97 N.M. 445, 640 P.2d 1325.

Effect of variance. — In prosecution for receiving and concealing stolen property, alleged variance between all the evidence and the indictment was not ground for acquittal, as court could at any time cause the indictment to be amended, nor did defense counsel's failure to object thereto establish his ineffectiveness. *State v. Chacon*, 1969-NMCA-112, 80 N.M. 799, 461 P.2d 932.

Use of conjunctive rather than disjunctive. — Where, through error, the information and the court's instructions defined the offense of buying, receiving or aiding in the concealment of stolen property conjunctively rather than disjunctively as in the statute, the defendant was not aided thereby since there was substantial evidence to show that he was guilty of all three offenses. *State v. Russell*, 1933-NMSC-018, 37 N.M. 131, 19 P.2d 742.

Instruction regarding type of intent. — Where on appeal it was contended an error occurred for the district court to give a general intent instruction without instructing the jury that it did not apply to a specific intent crime, because the instruction substantially followed the applicable law, there was no fundamental error. *State v. Gee*, 2004-NMCA-042, 135 N.M. 408, 89 P.3d 80, cert. denied, 2004-NMCERT-003, 135 N.M. 261, 88 P.3d 261.

Intent-to-return defense. — For the intent-to-return defense to apply, the stolen goods should never have been held for any purpose other than to return the goods to the owner. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

The prospect of a reward does not defeat the intent-to-return defense. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

The Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

Defendant was entitled to an instruction on the intent-to-return defense, where reasonable doubt could arise from the possibility that defendant's involvement consisted of only awareness of the burglary, knowledge of where the goods were being kept, use of reward money from an investigator to purchase the goods from those holding them, and delivery of the goods to the investigator. *State v. Lopez*, 1990-NMCA-016, 109 N.M. 578, 787 P.2d 1261.

Waiver of error in instruction. — Error committed by trial court in instructing the jury that requisite knowledge must, rather than may, be presumed upon proof of basic facts, which was not objected to, was waived and did not constitute fundamental error. *State v. Jones*, 1975-NMCA-078, 88 N.M. 110, 537 P.2d 1006, cert. denied, 88 N.M. 318, 540 P.2d 248.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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 law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 66 Am. Jur. 2d Receiving and Transporting Stolen Property §§ 1 to 4.

Possession of recently stolen goods by one charged with receiving them as evidence on question of guilty knowledge, 68 A.L.R. 187.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 A.L.R.2d 817.

Receiving property stolen in another state or country as receiving stolen property, 67 A.L.R.2d 752.

Attempts to receive stolen property, 85 A.L.R.2d 259.

Indictment: sufficiency of description of stolen property in indictment or information for receiving it, 99 A.L.R.2d 813.

Public documents: receipt of public documents taken by another as receipt of stolen property, 57 A.L.R.3d 1211.

Accomplice: receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such property, 89 A.L.R.3d 1202.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property, 30 A.L.R.4th 488.

Conviction of receiving stolen property, or related offenses, where stolen property previously placed under police control, 72 A.L.R.4th 838.

Possession of stolen property as continuing offense, 24 A.L.R.5th 132.

Participation in larceny or theft as precluding conviction for receiving or concealing the stolen property, 29 A.L.R.5th 59.

76 C.J.S. Receiving Stolen Goods § 1 et seq.

30-16-12. Falsely representing oneself as incapacitated.

Falsely representing oneself as disabled consists of a person falsely representing the person's own self to be blind, visually impaired, deaf or having a physical disability for the purpose of obtaining money or other thing of value.

Whoever commits falsely representing oneself as disabled is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-12, enacted by Laws 1963, ch. 303, § 16-12; 2007, ch. 46, § 36.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, made non-substantive language changes.

30-16-13. Cheating machine or device.

Cheating machine or device consists of any person, with intent to defraud, attempting to operate or causing to be operated any automatic vending machine, parking meter, coin-box telephone, or any machine or receptable [receptacle] designed to receive lawful money of the United States in connection with the sale, use or enjoyment of property or service, by means of any slug, or by any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device.

Whoever commits cheating machine or device is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-13, enacted by Laws 1963, ch. 303, § 16-13.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Selection of charges. — Where defendant was alleged to have stolen $400 in quarters from a change machine by using a rigged bill, he was potentially subject to being charged with both larceny and the misdemeanor offense of cheating a machine or device, and the preemption rationale of the general-specific rule did not preclude prosecution under either or both of the statutes. *State v. Davis*, 2000-NMCA-105, 129 N.M. 773, 14 P.3d 38, cert. denied, 130 N.M. 17, 16 P.3d 442.

30-16-14. Failing to label secondhand watches.

Failing to label secondhand watches consists of any person or jeweler failing to identify or specify in any advertising or merchandise display of watches that the watches offered for sale have had any portion of their movements or cases repaired or replaced. Watches which have had the brand name, the name of the maker, the serial number, movement number or any other distinguishing number or identifying mark erased, defaced, removed, altered or covered shall for the purpose of this section be deemed to be secondhand.

For the purpose of this section, sufficient labeling shall consist of any notice affixed to the outside of a watch which clearly and legibly indicates the word "secondhand" printed thereon so that it can be read by a person of normal vision.

Whoever commits failing to label secondhand watches is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-14, enacted by Laws 1963, ch. 303, § 16-14; 1965, ch. 71, § 1.

30-16-15. Coercing the purchase of insurance from particular broker.

Coercing the purchase of insurance from particular broker consists of any person engaged in selling real or personal property, or the lending of money, requiring as a condition precedent to the sale, financing the purchase of such property or the lending of money, or the renewal of extension of any loan or mortgage, that the purchaser of such property, or recipient of the financial assistance negotiate any policy of insurance or renewal thereof through a particular insurance company, agent, solicitor or broker.

Nothing in this section shall be construed to prevent the exercise by any person [of] the right to designate minimum standards as to the company, the terms and provisions of the policy and the adequacy of the coverage with respect to insurance on property pledged or mortgaged to such person.

Whoever commits coercing the purchase of insurance from particular broker is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-15, enacted by Laws 1963, ch. 303, § 16-15.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Debtor's executed contract, as condition precedent to loan, illegal. — Where an insurance creditor makes the execution of an insurance contract by the debtor a condition precedent to granting a loan, the contract is clearly illegal. *Capo v. Century Life Ins. Co*., 1980-NMSC-058, 94 N.M. 373, 610 P.2d 1202.

Contract not voided by violation. — Although requirement in loan agreement that borrowers purchase life insurance from named company as a condition precedent to the lending of money was illegal, directly contravening this section, that part of the contract was separable without materially affecting the remainder dealing with the note, mortgage and loan, which were not made unenforceable thereby. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, 81 N.M. 161, 464 P.2d 891.

But refund required. — This section, prohibiting the coercing of the purchase of insurance from a particular broker, placed a penalty on the party coercing but not on the other; hence, amount obtained by insurance company through the illegal agreement should be returned to the insureds, even though the insurance company could not have avoided liability on its policies because of the illegality. *Forrest Currell Lumber Co. v. Thomas*, 1970-NMSC-018, 81 N.M. 161, 464 P.2d 891.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 43 C.J.S. Innkeepers § 28.

30-16-16. Falsely obtaining services or accommodations; probable cause; immunity; penalty.

A. Falsely obtaining services or accommodations consists of a person obtaining service, food, entertainment or accommodations without paying with the intent to cheat or defraud the owner or person supplying the service, food, entertainment or accommodations.

B. A law enforcement officer may arrest without warrant a person the officer has probable cause to believe has committed the crime of falsely obtaining services or

accommodations. A merchant, owner or proprietor who causes such an arrest shall not be criminally or civilly liable if the merchant, owner or proprietor has actual knowledge that the person arrested has committed the crime of falsely obtaining services or accommodations.

C. Whoever commits falsely obtaining services or accommodations when the value of the service, food, entertainment or accommodations furnished is:

(1) less than two hundred fifty dollars ($250) is guilty of a petty misdemeanor;

(2) more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor;

(3) more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony;

(4) more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony; and

(5) more than twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-16, enacted by Laws 1963, ch. 303, § 16-16; 1981, ch. 254, § 1; 1987, ch. 121, § 6; 2006, ch. 29, § 8.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increased the value of the services, food, entertainment or accommodations in Paragraph (1) of Subsection C from less than $100 to less than $250; increased the value of the services, food, entertainment or accommodation in Paragraph (2) of Subsection C from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of the thing embezzled or converted in Paragraph (3) of Subsection C from more than $250 to more than $500.

The 1987 amendment, effective June 19, 1987, redesignated former Subsections C(2) and C(3) as present Subsections C(3) and C(4), added present Subsections C(2) and C(5), substituted "two hundred fifty dollars ($250) but not more" for "one hundred dollars ($100) but less" in Subsection C(3), and inserted "but not more than twenty thousand dollars ($20,000)" in Subsection C(4).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

43 C.J.S. Innkeepers § 28.

30-16-17. Unlawful removal of effects.

Unlawful removal of effects consists of any person removing or causing to be removed any baggage or effects from any hotel, motel, trailer park, inn, rented dwelling or boarding house while there is a lien existing thereon for the proper charges due for fare or board furnished from such hotel, motel, trailer park, inn, rented dwelling or boarding house, and where the owner or person in possession of such baggage or effects is given actual notice of the fact of such lien, or where a notice of such lien has been conspicuously posted upon the premises adjacent to such baggage or effects, giving notice of the fact of such lien and the amount thereof.

Whoever commits unlawful removal of effects is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-17, enacted by Laws 1963, ch. 303, § 16-17.

ANNOTATIONS

Cross references. — For landlord's lien, *see* 48-3-5 NMSA 1978.

For enforcement of liens, *see* 48-3-13, 48-3-14 NMSA 1978.

For lien in favor of owners or operators of hotels, rooming houses, apartment houses, rental dwellings, auto courts, trailer courts or campgrounds, priority and enforcement of same and penalty for removal of property affected thereby, *see* 48-3-16 to 48-3-18 NMSA 1978.

30-16-18. Improper sale, disposal, removal or concealing of encumbered property.

A. Improper sale, disposal, removal or concealing of encumbered property consists of a person knowingly, and with intent to defraud, selling, transferring, removing or concealing, or in any manner disposing of, any personal property upon which a security interest, chattel mortgage or other lien or encumbrance has attached or been retained, without the written consent of the holder of the security interest, chattel mortgage, conditional sales contract, lien or encumbrance.

B. A broker, dealer or an agent, buyer or seller who receives any remuneration whatsoever for transfer of equity or arranges the assumption of any loan on a mobile home or recreational vehicle that has a lien filed upon the vehicle with the motor vehicle division of the taxation and revenue department shall obtain written consent from the lien holder approving transferee's assumption of transferor's obligation to the lien holder within ten days of the transaction before the transaction is entered into, provided that the lien holder's written consent shall not unreasonably be withheld. Failure to do so constitutes an improper sale, disposal, removal or concealing of encumbered property, which is punishable as a petty misdemeanor.

C. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

D. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

E. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

F. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

G. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-18, enacted by Laws 1963, ch. 303, § 16-18; 1977, ch. 281, § 1; 1987, ch. 121, § 7; 2006, ch. 29, § 9.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increased the value of the property in Subsection C from $100 or less to $250 or less; increased the value of the property in Subsection D from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of the property in Subsection E from more than $250 to more than $500.

The 1987 amendment, effective June 19, 1987, substituted "motor vehicle division of the transportation department" for "New Mexico department of motor vehicles" in the first sentence of the second paragraph and "constitutes" for "will constitute" in the second sentence of that paragraph, added the present fourth and last paragraphs, substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in the fifth paragraph, and substituted "is over twenty-five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000)" for "exceeds twenty-five hundred dollars ($2,500)" in the sixth paragraph.

"Security interest" refers to encumbrance under Uniform Commercial Code. — By adding the reference "security interest," the legislature recognized a new type of encumbrance set out in the Uniform Commercial Code, 55-1-201(37) NMSA 1978. *State v. Woodward*, 1983-NMCA-153, 100 N.M. 708, 675 P.2d 1007.

Transfers from special account to operating account constituted larceny. — Under the terms of a "special deposit" agreement, funds deposited in a special account by the depositor were to be paid to the order of a third party, who held a security interest in the funds deposited in the account. The depositor's conduct in persuading the bank to make transfers from the special account to its operating account constituted larceny, theft and false pretenses under New Mexico law. *Wells Fargo Bus. Credit v. Am. Bank of Commerce,* 780 F.2d 871 (10th Cir. 1985).

"Conditional sales contract". — The term "conditional sales contract," as used in former law prohibiting sale, encumbrance or concealment of property held under a conditional sales contract, meant all contracts intended to hold title to personal property in the former owner, possessor or grantor. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280.

Oral conditional sales contracts not recognized. — Former law dealing with the crime of unlawfully selling or disposing of personal property held under a conditional sales contract evinced a legislative understanding that conditional sales contracts are written instruments and that oral conditional sales contracts are not recognized under our law. *Allison v. Niehaus*, 1940-NMSC-034, 44 N.M. 342, 102 P.2d 659.

Criminal intent. — While Laws 1929, ch. 46 (former 40-21-43 to 40-21-45, 1953 Comp.) did not specifically provide that the prohibited acts of a person, obtaining possession of personal property from its owner by a conditional sales contract and selling it without the consent of such owner, before securing title, be done with criminal intent, the act was manifestly designed to protect the interest of such owner, and the wrong inhered in delaying or defrauding him of his right to repossess his property if the conditional sales contract was breached by the buyer, and the specific conduct charged must have been actuated by such intent, to constitute a crime under the statute. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280.

Criminal intent negatived. — Where mortgagor removed mortgaged cattle to another state for grazing with oral consent on part of the mortgagee, mortgagor did not have the requisite criminal intent in moving the cattle to constitute offense of removing and concealing mortgaged cattle in violation of former law. *Howard v. Singleton*, 1950-NMSC-067, 55 N.M. 8, 225 P.2d 697.

Removal and concealment after repossession. — Where the evidence showed that the title holder of an automobile had already repossessed it because of defendant's default at the time defendant took it from garage and concealed it, defendant's taking and concealment, without the consent and knowledge of the title holder, would constitute a crime, but not the crime of unlawfully taking, carrying away and concealing personal property possession of which was obtained under a conditional sales contract. *State v. Shedoudy*, 1944-NMSC-042, 48 N.M. 354, 151 P.2d 57.

Failure to sell repossessed collateral not treated as election under 55-9-505 NMSA 1978. — Where a decrease in inventory constitutes a willful and malicious conversion of

collateral and a violation of this section, failing to sell the repossessed collateral will not be treated as an election under 55-9-505 NMSA 1978 to retain the collateral in satisfaction of the obligation. *With v. Amador*, 596 F.2d 428 (10th Cir. 1979).

Sale of borrowed motorcycle. — Where defendant sold a motorcycle to the complaining witness, subsequently borrowed it back, and then sold it to a third person, he was guilty of embezzlement; this section would have been applicable if the jury had determined that dealings between the defendant and complaining witness amounted to a secured transaction, but jury necessarily determined they did not. *State v. Gregg*, 1972-NMCA-001, 83 N.M. 397, 492 P.2d 1260, cert. denied, 83 N.M. 562, 494 P.2d 975.

Argument on value improperly refused. — On charge that buyer under a conditional sales contract obtained possession of an automobile of a finance company and unlawfully took, carried away and concealed such automobile of the value of more than $100 while its title was in such finance company and without its consent, it was error to refuse to permit accused's counsel to argue whether such value had been established by the evidence. *State v. Shedoudy*, 1941-NMSC-044, 45 N.M. 516, 118 P.2d 280.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15 Am. Jur. 2d Chattel Mortgages §§ 242, 243; 51 Am. Jur. 2d Liens § 60.

Conditional sale, offense of obtaining property by false pretenses predicated upon transaction involving, 134 A.L.R. 874.

Elements and proof of crime of improper sale, removal, concealment, or disposal of property subject to security interest under UCC, 48 A.L.R.4th 819.

77A C.J.S. Sales § 328 et seq.; 79 C.J.S. Secured Transactions, § 111 et seq.

30-16-19. [Shoplifting;] definitions.

As used in Sections 40A-16-19 through 40A-16-23 [40A-16-22] New Mexico Statutes Annotated, 1953 Compilation [30-16-19 to 30-16-23 NMSA 1978]:

A. "store" means a place where merchandise is sold or offered to the public for sale at retail;

B. "merchandise" means chattels of any type or description regardless of the value offered for sale in or about a store; and

C. "merchant" means any owner or proprietor of any store, or any agent, servant or employee of the owner or proprietor.

History: 1953 Comp., § 40A-16-19, enacted by Laws 1965, ch. 5, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The reference to "40A-16-19 through 40A-16-23 New Mexico Statutes Annotated, 1953 Compilation" apparently was intended to refer to the sections enacted by Laws 1965, ch. 5, which enacted only 40A-16-19 to 40A-16-22 and no 40A-16-23, 1953 Comp., compiled as 30-16-19, 30-16-20, 30-16-22 and 30-16-23 NMSA 1978. Laws 1967, ch. 230, § 1, subsequently added 40A-16-23, 1953 Comp., relating to a different subject matter and which was formerly compiled herein as 30-16-24 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

30-16-20. Shoplifting; aggravated shoplifting.

A. Shoplifting consists of one or more of the following acts:

(1) willfully taking possession of merchandise with the intention of converting it without paying for it;

(2) willfully concealing merchandise with the intention of converting it without paying for it;

(3) willfully altering a label, price tag or marking upon merchandise with the intention of depriving the retailer of all or some part of the value of it; or

(4) willfully transferring merchandise from the container in or on which it is displayed to another container with the intention of depriving the retailer of all or some part of the value of it.

B. Whoever commits shoplifting when the value of the merchandise shoplifted:

(1) is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor;

(2) is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor;

(3) is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony;

(4) is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony; or

(5) is more than twenty thousand dollars ($20,000) is guilty of a second degree felony.

C. Charges under this section shall be based on the aggregated retail market value of merchandise shoplifted from a single retailer at a single location in an amount specified in Subsection B of this section. Conduct that may form the basis for a charge under this section may be used or considered for an organized retail crime offense pursuant to Section 2 [30-16-20.1 NMSA 1978] of this 2023 act; provided that an individual charged with both a violation of this section and organized retail crime shall not be punished for both offenses.

D. When an individual has engaged in shoplifting more than once over a ninety-day period, whether committed at one or more retailers, the prosecution may charge the individual under this section based on either the aggregated retail market value of merchandise shoplifted from a single retailer at a single location or in a single charge based on the aggregated retail market value of merchandise shoplifted. Venue for prosecutions based on an aggregated retail market value of merchandise stolen shall be proper in any county in which merchandise was shoplifted.

E. Aggravated shoplifting consists of unlawfully assaulting or striking at another with a deadly weapon immediately after an act of shoplifting in order to retain possession of stolen property or to effect an escape from the scene of an act of shoplifting. Whoever commits aggravated shoplifting is guilty of a third degree felony.

F. As used in this section:

(1) "aggregated retail market value" means the total combined value of all merchandise involved at the price at which the merchandise would ordinarily be sold by the retailer with the legitimate sale or distribution of the item; and

(2) "retailer" means a person or business that sells or facilitates the sale of merchandise to the public for use or consumption rather than for resale.

History: 1953 Comp., § 40A-16-20, enacted by Laws 1965, ch. 5, § 2; 1969, ch. 24, § 1; 1987, ch. 121, § 8; 2006, ch. 29, § 10; 2023, ch. 194, § 1.

ANNOTATIONS

The 2023 amendment, effective June 16, 2023, created the crime of aggravated shoplifting, revised provisions related to the value of merchandise shoplifted, provided that when an individual has engaged in shoplifting more than once over a ninety-day period, whether committed at one or more retailers, the prosecution may charge the individual based on either the aggregated retail market value of merchandise shoplifted from a single retailer at a single location or in a single charged based on the aggregated retail market value of merchandise shoplifted, provided that venue for prosecutions based on aggregated retail market value of merchandise stolen shall be proper in any

county in which merchandise was shoplifted, and defined "aggregated retail market value" and "retailer" as used in this section; in the section heading, added "aggravated shoplifting"; in Subsection C, deleted "An individual charged with a violation of this section shall not be charged with a separate or additional offense arising out of the same transaction" and added "Charges under this section shall be based on the aggregated retail market value of merchandise shoplifted from a single retailer at a single location in an amount specified in Subsection B of this section. Conduct that may form the basis for a charge under this section may be used or considered for an organized retail crime offense pursuant to Section 2 of this 2023 act; provided that an individual charged with both a violation of this section and organized retail crime shall not be punished for both offenses."; and added Subsections D through F.

The 2006 amendment, effective July 1, 2006, increased the value of the merchandise in Paragraph (1) of Subsection B from $100 or less to $250 or less; increased the value of the services, food, entertainment or accommodation in Paragraph (2) of Subsection B from more than $100 but less than $250 to more than $250 but less than $500; and increased the value of the thing embezzled or converted in Paragraph (3) of Subsection B from more than $250 to more than $500.

The 1987 amendment, effective June 19, 1987, substituted "one hundred dollars ($100) or less" for "not more than one hundred dollars ($100)" in Subsection B(1), redesignated former Subsections B(2) and B(3) as present Subsections B(3) and B(4), added present Subsections B(2) and B(5), substituted "two hundred fifty dollars ($250)" for "one hundred dollars ($100)" in Subsection B(3), and inserted "but not more than twenty thousand dollars ($20,000)" in Subsection B(4).

Conviction of both shoplifting and burglary. — Where the defendant illegally entered a store intending to steal bottles of liquor, took bottles of liquor and did not pay for them, and there was no separation in time or location between the defendant’s intent when the defendant entered the store and when the defendant committed the theft, the burglary and the shoplifting arose out of the same transaction and the conviction of the defendant for both shoplifting and burglary was prohibited by this section. *State v. Ramirez*, 2008-NMCA-165, 145 N.M. 367, 198 P.3d 866, cert. denied, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Proof of market value. — In the absence of evidence that retail price of $119.97 did not accurately reflect the value of the merchandise in the retail market, evidence of that price was sufficient for the jury to determine there was a market value of more than $100, despite a showing that the wholesale price was only $84.97. *State v. Richardson*, 1976-NMCA-021, 89 N.M. 30, 546 P.2d 878.

A necklace's ticket price of $600 was not sufficient to establish its market value since there was evidence that such jewelry was never sold at the ticket price and that the store made its full anticipated profit selling such jewelry at 50% to 60% off such price. *State v. Contreras*, 1996-NMCA-045, 121 N.M. 550, 915 P.2d 306, cert. denied, 121 N.M. 499, 914 P.2d 636.

Sufficient evidence of market value. — Where defendant was charged with shoplifting over $500 for taking a television and the manager of the store testified that the retail price of the television at the time it was taken was $576, that the price had changed after the theft and had a retail price of $478 six months after the theft, that the store listed the television for $498 on its website, and that the store did not price match its website prices or engage in reference pricing in order to late discount to a lower sale price, there was sufficient evidence that the value of the television exceeded $500. *State v. Cofer*, 2011-NMCA-085, 150 N.M. 483, 261 P.3d 1115, cert. denied, 2011-NMCERT-007, 268 P.3d 46.

Sufficient evidence of value of merchandise stolen. — In defendant's trial for shoplifting and conspiracy to commit shoplifting, there was sufficient evidence to convict defendant of shoplifting of merchandise with a value of more than $500 where the evidence in the form of testimony and a store-generated training receipt that the value of the merchandise recovered from defendant and his accomplice was $556.39, without tax. *State v. Gallegos*, 2016-NMCA-076, cert. denied.

"Value" as "market value". — Although New Mexico's property crime statutes do not state how value is to be determined, the decisions have used the term "market value" as the test. *State v. Richardson*, 1976-NMCA-021, 89 N.M. 30, 546 P.2d 878.

"Market value" of merchandise does not include the New Mexico gross receipts tax for the purpose of fixing criminal penalties under this section. *Tunnell v. State*, 1983-NMSC-013, 99 N.M. 446, 659 P.2d 898.

Tax not included in determining item's "value" unless included in price. — The amount of gross receipts tax which could have been imposed on a regular sale of merchandise cannot be included for purposes of determining the "value" of the shoplifted item under this section, unless the total advertised retail or actual market price of the merchandise which was shoplifted included the amount of New Mexico gross receipts tax applicable to that particular item of merchandise. *Tunnell v. State*, 1983-NMSC-013, 99 N.M. 446, 659 P.2d 898.

Valuation of property taken by persons working together. — Since the defendant and his cohort working together took merchandise from the same store at the same time, the jury properly attributed to the defendant all the merchandise taken, regardless of in whose bag it was found. *State v. Armijo*, 1995-NMCA-115, 120 N.M. 702, 905 P.2d 740, cert. denied, 120 N.M. 636, 904 P.2d 1061.

Sentencing under habitual offender statute. — A sentence of eight years' imprisonment, imposed under the habitual offender statute against a defendant convicted for the fifth time on felony shoplifting charges, was not so disproportionate as to require reversal as cruel and unusual punishment under the New Mexico Constitution, notwithstanding facts that three of the convictions were over 15 years old, and the latest charge was only $3 over the minimum threshold for felony shoplifting.

State v. Rueda, 1999-NMCA-033, 126 N.M. 738, 975 P.2d 351, cert. denied, 127 N.M. 391, 981 P.2d 1209.

Conspiracy does not arise out of same transaction as shoplifting. — A charge of conspiracy does not arise out of the same transaction which results in an indictment for shoplifting, and thus cannot be dismissed as in violation of a statute prohibiting the charging of separate or additional offense if it arises out of the same transaction, notwithstanding proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge. *State v. Leyba*, 1979-NMCA-105, 93 N.M. 366, 600 P.2d 312.

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. — 50 Am. Jur. 2d Larceny § 71.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense, 64 A.L.R.4th 1088.

52A C.J.S. Larceny § 1(5).

30-16-20.1. Organized retail crime; penalties.

A. A person who commits any of the following acts is guilty of organized retail crime:

(1) acts in concert with one or more persons to steal merchandise with an aggregated retail market value of two thousand five hundred dollars ($2,500) or more from one or more retailers over the span of one year with the intent to sell, exchange or return the merchandise for value;

(2) acts in concert with one or more persons to receive, purchase or possess merchandise with an aggregated retail market value of two thousand five hundred dollars ($2,500) or more over the span of one year, knowing or believing it to have been stolen;

(3) acts as an agent of another individual or group of individuals to steal merchandise with an aggregated retail market value of two thousand five hundred dollars ($2,500) or more from one or more retailers over the span of one year as part of an organized plan to commit theft; or

(4) recruits, coordinates, organizes, supervises, directs, manages or finances another to undertake any of the acts described in this section or any other statute defining theft of merchandise.

B. Venue shall be proper in any county in which merchandise is stolen.

C. Whoever commits organized retail crime is guilty of a second degree felony.

D. As used in this section:

(1) "aggregated retail market value" means the total combined value of all merchandise involved at the price at which the merchandise would ordinarily be sold by the retailer with the legitimate sale or distribution of the item; and

(2) "retailer" means a person or business that sells or facilitates the sale of merchandise to the public for use or consumption rather than for resale.

History: Laws 2023, ch. 194, § 2.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 194 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

30-16-21. Civil liability of adult shoplifter; penalty.

Any person who has reached the age of majority and who has been convicted of shoplifting under Section 30-16-20 NMSA 1978, may be civilly liable for the retail value of the merchandise, punitive damages of not less than one hundred dollars ($100) nor more than two hundred fifty dollars ($250), costs of the suit and reasonable attorney's fees. However, the merchant shall not be entitled to recover damages for the retail value of any recovered undamaged merchandise.

History: 1953 Comp., § 40A-16-20.1, enacted by Laws 1977, ch. 104, § 1.

30-16-22. Presumptions created.

Any person who willfully conceals merchandise on his person or on the person of another or among his belongings or the belongings of another or on or outside the premises of the store shall be prima facie presumed to have concealed the merchandise with the intention of converting it without paying for it. If any merchandise is found concealed upon any person or among his belongings it shall be prima facie evidence of willful concealment.

History: 1953 Comp., § 40A-16-21, enacted by Laws 1965, ch. 5, § 3.

ANNOTATIONS

Cross references. — For evidentiary rule regarding presumptions in criminal cases, *see* Rule 11-302 NMRA.

Section subject to rule of evidence. — There being no statute providing otherwise, the provisions of this section are subject to Rule 303, N.M.R. Evid. (now Rule 11-302 NMRA). *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

Instructions improper. — Instructions that one who willfully conceals merchandise on his person shall be "prima facie presumed" to have concealed it with intent of converting it without paying for it, and that concealment on one's person or his belongings is "prima facie evidence" of willful concealment, violated Rule 303(c), N.M.R. Evid. (now Rule 302C NMRA). *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

Error not preserved. — Although instructions embodying the language of this section violated Rule 303(c), N.M.R. Evid. (now Rule 302C NMRA), requiring instructions on presumptions to be couched in permissive and not mandatory terms, nevertheless since defendant only objected with a general claim that the instructions created an unconstitutional presumption, and did not alert the trial court to the issue under the evidentiary rule, the error would not be considered further. *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

Willful concealment established. — Showing that defendant entered store which had just opened for the day with a blanket wrapped around him, went to the rack where the expensive rugs were kept and at the door was found to have a rug under his blanket, hidden and folded up, constituted sufficient evidence for a rational juror to find each of the inferred facts in this section beyond a reasonable doubt, and showed a willful concealment. *State v. Matamoros*, 1976-NMCA-028, 89 N.M. 125, 547 P.2d 1167.

30-16-23. Reasonable detention.

If any law enforcement officer, special officer or merchant has probable cause for believing that a person has willfully taken possession of any merchandise with the intention of converting it without paying for it, or has willfully concealed merchandise, and that he can recover the merchandise by detaining the person or taking him into custody, the law enforcement officer, special officer or merchant may, for the purpose of attempting to affect [effect] a recovery of the merchandise, take the person into custody and detain him in a reasonable manner for a reasonable time. Such taking into custody or detention shall not subject the officer or merchant to any criminal or civil liability.

Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the crime of shoplifting. Any merchant who causes such an arrest shall not be criminally or civilly liable if he has probable cause for believing the person so arrested has committed the crime of shoplifting.

History: 1953 Comp., § 40A-16-22, enacted by Laws 1965, ch. 5, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Severability clauses. — Laws 1965, ch. 5, § 5, provided for the severability of the act if any part or application thereof is held invalid.

Meaning of "probable cause". — A merchant has probable cause to detain a person when the totality of the facts and circumstances within the merchant's knowledge and of which the merchant has reasonably trustworthy information are sufficient to warrant a merchant of reasonable caution to believe that the person is willfully concealing merchandise. *Holguin v. Sally Beauty Supply, Inc*., 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Meaning of "willfully concealed". — When merchandise is concealed in the sense that it is not in plain sight, there must also be circumstances which reflect that the purpose of the concealment is adverse to the store owner's right to be paid for the merchandise before a conclusion can be made that the merchandise was "willfully concealed" under Section 30-16-23 NMSA 1978. *Holguin v. Sally Beauty Supply, Inc*., 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Statutory presumption. — The factual presumption under Section 30-16-22 NMSA 1978 that allows the finder of fact in a criminal prosecution for shoplifting to infer a specific intent to convert merchandise without paying for it if a person "willfully conceals" merchandise does not apply to the merchant's privilege under Section 30-16-23 NMSA 1978. Holguin v. Sally Beauty Supply, Inc., 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

Summary judgment not justified. — Where plaintiff entered defendant's store with a large conspicuous canvas shopping bag; plaintiff picked up a can of hair mousse, put it in the bag and carried it in the bag to the front counter to ask the cashier a question about it; plaintiff was detained and charged with shoplifting; and in plaintiff's civil suit against defendant for damages, the district court granted summary judgment to defendant based on the court's findings that when the mousse was put inside the bag, the assistant manager had probable cause to believe that plaintiff was shoplifting and that placing the mousse into the bag satisfied the statutory presumption under Section 30-16-22 NMSA 1978 that plaintiff intended to shoplift, the district court erred in granting summary judgment to defendant. *Holguin v. Sally Beauty Supply, Inc*., 2011-NMCA-100, 150 N.M. 636, 264 P.3d 732, cert. denied, 2011-NMCERT-009, 269 P.3d 903.

No reasonable cause to detain. — In suit for false imprisonment and defamation, where employee of self-service store testified that he saw one of two women plaintiffs who were shopping together remove the sticker from a box of merchandise and put the box in her purse, the women denied placing the box in the purse, and the box, absent

its sticker price tag, was found some 15 feet away from its accustomed place after the release of plaintiffs by the police officers who had detained them, the women's denial placed the evidence as to probable or reasonable cause for believing the women were unlawfully taking goods held for sale into conflict, which conflict the trial court, sitting as trier of fact, with ample support, resolved in favor of the women plaintiffs. *Stienbaugh v. Payless Drug Store, Inc.*, 1965-NMSC-033, 75 N.M. 118, 401 P.2d 104.

Defamatory statements in course of investigation. — Even assuming there had existed a privilege in pursuing investigation of supposed shoplifting, whether defamatory statement made by employee in presence of both employees and patrons of the store was made in the exercise of that privilege, was a question for the trier of facts. *Stienbaugh v. Payless Drug Store, Inc*., 1965-NMSC-033, 75 N.M. 118, 401 P.2d 104.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Defamation: actionability of accusation or imputation of shoplifting, 29 A.L.R.3d 961.

Rules or instructions: admissibility of defendant's rules or instructions for dealing with shoplifters, in action for false imprisonment or malicious prosecution, 31 A.L.R.3d 705.

False imprisonment action: construction and effect of statute providing for detention of suspected shoplifters by merchant or employee, 47 A.L.R.3d 998.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Liability of storekeeper for injury to customer arising out of pursuit of shoplifter, 14 A.L.R.4th 950.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 A.L.R.4th 165.

30-16-24. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 156, § 8 repealed 30-16-24 NMSA 1978, as enacted by Laws 1967, ch. 230, § 1, relating to appropriating trade secrets, effective June 16, 1989. For present comparable provisions, *see* 57-3A-1 NMSA 1978 et seq.

30-16-24.1. Theft of identity; obtaining identity by electronic fraud.

A. Theft of identity consists of willfully obtaining, recording or transferring personal identifying information of another person without the authorization or consent of that person and with the intent to defraud that person or another or with the intent to sell or distribute the information to another for an illegal purpose.

B. Obtaining identity by electronic fraud consists of knowingly and willfully soliciting, requesting or taking any action by means of a fraudulent electronic communication with intent to obtain the personal identifying information of another.

C. As used in this section:

(1) "fraudulent electronic communication" means a communication by a person that is an electronic mail message, web site or any other use of the internet that contains fraudulent, false, fictitious or misleading information that depicts or includes the name, logo, web site address, email address, postal address, telephone number or any other identifying information of a business, organization or state agency, to which the person has no legitimate claim of right;

(2) "personal identifying information" means information that alone or in conjunction with other information identifies a person, including the person's name, address, telephone number, driver's license number, social security number, date of birth, biometric data, place of employment, mother's maiden name, demand deposit account number, checking or savings account number, credit card or debit card number, personal identification number, electronic identification code, automated or electronic signature, passwords or any other numbers or information that can be used to obtain access to a person's financial resources, obtain identification, act as identification or obtain goods or services; and

(3) "biometric data" means data, such as finger, voice, retina or iris prints or deoxyribonucleic acid, that capture, represent or enable the reproduction of unique physical attributes of a person.

D. Whoever commits theft of identity is guilty of a fourth degree felony.

E. Whoever commits obtaining identity by electronic fraud is guilty of a fourth degree felony.

F. Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.

G. In a prosecution brought pursuant to this section, the theft of identity or obtaining identity by electronic fraud shall be considered to have been committed in the county:

(1) where the person whose identifying information was appropriated, obtained or sought resided at the time of the offense; or

(2) in which any part of the offense took place, regardless of whether the defendant was ever actually present in the county.

H. A person found guilty of theft of identity or of obtaining identity by electronic fraud shall, in addition to any other punishment, be ordered to make restitution for any financial loss sustained by a person injured as the direct result of the offense. In addition to out-of-pocket costs, restitution may include payment for costs, including attorney fees, incurred by that person in clearing the person's credit history, credit rating, criminal history or criminal charges or costs incurred in connection with a legal proceeding to satisfy a debt, lien, judgment or other obligation of that person arising as a result of the offense.

I. The sentencing court shall issue written findings of fact and may issue orders as are necessary to correct public records and errors in credit reports and identifying information that contain false information as a result of the theft of identity or of obtaining identity by electronic fraud.

History: Laws 2001, ch. 138, § 1; 2005, ch. 296, § 1; 2009, ch. 95, § 3.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection A, after "person or another", added the remainder of the sentence; in Paragraph (2) of Subsection C, after "social security number", added "date of birth, biometric data"; after "place of employment" added "mother's"; after "maiden name", deleted "of the person's mother", after "personal identification number", added "electronic identification code, automated or electronic signature", after "can be used to", added "obtain" and after "person's financial resources", added the remainder of the sentence; added Paragraph (3) of Subsection C; in Subsection H, after "credit rating" added "criminal history or criminal charges" and after "in connection with a", changed "civil or administrative" to "legal"; and in Subsection I, after "necessary to correct", changed "a public record" to "public records and errors in credit reports and identifying information".

The 2005 amendment, effective July 1, 2005, added Subsection B to define the crime of obtaining identity by electronic fraud; added Subsection C(1) to define "fraudulent electronic communication"; changed the crime of theft of identity from a misdemeanor to a fourth degree felony in Subsection D; added Subsection E to provide that the crime of obtaining identity by electronic fraud is a fourth degree felony; added the crime of obtaining identity by electronic fraud in Subsection G; provided in Subsection G(1) that the crimes are considered to be committed in the county where the person whose identifying information was obtained or sought resided; and added the crime of obtaining identity by electronic fraud in Subsections H and I.

Jurisdiction to prosecute use of identity outside New Mexico. — Where defendant used the victim's identity to obtain a driver's license in Arizona, rent cars in Arizona, Nevada, and Georgia, and provide booking information upon defendant's arrest in Georgia; none of the acts of using the victim's identity occurred in New Mexico; the victim resided in New Mexico at the time of the transactions; and as a result of defendant's use of the victim's identity, the victim encountered problems trying to get a

driver’s license in New Mexico and victim received rental car bills in New Mexico that were incurred by defendant outside New Mexico, New Mexico had territorial jurisdiction over the offense, even if the acts were committed outside New Mexico because the crime had an effect upon the victim in New Mexico. *State v. Allen*, 2014-NMCA-111, cert. denied, 2014-NMCERT-010.

Defendant's conviction for identity theft was preempted by the federal Immigration Reform and Control Act. — Where defendant was convicted of identity theft for using another person's personal identifying information on documents he submitted to his employer during the hiring process, among which was a federal employment eligibility verification form (Form I-9) which the federal government requires employers to use to verify that an employee may lawfully work in the United States, and where defendant claimed that his conviction for identity theft was preempted by the federal Immigration Reform and Control Act (IRCA), which makes it unlawful for an employer to knowingly hire a non-citizen or non-national who is not authorized to work in the United States, defendant's conviction was improper because IRCA expressly prohibits the use of Form I-9 except for a few enumerated purposes to verify that an individual is not an unauthorized alien, and in this case, the state used Form I-9 to prove the identity theft charge, a non-enumerated purpose. Therefore, the state's use of Form I-9 was prohibited by IRCA and defendant's identity theft conviction was preempted to the extent it was based on Form I-9. Moreover, defendant's conviction constituted fundamental error because it is unclear to what extent the jury's decision was predicated on Form I-9, as opposed to other documents relied on by the State. *State v. Prieto-Lozoya*, 2021-NMCA-019, cert. denied.

Sufficient evidence to support defendant's conviction for identity theft. — Where defendant was charged with identity theft for using another person's personal identifying information on documents he submitted to his employer during the hiring process, and where the state presented evidence that defendant was not authorized to be in the United States at the time he applied for the job, that he did not apply for the job in his own name, but used the identity of someone else, that he submitted documentation, including a social security card bearing another persons' name and social security number, a permanent resident card bearing another person's name and date of birth, but with defendant's image on the card, a W-4 federal tax withholding form bearing another person's name and social security number, and a federal employment eligibility verification form bearing another person's name, date of birth and social security number, to his employer as part of the hiring process, and that defendant was not authorized to use the personal identifying information of the other person, there was sufficient evidence to prove beyond a reasonable doubt that defendant intended to defraud his employer and that he committed identity theft. *State v. Prieto-Lozoya*, 2021-NMCA-019, cert. denied.

30-16-25. Credit cards; definitions.

As used in Sections 30-16-25 through 30-16-38 NMSA 1978:

A. "cardholder" means the person or organization identified on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer;

B. "credit card" means:

(1) any instrument or device, whether known as a credit card, credit plate, charge card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit or in consideration of an undertaking or guarantee by the issuer of the payment of a check drawn by the cardholder; or

(2) a credit card account number;

C. "expired credit card" means a credit card which shows on its face that it is outdated;

D. "issuer" means the business organization or financial institution, or its duly authorized agent, which issues a credit card;

E. "participating party" means a business organization, or financial institution, other than the issuer, which acquires for value a sales slip or agreement;

F. "sales slip or agreement" means any writing evidencing a credit card transaction;

G. "merchant" means every person who is authorized by an issuer or a participating party to furnish money, goods, services or anything else of value upon presentation of a credit card by a cardholder;

H. "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;

I. "revoked credit card" means a credit card for which the permission to use has been suspended or terminated by the issuer, and notice thereof has been given to the cardholder; and

J. "anything of value" includes money, goods and services.

History: 1953 Comp., § 40A-16-24, enacted by Laws 1971, ch. 239, § 1; 1999, ch. 17, § 1.

ANNOTATIONS

Cross references. — For fraudulently obtaining telecommunications services, *see* 30-33-12 to 30-33-14 NMSA 1978.

For the Credit Card Act, *see* 56-4-1 NMSA 1978.

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-24, 1953 Comp., relating to definitions regarding credit cards, and Laws 1971, ch. 239, § 1, enacted a new section.

The 1999 amendment, effective July 1, 1999, updated statutory references, and in Subsection B added the Paragraph (1) designation and added Paragraph (2).

Definition of credit card. — An electronic benefits transfer (EBT) card issued to a public assistance recipient is not a credit card under Section 30-16-33 NMSA 1978, *State v. Martinez*, 2001-NMCA-099, 131 N.M. 254, 34 P.3d 643.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

30-16-26. Theft of a credit card by taking or retaining possession of card taken.

A person who takes a credit card from the person, possession, custody or control of another without the cardholder's consent, or who with knowledge that it has been so taken, acquires or possesses a credit card with the intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder, is guilty of a fourth degree felony. 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.

History: 1953 Comp., § 40A-16-25, enacted by Laws 1971, ch. 239, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-25, 1953 Comp., relating to false statements of financial condition, and Laws 1971, ch. 239, § 2, enacted a new section.

Constitutionality. — Sections 30-16-26 and 30-16-27 NMSA 1978 are not unconstitutionally vague. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

Intent. — Section 30-16-26 NMSA 1978 requires actual knowledge that the credit card was wrongfully taken at the time it was acquired, whereas Section 30-16-27 NMSA 1978 applies when the possessor of the card merely has reason to know of the stolen, mislaid, or mistakenly delivered nature of the card, which knowledge could be gained at any time during the possession. Further, Section 30-16-26 appears to proscribe acquisition with the requisite intent, whereas one can legitimately acquire a stolen credit

card under Section 30-16-27 and if one develops the requisite intent later one would not be guilty until that time. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

Double jeopardy. — Municipal court conviction of larceny is not the same offense for purposes of double jeopardy as a district court conviction of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

Larceny is lesser included offense of theft of a credit card. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Criminal liability for unauthorized use of credit card, 24 A.L.R.3d 986.

30-16-27. Possession of a credit card stolen, lost, mislaid or delivered by mistake.

A person other than the issuer who receives or possesses a credit card that he knows or has reason to know to have been stolen, lost, mislaid or delivered under a mistake as to the identity or address of the cardholder, and who retains possession thereof with the intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder, is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-26, enacted by Laws 1971, ch. 239, § 3.

ANNOTATIONS

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-26, 1953 Comp., relating to the fraudulent taking, receiving or transfer of a credit card, and Laws 1971, ch. 239, § 3, enacted a new section.

Constitutionality. — Sections 30-16-26 and 30-16-27 NMSA 1978 are not unconstitutionally vague. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

Intent. — Section 30-16-26 NMSA 1978 requires actual knowledge that the credit card was wrongfully taken at the time it was acquired, whereas Section 30-16-27 NMSA 1978 applies when the possessor of the card merely has reason to know of the stolen, mislaid, or mistakenly delivered nature of the card, which knowledge could be gained at any time during the possession. Further, Section 30-16-26 NMSA 1978 appears to proscribe acquisition with the requisite intent, whereas one can legitimately acquire a stolen credit card under Section 30-16-27 NMSA 1978 and if one develops the requisite intent later one would not be guilty until that time. *State v. Wilson*, 1994-NMSC-009, 116 N.M. 793, 867 P.2d 1175.

30-16-28. Fraudulent transfer or receipt of a credit card.

A person other than the issuer, or his authorized agent, who, with intent to defraud, transfers possession of a credit card to a person other than the person whose name appears thereon, or a person who with intent to defraud receives possession of a credit card issued in the name of a person other than himself from a person other than the issuer, or his authorized agent, is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-27, enacted by Laws 1971, ch. 239, § 4.

ANNOTATIONS

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-27, 1953 Comp., relating to the fraudulent making or signing of a credit card, and Laws 1971, ch. 239, § 4, enacted a new section.

30-16-29. Fraudulent taking, receiving or transferring credit cards.

Any person who, with intent to defraud, receives, sells or transfers a credit card by making, directly or indirectly, any false statement of a material fact, either orally or in writing, respecting his identity or financial condition or that of any other person, firm or corporation, is guilty of a misdemeanor.

History: 1953 Comp., § 40A-16-29, enacted by Laws 1971, ch. 239, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-29, 1953 Comp., relating to fraudulent acts by a merchant, and Laws 1971, ch. 239, § 5, enacted a new section.

30-16-30. Dealing in credit cards of another.

Any person, other than the issuer, who possesses, receives, sells or transfers four or more credit cards, issued in a name or names other than his own in violation of Sections [Section] 30-16-26 or 30-16-27 or 30-16-28 or 30-16-29 NMSA 1978 is guilty of a third degree felony.

History: 1953 Comp., § 40A-16-30, enacted by Laws 1971, ch. 239, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-30, 1953 Comp., relating to possession of incomplete credit card or machinery, plates or other contrivance, and Laws 1971, ch. 239, § 6, enacted a new section.

30-16-31. Forgery of a credit card.

A person who, with intent to defraud a purported issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, makes or embosses a purported credit card, or alters such a credit card, without the consent of the issuer, is guilty of a fourth degree felony. A person "makes" a credit card when he makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or when he alters a credit card which was validly issued. A person "embosses" a credit card when, without the authorization of the named issuer, he completes a credit card by adding any other 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.

History: 1953 Comp., § 40A-16-31, enacted by Laws 1971, ch. 239, § 7.

ANNOTATIONS

Repeals and reenactments. — Laws 1971, ch. 239, § 15, repealed 40A-16-31, 1953 Comp., relating to obtaining a fraudulently acquired transportation ticket at a discount, and Laws 1971, ch. 239, § 7, enacted a new section.

30-16-32. Fraudulent signing of credit cards or sales slips or agreements.

Any person, other than a cardholder, or a person authorized by him, who, with intent to defraud, signs the name of another, or of a fictitious person, to a credit card or to a sales slip or agreement is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-32, enacted by Laws 1971, ch. 239, § 8.

ANNOTATIONS

Due process. — The phrase "signs the name of another" does not render this section unconstitutionally vague. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

Equal protection. — This section does not deprive a defendant of equal protection of the law. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

Contention that this section denies equal protection to those who sign the name of another to a credit card, sales slip or agreement because the class of people who use the credit card of another with the same name as theirs, and sign that name, which is both theirs and the cardholder's, are exempt from prosecution, was without merit. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

This section is directed to prevention of fraud in connection with credit cards, sales slips or agreements and applies when a person with the requisite intent signs a name other than his own or the name of a fictitious person. *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

"Another" means "other than oneself." *State v. Sweat*, 1972-NMCA-162, 84 N.M. 416, 504 P.2d 24.

Each use separate offense. — This section punishes each fraudulent signature. This indicates that the legislature intended to punish each use of a credit card under 30-16-33 NMSA 1978, not the continuing possession and usage of one card. *State v. Salazar*, 1982-NMCA-077, 98 N.M. 70, 644 P.2d 1059.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card, 106 A.L.R.5th 701.

30-16-33. Fraudulent use of a credit card.

A. Fraudulent use of a credit card consists of a person obtaining anything of value, with intent to defraud, by using:

(1) a credit card obtained in violation of Sections 30-16-25 through 30-16-38 NMSA 1978;

(2) a credit card that is invalid, expired or revoked;

(3) a credit card while fraudulently representing that the person is the cardholder named on the credit card or an authorized agent or representative of the cardholder named on the credit card; or

(4) a credit card issued in the name of another person without the consent of the person to whom the card has been issued.

B. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is two hundred fifty dollars ($250) or less in any consecutive six-month period is guilty of a petty misdemeanor.

C. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period is guilty of a misdemeanor.

D. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period is guilty of a fourth degree felony.

E. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period is guilty of a third degree felony.

F. Whoever commits fraudulent use of a credit card when the value of the property or service obtained is over twenty thousand dollars ($20,000) in any consecutive six-month period is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-33, enacted by Laws 1971, ch. 239, § 9; 2006, ch. 29, § 11.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, provided in Subsection A that fraudulent use of a credit card consists of a person obtaining anything of value with intent to defraud by using a credit card; changed the 1953 statutory references in Paragraph (1) of Subsection A to the NMSA 1978; replaced the former Subsection B, which provided that if the value of things obtained exceeds $300 in a consecutive six months period, the offense was a third degree felony with new Subsections B through F providing separate penalties for fraudulent use of a credit card depending on the value of the property or service obtained.

Definition of credit card. — An electronic benefits transfer (EBT) card issued to a public assistance recipient is not a credit card under Section 30-16-33 NMSA 1978, *State v. Martinez*, 2001-NMCA-099, 131 N.M. 254, 34 P.3d 643.

Section 30-16-33 NMSA 1978 is not unconstitutionally vague. *State v. Castillo*, 2011-NMCA-046, 149 N.M. 536, 252 P.3d 760, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

Debit card. — Debit cards, which are tied to individual checking accounts, as opposed to lines of credit or guarantee of payment by the issuing bank, is not a "credit card" for purposes of Section 30-16-33 NMSA 1978. *State v. Castillo*, 2011-NMCA-046, 149 N.M. 536, 252 P.3d 760, cert. denied, 2011-NMCERT-004, 150 N.M. 648, 264 P.3d 1171.

Each use separate offense. — Section 30-16-32 NMSA 1978 punishes each fraudulent signature. This indicates that the legislature intended to punish each use of a credit card under this section, not the continuing possession and usage of one card. *State v. Salazar*, 1982-NMCA-077, 98 N.M. 70, 644 P.2d 1059.

Sufficient evidence of conspiracy to commit fraudulent use of a credit card. — Where defendant was convicted of fourth-degree fraudulent use of a credit card (over $500) and conspiracy to commit fraudulent use of a credit card, and where defendant claimed that there was insufficient evidence to support her conviction for conspiracy, arguing that the state did not present direct or circumstantial evidence from which the

jury could determine that an agreement was reached with another person, there was sufficient circumstantial evidence to support the jury's determination that defendant agreed with at least one other person to commit fraudulent use of a credit card where, at trial, the state admitted into evidence the receipts for nine unauthorized credit card transactions made over the course of five consecutive days and offered testimony that defendant appeared in surveillance footage conducting one of the credit card transactions and used the same job identifier for her purchase as did another unauthorized user of the credit card in a separate transaction. From this evidence, a rational jury could reasonably infer that there was some level of agreement and coordination among the users of the credit card based on the use of the same job identifier in multiple transactions, that defendant must have received the credit card from another unauthorized user of the credit card because she used the credit card to make a purchase one day after it was used in the first transaction by another person, and that defendant must have given the credit card to another person who used the credit card three more times in the two days after defendant used the credit card. *State v. Herrera,* 2024-NMCA-025, cert. denied.

Consent. — Consent is not an essential element of the crime defined in Subsection A(3) of this section. *State v. Lopez*, 1973-NMCA-148, 85 N.M. 742, 516 P.2d 1125.

Admissibility of related incident. — In prosecution for charging purchase on credit card belonging to another, admission of testimony of a subsequent attempt to charge additional purchases on the following day at the same store was not erroneous, as the second incident was strong evidence of defendant's intent and his plan, and the concurrence of time, place and modus operandi also tended to establish the identity of the accused. *State v. Lopez*, 1973-NMCA-148, 85 N.M. 742, 516 P.2d 1125.

Opinion evidence on intent. — It was error to allow store employee who dealt with defendant to express opinion on whether he had reason to believe that defendant intended to defraud the establishment, but considering the strong evidence in the record, this error was not prejudicial. *State v. Lopez*, 1973-NMCA-148, 85 N.M. 742, 516 P.2d 1125.

Arrest valid. — Where arresting officer had reasonable grounds to believe that person arrested had committed the crime of misusing an expired credit card, the arrest was valid. *Stone v. United States*, 385 F.2d 713 (10th Cir. 1967), cert. denied, 391 U.S. 966, 88 S. Ct. 2038, 20 L. Ed. 2d 880 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Successful negotiation of commercial transaction as element of state offense of credit card fraud or false pretense in use of credit card, 106 A.L.R.5th 701.

30-16-34. Fraudulent acts by merchants or their employees.

A. A merchant or the employee of a merchant commits fraud if, with intent to defraud, the merchant or employee furnishes or allows to be furnished anything of value upon presentation of a credit card:

(1) obtained or retained in violation of Sections 30-16-25 through 30-16-38 NMSA 1978;

(2) fraudulently made or embossed;

(3) fraudulently signed;

(4) that the merchant or employee knows is invalid, expired or revoked; or

(5) by a person whom the merchant or employee knows is not the cardholder named on the credit card or an authorized agent or representative of the cardholder named on the credit card.

B. When the value of anything furnished by a merchant, or by an employee of a merchant, in violation of this section:

(1) is two hundred fifty dollars ($250) or less in any consecutive six-month period, the offense is a petty misdemeanor;

(2) is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period, the offense is a misdemeanor;

(3) is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period, the offense is a fourth degree felony;

(4) is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a third degree felony; or

(5) is more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a second degree felony.

C. A merchant or the employee of a merchant commits fraud if, with intent to defraud, the merchant or employee fails to furnish anything of value that the merchant or employee represents in writing to the issuer or to a participating party that the merchant or employee has furnished on a credit card or cards of the issuer. When the difference between the value of anything actually furnished to a person and the value represented by the merchant to the issuer or participating party:

(1) is two hundred fifty dollars ($250) or less in any consecutive six-month period, the offense is a petty misdemeanor;

(2) is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period, the offense is a misdemeanor;

(3) is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period, the offense is a fourth degree felony;

(4) is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a third degree felony; or

(5) is more than twenty thousand dollars ($20,000) in any consecutive six-month period, the offense is a second degree felony.

History: 1953 Comp., § 40A-16-34, enacted by Laws 1971, ch. 239, § 10; 2006, ch. 29, § 12.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, changed the 1953 statutory reference in Paragraph (1) of Subsection A to the NMSA 1978 section numbers; deleteds the former Subsection B, which provided that if the value of anything furnished by a merchant or a merchant's employee exceeds $300 in any consecutive six-month period, the offense was a third degree felony and replaced it with Paragraphs (1) through (5) that provide penalties based on the value of the items furnished; and deleted former Subsection 3 and replaced it with Paragraphs (1) through (5) that provide penalties based on the value of the thing furnished.

Falsifying invoice. — Charge that service station operator falsified an invoice covering a credit card transaction in order to reflect a sale which had not occurred was not within the scope of former credit card statute making it a misdemeanor to use another's card without his consent, and defendant was properly prosecuted under the forgery statute. *State v. Cowley*, 1968-NMCA-011, 79 N.M. 49, 439 P.2d 567, cert. denied, 79 N.M. 98, 440 P.2d 136.

30-16-35. Possession of incomplete credit cards or machinery, plates or other contrivance.

A. Any person who possesses an incomplete credit card, with intent to defraud, is guilty of a misdemeanor. Possession of four or more incomplete credit cards, with intent to defraud, is a fourth degree felony.

B. Any person, who with intent to defraud, possesses machinery, plates or any other contrivance designed to reproduce instruments purporting to be credit cards of an issuer who has not consented to the preparation of such credit cards, is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-35, enacted by Laws 1971, ch. 239, § 11.

30-16-36. Receipt of property obtained in violation of act.

A person who receives money, goods, services or anything else of value obtained in violation of Section 30-16-33 NMSA 1978, and who knows or has reason to believe that it was so obtained, violates this section. The degree of the offense is determined as follows:

A. when the value of all things of value obtained from a person in violation of this section is two hundred fifty dollars ($250) or less in any consecutive six-month period, then the offense is a petty misdemeanor;

B. when the value of all things of value obtained from a person in violation of this section is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any consecutive six-month period, then the offense is a misdemeanor;

C. when the value of all things of value obtained from a person in violation of this section is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any consecutive six-month period, then the offense is a fourth degree felony;

D. when the value of all things of value obtained from a person in violation of this section is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any consecutive six-month period, then the offense is a third degree felony; or

E. when the value of all things of value obtained from a person in violation of this section is more than twenty thousand dollars ($20,000) in any consecutive six-month period, then the offense is a second degree felony.

History: 1953 Comp., § 40A-16-36, enacted by Laws 1971, ch. 239, § 12; 2006, ch. 29, § 13.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, changed the statutory references from the 1953 references to the NMSA 1978 references; increased the value of the property in Subsection A from $100 or less to $250 or less; increased the value of the property in Subsection B from more than $100 but less than $300 in a consecutive six-month period to more than $250 but less than $500 in a consecutive six-month period;

replaced former Subsection C, which provided that if the value of things obtained exceeds $300 in a consecutive six-month period the offense was a third degree felony, with Subsections C through E.

30-16-37. Obtaining fraudulently acquired transportation ticket at a discount.

Any person who obtains, at a discount price, a ticket issued by an airline, railroad, steamship or other transportation company, which ticket was acquired in violation of Section 30-16-33 NMSA 1978, without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it, shall be presumed to know that the ticket was acquired under circumstances constituting a violation of Section 30-16-33 NMSA 1978, and shall be guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-37, enacted by Laws 1971, ch. 239, § 13.

30-16-38. Applicability of other laws.

The provisions of Sections 30-16-25 through 30-16-38 NMSA 1978 shall not be construed to preclude the applicability of any other provision of the criminal law of this state or any municipality thereof that presently applies or may in the future apply to any transaction that violates the cited provisions, unless the other state or municipal law is inconsistent with the terms of the cited provisions.

History: 1953 Comp., § 40A-16-38, enacted by Laws 1971, ch. 239, § 14.

ANNOTATIONS

Severability. — Laws 1971, ch. 239, § 16, provided for the severability of the act if any part or application thereof is held invalid.

30-16-39. Fraudulent acts to obtain or retain possession of rented or leased vehicle or other personal property; penalty.

A person who rents or leases a vehicle or other personal property and obtains or retains possession of it by means of any false or fraudulent representation, fraudulent concealment, false pretense, trick, artifice or device, including a false representation as to the person's name, residence, employment or operator's license, is guilty of a:

A. petty misdemeanor if the vehicle or property has a value of two hundred fifty dollars ($250) or less;

B. misdemeanor if the vehicle or property has a value of over two hundred fifty dollars ($250) but not more than five hundred dollars ($500);

C. fourth degree felony if the property or vehicle has a value of over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500);

D. third degree felony if the property or vehicle has a value of over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000); and

E. second degree felony if the property or vehicle has a value of over twenty thousand dollars ($20,000).

History: 1953 Comp., § 40A-16-39, enacted by Laws 1972, ch. 23, § 1; 1979, ch. 251, § 1; 2006, ch. 29, § 14.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, provided in Subsection A that if the value of the vehicle is $250 or less, the crime is a petty misdemeanor; provided in Subsection B that if the value of the vehicles is more than $250 but less than $500, the crime is a misdemeanor; provided in Subsection C that if the value of the vehicle is more than $500 but less than $2,500, the crime is a fourth degree felony; provided in Subsection D that if the value of the vehicle is more than $2,500 but less than $20,000, the crime is a third degree felony; and provided in Subsection E that if the value of the vehicle is more than $20,000, the crime is a second degree felony.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

30-16-40. Fraudulent refusal to return a leased vehicle or other personal property; penalty; presumption.

A. A person who, after leasing a vehicle or other personal property under a written agreement that provides for the return of the vehicle or personal property to a particular place at a particular time and who, with intent to defraud the lessor of the vehicle or personal property, fails to return the vehicle or personal property to the place within the time specified, is guilty of a:

(1) petty misdemeanor if the property or vehicle has a value of two hundred fifty dollars ($250) or less;

(2) misdemeanor if the property or vehicle has a value of over two hundred fifty dollars ($250) but not more than five hundred dollars ($500);

(3) fourth degree felony if the property or vehicle has a value of over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500);

(4) third degree felony if the property or vehicle has a value of over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000); and

(5) second degree felony if the property or vehicle has a value of over twenty thousand dollars ($20,000).

B. Failure of the lessee to return the vehicle or personal property to the place specified within seventy-two hours after mailing to the lessee by certified mail at the lessee's address shown on the leasing agreement a written demand to return the vehicle or personal property shall raise a rebuttable presumption that the failure to return the vehicle or personal property was with intent to defraud.

History: 1953 Comp., § 40A-16-40, enacted by Laws 1973, ch. 154, § 1; 1979, ch. 251, § 2; 1998, ch. 67, § 1; 2006, ch. 29, § 15.

ANNOTATIONS

Cross references. — For evidentiary rule regarding presumptions in criminal cases, *see* Rule 11-302 NMRA.

Repeals and reenactments. — Laws 1973, ch. 154, § 1, repealed former 40A-16-40, 1953 Comp., relating to refusal to return rented or leased vehicle after notice, and enacted a new 40A-16-40, 1953 comp.

The 2006 amendment, effective July 1, 2006, deleted former Paragraphs (1) through (4) of Subsection A; added a new Paragraph (1) of Subsection A to provide that if the value of the property or vehicle is $250 or less, the crime is a petty misdemeanor; added Paragraph (2) of Subsection A to provide that if the value of the vehicle or property is more than $100 but less than $500, the crime is a misdemeanor; addeds Paragraph (3) of Subsection A to provide that if the value of the property or vehicle is more than $500 but less than $2,500, the crime is a fourth degree felony; added Paragraph (4) of Subsection A to provide that if the value of the property or vehicle is more than $2,500 but less than $20,000, the crime is a third degree felony; and added Paragraph (5) of Subsection A to provide that if the value of the property or vehicle is more than $20,000, the crime is a second degree felony.

The 1998 amendment, effective July 1, 1998, rewrote Paragraphs A(1) and (2) and added Paragraphs A(3) and (4), and in Subsection B, deleted "of" following "leasing agreement".

"Intent to defraud." — Where defendant was charged with fraudulent refusal to return leased property and all of the essential elements of the crime were included in the jury instruction, but the jury instructions did not include a definitional instruction clarifying the meaning of the term "intent to defraud", a reasonable juror would understand the meaning of "intent to defraud" and the omission of a definitional instruction did not

constitute fundamental error. *State v. Rodarte*, 2011-NMCA-067, 149 N.M. 819, 255 P.3d 397, cert. denied, 2011-NMCERT-005, 150 N.M. 666, 265 P.3d 717.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

30-16-41. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 112, § 10 repealed 30-16-41 NMSA 1978, as enacted by Laws 1974, ch. 89, § 1, relating to unauthorized recording, sale of unauthorized recordings, providing equipment for illegal recording, penalties, and exemptions, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

30-16-42. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 112, § 10 repealed 30-16-42 NMSA 1978, as enacted by Laws 1974, ch. 89, § 2, relating to manufacture, distribution or sale of phonograph recordings without name of manufacturer and designation of featured performer or group, and penalties, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

30-16-43. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 112, § 10 repealed 30-16-43 NMSA 1978, as enacted by Laws 1974, ch. 89, § 3, relating to rights of parties in private litigation, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

30-16-44. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 112, § 10 repealed 30-16-44 NMSA 1978, as enacted by 1975, ch. 335, § 2, relating to forfeitures, property subject, effective July 1, 1991. For

provisions of former sections, *see* the 1990 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

30-16-45. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 112, § 10 repealed 30-16-45 NMSA 1978, as enacted by Laws 1975, ch. 335, § 3, relating to forfeiture, procedure, effective July 1, 1991. For provisions of former sections, *see* the 1990 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* Chapter 30, Article 16B NMSA 1978.

30-16-46. Legislative finding.

The legislature finds that thefts of crude petroleum oil are a significant problem in this state, and that due to the fungible nature of the product and difficulty of identification and apprehension, extraordinary measures are necessary.

History: Laws 1981, ch. 257, § 1.

30-16-47. Documentation required.

A. Any person in possession of crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both for transportation by motor vehicle from or to storage, disposal, processing or refining must also possess specific documentation required by regulation of the oil conservation division of the energy and minerals department, hereinafter in this act [30-16-46 to 30-16-48 NMSA 1978] called "division," which substantiates his right to be in possession of the estimated volume of crude petroleum oil carried in that vehicle. The regulation shall require the documentation to include:

(1) the identity of the operator and the location of the lease from which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both, if it is purportedly being transported from a lease; and

(2) the identity of the operator of and the location of the storage facility from which or to which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both is being transported; and

(3) the identity of the operator of and the location of the disposal, processing or refining facility to which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both is being transported; and

(4) the estimated percentage of crude petroleum oil in the sediment, water or brine produced in association with the production of oil or gas or both, which is being transported; or

(5) the volume of crude petroleum oil being transported; and

(6) any additional information the division finds necessary or convenient.

B. Any person who stores, processes, disposes of or refines any volume of crude petroleum oil must possess specific documentation as prescribed by regulation of the division which substantiates his right to be in possession of the volume of crude petroleum oil he possesses or in possession of an amount of crude petroleum oil which could reasonably justify the amount of processed or refined products produced by him from crude petroleum oil, and in his possession or sold by him.

History: Laws 1981, ch. 257, § 2.

30-16-48. Penalty; further investigation.

Any person who is found within any geographical area of the state designated by regulation of the division as a crude petroleum oil producing area, in possession of crude petroleum oil, sediment, water or brine produced in association with the production of oil or gas or both, which contains crude petroleum oil, and does not, on a reasonable request of any state police officer or other law enforcement officer as defined in Section 29-7-9 NMSA 1978, produce the required documentation for examination and inspection is guilty of a misdemeanor. If the documentation is produced but differs substantially from the load the transporter is carrying, or differs substantially from crude petroleum oil or processed or refined products produced by him from crude petroleum oil, and in his possession or sold by him, it shall be substantial evidence supporting further investigation by such officer or agent of possible theft of crude petroleum oil.

History: Laws 1981, ch. 257, § 3.

ANNOTATIONS

Compiler's notes. — Section 29-7-9, referred to in this section, was repealed by Laws 1988, ch. 58, § 7. For present comparable provisions, *see* 29-7-7F NMSA 1978.

ARTICLE 16A
Computer Crimes (Repealed.)

30-16A-1. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 215, § 8 repealed 30-16A-1 NMSA 1978, as enacted by Laws 1979, ch. 176, § 1, relating to the short title of the Computer Crimes Act, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

30-16A-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 215, § 8 repealed 30-16A-2 NMSA 1978, as enacted by Laws 1979, ch. 176, § 2, relating to definitions of the Computer Crimes Act, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

30-16A-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 215, § 8 repealed 30-16A-3 NMSA 1978, as enacted by Laws 1979, ch. 176, §3, relating to computer fraud, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

30-16A-4. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 215, § 8 repealed 30-16A-4 NMSA 1978, as enacted by Laws 1979, ch. 176, § 4, relating to unauthorized computer use, effective June 16, 1989. For present comparable provisions, *see* 30-45-1 NMSA 1978 et seq.

ARTICLE 16B
Unauthorized Recording

30-16B-1. Short title.

Sections 1 through 9 [30-16B-1 to 30-16B-9 NMSA 1978] of this act may be cited as the "Unauthorized Recording Act".

History: Laws 1991, ch. 112, § 1.

30-16B-2. Definitions.

As used in the Unauthorized Recording Act:

A. "audiovisual recording" means a recording on which images, including images accompanied by sound, are recorded or otherwise stored, including motion picture film,

video cassette, video tape, video disc, other recording mediums or a copy that duplicates in whole or in part the original, but does not include recordings produced by an individual for personal use that are not commercially distributed for profit;

B. "fixed" means embodied in a recording or other tangible medium of expression, by or under the authority of the owner, so that the matter embodied is sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration;

C. "live performance" means a recitation, rendering or playing of a series of images, musical, spoken or other sounds, or a combination of images and sounds;

D. "manufacturer" means any person who actually transfers or causes the transfer of a recording, or assembles and transfers any product containing any recording as a component thereof, but does not include the manufacturer of a cartridge or casing for a recording;

E. "owner" means a person who owns the sounds or images fixed in a master phonograph record, master disc, master tape, master film or other recording on which sound or image is or can be recorded and from which the transferred recorded sounds or images are directly or indirectly derived;

F. "person" means any individual, firm, partnership, corporation, association or other entity;

G. "recording" means a tangible medium on which sounds, images or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio cassette or videocassette, wire, film or other medium now existing or developed later on which sounds, images or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original;

H. "tangible medium of expression" means the material object on which sounds, images or a combination of both are fixed by any method now known or later developed, and from which the sounds, images or combination of both can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device; and

I. "transfer" means to duplicate a recording from one tangible medium of expression to another recording.

History: Laws 1991, ch. 112, § 2.

30-16B-3. Unauthorized recording; prohibited act; penalties.

A. It is unlawful for any person to:

(1) knowingly transfer for sale or cause to be transferred any recording with intent to sell it or cause it to be sold or use it or cause it to be used for commercial advantage or private financial gain without the consent of the owner;

(2) transport within this state for commercial advantage or private financial gain a recording with the knowledge that the sounds have been transferred without the consent of the owner; or

(3) advertise or offer for sale, sell, rent or cause the sale, resale or rental of or possess for one or more of these purposes any recording that the person knows has been transferred without the consent of the owner.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves seven or more unauthorized recordings embodying sound or seven or more audiovisual recordings, at any one time, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves fewer than seven unauthorized recordings embodying sound or fewer than seven audiovisual recordings, at any one time, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 1991, ch. 112, §3; 2005, ch. 248, § 1.

ANNOTATIONS

The 2005 amendment, effective July 1, 2005, changed the threshold number of recordings embodying sound from one hundred to seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period, and added the qualification that the recordings may occur at any one time in Subsection B(1); and changed the number of recordings embodying sound from fewer than one hundred to fewer than seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period and adds the qualification that the recordings may occur at any one time in Subsection B(2).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Propriety of attorney's surreptitious sound recording of statements by others who are or may become involved in litigation, 32 A.L.R.5th 715.

30-16B-4. Required labeling; penalties.

A. It is unlawful for any person for commercial advantage or private financial gain to advertise, offer for sale or resale, sell, resell, lease or possess for any of these purposes

any recording that the person knows does not contain the true name of the manufacturer in a prominent place on the cover, jacket or label of the recording.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves seven or more unauthorized recordings embodying sound or seven or more audiovisual recordings, at any one time, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves fewer than seven unauthorized recordings embodying sound or fewer than seven audiovisual recordings, at any one time, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 1991, ch. 112, § 4; 2005, ch. 248, § 2.

ANNOTATIONS

The 2005 amendment, effective July 1, 2005, changed the threshold number of recordings embodying sound from one hundred to seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period, and added the qualification that the recordings may occur at any one time in Subsection B(1); and changed the number of recordings embodying sound from fewer than one hundred to fewer than seven, deletes the former qualification that the recordings occur during a one-hundred-eighty-day period and adds the qualification that the recordings may occur at any one time in Subsection B(2).

30-16B-5. Unauthorized recording of live performances; penalties.

A. It is unlawful for any person for commercial advantage or private financial gain to advertise, offer for sale, sell, rent, transport, cause the sale, resale, rental or transportation of or possess for one or more of these purposes a recording of a live performance that has been recorded or fixed without the consent of the owner.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves seven or more unauthorized recordings embodying sound or seven or more audiovisual recordings, at any one time, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves fewer than seven unauthorized recordings embodying sound or fewer than seven audiovisual recordings, at any one time, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. In the absence of a written agreement or law to the contrary, the performer of a live performance is presumed to own the rights to record or fix those sounds.

D. For the purposes of this section, a person who is authorized to maintain custody and control over business records that reflect whether the owner of the live performance consented to having the live performance recorded or fixed is a competent witness in a proceeding regarding the issue of consent.

History: Laws 1991, ch. 112, § 5; 2005, ch. 248, § 3.

ANNOTATIONS

The 2005 amendment, effective July 1, 2005, changed the threshold number of recordings embodying sound from one hundred to seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period, and added the qualification that the recordings may occur at any one time in Subsection B(1); and changed the number of recordings embodying sound from fewer than one hundred to fewer than seven, deleted the former qualification that the recordings occur during a one-hundred-eighty-day period and added the qualification that the recordings may occur at any one time in Subsection B(2).

30-16B-6. Exemptions.

The provisions of the Unauthorized Recording Act do not apply to:

A. any radio or television broadcaster who transfers any recording as part of, or in connection with, a radio or television broadcast transmission or for archival preservation;

B. any recording defined as a public record of any court, legislative body or proceedings of a public body, whether or not a fee is charged or collected for copies; or

C. any person who transfers a recording for his personal use and who does not derive any commercial advantage or private financial gain from the transfer.

History: Laws 1991, ch. 112, § 6.

30-16B-7. Construction.

Nothing in the Unauthorized Recording Act shall enlarge or diminish the rights of parties in private litigation.

History: Laws 1991, ch. 112, § 7.

30-16B-8. Forfeitures; property subject.

Pursuant to the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978], the following are subject to forfeiture:

A. all equipment, devices or articles that have been produced, reproduced, manufactured, distributed, dispensed or acquired in violation of the Unauthorized Recording Act;

B. all devices, materials, products and equipment of any kind that are used or intended for use in producing, reproducing, manufacturing, processing, delivering, importing or exporting any item set forth in and in violation of the Unauthorized Recording Act;

C. all books, business records, materials and other data that are used or intended for use in violation of Section 30-16B-3, 30-16B-4 or 30-16B-5 NMSA 1978; and

D. money or negotiable instruments that are the fruit or instrumentality of the crime.

History: Laws 1991, ch. 112, § 8; 2015, ch. 152, § 16.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, provided that the provisions of the Forfeiture Act apply to this section; in the undesignated introductory sentence, added "Pursuant to the provisions of the Forfeiture Act"; and in Subsection C, after "Section", deleted "3, 4 or 5 of the Unauthorized Recording Act" and added "30-16B-3, 30-6B-4 or 30-16B-5 NMSA 1978".

30-16B-9. Forfeiture; procedure.

The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture under the Unauthorized Recording Act.

History: Laws 1991, ch. 112, § 9; 2002, ch. 4, § 13.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, deleted the Subsection A designation; added "The provisions of the Forfeiture Act apply to the seizure, forfeiture and disposal of" in the first sentence; and deleted the last phrase of the first sentence in former Subsection A and former Subsections B through F, which contained standards and procedures for the forfeiture of property subject to forfeiture under the Unauthorized Recording Act.

ARTICLE 16C
Unauthorized Theater Recording

30-16C-1. Unlawful operation of an audiovisual recording device.

A. Unlawful operation of an audiovisual recording device consists of a person knowingly operating an audiovisual recording device to record or transmit a motion picture in a motion picture theater without the consent of the motion picture theater owner or manager while a motion picture is being exhibited.

B. A person who commits unlawful operation of an audiovisual recording device is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. The owner, manager or lessee of a motion picture theater or an agent or employee of the owner, manager or lessee who alerts law enforcement authorities that an alleged violation of Subsection A of this section is taking place is not liable in any civil action arising from the detention of the person alleged to be operating or to have operated the audiovisual recording device when the owner, manager or lessee or an agent or employee of the owner, manager or lessee is acting in good faith, unless the plaintiff can show by a preponderance of the evidence that the detention measures were unreasonable or the period of detention was unreasonably long.

D. This section does not prevent law enforcement personnel from operating an audiovisual recording device in a motion picture theater as part of a lawfully authorized investigation.

E. Nothing in this section prevents prosecution under any other statutes.

F. As used in this section:

(1) "audiovisual recording device" means a device capable of recording or transmitting a motion picture or any part of a motion picture by means of any technology; and

(2) "motion picture theater" means a movie theater, screening room or other venue used primarily for the exhibition of motion pictures.

History: Laws 2006, ch. 79, § 1.

ANNOTATIONS

Effective dates. — Laws 2006, ch. 79, § 2 made the act effective July 1, 2006.

ARTICLE 16D
Unlawful Taking of a Vehicle or Motor Vehicle

30-16D-1. Unlawful taking of a vehicle or motor vehicle.

A. Unlawful taking of a vehicle or motor vehicle consists of a person taking any vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978] intentionally and without consent of the owner. Whoever commits unlawful taking of a vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

B. The consent of the owner of the vehicle or motor vehicle to its taking shall not in any case be presumed or implied because of the owner's consent on a previous occasion to the taking of the vehicle or motor vehicle by the same or a different person.

C. Nothing in this section shall be construed to prohibit the holder of a lien duly recorded with the motor vehicle division of the taxation and revenue department from taking possession of a vehicle to which possession the lienholder is legally entitled under the provisions of the instrument evidencing the lien. A holder of a duly recorded lien who takes possession of a vehicle without the knowledge of the owner of the vehicle shall immediately notify the local police authority of the fact that the holder has taken possession of the vehicle.

History: 1953 Comp., § 64-3-504, enacted by Laws 1978, ch. 35, § 91; 1998, ch. 67, § 2; § 66-3-504 NMSA 1978 recompiled and amended as § 30-16D-1 by Laws 2009, ch. 253, § 1 and Laws 2009, ch. 261, § 1.

ANNOTATIONS

Recompilations. — Laws 2009, ch. 253, § 1 and Laws 2009, ch. 261, § 1 recompiled and amended former 66-3-504 NMSA 1978, relating to unlawful taking of a vehicle or motor vehicle, as 30-16D-1 NMSA 1978, effective July 1, 2009.

The 2009 amendment, effective July 1, 2009, in Subsection A, at the beginning of the sentence, deleted "Any person who" and added the language up to "any vehicle"; after "motor vehicle", added "as defined by the Motor Vehicle Code" and added the language at the beginning of the sentence up to "is", in Paragraph (8) of Subsection A, after "fourth degree felony", deleted "if the vehicle or motor vehicle has a value of less than two thousand five hundred dollars ($2,500)" and added "for a first offense"; in Paragraph (2) of Subsection, after "felony", deleted "if the vehicle or motor vehicle has a

value of two thousand five hundred dollars ($2,500) or more"; and added "for a second offense"; added Paragraph (3) of Subsection A; deleted former Subsection C, which provided that district courts have exclusive jurisdiction over offenses prescribed in this section; and in Subsection C, changed "division" to "motor vehicle division of the taxation and revenue department".

Laws 2009, ch. 253, § 1 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 1. *See* 12-1-8 NMSA 1978.

Specification of "anything of value" resulted in double jeopardy. — Where the child was charged with armed robbery for taking both an automobile and the keys to the automobile in violation of Section 30-16-2 NMSA 1978 and for the unlawful taking of a motor vehicle in violation of Section 30-16D-1 NMSA 1978, the child's conduct underlying both crimes was unitary; and both convictions required the same proof of the theft of the automobile, the unlawful taking of a motor vehicle conviction was subsumed by the robbery conviction and the child's conviction for both resulted in double jeopardy. *State v. Gutierrez*, 2011-NMSC-024, 150 N.M. 232, 258 P.3d 1024.

Sufficient evidence to prove unlawful taking of a motor vehicle. — In delinquency proceedings where the child was charged with unlawful taking of a motor vehicle and reckless driving, there was sufficient evidence to support the jurors' reasonable determination that the child committed the delinquent act of unlawful taking of a motor vehicle where the state, in addition to presenting Facebook messages in which the child apologized to the victim and claimed that she was intoxicated when she took the victim's vehicle, presented testimony from the victim that after getting out of his vehicle to hug the child goodbye, the child pushed him aside and took off in his vehicle without his permission, and that she failed to stop even though he ran after her, banged on the driver side window, and yelled for her to stop. *State v. Jesenya O.*, 2021-NMCA-030, 493 P.3d 418, *rev'd on other grounds by* 2022-NMSC-014.

30-16D-2. Embezzlement of a vehicle or motor vehicle.

A. Embezzlement of a vehicle or motor vehicle consists of a person embezzling or converting to the person's own use a vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978], with which the person has been entrusted, with the fraudulent intent to deprive the owner of the vehicle or motor vehicle.

B. Whoever commits embezzlement of a vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

History: Laws 2009, ch. 253, § 2 and Laws 2009, ch. 261, § 2.

ANNOTATIONS

Duplicate laws. — Laws 2009, ch. 253, § 2 and Laws 2009, ch. 261, § 2 enacted identical sections, effective July 1, 2009. Both have been compiled as 30-16D-2 NMSA 1978.

30-16D-3. Fraudulently obtaining a vehicle or motor vehicle.

A. Fraudulently obtaining a vehicle or motor vehicle consists of a person intentionally misappropriating or taking a vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978] that belongs to another person by means of fraudulent conduct, practices or representations.

B. Whoever commits fraudulently obtaining a vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

History: Laws 2009, ch. 253, § 3 and Laws 2009, ch. 261, § 3.

ANNOTATIONS

Duplicate laws. — Laws 2009, ch. 253, § 3 and Laws 2009, ch. 261, § 3 enacted identical sections, effective July 1, 2009. Both have been compiled as 30-16D-3 NMSA 1978.

30-16D-4. Receiving or transferring stolen vehicles or motor vehicles.

A. Receiving or transferring a stolen vehicle or motor vehicle consists of a person who, with intent to procure or pass title to a vehicle or motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978] that the person knows or has reason to believe has been stolen or unlawfully taken, receives or transfers possession of the vehicle or motor vehicle from or to another or who has in the person's possession any vehicle that the person knows or has reason to believe has been stolen or unlawfully taken. This section shall not apply to an officer of the law engaged at the time in the performance of the officer's duty as an officer.

B. Whoever commits receiving or transferring a stolen vehicle or motor vehicle is guilty of a:

(1) fourth degree felony for a first offense;

(2) third degree felony for a second offense; and

(3) second degree felony for a third or subsequent offense.

History: 1953 Comp., § 64-3-505, enacted by Laws 1978, ch. 35, § 92; 1978 Comp., § 66-3-505, recompiled and amended as § 30-16D-4 by Laws 2009, ch. 253, § 4 and Laws 2009, ch. 261, § 4.

ANNOTATIONS

Recompilations. — Laws 2009, ch. 253, § 4 and Laws 2009, ch. 261, § 4 recompiled and amended former 66-3-505 NMSA 1978, relating to receiving or transferring stolen vehicles or motor vehicles, as 30-16D-4 NMSA 1978, effective July 1, 2009.

The 2009 amendment, effective July 1, 2009, in Subsection A, at the beginning of the first sentence, added "Receiving or transferring a stolen vehicle or motor vehicle consists of"; after "motor vehicle", in the first sentence, added "defined by the Motor Vehicle Code that the person"; at the beginning of the second sentence, added "This section shall not apply to" and after "the officer's duty as an officer", deleted the remainder of the sentence which provided that the offense was a fourth degree felony and prescribed penalties; and added Subsection B.

Laws 2009, ch. 253, § 4 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 4. *See* 12-1-8 NMSA 1978.

Statute defines two separate crimes. — This statute, 30-16D-4 NMSA 1978, defines two separate crimes: (1) taking, receiving, or transferring possession of a vehicle with knowledge or reason to believe it is stolen and with intent to procure or pass title, and (2) unlawful possession of a stolen vehicle. The legislature's use of the word "or" indicates that a person who possesses a stolen vehicle is independent from a person who, with intent to procure or pass title to a vehicle, receives or transfers possession of the vehicle. *State v. Bernard*, 2015-NMCA-089.

Where defendant was convicted of four counts of receiving or transferring stolen vehicles for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two all-terrain vehicles, defendant's claim that the jury instructions failed to instruct the jury that it was required to find that defendant intended to procure or pass title to a vehicle, and therefore improperly omitted an essential element of the offense of possession of a stolen vehicle, was without merit, because the "intent to procure or pass title to a vehicle" is not an essential element of the crime of possession of a stolen vehicle, which is a separate and distinct offense under 30-16D-4 NMSA 1978. *State v. Bernard*, 2015-NMCA-089.

Double jeopardy analysis applied to unlawful possession of stolen vehicles. — Where defendant was convicted of four counts of receiving or transferring stolen vehicles for his unlawful possession of a stolen enclosed trailer, a snowmobile, and two

all-terrain vehicles (ATV), and where defendant claimed that his four convictions based on a single statute violated the double jeopardy protection against multiple punishments for the same offense, defendant's four convictions were justified because the language of the statute indicates that the legislature sought to address the harm inflicted on the public by a particularized type of criminal enterprise: vehicle theft. Because 30-16D-4 NMSA 1978 appears designed to protect the public from the trafficking of stolen vehicles, it follows that the legislature intended to allow for separate charges for each stolen vehicle separately possessed by an individual. Defendant's acts of possession of a trailer, a snowmobile, and two ATVs are sufficiently distinct to justify four convictions for possession of a stolen vehicle. *State v. Bernard*, 2015-NMCA-089.

Evidence sufficient to convict of possession of stolen vehicle. — Where the evidence showed that a stolen vehicle was parked next to defendant's house, the vehicle was partially covered with a tarp, numerous parts had been removed from the vehicle, and the vehicle was covered with dust, the jury could reasonably infer that defendant possessed the stolen vehicle. *State v. Brown*, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Sufficient evidence of receiving or transferring a stolen vehicle. — Where defendant was convicted of receiving or transferring a stolen vehicle, and where the state presented evidence that defendant, when stopped by police, was driving a vehicle that had been reported stolen and that the owner of the vehicle identified the vehicle defendant was driving as the one reported stolen, there was sufficient evidence to support defendant's conviction for receiving or transferring a stolen vehicle. *State v. Ford*, 2019-NMCA-073.

30-16D-5. Injuring or tampering with a motor vehicle.

A. Injuring or tampering with a motor vehicle consists of a person, individually or in association with another person:

(1) purposely and without authority from the owner starting or causing to be started the engine of any motor vehicle;

(2) purposely and maliciously shifting or changing the starting device or gears of a standing motor vehicle to a position other than that in which they were left by the owner or driver of the motor vehicle;

(3) purposely scratching or damaging the chassis, running gear, body, sides, top covering or upholstering of a motor vehicle that is the property of another;

(4) purposely destroying any part of a motor vehicle or purposely cutting, mashing or marking or in any other way destroying or damaging any part, attachment, fastening or appurtenance of a motor vehicle without the permission of the owner;

(5) purposely draining or starting the drainage of any radiator, oil tank or gas tank upon a motor vehicle without the permission of the owner;

(6) purposely putting any metallic or other substance or liquid in the radiator, carburetor, oil tank, grease cup, oilers, lamps, gas tanks or machinery of the motor vehicle with the intent to injure or damage or impede the working of the machinery of the motor vehicle;

(7) maliciously tightening or loosening any bracket, bolt, wire, nut, screw or other fastening on a motor vehicle; or

(8) purposely releasing the brake upon a standing motor vehicle with the intent to injure the motor vehicle.

B. Whoever commits injuring or tampering with a motor vehicle is guilty of a misdemeanor.

C. As used in this section, "motor vehicle" means a motor vehicle as defined by the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978].

History: 1953 Comp., § 64-3-506, enacted by Laws 1978, ch. 35, § 93; § 66-3-506 NMSA 1978 recompiled and amended as § 30-16D-5 by Laws 2009, ch. 253, § 5 and Laws 2009, ch. 261, § 5.

ANNOTATIONS

Recompilations. — Laws 2009, ch. 253, § 5 and Laws 2009, ch. 261, § 5 recompiled and amended former 66-3-506 NMSA 1978, relating to injuring or tampering with vehicle, as 30-16D-5 NMSA 1978, effective July 1, 2009.

The 2009 amendment, effective July 1, 2009, in Subsection A, at the beginning of the sentence, added "Injuring or tampering with a motor vehicle consists of"; after "association with", deleted the remainder of the sentence, which provided that the offense was a misdemeanor and prescribed penalties and added "another person"; and added Subsections B and C.

Laws 2009, ch. 253, § 5 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 5. *See* 12-1-8 NMSA 1978.

30-16D-6. Altering or changing engine or other numbers.

A. No person shall, with fraudulent intent, deface, remove, cover, destroy or alter the manufacturer's serial number, engine number, decal or other distinguishing number or identification mark or number placed under assignment of the motor vehicle division of the taxation and revenue department of a vehicle required to be registered under the Motor Vehicle Code [Chapter 66, Articles 1 to 8 NMSA 1978] or any vehicle, motor

vehicle or motor vehicle engine or component as defined by the Motor Vehicle Code for which a dismantler's notification form has been processed through the division, nor shall any person place or stamp any serial, engine, decal or other number or mark upon the vehicle except one assigned by the division. Any violation of this section is a fourth degree felony.

B. This section shall not prohibit the restoration by an owner of an original serial, engine, decal or other number or mark when the restoration is made under permit issued by the division nor prevent any manufacturer from placing, in the ordinary course of business, numbers, decals or marks upon vehicles or parts thereof.

History: 1953 Comp., § 64-3-508, enacted by Laws 1978, ch. 35, § 95; 1978 Comp., § 66-3-508, recompiled and amended as § 30-16D-6 by Laws 2009, ch. 253, § 6 and Laws 2009, ch. 261, § 6.

ANNOTATIONS

Recompilations. — Laws 2009, ch. 253, § 6 and Laws 2009, ch. 261, § 6 recompiled and amended former 66-3-508 NMSA 1978, relating to altering or changing engine or other numbers, as 30-16D-6 NMSA 1978, effective July 1, 2009.

The 2009 amendment, effective July 1, 2009, in Subsection A, added "number" and "decal"; changed "division" to "motor vehicle division of the taxation and revenue department"; after "vehicle engine", added "or component as defined by the Motor Vehicle Code"; in the last sentence, changed "provision is a felony" to "section is a fourth degree felony"; and in Subsection B, added "decals".

Laws 2009, ch. 253, § 6 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 6. *See* 12-1-8 NMSA 1978.

30-16D-7. Operating a chop shop; penalty.

A. Operating a chop shop consists of a person owning, operating, maintaining, controlling or conducting operations in a chop shop, who knows or should have known that it is a chop shop.

B. Whoever commits operating a chop shop is guilty of a third degree felony.

C. As used in this section:

(1) "chop shop" means a premises where a person possesses, receives, stores, disassembles or alters an unlawfully obtained motor vehicle or vehicle as defined in the Motor Vehicle Code [66-1-1 NMSA 1978], including the alteration or concealment of any identifying feature or number, including the manufacturer's serial number, engine number, decal or other distinguishing number or identification mark or

number placed under assignment of the motor vehicle division of the taxation and revenue department; and

(2) "unlawfully obtained" means obtained by theft, fraud or deceit or obtained without the permission of the owner.

D. Nothing in this section shall be construed to preclude a claim made pursuant to any other section of law.

History: Laws 2022, ch. 56, § 49.

ANNOTATIONS

Effective dates. — Laws 2022, ch. 56, § 49 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 18, 2022, 90 days after adjournment of the legislature.

ARTICLE 17
Fire

30-17-1. Improper handling of fire.

Improper handling of fire consists of:

A. setting fire, or causing or procuring a fire to be set to any inflammable vegetation or forest material, growing or being on the lands of another person and without the permission of the owner thereof;

B. allowing fire to escape or spread from the control of the person having charge thereof without using reasonable and proper precaution to prevent such fire from escaping or spreading;

C. burning any inflammable vegetation or forest material, whether upon his own land or that of another person, without using proper and reasonable precaution at all times to prevent the escape of such fire;

D. leaving any campfire burning and unattended upon the lands of another person; or

E. causing a fire to be started in any inflammable vegetation or forest material, growing or being upon the lands of another person, by means of any lighted cigar, cigarette, match or other manner, and leaving such fire unquenched.

Provided, nothing herein shall constitute improper handling of fire where the fire is a backfire set for the purpose of stopping the progress of a fire then actually burning.

Whoever commits improper handling of fire is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-17-1, enacted by Laws 1963, ch. 303, § 17-1.

ANNOTATIONS

Cross references. — For arson, *see* 30-17-5, 30-17-6 NMSA 1978.

For provisions covering the lighting, leaving or failure to extinguish fires on state lands, *see* 19-6-1, 19-6-2 NMSA 1978.

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Fires §§ 5, 6.

Liability of property owner for damages from spread of accidental fire originating on property, 17 A.L.R.5th 547.

Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

36A C.J.S. Fires §§ 2, 3.

30-17-2. Use of an engine without spark arrester.

Use of an engine without spark arrester consists of using or operating any locomotive, logging engine, portable engine, traction engine or stationary engine using any combustible fuel when such engine is not provided with an adequate spark arrester kept in constant use and repair.

Escape of fire or live sparks from any engine shall be prima facie evidence that such engine has not been adequately equipped with a spark arrester in compliance with this section.

Whoever commits use of an engine without spark arrester is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-17-2, enacted by Laws 1963, ch. 303, § 17-2.

ANNOTATIONS

Cross references. — For provisions authorizing counties to require railroads to maintain fireguards, *see* 63-3-25 to 63-3-27 NMSA 1978.

30-17-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 246, § 8 repealed 30-17-3 NMSA 1978, as enacted by Laws 1963, ch. 303, § 17-3, relating to interference with fire controls, effective April 8, 1981.

30-17-4. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 346, § 13 repealed 30-17-4 NMSA 1978, enacted by Laws 1963, ch. 303, § 17-4, effective February 1, 1990. For present comparable provisions, *see* 60-2C-1 NMSA 1978 et seq.

30-17-5. Arson and negligent arson.

A. Arson consists of a person maliciously or willfully starting a fire or causing an explosion with the purpose of destroying or damaging:

(1) a building, occupied structure or property of another person;

(2) a bridge, utility line, fence or sign; or

(3) any property, whether the person's own property or the property of another person, to collect insurance for the loss.

B. Whoever commits arson when the damage is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits arson when the damage is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits arson when the damage is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits arson when the damage is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits arson when the damage is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Negligent arson consists of a person recklessly starting a fire or causing an explosion, whether on the person's property or the property of another person, and thereby directly:

(1) causing the death or bodily injury of another person; or

(2) damaging or destroying a building or occupied structure of another person.

H. Whoever commits negligent arson is guilty of a fourth degree felony.

I. As used in this section, "occupied structure" includes a boat, trailer, car, airplane, structure or place adapted for the transportation or storage of property, for overnight accommodations of persons or for carrying on business therein, whether or not a person is actually present.

History: 1953 Comp., § 40A-17-5, enacted by Laws 1970, ch. 39, § 1; 2006, ch. 29, § 16.

ANNOTATIONS

Cross references. — For provisions covering the lighting, leaving or failure to extinguish fires on state lands, *see* 19-6-1, 19-6-2 NMSA 1978.

Repeals and reenactments. — Laws 1970, ch. 39, § 1, repealed 40A-17-5, 1953 Comp., and enacted a new section.

The 2006 amendment, effective July 1, 2006, in Subsection B (former Paragraph (1) of Subsection A), increased the damage amount from $100 or less to $250 or less and changed the crime from a misdemeanor to a petty misdemeanor; in Subsection C (former Paragraph (2) of Subsection A), increased the damage from more than $250 but not more than $1,000 to more than $250 but not more than $500 and changed the crime from a fourth degree felony to a misdemeanor; deleted the former provision in Subsection D (former Paragraph (3) of Subsection A) that whoever commits arson when the value of the property is more than $1,000 is guilty of a fourth degree felony; provided in Subsection D that if the damage is more than $500 but not more than $2,500, the crime is a fourth degree felony; added Subsection E to provide that if the damage is more than $2,500 but not more than $20,000, the crime is a third degree felony; and added Subsection F to provide that if the damage is more than $20,000, the crime is a second degree felony.

Conduct constituting intentional arson could not be construed as negligent arson. *State v. Jacobs*, 1985-NMCA-054, 102 N.M. 801, 701 P.2d 400.

Words "property of another" include those things that are either structures, fixtures, or appurtenances to real property, but does not include personal property. *In re Gabriel M.*, 2002-NMCA-047, 132 N.M. 124, 45 P.3d 64, cert. denied, 132 N.M. 193, 46 P.3d 100.

Sufficient evidence to support defendant's conviction for arson. — Where defendant was convicted of first-degree murder, conspiracy to commit first-degree murder, arson, and tampering with evidence due to his involvement in the murder of a man, and where defendant claimed that the State did not provide sufficient evidence that he burned the property of another or that the burning was malicious, claiming that the evidence established that defendant and his coconspirators burned the body of the victim in a coconspirator's vehicle who consented to setting the vehicle on fire, there was sufficient evidence to support the jury's verdict where evidence was also presented to the jury that the vehicle belonged to the victim or the victim's girlfriend and that defendant intentionally set the vehicle on fire while the victim was inside the vehicle. *State v. Chavez*, 2021-NMSC-017.

Negligent arson not lesser included offense of malicious arson. — Where defendant had not been formally charged with negligent arson, and that offense was not a lesser included offense of malicious arson, of which he was charged, defendant's conviction of negligent arson was subject to reversal. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

Sufficient evidence to support arson conviction. — Where defendant was charged with arson, breaking and entering and violating an order of protection, and where the state presented evidence that defendant had broken into the victim's house through her window on prior occasions, similar to the way the arsonist did on the night of the fire, that defendant's blood was found on a pair of pliers and pruning shears found near the victim's broken window on the night of the fire, tools which the victim did not recognize or notice when she had her window secured earlier that morning, and that defendant had a motive to burn the victim's house down, jealousy following a breakup, there was sufficient evidence for a rational juror to find that defendant broke into the victim's house and set it on fire. *State v. Pamphille*, 2021-NMCA-002, cert. denied.

Merger with crime of dangerous use of explosives. — The crime of dangerous use of explosives merges into a conviction for arson. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

Destruction or damage of automobile by fire or explosion. — Section 64-9-6 D, 1953 Comp. (now repealed but similar to 66-3-506 NMSA 1978), was a general statute directed to destroying or damaging an automobile, whereas this section is a specific statute directed to destroying or damaging an automobile by fire or explosion, and is the applicable statute to charge one with arson of an automobile having a value in excess of $1,000. *State v. Martinez*, 1978-NMCA-069, 91 N.M. 804, 581 P.2d 1299.

Merger of arson with crime of aggravated assault. — Conviction of arson requires proof of intent to damage property; conviction of aggravated assault requires proof of use of a deadly weapon to assault or strike at another. Convictions of arson and aggravated assault do not merge because they require proof of different facts and theories. *State v. Rodriguez*, 1992-NMCA-035, 113 N.M. 767, 833 P.2d 244, cert. denied, 113 N.M. 636, 830 P.2d 553.

Conviction of accessory where principal unknown. — Circumstantial evidence that defendant aided and abetted arsonist, who was unknown, was sufficient to sustain conviction of defendant under this section. *State v. Atwood*, 1971-NMCA-171, 83 N.M. 416, 492 P.2d 1279, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Aiding and abetting shown. — Evidence that defendant borrowed a water bottle when one was already at his business, purchased dynamite, fuse and caps for a friend "ready for them," caused these items to be left outside a motel room in Roswell where "the party would pick it up," and was at the motel an hour later (after the material was left outside the motel room door) was sufficient to establish that he aided and abetted the arson at his place of business two hours after he was observed at the motel. *State v. Atwood*, 1971-NMCA-171, 83 N.M. 416, 492 P.2d 1279, cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Conspiracy to damage and burn insured business. — For a conspiracy to burn an insured business after making it appear to have been burglarized and vandalized, defendant could be prosecuted under both this section and 30-15-3 NMSA 1978, but only a single penalty could be validly imposed. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Where conspiracy to burglarize and vandalize an insured business prior to proposed arson was directed to acts not covered hereunder, this section did not function as a special provision prohibiting the prosecution of defendant under 30-15-3 NMSA 1978, for the aspect of the conspiracy directed toward the burglary and vandalism. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Conspiracy to commit arson outside state. — In a prosecution for conspiracy to burn defendant's own grain elevator in another state, it was necessary to prove that such burning was arson in the sister state. *State v. Henneman*, 1936-NMSC-021, 40 N.M. 166, 56 P.2d 1130.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arson and Related Offenses § 1 et seq.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally, 5 A.L.R. 783, 74 A.L.R. 1110, 131 A.L.R. 1322.

Ownership of property as affecting criminal liability for burning thereof, 17 A.L.R. 1168.

Evidence: admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 A.L.R.2d 891.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

6A C.J.S. Arson §§ 1 to 22.

30-17-6. Aggravated arson.

Aggravated arson consists of the wilful [willful] or malicious damaging by any explosive substance or the wilful [willful] or malicious setting fire to any bridge, aircraft, watercraft, vehicle, pipe line [pipeline], utility line, communication line or structure, railway structure, private or public building, dwelling or other structure, causing a person great bodily harm.

Whoever commits aggravated arson is guilty of a second degree felony.

History: 1953 Comp., § 40A-17-6, enacted by Laws 1963, ch. 303, § 17-6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson, 44 A.L.R.2d 1456.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

ARTICLE 18
Animals

30-18-1. Cruelty to animals; extreme cruelty to animals; penalties; exceptions.

A. As used in this section, "animal" does not include insects or reptiles.

B. Cruelty to animals consists of a person:

(1) negligently mistreating, injuring, killing without lawful justification or tormenting an animal; or

(2) abandoning or failing to provide necessary sustenance to an animal under that person's custody or control.

C. As used in Subsection B of this section, "lawful justification" means:

(1) humanely destroying a sick or injured animal; or

(2) protecting a person or animal from death or injury due to an attack by another animal.

D. Whoever commits cruelty to animals is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978. Upon a fourth or subsequent conviction for committing cruelty to animals, the offender is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. Extreme cruelty to animals consists of a person:

(1) intentionally or maliciously torturing, mutilating, injuring or poisoning an animal; or

(2) maliciously killing an animal.

F. Whoever commits extreme cruelty to animals is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

G. The court may order a person convicted for committing cruelty to animals to participate in an animal cruelty prevention program or an animal cruelty education program. The court may also order a person convicted for committing cruelty to animals or extreme cruelty to animals to obtain psychological counseling for treatment of a mental health disorder if, in the court's judgment, the mental health disorder contributed to the commission of the criminal offense. The offender shall bear the expense of participating in an animal cruelty prevention program, animal cruelty education program or psychological counseling ordered by the court.

H. If a child is adjudicated of cruelty to animals, the court shall order an assessment and any necessary psychological counseling or treatment of the child.

I. The provisions of this section do not apply to:

(1) fishing, hunting, falconry, taking and trapping, as provided in Chapter 17 NMSA 1978;

(2) the practice of veterinary medicine, as provided in Chapter 61, Article 14 NMSA 1978;

(3) rodent or pest control, as provided in Chapter 77, Article 15 NMSA 1978;

(4) the treatment of livestock and other animals used on farms and ranches for the production of food, fiber or other agricultural products, when the treatment is in accordance with commonly accepted agricultural animal husbandry practices;

(5) the use of commonly accepted Mexican and American rodeo practices, unless otherwise prohibited by law;

(6) research facilities licensed pursuant to the provisions of 7 U.S.C. Section 2136, except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility; or

(7) other similar activities not otherwise prohibited by law.

J. If there is a dispute as to what constitutes commonly accepted agricultural animal husbandry practices or commonly accepted rodeo practices, the New Mexico livestock board shall hold a hearing to determine if the practice in question is a commonly accepted agricultural animal husbandry practice or commonly accepted rodeo practice.

History: 1978 Comp., § 30-18-1, enacted by Laws 1999, ch. 107, § 1; 2001, ch. 81, § 1; 2007, ch. 6, § 1.

ANNOTATIONS

Cross references. — For dog fighting, *see* 30-18-9 NMSA 1978.

For authority of livestock officers to arrest persons for violations of this article, *see* 77-2-9 NMSA 1978.

Repeals and reenactments. — Laws 1999, ch. 107, § 1 repealed 30-18-1 NMSA 1978, as enacted by Laws 1963, ch. 303, § 18-1, and enacted a new section, effective July 1, 1999.

The 2007 amendment, effective June 15, 2007, deleted former Subsection K, which provided that this section shall not be interpreted to prohibit cockfighting in New Mexico.

The 2001 amendment, effective June 15, 2001, inserted the Subsection A designation and renumbered the remaining Subsections accordingly and made related changes;

and rewrote Paragraph I(6) which formerly read "research facilities intermediate handlers, carriers and exhibitors licensed pursuant to the provisions of 7 U.S.C. Section 2136; or".

General criminal negligence. — Evidence that a defendant acted intentionally, purposely, or deliberately, in harming an animal, is sufficient to establish that the defendant acted with "willful disregard" for that animal's safety for purposes of conviction under the animal cruelty statute. *State v. Stewart*, 2005-NMCA-126, 138 N.M. 500, 122 P.3d 1269

Article II, Section 5 of the New Mexico Constitution does not render the statutory ban on cockfighting unconstitutional. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

No standing based on economic injury. — Where plaintiffs alleged purely economic interests that would be harmed by a ban on cockfighting, including reduced gross receipts, loss of employees and a threat to the viability of their businesses, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because the constitution does not protect plaintiffs' right to engage in particular business activities so as to avoid economic loss. *N.M. Gamefowl Assn., Inc. v. State of N.M. ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

No standing based on spectator interest in cockfighting. — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression, plaintiffs had no standing to challenge the constitutionality of 30-18-1 NMSA 1978 because there is no credible threat of prosecution related to mere attendance at cockfighting. *N.M. Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

No third party standing. — Where plaintiffs alleged past attendance at cockfights and that the ban on cockfighting would prevent them from future attendance at events plaintiffs considered to be an aspect of cultural expression and alleged that persons who intend to participate in cockfighting would be injured, but provided no reason why a person who has violated 30-18-1 NMSA 1978 cannot challenge the constitutionality of the statute, plaintiffs had no third-party standing to challenge the constitutionality of Section 30-18-1 NMSA 1978. *N.M. Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Associational standing. — Where members of the plaintiff association owned and equipped cocks for the purpose of fighting; the purpose of the association was to keep cockfighting legal; and the association's remedy to have the ban on cockfighting declared unconstitutional addressed the injury claimed by the entire membership of the

association, the association had associational standing to challenge the constitutionality of 30-18-1 NMSA 1978. *N.M. Gamefowl Assn., Inc. v. State ex rel. King*, 2009-NMCA-088, 146 N.M. 758, 215 P.3d 67, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Sufficient evidence of cruelty to animals. — Where defendant was charged with cruelty to animals, and where the state established that defendant kept numerous dogs chained outdoors, that some of the dogs were not given sufficient food, water or shelter, some were emaciated to the degree that their ribs and hip bones were visibly protruding, some were infested with ticks, some had visible injuries and open sores, and some had wounds and scarring on their faces, which was consistent with staged dogfighting, there was sufficient evidence to support, beyond a reasonable doubt, that defendant intentionally mistreated, injured or tormented or abandoned or failed to provide necessary sustenance to numerous dogs. *State v. Duttle*, 2017-NMCA-001, cert. denied.

Sufficient evidence of extreme cruelty to animals. — Where defendant was charged with extreme cruelty to animals, evidence that of the eight dogs that defendant was convicted of subjecting to extreme cruelty, all eight were without clean water, seven were underweight, one was emaciated, five were severely emaciated, six had obvious scarring consistent with staged dogfighting, six had open wounds and untreated sores, one had a severe eye injury, two had advanced heart worm disease, one was infested with ticks, three had large painful tumors or masses, two exhibited obvious signs of serious illness, and four had teeth that were cut or filed to the gum line, making it extremely painful to eat or drink, was sufficient to support, beyond a reasonable doubt that defendant intentionally or maliciously tortured, mutilated or injured her dogs. *State v. Duttle*, 2017-NMCA-001, cert. denied.

Meaning of "torture" and "torment". — The words "torture" and "torment" are commonly defined to include every act, omission or neglect whereby unjustified physical pain and suffering or death is caused or permitted. *State v. Buford*, 1958-NMSC-129, 65 N.M. 51, 331 P.2d 1110 (decided under prior law).

Animals included. — The language of former 40-4-3, 1953 Comp., seemed to apply only to brute creatures and work animals, and the history showed that it was passed in relation to other laws governing livestock. *State v. Buford*, 1958-NMSC-129, 65 N.M. 51, 331 P.2d 1110 (decided under prior law).

Section inapplicable to wild animals. — This section applies only to cruelty to domesticated animals and wild animals previously reduced to captivity, and under the "general-specific" rule of statutory construction, treatment of wild animals is presumed to be governed by the comprehensive hunting and fishing laws contained in Chapter 17, which therefore preempt this section as to such animals. *State v. Cleve*, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23.

The game and fish laws in Chapter 17 are expressly intended to cover free-roaming, wild game elk; the animal statutes in Article 18 of Chapter 30 are not. *State v. Parson*, 2005-NMCA-083, 137 N.M. 773, 115 P.3d 236.

Cockfighting. — Cruelty to animal statute (former 40-4-3, 1953 Comp.) was not passed with the intention of prohibiting such sports as cockfighting. *State v. Buford*, 1958-NMSC-129, 65 N.M. 51, 331 P.2d 1110 (decided under prior law).

Disputes over commonly accepted practices. — The district court in a criminal case in which the defendant is charged with animal cruelty is the proper forum to determine if a dispute exists regarding whether the defendant's conduct is a commonly accepted agricultural animal husbandry practice and to define the parameters of the dispute in order to ensure that the issues are fairly referred to the livestock board. If the district court determines that there is a dispute regarding whether the defendant's conduct is a commonly accepted agricultural animal husbandry practice, the district court must order the livestock board to hold a Section 30-18-1 J NMSA 1978 hearing. *State ex rel. Collier v. N.M. Livestock Bd*., 2014-NMCA-010, cert. denied, 2013-NMCERT-011.

Where defendant was charged with extreme animal cruelty that arose from the death of a colt as a result of defendant's use of questionable training techniques; defendant never filed a formal motion in the criminal case requesting a Section 30-18-1 J NMSA 1978 hearing before the livestock board to determine whether defendant's training techniques were commonly accepted agricultural animal husbandry practices; the livestock board denied defendant's request that it hold a hearing; and defendant filed a civil action asking the district court to order the livestock board to hold a hearing, defendant's civil action did not state a proper claim for relief because the district court presiding in defendant's pending criminal case was the proper forum to determine if a dispute existed regarding whether defendant's conduct was a commonly accepted agricultural animal husbandry practice and to order the livestock board to hold a Section 30-18-1 J NMSA 1978 hearing. *State ex rel. Collier v. N.M. Livestock Bd*., 2014-NMCA-010, cert. denied, 2013-NMCERT-011.

Animals included. — No legislative intent appears to restrict the sanction of this section to any particular class of animals. 1964 Op. Att'y Gen. No. 64-86.

Cruel sport. — Placing of a live coon in a shallow barrel which is swiveled to rotate around a pole when pushed, with the object of finding which hound dog can pull the coon out of the barrel in the shortest time, constitutes cruelty to animals as defined in this section. 1964 Op. Att'y Gen. No. 64-86.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Animals § 31 et seq.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals, 42 A.L.R.4th 860.

What constitutes offense of cruelty to animals - modern cases, 6 A.L.R.5th 733.

Damages for killing or injuring dog, 61 A.L.R.5th 635.

Construction and application of Horse Protection Act of 1970 (15 USCS § 1821 et seq.), 131 A.L.R. Fed. 363.

3A C.J.S. Animals §§ 99 to 116.

30-18-1.1. Seizure of animals; notice.

A. A peace officer who reasonably believes that the life or health of an animal is endangered due to cruel treatment may apply to the district court, magistrate court or the metropolitan court in the county where the animal is located for a warrant to seize the animal.

B. If the court finds probable cause that the animal is being cruelly treated, the court shall issue a warrant for the seizure of the animal. The court shall also schedule a hearing on the matter as expeditiously as possible within thirty days unless good cause is demonstrated by the state for a later time.

C. Written notice regarding the time and location of the hearing shall be provided to the owner of the seized animal. The court may order publication of a notice of the hearing in a newspaper closest to the location of the seizure.

D. If the owner of the animal cannot be determined, a written notice regarding the circumstances of the seizure shall be conspicuously posted where the animal is seized at the time the seizure occurs.

E. At the option and expense of the owner, the seized animal may be examined by a veterinarian of the owner's choice.

F. If the animal is a type of livestock, seizure shall be pursuant to Chapter 77, Article 18 NMSA 1978.

History: Laws 1999, ch. 107, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 107, § 7, made the act effective on July 1, 1999.

30-18-1.2. Disposition of seized animals.

A. If the court finds that a seized animal is not being cruelly treated and that the animal's owner is able to provide for the animal adequately, the court shall return the animal to its owner.

B. If the court finds that a seized animal is being cruelly treated or that the animal's owner is unable to provide for the animal adequately, the court shall hold a hearing to determine the disposition of the animal.

C. An agent of the New Mexico livestock board, an animal control agency operated by the state, a county or a municipality, or an animal shelter or other animal welfare organization designated by an animal control agency or an animal shelter, in the custody of which an animal that has been cruelly treated has been placed may petition the court to request that the animal's owner may be ordered to post security with the court to indemnify the costs incurred to care and provide for the seized animal pending the disposition of any criminal charges of committing cruelty to animals pending against the animal's owner.

D. The court shall determine the amount of security while taking into consideration all of the circumstances of the case including the owner's ability to pay, and may conduct periodic reviews of its order. If the posting of security is ordered, the New Mexico livestock board, animal control agency, animal shelter or animal welfare organization may, with permission of the court, draw from the security to indemnify the costs incurred to care and provide for the seized animal pending disposition of the criminal charges.

E. If the owner of the animal does not post security within fifteen days after the issuance of the order, or if, after reasonable and diligent attempts the owner cannot be located, the animal may be deemed abandoned and relinquished to the New Mexico livestock board, animal control agency, animal shelter or animal welfare organization for adoption or humane destruction; provided that if the animal is livestock other than poultry associated with cockfighting, the animal may be sold pursuant to the procedures set forth in Section 77-18-2 NMSA 1978.

F. Nothing in this section shall prohibit an owner from voluntarily relinquishing an animal to an animal control agency or shelter in lieu of posting security. A voluntary relinquishment shall not preclude further prosecution of any criminal charges alleging that the owner has committed felony cruelty to animals.

G. Upon conviction, the court shall place the animal with an animal shelter or animal welfare organization for placement or for humane destruction.

H. As used in this section, "livestock" means all domestic or domesticated animals that are used or raised on a farm or ranch and exotic animals in captivity and includes equines as defined in Section 77-2-1.1 NMSA 1978, cattle, sheep, goats, swine, bison, poultry, ostriches, emus, rheas, camelids and farmed cervidae but does not include canine or feline animals.

History: Laws 1999, ch. 107, § 3; 2009, ch. 43, § 1; 2023, ch. 45, § 2.

ANNOTATIONS

The 2023 amendment, effective July 1, 2023, included the New Mexico livestock board in an existing provision that allowed certain agencies to draw from court-ordered security to indemnify the costs incurred to care and provide for seized animals, included the New Mexico livestock board in an existing provision that allowed agencies to receive animals deemed abandoned, and revised the definition of "livestock"; in Subsections D and E, added "New Mexico livestock board" preceding "animal control agency"; and in Subsection H, after "includes", deleted "horses, asses, mules" and added "equines as defined in Section 77-2-1.1 NMSA 1978".

The 2009 amendment, effective June 19, 2009, added Subsections, C, D, E, F and H.

30-18-1.3. Costs.

A. Upon conviction, a defendant shall be liable for the reasonable cost of boarding the animal and all necessary veterinary examinations and care provided to the animal. The amount of these costs shall be offset by the security posted pursuant to Section 30-18-1.2 NMSA 1978. Unexpended security funds shall be returned to the defendant.

B. In the absence of a conviction, the seizing agency shall bear the costs of boarding the animal and all necessary veterinary examinations and care of the animal during the pendency of the proceedings, return the animal, if not previously relinquished, and all of the security posted pursuant to Section 30-18-1.2 NMSA 1978.

History: Laws 1999, ch. 107, § 4; 2009, ch. 43, § 2.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsection A, added "reasonable" before "cost of boarding" and added the last two sentences; in Subsection B, added the provision that the seizing agency shall return the animal and amounts of the security posted.

30-18-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 107 § 6 repealed 30-18-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 18-2, relating to injury to animals, effective July 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 30-18-1 NMSA 1978.

30-18-2.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 107 § 6 repealed 30-18-2.1 NMSA 1978, as enacted by Laws 1981, ch. 226, § 1, relating to malicious slaughter of domestic canine animals, effective July 1, 1999. For provisions of former sections, *see* the 1998 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 30-18-1 NMSA 1978.

30-18-3. Unlawful branding.

Unlawful branding consists of either:

A. branding, marking or causing to be branded or marked any animal, which is the property of another, with any brand not the brand of the owner of the animal;

B. defacing or obliterating any brand or mark upon any animal which is the property of another; or

C. using any brand unless said brand shall have been duly recorded in the office of the cattle sanitary board of New Mexico [New Mexico livestock board] or the sheep sanitary board of New Mexico [New Mexico livestock board], whichever is applicable, and the person holds a certificate from the cattle sanitary board [New Mexico livestock board] or the sheep sanitary board [New Mexico livestock board] certifying to the fact of such record.

Whoever commits unlawful branding is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-18-3, enacted by Laws 1963, ch. 303, § 18-3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Section 47-2-1, 1953 Comp., establishing the cattle sanitary board, and 47-8-2, 1953 Comp., establishing the sheep sanitary board and related sections, were repealed by Laws 1967, ch. 213, § 12. Section 77-2-2 NMSA 1978 created the New Mexico livestock board, and provided that reference to the above-mentioned sanitary boards shall mean the livestock board.

Cross references. — For description of bovine animal in a criminal indictment, *see* 31-7-1 NMSA 1978.

For Livestock Code, *see* 77-2-1 NMSA 1978 et seq.

For provisions regarding the branding of animals, and penalties for violation thereof, *see* 77-9-3 to 77-9-5 NMSA 1978.

Due process. — Subsection C is a reasonable exercise of the police power of New Mexico; in the light of its purpose, its application to innocent acts and the felony penalty

it provides do not violate due process requirements. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953.

Equal protection. — As 77-9-4 NMSA 1978 applies to branding requirements generally while Subsection C of this section applies specifically to the use of an unrecorded brand, one section does not provide a different penalty for the identical act prohibited by the other, and hence these sections do not violate the requirement of equal protection of the laws. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953.

Purpose of Subsection C is to prevent a kind of theft peculiarly easy of commission and difficult of discovery and punishment, and to afford special protection to the important industry of stockraising. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953; *State v. Thompson*, 1953-NMSC-072, 57 N.M. 459, 260 P.2d 370.

Criminal intent is not element of crime stated in Subsection C. *State v. Vickery*, 1973-NMCA-091, 85 N.M. 389, 512 P.2d 962, cert. denied, 85 N.M. 380, 512 P.2d 953.

Brand not proof of defendant's ownership. — Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendant owned the animal under statute providing that registration in the brand book under seal of the cattle sanitary board (now New Mexico livestock board) constituted prima facie proof that person owning recorded brand was owner of animal branded with such brand. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Indictment defective. — An indictment under Laws 1919, ch. 57, § 1 (former 40-4-15, 1953 Comp.), prohibiting branding of unmarked animals with mark not the recorded, kept up or running mark or brand of the user, was fatally defective if it failed to allege that the brand was placed upon an unbranded animal. *State v. Lopez*, 1922-NMSC-061, 28 N.M. 216, 210 P. 567.

Instructions on circumstantial evidence. — Instruction on circumstantial evidence concerning the stealing and unlawful branding of a bull calf was not erroneous because of inclusion of statement "that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

The court was not required to give an instruction on circumstantial evidence which was cumulative. *State v. Reed*, 1951-NMSC-021, 55 N.M. 231, 230 P.2d 966, cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3A C.J.S. Animals §§ 23 to 30.

30-18-4. Unlawful disposition of animal.

Unlawful disposition of animal consists of:

A. skinning or removing without the permission of the owner any part of the hide of any neat cattle found dead;

B. abandoning any livestock without giving reasonable notice to the owner, where the livestock has been entrusted by the owner to such person for the herding, care or safekeeping upon a contract for a valuable consideration;

C. taking any livestock for use or work, without the consent of the owner;

D. driving or leading any animal being the property of another from its usual range, without the consent of the owner;

E. contracting, selling or otherwise disposing of any animal, which a person has in his possession or under his control on shares or under contract, without the consent of the owner of such animal; or

F. knowingly buying, taking or receiving from any person having in his possession, or under his control, any animal on shares or under contract, without the consent of the owner of such animal.

Whoever commits unlawful disposition of animal is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-4, enacted by Laws 1963, ch. 303, § 18-4.

ANNOTATIONS

Cross references. — For notification of intention to slaughter cattle, *see* 7-23-1, 7-23-2 NMSA 1978.

For description of bovine animal in indictment, *see* 31-7-1 NMSA 1978.

Former law not violative of equal protection. — Classification in former law providing for the punishment of all persons who skin or remove the hide from the carcass of neat cattle found dead without the permission of the owner, but exempting all employees of railroad companies so doing when the animal was killed by the railroad company, was entirely constitutional. *State v. Thompson*, 1953-NMSC-072, 57 N.M. 459, 260 P.2d 370 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3A C.J.S. Animals §§ 119, 120.

30-18-5. [Illegal confinement of animals.]

Illegal confinement of animals consists of:

A. detaining for more than two (2) hours for the purpose of milking any cow, without the permission of the owner;

B. taking and detaining any bull for the purpose of improving livestock, without the consent of the owner;

C. intentionally separating offspring of livestock from the mother, unless branded. Provided that, when milk cows, which are actually used to furnish milk for household or dairy purposes, have calves, that are unbranded, such young animals may be separated from their mother and inclosed; or

D. confining, or in any manner interfering with the freedom of, or selling, or offering to sell, any freshly branded animal, unless such animal has been previously branded with an older and duly recorded brand for which the person has a legally executed bill of sale from the owner of such brand or unless such animals are with their mother, or unless such animals are the calves of milk cows when such cows are actually used to furnish milk for household purposes or for carrying on a dairy; but in every such case the person, firm or corporation, separating calves from their mother for either of these purposes shall, upon the demand of any sheriff, inspector or other officer, produce, in a reasonable time, the mother of each of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf.

Whoever commits illegal confinement of animals is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-5, enacted by Laws 1963, ch. 303, § 18-5; 1965, ch. 3, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Indictment adequate. — An indictment under Laws 1901, ch. 23, § 1 (former 40-4-29, 1953 Comp.), prohibiting separation of calves under seven months old from their mothers, was valid, even though it did not directly and positively allege that calves were under seven months of age, it using the words "the said calves being then and there under seven months of age." *State v. Brooken*, 1914-NMSC-075, 19 N.M. 404, 143 P. 479 (decided under prior law).

Evidence sufficient. — Evidence that calf was found chained in depression in defendant's pasture and that defendant's riding horse was seen close to such depression was sufficient to support conviction under Laws 1901, ch. 23, § 1 (former

40-4-29, 1953 Comp.). *State v. Blevins*, 1935-NMSC-083, 39 N.M. 532, 51 P.2d 599 (decided under prior law).

30-18-6. Transporting stolen livestock.

Transporting stolen livestock consists of knowingly transporting or carrying any stolen or unlawfully possessed livestock or any unlawfully possessed game animal, or any parts thereof.

Whoever commits transporting stolen livestock is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-18-6, enacted by Laws 1963, ch. 303, § 18-6.

ANNOTATIONS

Cross references. — For penalties for violation of fish and game laws or regulations, *see* 17-2-10 NMSA 1978.

For seizure and disposition of game and vehicles under fish and game laws, *see* 17-2-19 NMSA 1978 et seq.

For prohibition against transporting game or fish taken from unlicensed parks or lakes, *see* 17-4-10 NMSA 1978.

For transportation of sheep, *see* 77-8-3 NMSA 1978 et seq.

For transportation of livestock, *see* 77-9-28 NMSA 1978 et seq.

For penalties for exporting animals without inspection, *see* 77-9-31 NMSA 1978.

For authority of officers to stop vehicles transporting livestock, *see* 77-9-46, 77-9-51 NMSA 1978.

Transporting stolen livestock and larceny of livestock. — Defendant's conviction for transporting stolen livestock, when considered with his conviction for larceny of livestock, violated his constitutional right to be free of double jeopardy. *State v. Clark*, 2000-NMCA-052, 129 N.M. 194, 3 P.3d 689, cert. denied, 129 N.M. 207, 4 P.3d 35.

Section inapplicable. — This section does not apply to the transporting of elk. *State v. Parson*, 2005-NMCA-083, 137 N.M. 773, 115 P.3d 236.

30-18-7. Misrepresentation of pedigree.

Misrepresentation of pedigree consists of either the giving, obtaining, misrepresenting or exhibiting of any type of registry certificate or transfer certificate, pertaining to the pedigree registry of any animal, knowing such certificate to be false or

misleading, or to have been secured by means of false pretenses or false representations.

Whoever commits misrepresentation of pedigree is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-7, enacted by Laws 1963, ch. 303, § 18-7.

30-18-8. [Killing unbranded cattle; killing, without bill of sale, cattle bearing brand of another person; penalty.]

Any person, firm or corporation, who shall kill or cause to be killed, for sale or use any unbranded neat cattle, or any cattle on which the brand has not peeled off and fully healed, unless such cattle shall have an older and duly recorded brand; or shall kill, or cause to be killed for sale or use any neat cattle having a brand not legally owned by such person, firm or corporation, without having taken a duly acknowledged bill of sale for the same from the owner thereof, shall be deemed guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-18-8, enacted by Laws 1965, ch. 7, § 1.

30-18-9. Dog fighting and cockfighting; penalty.

A. It is unlawful for any person to cause, sponsor, arrange, hold or participate in a fight between dogs or cocks for the purpose of monetary gain or entertainment. Participation in a fight between dogs or cocks for the purpose of monetary gain or entertainment consists of an adult knowingly:

(1) being present at a dog fight without attempting to interfere with or stop the contest; or

(2) owning or equipping one of the participating dogs or cocks with knowledge of the contest.

B. It is unlawful to train, equip or sponsor a dog or cock for the purpose of having it participate in a fight with another dog or cock, respectively, for monetary gain or entertainment.

C. Any person violating the provisions of Subsection A or B of this section, as it pertains to dogs, is guilty of a fourth degree felony.

D. Any person violating the provisions of Subsection A or B of this section as it pertains to cocks:

(1) upon a first conviction, is guilty of a petty misdemeanor;

(2) upon a second conviction, is guilty of a misdemeanor; and

(3) upon a third or subsequent conviction, is guilty of a fourth degree felony.

History: Laws 1981, ch. 30, § 1; 2007, ch. 6, § 2.

ANNOTATIONS

The 2007 amendment, effective June 15, 2007, added "or cocks" after the word "dogs" in Subsection A; changed "such a fight" to "a dog fight" in Paragraph (1) of Subsection A; added "or cock" and "or cock, respectively" after the words "dog" in Subsection B; added "as it pertains to dogs" after the word "section" in Subsection C; and added Subsection D to provide penalties.

30-18-10. Exclusion.

Nothing in this act [30-18-9, 30-18-10 NMSA 1978] shall be construed to prohibit or make unlawful the taking of game animals, game birds or game fish by the use of dogs, provided the person so doing is licensed as provided by law and is using such dogs in a lawful manner.

History: Laws 1981, ch. 30, § 2.

30-18-11. Unlawful tripping of an equine; exception.

A. Unlawful tripping of an equine consists of intentionally using a wire, pole, stick, rope or any other object to cause an equine to lose its balance or fall, for the purpose of sport or entertainment.

B. The provisions of Subsection A of this section do not apply to laying an equine down for medical or identification purposes.

C. As used in this section, "equine" means a horse, pony, mule, donkey or hinny.

D. Whoever commits unlawful tripping of an equine is guilty of a misdemeanor.

E. Whoever commits unlawful tripping of an equine that causes the maiming, crippling or death of the equine is guilty of a fourth degree felony.

History: Laws 1995, ch. 113, § 1.

ANNOTATIONS

Effective dates. — Laws 1995, ch. 113, § 2 makes the act effective July 1, 1995.

30-18-12. Injury to livestock.

A. Injury to livestock consists of willfully and maliciously poisoning, killing or injuring livestock that is the property of another.

B. As used in this section, "livestock" means cattle, sheep, buffalo, horses, mules, goats, swine and ratites.

C. Whoever commits injury to livestock is guilty of a fourth degree felony.

History: Laws 1998, ch. 35, § 1.

ANNOTATIONS

Effective dates. — Laws 1998, ch. 35, § 2 makes the act effective July 1, 1998.

30-18-13. Injury to a police dog, police horse or fire dog; harassment of a police dog, police horse or fire dog.

A. As used in this section:

(1) "fire dog" means a dog used by a fire department, special fire district or the state fire marshal for the primary purpose of aiding in the detection of flammable materials or the investigation of fires;

(2) "police dog" means a dog used by a law enforcement or corrections agency that is specially trained for law enforcement or corrections work in the areas of tracking, suspect apprehension, crowd control or drug or explosives detection; and

(3) "police horse" means a horse that is used by a law enforcement or corrections agency for law enforcement or corrections work.

B. Injury to a police dog, police horse or fire dog consists of willfully and with intent to injure or prevent the lawful performance of its official duties:

(1) striking, beating, kicking, cutting, stabbing, shooting or administering poison or any other harmful substance to a police dog, police horse or fire dog; or

(2) throwing or placing an object or substance in a manner that is likely to produce injury to a police dog, police horse or fire dog.

C. Whoever commits injury to a police dog, police horse or fire dog when the injury causes the animal minor physical injury or pain is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

D. Whoever commits injury to a police dog, police horse or fire dog when the injury causes the animal serious physical injury or death or directly causes the destruction of

the animal is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. A person convicted of injury to a police dog, police horse or fire dog may be ordered to make restitution for the animal's veterinary bills or replacement costs of the animal if it is permanently disabled, killed or destroyed.

F. Harassment of a police dog, police horse or fire dog consists of a person willfully and maliciously interfering with or obstructing a police dog, police horse or fire dog by frightening, agitating, harassing or hindering the animal.

G. Whoever commits harassment of a police dog, police horse or fire dog is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

H. Whoever commits harassment of a police dog, police horse or fire dog that results in bodily injury to a person not an accomplice to the criminal offense is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

I. It is an affirmative defense to a prosecution brought pursuant to the provisions of this section that a police dog, police horse or fire dog was not handled in accordance with well-recognized national handling procedures or was handled in a manner contrary to its own department's handling policies and procedures.

History: Laws 1999, ch. 107, § 5.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 107, § 7, makes the act effective on July 1, 1999.

30-18-14. Livestock crimes; livestock inspectors to enforce.

Livestock inspectors who are certified peace officers shall enforce the provisions of Chapter 30, Article 18 NMSA 1978 and other criminal laws relating to livestock.

History: Laws 2001, ch. 8, § 1 and Laws 2001, ch. 341, § 1.

ANNOTATIONS

Duplicate laws. — Laws 2001, ch. 8, § 1, approved March 14, 2001, and Laws 2001, ch. 341, § 1, approved April 5, 2001, both effective June 15, 2001, enacted two versions of this section. Laws 2001, ch. 8, § 1 would have read as follows: "Livestock crimes; livestock inspectors to enforce. Livestock inspectors who are certified peace officers may enforce the provisions of Chapter 30, Article 18 NMSA 1978 and other criminal laws relating to livestock."

The section is set out as enacted by Laws 2001, ch. 341, § 1. *See* 12-1-8 NMSA 1978.

Livestock inspector's law enforcement authority. — The law enforcement authority of a livestock inspector is limited to the power and authority expressly granted or necessarily implied in statute; certified livestock inspectors employed by the livestock board have the same powers as any other peace officer for enforcement of the Livestock Code and other criminal laws relating to livestock. Livestock inspectors, therefore, may not act as law enforcement officers or assist other law enforcement agencies to enforce criminal laws outside the inspector's specific statutory authority. *Authority of Livestock Inspectors* (11/13/18), Att'y Gen. Adv. Ltr. 2018-08.

Livestock inspectors are not statutorily required to carry a firearm while on duty. — Section 77-2-7 NMSA 1978, provides that all livestock inspectors appointed by the board shall have the same powers as any other peace officer in the enforcement of that code, and 30-7-2(A)(3) NMSA 1978, permits certified law enforcement officers, including livestock inspectors to carry a firearm, but there is no statute that requires livestock inspectors to carry a firearm while on duty or otherwise. The livestock board, as the law enforcement agency for livestock inspectors, however, may set appropriate policies for the carrying of firearms, including policies dictating when livestock inspectors should or should not carry firearms while performing their responsibilities for enforcing the Livestock Code and criminal laws relating to livestock. *Authority of Livestock Inspectors* (11/13/18), Att'y Gen. Adv. Ltr. 2018-08.

30-18-15. Intracardiac injection prohibited on conscious animal.

A. It is unlawful for an employee or agent of an animal control service or facility, animal shelter or humane society to use intracardiac injection to administer euthanasia on a conscious animal if the animal could first be rendered unconscious in a humane manner.

B. A person who violates the provisions of Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

History: Laws 2004, ch. 35, § 1.

ANNOTATIONS

Effective dates. — Laws 2004, ch. 35 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 19, 2004, 90 days after adjournment of the legislature.

30-18-16. Coyote; killing contests prohibited; definition; penalties.

A. It is unlawful for a person to organize, cause, sponsor, arrange, hold or participate in a coyote-killing contest.

B. As used in this section, "coyote-killing contest" means an organized or sponsored competition with the objective of killing coyotes for prizes or entertainment.

C. Organizing, causing, sponsoring, arranging or holding a coyote-killing contest consists of a person knowingly:

(1) planning, organizing or enticing a person to participate in a coyote-killing contest; or

(2) providing the venue for a coyote-killing contest.

D. Participation in a coyote-killing contest consists of a person knowingly taking part in a coyote-killing contest.

E. A person who organizes, causes, sponsors, arranges or holds a coyote-killing contest is guilty of a misdemeanor.

F. A person who participates in a coyote-killing contest is guilty of a petty misdemeanor.

G. Nothing in this section shall be construed to prohibit a person from protecting a person or property or the state game commission from carrying out the statutory authority allowed by Chapter 17 NMSA 1978 in a non-coyote-killing contest setting.

History: Laws 2019, ch. 151, § 1.

ANNOTATIONS

Effective dates. — Laws 2019, ch. 151, § 2 made Laws 2019, ch. 151, § 1 effective July 1, 2019.

ARTICLE 19
Gambling

30-19-1. Definitions relating to gambling.

As used in Chapter 30, Article 19 NMSA 1978:

A. "antique gambling device" means a gambling device manufactured before 1970 and substantially in original condition that is not used for gambling or commercial gambling or located in a gambling place;

B. "bet" means a bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value specified in the agreement. A bet does not include:

(1) bona fide business transactions that are valid under the law of contracts, including:

(a) contracts for the purchase or sale, at a future date, of securities or other commodities; and

(b) agreements to compensate for loss caused by the happening of the chance, including contracts for indemnity or guaranty and life or health and accident insurance;

(2) offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such contest;

(3) a lottery as defined in this section; or

(4) betting otherwise permitted by law;

C. "gambling device" means a contrivance other than an antique gambling device that is not licensed for use pursuant to the Gaming Control Act [Chapter 60, Article 2E NMSA 1978] and that, for a consideration, affords the player an opportunity to obtain anything of value, the award of which is determined by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the device;

D. "gambling place" means a building or tent, a vehicle, whether self-propelled or not, or a room within any of them that is not within the premises of a person licensed as a lottery retailer or that is not licensed pursuant to the Gaming Control Act, one of whose principal uses is:

(1) making and settling of bets;

(2) receiving, holding, recording or forwarding bets or offers to bet;

(3) conducting lotteries; or

(4) playing gambling devices; and

E. "lottery" means an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill. "Lottery" does not include the New Mexico state lottery established and operated pursuant to the New Mexico Lottery Act [Chapter 6, Article 24 NMSA 1978] or gaming that is licensed and operated pursuant to the Gaming Control Act. As used in this subsection, "consideration" means anything of pecuniary value required to be paid to the promoter in order to participate in a gambling or gaming enterprise.

History: 1953 Comp., § 40A-19-1, enacted by Laws 1963, ch. 303, § 19-1; 1965, ch. 37, § 1; 1985, ch. 108, § 1; 1995, ch. 155, § 37; 1997, ch. 190, § 66; 2002, ch. 102, § 1.

ANNOTATIONS

Cross references. — For the Indian Gaming Compact, *see* 11-13-1 NMSA 1978.

The 2002 amendment, effective March 5, 2002, substituted "manufactured before 1970" for "twenty-five years of age or older" in Subsection A.

The 1997 amendment, effective June 20, 1997, deleted former Subsection C defining "lottery", redesignated former Subsections D and E as Subsections C and D, inserted "that is not licensed for use pursuant to the Gaming Control Act and" near the beginning of Subsection C, inserted "that is not within the premises of a person licensed as a lottery retailer or that is not licensed pursuant to the Gaming Control Act" in the first sentence of Subsection D, added Subsection E, and made minor stylistic changes throughout the section.

The 1995 amendment, effective July 1, 1995, in Subsection C, inserted "other than the New Mexico state lottery established and operated pursuant to the New Mexico Lottery Act" and made minor stylistic changes throughout the section.

The 1985 amendment added Subsection A, redesignated former Subsections A, B, C, and D as present Subsections B, C, D, and E, respectively, and inserted "other than an antique gambling device" following "contrivance" near the beginning of Subsection D.

Due process. — "Gambling device" is defined with acceptable clarity, given the legislative dilemma of drafting criminal statutes general enough to escape legalistic evasion while specific enough to give fair warning of proscribed conduct. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Meaning of "lottery". — A lottery was a game of hazard in which small sums of money were ventured for chance of obtaining a larger value in money or other articles, and the test employed for detecting a lottery was the presence of a prize, chance and consideration, the presence of all three compelling its characterization as such. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324 (decided under prior law).

Test employed. — The test employed for detecting a lottery is the presence of three elements, prize, chance and consideration. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324 (opinion rendered under prior law).

Baseball pools. — Where tickets were sold in books of 120, to be sold at 10 cents each, entitling the holder to a $9.00 prize from a lucky ticket containing the names of two ball teams making the high scores each day, there was a lottery, although the

tickets themselves did not convey the information as to the prize. *State v. Butler*, 1938-NMSC-017, 42 N.M. 271, 76 P.2d 1149.

"Bank Night" scheme. — Scheme operated under name "Bank Night" involved an element of "consideration" which together with elements of "prize" and "chance," constituted the scheme of a "lottery" under prior law. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324.

Meaning of "gambling device". — No contrary intent appearing in the statute, the ordinary and usual meaning of the term "gambling devices" is to be used, that is, those devices which are normally associated with gambling. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Where there is no allegation that owners of slot machines were involved in illegal gambling, and the only persons who played the slot machines were the owners and their social acquaintances, and there is no allegation or proof that anyone playing a machine made any money except through winnings as a player, no "consideration" was paid to owners to play a machine so there is no "gambling device". *State ex rel. N.M. Gaming Control Bd. v. Ten (10) Gaming Devices*, 2005-NMCA-117, 138 N.M. 426, 120 P.3d 848, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

Computer terminal was not a gambling device. — Where defendant owned and operated an internet cafe where customers could purchase time on the internet using computer terminals in the cafe as a promotion, defendant gave customers free entries into a sweepstakes that awarded cash prizes determined by chance; defendant's computer system pre-determined the winning sweepstakes entries; sweepstake entries were delivered to customers in the form or a "swipe card" that was swiped into a reader for visual display at the café's counter or at individual computer terminals; money could not be inserted into the computer terminals to participate in the sweepstakes; additional sweepstake entries could only be obtained from the café's counter and then downloaded upon the "swipe card"; and the computer terminals gave consumers anything of value, defendant's computer terminals were not a gambling device. *State v. Vento*, 2012-NMCA-099, 286 P.3d 627, cert. granted, 2012-NMCERT-009.

Exchange of pull tabs for free games won on video machines. — The practice of exchanging pull tabs for free games won on electronic video games was impermissible under the Bingo and Raffle Act, Chapter 60, Article 2B NMSA 1978, since to permit operation of the machines for such purpose would be to sanction commercial gambling. *American Legion Post No. 49 v. Hughes*, 1994-NMCA-153, 120 N.M. 255, 901 P.2d 186, cert. quashed, 120 N.M. 117, 898 P.2d 1255.

Extent of pari-mutuel exemption. — It was the intention of the legislature to exempt pari-mutuel betting from the general provisions of the gambling laws only when done by patrons who are physically present at the track; one who is not personally present at the track is not a patron thereof and does not come within the pari-mutuel exemption at

Section 60-1-10 NMSA 1978. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922 (decided under prior law).

Off-track betting illegal. — The giving of money to defendant and his transporting it to the place of betting was inseparable from the act of placing the bet itself; to sanction such a procedure would permit a mode of gambling not allowed by the pari-mutuel statute. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922 (decided under prior law).

Illegal gambling contract unenforceable. — The public policy of New Mexico is to restrain and discourage gambling and must override the rule which prevents unjust enrichment, particularly where there is a choice between that which is considered to be for the benefit of the public at large as distinguished from any benefit to an individual litigant. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922 (decided under prior law).

Applicability of gambling laws to Indians. — State law did not permit authorization of "all forms of casino-style games" in compacts with Indian tribes negotiated by the governor pursuant to the federal Indian Gaming Regulatory Act. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

State statutes are not superseded by federal laws relating to lottery broadcasting; being a form of gambling, lotteries are primarily a matter of state interest and policy under the police power. 1963 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Since there is no indication of a congressional intent to reserve regulation of the broadcasting of lotteries to the federal government, states may regulate such broadcasts to the same extent as the broadcasting of other gambling information. 1963 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Meaning of "lottery". — A lottery has been defined as a plan which contains the elements of prize, chance and consideration. 1963 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Test employed. — The test employed for detecting a lottery is the presence of three elements, prize, chance and consideration. 1965 Op. Att'y Gen. No. 65-196; 1960 Op. Att'y Gen. No. 60-05; 1956 Op. Att'y Gen. No. 56-6516, 1956 Op. Att'y Gen. No. 56-6347, 1955 Op. Att'y Gen. No. 55-6168 (opinion rendered under prior law).

Consideration present even without purchase from promoter. — The consideration necessary for a lottery may be present even where no purchase is required as a condition precedent to eligibility for a prize. 1963 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Where a lottery plan involves increased traffic to the participating stores with a necessarily resultant increase in sales, therein lies the financial advantage to the promoter and thus consideration as defined in this section. 1963 Op. Att'y Gen. No. 63-141 (opinion rendered under prior law).

Broadening of exclusions. — By the 1965 amendment to this section the legislature intended to liberalize or broaden the definition of activities that were not prohibited by law. 1965 Op. Att'y Gen. No. 65-196.

Definition of lottery. — The definition of lottery was intended to broaden the exclusions for certain types of operations which were not basically an attempt to hazard a sum for the hope of a larger sum. 1969 Op. Att'y Gen. No. 69-60.

Substance of scheme important. — In analyzing an operation to determine whether or not it is a lottery, the court must look to the substance of the scheme as well as the form. 1969 Op. Att'y Gen. No. 69-60.

Activity primarily a lottery. — When a promoter charges more than the usual price of an innocent activity and advertises that prizes will be drawn by lot and awarded to the holder of the ticket for the activity then the activity is primarily a lottery. 1969 Op. Att'y Gen. No. 69-60.

Drawing hotel room number. — Where plan was to assign numbers to each of the rooms of a motel, there being some 16 rooms, and as the rooms were filled in the course of the evening, to conduct a drawing, with the person occupying the room number corresponding with the number drawn from the hat to receive his room rent free for that night, the scheme constituted a lottery and was, therefore, illegal under former gambling laws. 1956 Op. Att'y Gen. No. 56-6347.

Store punch card. — Scheme whereby a punch card is given to each customer purchasing merchandise in a store or chain of stores, and each time the customer purchases items from the store, the dollar amount of the purchase is punched out on the card until the customer's purchases reach a certain total, at which point the large seal on the card is removed under which is found one of three dollar amounts representing the customer's prize, or in the alternative, some simple question the answer to which entitles the customer to a prize constituted a lottery under former gambling laws. 1960 Op. Att'y Gen. No. 60-05.

Nature of "pecuniary value" intended. — Pecuniary value must be paid over and above payment for a legal activity before the giving of a door prize at a legal activity is to be considered an illegal lottery. 1969 Op. Att'y Gen. No. 69-60.

Pecuniary value. — Element of pecuniary consideration for the sole purpose of engaging in the gambling enterprise must be present. 1965 Op. Att'y Gen. No. 65-196.

Hazarding of small sum for larger. — The substance of paying something of pecuniary value in order to participate in the enterprise is that the small sum is hazarded in the hope of winning a larger sum. 1969 Op. Att'y Gen. No. 69-60.

No pecuniary value paid. — If one pays the normal going rate for a dinner or theater ticket or style show and a prize or prizes are given in conjunction with those legal activities, one has not paid to the promoter anything of pecuniary value in order to participate in the chance at the prize. 1969 Op. Att'y Gen. No. 69-60.

Drawing of numbered tickets of admission to the state fair, for a prize, in which those individuals who had purchased tickets would be entitled to participate, would be legal, since no consideration would be paid for the privilege of participating in the opportunity to win a prize. 1965 Op. Att'y Gen. No. 65-196.

Specific intent understood. — The narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling purpose, and use for entertainment alone would not subject the parties to prosecution under the gambling statutes. 1969 Op. Att'y Gen. No. 69-54.

Chance to win prize determinative. — If there was no opportunity to obtain anything of value when a gambling device was used for entertainment, then the item would not be a gambling device within the definition of this section. 1969 Op. Att'y Gen. No. 69-54.

Savings and loan promotion legal. — A savings and loan association may give every person who deposits a certain amount in a savings account a chance to win a four-day all-expense-paid trip at a drawing without violating the New Mexico gambling laws. 1971 Op. Att'y Gen. No. 71-109.

Selling of souvenir tokens. — Where the element of chance is absent, slot machines converted into vending machines which will sell souvenir tokens do not fall within the definition of gambling device. 1972 Op. Att'y Gen. No. 72-39.

Applicability of gambling laws to Indians. — Where federal law is silent on gambling and state law prohibits it, and such gambling is carried on by Indians in Indian country, the gambling is illegal, with exclusive jurisdiction resting in the federal courts unless the gambling has already been punished by the tribal court. 1965 Op. Att'y Gen. No. 65-221 (opinion rendered under prior law).

Under the federal Assimilative Crimes Act, there would not be a conflict between federal and state laws on gambling if carried on in Indian country and gambling is illegal in the state. 1965 Op. Att'y Gen. No. 65-221 (opinion rendered under prior law).

State courts would have jurisdiction over a non-Indian charged with conducting a gambling operation on an Indian reservation. 1965 Op. Att'y Gen. No. 65-221 (opinion rendered under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Scheme for advertising or stimulating legitimate business as a lottery, 48 A.L.R. 1115, 57 A.L.R. 424, 103 A.L.R. 866, 109 A.L.R. 709, 113 A.L.R. 1121.

What is a game of chance, 135 A.L.R. 104.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking, 53 A.L.R.4th 801.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

30-19-2. Gambling.

Gambling consists of:

A. making a bet;

B. entering or remaining in a gambling place with intent to make a bet, to participate in a lottery or to play a gambling device;

C. conducting a lottery; or

D. possessing facilities with intent to conduct a lottery.

Whoever commits gambling is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-19-2, enacted by Laws 1963, ch. 303, § 19-2.

ANNOTATIONS

Cross references. — For recovery of gambling losses and avoidance of gambling debts, *see* 44-5-1 NMSA 1978 et seq.

For provision granting immunity from punishment for gambling to one suing to recover losses, *see* 44-5-14 NMSA 1978.

Double jeopardy not threatened. — Defendant was not convicted of different offense than that with which he was charged, where information cited former 40-22-1, 1953 Comp. and judgment referred to former 40-22-2, 1953 Comp., as the former section merely defines certain acts as unlawful, while the latter section provides the penalty; the essential part of the judgment was finding defendant guilty of operating a game of chance for money, so that the judgment would bar a subsequent prosecution for the

same offense. *State v. La Rue*, 1960-NMSC-054, 67 N.M. 149, 353 P.2d 367 (decided under prior law).

Gambling distinguished from commercial gambling. — Gambling under Subsection A of this section is distinguishable from commercial gambling under 30-19-3B NMSA 1978 in that this section requires only one act whereas 30-19-3B NMSA 1978 requires more than one act to constitute a violation. *State v. Owens*, 1984-NMCA-105, 103 N.M. 121, 703 P.2d 898, cert. quashed, 103 N.M. 62, 702 P.2d 1007 (1985).

Longstanding prohibition. — The declared prohibition against gambling in any manner or form has long been a part of the existing law of this state. *Ross v. State Racing Comm'n*, 1958-NMSC-117, 64 N.M. 478, 330 P.2d 701.

Frequenting and keeping game distinguished. — To frequent a gambling table of a banking game was one offense and to keep such table was another. *Territory v. Copely*, 1873-NMSC-007, 1 N.M. 571 (decided under prior law).

Distribution of common lands by lot illegal. — Scheme whereby community land grant attempted to distribute some 10,000 acres of common lands among almost 2000 heirs by lottery, at a nominal fee, amounted to a violation of the statute law of this state prohibiting lotteries, as well as amounting to a dissipation of the assets of the corporation, contrary to law. *Armijo v. Town of Atrisco*, 1957-NMSC-045, 62 N.M. 440, 312 P.2d 91.

Hand held "power bingo". — Hand held electronic devices known as "Power Bingo" are "gambling devices" within the meaning of this section and 30-19-3 NMSA 1978, and such units may not be used in *New Mexico. Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, 121 N.M. 205, 910 P.2d 281.

Defendants not exempt from punishment. — Where defendants, immediately prior to trial for playing at a game of chance for money, filed a civil action for recovery of individual gambling losses under 44-5-14 NMSA 1978, they were not entitled to exemption from punishment provided for in that section. *State v. Schwartz*, 1962-NMSC-119, 70 N.M. 436, 374 P.2d 418.

Standing to challenge validity. — Because defendants were charged with a violation of 30-19-3F NMSA 1978, they had no standing to challenge 30-19-3E NMSA 1978 and this section. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Admission of "other crimes" held prejudicial. — The admission of evidence of "other crimes, wrongs and misconduct" is prejudicial error where it laps over into a smear on gambling and general criminal activity, destroying the justification of relevance on a particular issue of intent. *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983).

Gambling contract unenforceable. — An action cannot be maintained on a contract that is illegal or against public policy, where both parties are equally culpable. *Schnoor v. Griffin*, 1968-NMSC-067, 79 N.M. 86, 439 P.2d 922.

Raffle where purchase unnecessary. — The offering by a nightclub and package store of raffle tickets to patrons upon their entry into the premises, for a drawing to be held once a week at which prizes would be given away, so long as an individual might participate in the drawing without being required to purchase something (part with anything of pecuniary value), this would not fall within the statutory definition of a lottery and is not prohibited by this section. 1973 Op. Att'y Gen. No. 73-31.

Raffle at $50 per plate dinner. — A noncharitable organization may not hold a public dinner, the cost of which is $50 per ticket, and at which the organization gives away prizes varying in value from a few cents to several hundred dollars, drawn by lot. 1969 Op. Att'y Gen. No. 69-60.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 26 to 54.

Entrapment to commit offense with respect to gambling or lotteries, 31 A.L.R.2d 1212.

Coin-operated pinball machine or similar device, played for amusement alone or confining reward to privilege of free replays, as prohibited or permitted by anti-gambling laws, 89 A.L.R.2d 815.

Bridge as within gambling laws, 97 A.L.R.2d 1420.

Private residence: gambling in private residence prohibited or permitted by anti-gambling laws, 27 A.L.R.3d 1074.

Advertising: promotion schemes of retail stores as criminal offense under anti-gambling laws, 29 A.L.R.3d 888.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling, 80 A.L.R.4th 1079.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling, 84 A.L.R.4th 740.

38 C.J.S. Gaming § 84 et seq.; 54 C.J.S. Lotteries § 22.

30-19-3. Commercial gambling.

Commercial gambling consists of either:

A. participating in the earnings of or operating a gambling place;

B. receiving, recording or forwarding bets or offers to bet;

C. possessing facilities with the intent to receive, record or forward bets or offers to bet;

D. for gain, becoming a custodian of anything of value, bet or offered to be bet;

E. conducting a lottery where both the consideration and the prize are money, or whoever with intent to conduct a lottery, possesses facilities to do so; or

F. setting up for use, for the purpose of gambling, or collecting the proceeds of, any gambling device.

Whoever commits commercial gambling is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-19-3, enacted by Laws 1963, ch. 303, § 19-3.

ANNOTATIONS

Cross references. — For gambling and gambling houses deemed public nuisances, *see* 30-19-8 NMSA 1978.

Constitutionality. — Subsection F of this section is not void for vagueness and uncertainty. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Standing to challenge validity. — Because defendants were charged with a violation of Subsection F of this section, they had no standing to challenge Subsection E and 30-19-2D NMSA 1978. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Applicability. — Former law, designed to prevent and prohibit gambling, was applicable to private individuals and fraternal organizations alike. *State v. Las Cruces Elks Club*, 1950-NMSC-013, 54 N.M. 137, 215 P.2d 821.

Offense distinguished from permitting of gambling. — Subsection F of this section and Section 30-19-4B NMSA 1978 do not relate to the same activity, since Subsection F of this section requires a positive act by an accused relating to commercial gambling, while Section 30-19-4B NMSA 1978 connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his

control. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

As permitting a gambling device to be set up and setting up a gambling device are not identical acts, an individual could not be held accountable under both sections for the same act. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Gambling distinguished from commercial gambling. — Gambling under Section 30-19-2A NMSA 1978 is distinguishable from commercial gambling under Subsection B of this section in that Section 30-19-2A NMSA 1978 requires only one act whereas this section requires more than one act to constitute a violation. *State v. Owens*, 1984-NMCA-105, 103 N.M. 121, 703 P.2d 898, cert. quashed, 103 N.M. 62, 702 P.2d 1007.

Elements of offense. — That game be played for money or anything of value was an essential element in violation of former gambling law, as merely playing or operating the gaming device was not actionable. *State v. Valdez*, 1947-NMSC-059, 51 N.M. 393, 185 P.2d 977.

Computer sweepstakes promotion was a lottery. — Where defendant owned and operated an internet cafe where customers could purchase time on the internet using computer terminals in the cafe; as a promotion, defendant gave customers free entries into a sweepstakes that awarded cash prizes determined by chance; defendant's computer system pre-determined the winning sweepstakes entries; customers could not obtain a refund of any internet time they did not use which consisted of 99.75% of internet time purchased; and defendant retained 8% of revenues from the sale of internet time and used the balance of the revenues to pay sweepstake prizes to customers, there was sufficient evidence to support the finding that defendant's sweepstakes promotion was a lottery. *State v. Vento*, 2012-NMCA-099, 286 P.3d 627, cert. granted, 2012-NMCERT-009.

Card game for value. — The game of solo, played with cards for something of value, was made an offense by the general language of Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.). *Grafe v. Delgado*, 1924-NMSC-065, 30 N.M. 150, 228 P. 601.

Slot machines. — Slot machines, where the chances were unequal with the chances in favor of the machine, were covered by former gambling law as illegal. *Territory v. Jones*, 1908-NMSC-03014 N.M. 579, 99 P. 338 (1908).

Hand held "power bingo". — Hand held electronic devices known as "power bingo" are "gambling devices" within the meaning of this section and Section 30-19-2 NMSA 1978, and such units may not be used in New Mexico. *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, 121 N.M. 205, 910 P.2d 281.

Free games as thing of value. — Where free games were awarded through chance to a player for his enjoyment in successfully operating a pinball machine, he received

something of value within proscription of Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.). *Giomi v. Chase*, 1942-NMSC-071, 47 N.M. 22, 132 P.2d 715.

Repayment in chewing gum. — Fact that slot machine always paid player value of his money in chewing gum did not exclude it from operation of anti-gambling law. *State v. Apodaca*, 1926-NMSC-053, 32 N.M. 80, 251 P. 389.

Supplying of lottery tickets. — One who supplied lottery tickets to others to be sold, but did not otherwise participate in the promotion of the lottery was nevertheless subject to the penalty. *State v. Butler*, 1938-NMSC-017, 42 N.M. 271, 76 P.2d 1149.

Essential allegations. — If allegation that operation of a game of chance "for money or anything of value" was omitted, the indictment or information failed to charge any offense and use of word "unlawfully" operating of a game of chance did not cure the defect. *State v. Valdez*, 1947-NMSC-059, 51 N.M. 393, 185 P.2d 977.

Failure to charge offense. — Where information was insufficient in failing to charge an offense under statute prohibiting operation of games of chance "for money or anything of value," did not state particulars of the offense and did not refer to the section of the statute creating the offense, information could not be amended after all the evidence was introduced at the trial. *State v. Ardovino*, 1951-NMSC-018, 55 N.M. 161, 228 P.2d 947, distinguished in *State v. Silva*, 1967-NMCA-008, 78 N.M. 286, 430 P.2d 783.

Indictment sufficient. — An information charging accused, under former law, with "having in his possession lottery tickets for the purpose of vending the same contrary to the form of the statute," with bill of particulars describing the form of the tickets used, was sufficient. *State v. Butler*, 1938-NMSC-017, 42 N.M. 271, 76 P.2d 1149.

Admissions as part of res gestae. — Unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained solely on extrajudicial confessions or admissions of an accused, but where evidence establishes the commission of the offense charged independently of the admissions by appellant, admissions at the time of arrest and at the place where the paraphernalia was found are a part of the res gestae and, for that reason, are admissible. *State v. La Rue*, 1960-NMSC-054, 67 N.M. 149, 353 P.2d 367 (decided under prior law).

Evidence of operating adequate. — While no gambling was observed on the premises, evidence of discovery of gambling paraphernalia in basement of cafe, in which defendant and others were also found, along with statements of defendant admitting that he was the operator, pointed unerringly to defendant's guilt. *State v. La Rue*, 1960-NMSC-054, 67 N.M. 149, 353 P.2d 367 (decided under prior law).

Admission of "other crimes" held prejudicial. — The admission of evidence of "other crimes, wrongs and misconduct" is prejudicial error where it laps over into a smear on gambling and general criminal activity, destroying the justification of relevance on a particular issue of intent. *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983).

Instruction on operation approved. — Instruction that any person who manages, controls or takes or receives any money or thing of value from game for running the game or like purpose shall be deemed an operator of such game was substantially in the language of the applicable statute and correctly stated the law. *Kilpatrick v. State*, 1953-NMSC-117, 58 N.M. 88, 265 P.2d 978.

Jury instructions were improper. — Where defendant owned and operated an internet cafe where customers could purchase time on the internet using computer terminals in the cafe; as a promotion, defendant gave customers free entries into a sweepstakes that awarded cash prizes determined by chance; defendant's computer system pre-determined the winning sweepstakes entries; the jury was instructed on all alternative bases for a commercial gambling conviction, including the definitions of a bet, a lottery, and a gambling device; and the jury returned a general verdict that found defendant guilty of commercial gambling without identifying the underlying basis for the conviction among the alternatives in the commercial gambling statute, the district court erred when it used a general verdict form and instructed the jury on the charge of commercial gambling based upon the mutually exclusive theories of a lottery or a bet. *State v. Vento*, 2012-NMCA-099, 286 P.3d 627, cert. granted, 2012-NMCERT-009.

Questions for jury. — Where there was a substantial conflict as to whether or not the defendant operated a game of chance for money in his premises on the night in question, it was for the jury to determine the weight of the evidence, and also the credibility of the witnesses, and not the duty of the appellate court to do so. *Kilpatrick v. State*, 1953-NMSC-117, 58 N.M. 88, 265 P.2d 978.

Consideration. — Either a promise by the participant to pay if he does not win or payment by the participant subject to return of his money should chance make him the winner is sufficient as consideration; that a subsequent event may relieve from the promise or payment cannot obliterate the fact that at the time the participant enters the scheme consideration is rendered. 1955 Op. Att'y Gen. No. 55-6168.

Either a promise to pay or payment is, when tested by the law of contracts, sufficient as consideration. 1956 Op. Att'y Gen. No. 56-6347.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 82 to 117.

Connection with place where gaming is carried on which will render one guilty as keeper thereof, 15 A.L.R. 1202.

Possession of gambling device as offense not requiring showing that device was used for gambling or kept for gambling purposes, 162 A.L.R. 1188.

Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia, 51 A.L.R.4th 796.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool, 78 A.L.R.4th 483.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

38 C.J.S. Gaming § 99 et seq.; 54 C.J.S. Lotteries §§ 22, 23.

30-19-4. Permitting premises to be used for gambling.

Permitting premises to be used for gambling consists of:

A. knowingly permitting any property owned or occupied by such person or under his control to be used as a gambling place; or

B. knowingly permitting a gambling device to be set up for use for the purpose of gambling in a place under his control.

Whoever commits permitting premises to be used for gambling is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-19-4, enacted by Laws 1963, ch. 303, § 19-4.

ANNOTATIONS

Offense distinguished from commercial gambling. — Section 30-19-3F NMSA 1978 and Subsection B of this section do not relate to the same activity, since 30-19-3F requires a positive act by an accused relating to commercial gambling, while Subsection B of this section connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

As permitting a gambling device to be set up and setting up a gambling device are not identical acts, an individual could not be held accountable under both sections for the same act. *State v. Marchiondo*, 1973-NMCA-137, 85 N.M. 627, 515 P.2d 146, cert. denied, 85 N.M. 639, 515 P.2d 643.

Guilty pleas of others inadmissible. — Upon trial of one charged with unlawfully and knowingly permitting a game of chance for money to be played on premises occupied by him, the record of the information charging third persons with unlawful gaming and their pleas of guilty thereto was inadmissible as hearsay and as depriving the defendant

of his constitutional right to be confronted by the witnesses against him. *State v. Martino*, 1918-NMSC-128, 25 N.M. 47, 176 P. 815.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

30-19-5. Dealing in gambling devices.

A. Dealing in gambling devices consists of manufacturing, transferring commercially or possessing, with intent to transfer commercially, any of the following:

(1) anything which he knows evidences, purports to evidence or is designed to evidence participation in gambling; or

(2) any device which he knows is designed exclusively for gambling purposes or anything which he knows is designed exclusively as a subassembly or essential part of such device. This includes, without limitation, gambling devices, numbers jars, punchboards and roulette wheels.

Proof of possession of any device designed exclusively for gambling purposes which is not in a gambling place and is not set up for use is prima facie evidence of possession with intent to transfer.

B. The provisions of this section shall not apply to any manufacturer of gambling devices who exports his product exclusively in foreign commerce, and who is under ten thousand dollar ($10,000) bond payable to the state of New Mexico to assure export.

Provided, however, the provisions of this section shall apply to manufacturers of gambling devices used, adapted, devised or designed to be used in bookmaking, in wagering pools with respect to a sporting event, or in a numbers, policy, bolita or similar game.

C. Nothing in this section shall be construed to prohibit the ownership, possession, display, sale, purchase, exchange or transfer of antique gambling devices.

D. Whoever deals in gambling devices, other than those herein specified and excluded, is guilty of a misdemeanor.

History: 1953 Comp., § 40A-19-5, enacted by Laws 1963, ch. 303, § 19-5; 1965, ch. 230, § 1; 1985, ch. 108, § 2.

ANNOTATIONS

Cross references. — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

The 1985 amendment effective June 14, 1985, designated the formerly undesignated introductory paragraph as Subsection A, redesignating former Subsections A and B as present Paragraphs (1) and (2) within that subsection, redesignated former Subsection C as present Subsection B, added present Subsection C and designated the formerly undesignated last paragraph as present Subsection D.

Specific intent required. — The narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling purpose, and use for entertainment alone would not subject the parties to prosecution under the gambling statutes. 1969 Op. Att'y Gen. No. 69-54.

Transporting devices to Indian country. — Under this section and 30-19-10 NMSA 1978 the state could seize gambling devices being transported across lands under state jurisdiction to Indian country. 1965 Op. Att'y Gen. No. 65-221.

Importation for entertainment. — Gambling devices may be imported into the state and held for the purposes of providing entertainment for patrons of a nightclub which plans to use the devices with stage money and without any consideration or prize involved in the entertainment. 1969 Op. Att'y Gen. No. 69-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 82 to 106.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 A.L.R.3d 726.

Possession: validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts, 17 A.L.R.3d 491.

38 C.J.S. Gaming § 99 et seq.

30-19-6. Permissive lottery.

A. Nothing in Chapter 30, Article 19 NMSA 1978 shall be held to prohibit any bona fide motion picture theater from offering prizes of cash or merchandise for advertising purposes, in connection with such business or for the purpose of stimulating business, whether or not any consideration other than a monetary consideration in excess of the regular price of admission is exacted for participation in drawings for prizes.

B. Nothing in Chapter 30, Article 19 NMSA 1978 shall be construed to apply to any activity:

(1) regulated by the New Mexico Bingo and Raffle Act [60-2F-1 to 60-2F-26 NMSA 1978]; or

(2) specifically exempted from regulation by the provisions of the New Mexico Bingo and Raffle Act.

History: 1953 Comp., § 40A-19-6, enacted by Laws 1963, ch. 303, § 19-6; 1981, ch. 231, § 1; 2009, ch. 81, § 27.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, deleted former Subsection A, which provided that Article 19, Chapter 30 NMSA 1978 did not apply to a charitable lottery; deleted former Subsection C, which provided that Article 19, Chapter 30 NMSA 1978 did not apply to county fairs; deleted former Subsection D, which provided that Article 19, Chapter 30 NMSA 1978 did not apply to an organization that is exempt from the state income tax; and added Subsection B.

Size of permissive lotteries of necessity limited. — Although the provision of Laws 1949, ch. 133, § 1 (former 40-22-18, 1953 Comp.) lifting the ban against lotteries conducted at fairs where entire proceeds were expended in the state for benefit of public libraries, churches or religious societies did not place a limitation on the size of such lotteries, the condition imposed confined them to petty lotteries since removal of profit from a lottery would greatly curtail the size. *State v. Jones*, 1940-NMSC-066, 44 N.M. 623, 107 P.2d 324 (decided under prior law).

Donation of gross proceeds necessary. — Under Laws 1949, ch. 133, § 1 (former 40-22-18, 1953 Comp.), a lottery scheme which appropriated only net proceeds to a charitable organization was illegal. "All the proceeds" meant "gross proceeds." *Harriman Inst. of Social Research, Inc. v. Carrie Tingley Crippled Children's Hosp*., 1938-NMSC-062, 43 N.M. 1, 84 P.2d 1088 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling § 60.

State lotteries: Actions by ticketholders against state or contractor for state, 40 A.L.R.4th 662.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Enforceability of contract to share winnings from legal lottery ticket, 90 A.L.R.4th 784.

54 C.J.S. Lotteries § 11.

30-19-7. Fraudulently operating a lottery.

Fraudulently operating a lottery consists of operating or managing any lottery which does not provide a fair and equal chance to all participants, or which lottery is conducted in a manner tending to defraud or mislead the public.

Whoever commits fraudulently operating a lottery is guilty of a misdemeanor.

History: 1953 Comp., § 40A-19-7, enacted by Laws 1963, ch. 303, § 19-7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Recovery of money or property lost through cheating or fraud in forbidden gambling or game, 39 A.L.R.2d 1213.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

30-19-7.2. Recreational bingo exception.

Nothing in this chapter or in the New Mexico Bingo and Raffle Act [60-2F-1 to 60-2F-26 NMSA 1978] prohibits a senior citizen group from organizing and conducting bingo at a senior citizen center, provided that no person other than players participating in the bingo game receive or become entitled to receive any part of the proceeds, either directly or indirectly, from the bingo game, and no minor is allowed to participate in the organization or conduct of games or play bingo. As used in this section, "senior citizen group" means an organization in which the majority of the membership consists of persons who are at least fifty-five years of age and the primary activities and purposes of which are to provide recreational or social activities for those persons.

History: Laws 1997, ch. 101, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 101 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 20, 1997, 90 days after adjournment of the legislature. *See* Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.

30-19-8. Gambling and gambling houses as public nuisance.

Except as otherwise permitted or excepted under this article [30-19-1 to 30-19-15 NMSA 1978], any gambling device or gambling place is a public nuisance per se.

The attorney general, any district attorney or any citizen of this state may institute an injunction proceeding to have such public nuisance abated. In the event such injunction is issued on behalf of any citizen of this state it shall not be necessary in such proceeding to show that he is personally injured by the act complained of.

History: 1953 Comp., § 40A-19-8, enacted by Laws 1963, ch. 303, § 19-8.

ANNOTATIONS

Cross references. — For provision defining a public nuisance, *see* 30-8-1 NMSA 1978.

For abatement of a public nuisance, *see* 30-8-8 NMSA 1978.

Former law not exclusive. — Laws 1921, ch. 86, § 9 (40-22-9, 1953 Comp.), providing for closing of gaming-house, did not impair or modify the common-law powers of courts to abate public nuisances summarily inasmuch as it was a permissive statute only. *State v. Johnson*, 1948-NMSC-033, 52 N.M. 229, 195 P.2d 1017 (decided under prior law).

Suit to enjoin pari-mutuel betting not maintainable. — Plaintiffs could not seek injunctive relief through the general gambling statute, 40-22-6, 1953 Comp., to enjoin defendant from using certain premises for pari-mutuel betting on horse racing, until they could have shown that the pari-mutuel statute, 60-1-10 NMSA 1978, was unconstitutional. *Patton v. Fortuna Corp*., 1960-NMSC-136, 68 N.M. 40, 357 P.2d 1090.

Destruction of equipment. — Under Laws 1921, ch. 86, § 9 (former 40-22-9, 1953 Comp.), any gaming-house, gambling table, banking game, gaming paraphernalia or gaming device or equipment of any sort was a public nuisance and the equipment could be ordered destroyed upon hearing for an injunction in district court. *State v. Las Cruces Elks Club*, 1950-NMSC-013, 54 N.M. 137, 215 P.2d 821.

Contempt charge. — Injunction against use of certain premises for gaming was not ineffectual as a basis for contempt charge because of failure of court to order premises closed. Contempt was sufficiently charged by alleging injunction, and subsequent use of premises. *State v. Dunn*, 1932-NMSC-047, 36 N.M. 258, 13 P.2d 557.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling § 16.

Private residence: gambling in private residence as prohibited or permitted by anti-gambling laws, 27 A.L.R.3d 1074.

66 C.J.S. Nuisances § 48.

30-19-9. Evidence of unlawful use of premises.

Evidence that a place has a general reputation as a gambling site or that at or about the time in question it was frequently visited by persons known to be professional gamblers or known as frequentors [frequenters] of gambling places is admissible on the issue of whether such site is a gambling place.

History: 1953 Comp., § 40A-19-9, enacted by Laws 1963, ch. 303, § 19-9.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

30-19-10. Forfeiture of equipment.

Any gambling device or other equipment of any type used in gambling is subject to forfeiture, and the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of such property.

History: 1953 Comp., § 40A-19-10, enacted by Laws 1963, ch. 303, § 19-10; 2002, ch. 4, § 14.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, after the first phrase, "Any gambling device or other equipment of any type used in gambling," deleted the rest of the section, which contained standards and procedures for the forfeiture of gambling devices and other equipment of any type used in gambling; and added the present remainder of section.

Under law prior to 2002, slot machines in private home that are not used for illegal gambling are not gaming machines or gambling devices and therefore are not subject to forfeiture because they are not licensed under the Gaming Control Act. *State ex rel. N.M. Gaming Control Bd. v. Ten (10) Gaming Devices*, 2005-NMCA-117, 138 N.M. 426, 120 P.3d 848, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

Forfeiture of money. — Money segregated as gambling paraphernalia cannot be restored to the former owner, and such money which has been earmarked as an integral part of gambling equipment may be seized as a gambling device; this rule is not limited to situations where money is placed inside a gambling device such as a slot machine and becomes a component part thereof, but includes money found lying on a card table which had been used in the game. *State v. Casarez*, 1965-NMSC-103, 75 N.M. 436, 405 P.2d 759.

Applicability. — Statute providing for forfeiture of gambling devices seized by law enforcement officials has no application to equipment not "used in gambling." 1969 Op. Att'y Gen. No. 69-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38 Am. Jur. 2d Gambling §§ 174 to 183.

Money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, rights and remedies in respect of, 79 A.L.R. 1007.

Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises where such activities took place, 19 A.L.R.2d 1228.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 A.L.R.3d 726.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

Constitutionality of statutes providing for destruction of gambling devices, 14 A.L.R.3d 366.

38A C.J.S. Gaming § 75 et seq.

30-19-11. Remedy of lessor.

If the lessee of property has been convicted of using it as a gambling place or if the property has been adjudged to constitute a public nuisance, such lease shall be voidable at the option of the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

History: 1953 Comp., § 40A-19-11, enacted by Laws 1963, ch. 303, § 19-11.

ANNOTATIONS

Cross references. — For forcible entry and detainer, *see* 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, *see* 47-8-1 NMSA 1978 et seq.

30-19-12. Duties of enforcement officials.

Upon the filing with any district judge or justice of the peace [magistrate court] of an affidavit in writing made by any citizen that gambling as prohibited by this article [30-19-1 to 30-19-15 NMSA 1978] is being conducted in any building, room, premises or place describing the same for sufficient identification, it shall be the duty of the district judge or justice of the peace [magistrate] with whom such affidavit is filed to immediately issue a warrant commanding the peace officer to whom the same is addressed to forthwith enter and search the building, room, premises or place. In the event the location is being used for purposes prohibited by this article, the peace officer shall arrest without a warrant the parties therein or making their escape therefrom, and who would be subject to arrest with a warrant. The officers shall also take possession of any gambling paraphernalia, device or equipment found therein, and shall hold the same until

deprived of the possession thereof by law. It shall be the duty of the peace officers to take any persons so arrested before some magistrate having jurisdiction and to forthwith file a proper complaint against each person so arrested.

History: 1953 Comp., § 40A-19-12, enacted by Laws 1963, ch. 303, § 19-12.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace was abolished by 35-1-38 NMSA 1978, and the jurisdiction, powers and duties were transferred to the magistrate courts.

Disposition of affidavit. — Former section 40-22-8, 1953 Comp., provided only for the filing of the required affidavit and had no further directive as to the disposition of the same by the judge. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

Effect of misplacing affidavit. — If the affidavit provided for in 40-22-8, 1953 Comp., was lost or misplaced, the search warrant and the proceedings leading to its issuance, otherwise in conformity with the statute, could not be thereby invalidated. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 38A C.J.S. Gaming § 75 et seq.

30-19-13. Bribery of participant in a contest.

Bribery of participant in a contest consists of:

A. the transferring or promise to transfer anything of value to any person with intent to influence thereby any participant in a contest to refrain from exerting his full skill, speed, strength or endurance in such contest; or

B. the agreeing or offering by a participant in a contest, to refrain from exerting his full skill, speed, strength or endurance, in return for anything of value transferred or promised to himself or another.

The term "participant" as used in this section includes any person who is selected to or expects to take part in any such contest.

Whoever commits bribery of participant in a contest is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-19-13, enacted by Laws 1963, ch. 303, § 19-13.

ANNOTATIONS

Cross references. — For other provisions relating to bribery, *see* 30-24-1 to 30-24-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Bribery in athletic contest, 49 A.L.R.2d 1234.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest, 85 A.L.R.4th 1048.

30-19-14. Testimony of witnesses to gambling.

Any district judge or justice of the peace [magistrate court] having jurisdiction over any of the crimes enumerated in this article [30-19-1 to 30-19-15 NMSA 1978], or any district attorney inquiring into the alleged violation of any of the provisions of this article, may subpoena persons and compel their attendance as witnesses and may compel such witnesses to testify concerning any violation of this article.

Any person who is so subpoenaed and examined shall be immune to prosecution or conviction for any violation of this article about which he testifies.

A conviction may be had for any violation of this article upon the unsupported testimony of any accomplice or participant.

History: 1953 Comp., § 40A-19-14, enacted by Laws 1963, ch. 303, § 19-14.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The office of justice of the peace has been abolished by 35-1-38 NMSA 1978 and the jurisdiction, powers and duties thereof have been transferred to the magistrate courts.

Subpoena powers limited. — A close study of the statutory language contained in 40-22-11, 1953 Comp., predecessor of this section, leads to the conclusion that the powers vested in district attorneys under the provisions of that section were limited to situations wherein the witnesses were brought before a grand jury, or were subpoenaed to testify as to alleged violations of the gaming laws of the state at the time of trial. 1961 Op. Att'y Gen. No. 61-88.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Witness, asking as to pursuing occupation of gambling for purposes of impeachment, 1 A.L.R. 1402.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

30-19-15. Unlawful to accept for profit anything of value to be transmitted or delivered for gambling; penalty.

A. It is unlawful for any person to, directly or indirectly, knowingly accept for a fee, property, salary or reward anything of value from another to be transmitted or delivered for gambling or parimutuel [pari-mutuel] wagering on the results of a race, sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever.

B. None of the provisions of this act shall be construed to prohibit the operation or continued operation of bingo programs presently conducted for charitable purposes.

C. Any person violating any of the provisions of this section is guilty of a fourth degree felony.

History: Laws 1979, ch. 4, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The term "this act", referred to in Subsection B, means Laws 1979, ch. 4. Laws 1979, ch. 4, § 1, is compiled as this section.

ARTICLE 20
Crimes Against Public Peace

30-20-1. Disorderly conduct.

Disorderly conduct consists of:

A. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace; or

B. maliciously disturbing, threatening or, in an insolent manner, intentionally touching any house occupied by any person.

Whoever commits disorderly conduct is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-1, enacted by Laws 1963, ch. 303, § 20-1; 1967, ch. 120, § 1.

ANNOTATIONS

Prosecution for disorderly conduct while intoxicated. — The Detoxification Reform Act does not preclude criminal prosecution for disorderly conduct when the accused's conduct otherwise satisfies the statutory elements of the charge, regardless of whether the offender is intoxicated. *State v. Correa*, 2009-NMSC-051, 147 N.M. 291, 222 P.3d 1.

Insufficient evidence. — Where police officers responded to a call from defendant's neighbor who alleged that defendant had made death threats to the neighbor; when defendant answered the officers' knock on the door, the officers identified themselves as police officers and asked to talk to defendant; defendant shut and locked the metal security door and refused to talk to the officers; upon a second request for cooperation by the officers, defendant raised his voice, used profanity and instructed the officers to leave; the officers observed that defendant was heavily intoxicated; defendant was joined at the door by his friend who made obscene gestures and yelled profanities at the officers through the screen door; and the record did not reveal any threatening conduct toward the officers, the evidence was insufficient to support defendant's conviction of disorderly conduct. *State v. Correa*, 2009-NMSC-051, 147 N.M. 291, 222 P.3d 1.

Constitutionality. — This section is not void for vagueness and is not overly broad. *State v. James M*., 1990-NMCA-135, 111 N.M. 473, 806 P.2d 1063, cert. denied, 111 N.M. 529, 807 P.2d 227 (1991).

No common-law crime. — There is no common-law crime of disorderly conduct; hence, unless the acts complained of fall clearly within the statute, they are not disorderly. *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

Elements of offense. — To violate this section, defendant's conduct must have (1) been indecent or profane and (2) tended to disturb the peace. *State v. James M*., 1990-NMCA-135, 111 N.M. 473, 806 P.2d 1063, cert. denied, 111 N.M. 529, 807 P.2d 227 (1991).

Evidence supported defendant's conviction of disorderly conduct, where defendant - while pointing and flailing his arms - directed loud and profane language to another person, and defendant's conduct supported an intervening police officer's belief that a fight was possible. *State v. James M*., 1990-NMCA-135, 111 N.M. 473, 806 P.2d 1063, cert. denied, 111 N.M. 529, 807 P.2d 227 (1991).

Meaning of "indecent". — Meaning of indecent includes that tending toward or being in fact something generally viewed as morally indelicate or improper or offensive. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

Disturbing peace as breach thereof. — The meaning of "disturb the peace" in this statute is not strained if equated with the words "breach of the peace" as used in New York statute. *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

Tendency to disturb peace. — All this section required in the case at hand was indecent conduct which tended to disturb the peace; conduct which is inconsistent with

the peaceable and orderly conduct of society tends to disturb the peace and quiet of the community. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

Section contemplates conduct which tends to disturb the peace; a breach of the peace is a disturbance of public order by an act of violence or by any act likely to produce violence or which, by causing consternation and alarm, disturbs the peace and quiet of the community. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

Nonprovocative objection to police detention. — One is not to be punished for nonprovocatively voicing his objection to what he obviously feels is a highly questionable detention by a police officer. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

Determining nature of conduct. — Since disturbance is viewed in relation to the peace and quiet of the community, the question of disturbing the peace would not be determined solely by the reaction of the girls toward whom his conduct was directed. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

Conduct indecent. — Where defendant by language and gesture referred to male and female sex organs while talking to girls on tennis courts and after defendant's companions appeared naked he asked girls if they had ever seen a nude boy before, there was substantial evidence that defendant's conduct was indecent and tended to disturb the peace. *State v. Oden*, 1971-NMCA-062, 82 N.M. 563, 484 P.2d 1273.

Blocking of road by cars was not disorderly conduct. *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

Elements of breach of peace not present. — Where the defendant was angry and had his fist clenched but made no gesture or movement toward some police officers, and there was no evidence that a crowd was gathering, that the defendant was inciting belligerent behavior or that he was causing consternation or alarm, then the defendant's words and actions did not constitute disorderly conduct. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

Offensive statements directed at police. — Because police officers are held to a higher standard of tolerance for abuse or offensive language, evidence that defendant directed offensive statements at an officer who had come onto his premises was insufficient to support a conviction for disorderly conduct. *State v. Hawkins*, 1999-NMCA-126, 128 N.M. 245, 991 P.2d 989.

Tendency to disturb peace not shown. — Where officer saw no acts of violence or indecent behavior, nor did he hear any boisterous, loud, noisy or profane language and he observed only a gathering crowd of teenagers and people in their early twenties, conviction for disorderly conduct would be overturned as conduct was not such as "tends to disturb the peace." *State v. Florstedt*, 1966-NMSC-208, 77 N.M. 47, 419 P.2d 248.

Acquittal bars retrial for battery. — After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. *State v. Orosco*, 1982-NMCA-181, 99 N.M. 180, 655 P.2d 1024.

Probable cause for arrest. — A police officer who heard defendant use loud and profane language and observed a woman whose actions indicated to him that defendant was bothering her had probable cause to arrest defendant for disorderly conduct. *State v. Salas*, 1999-NMCA-099, 127 N.M. 686, 986 P.2d 482, cert. denied, 128 N.M. 149, 990 P.2d 823.

Police did not have probable cause to arrest an anti-war protestor for disorderly conduct where the anti-war protestor chanted the non-abusive, non-profane slogan "police strike" for about one minute and then stood quietly in the street or to arrest an anti-war protestor who was ringing a cow bell during the protest. *Buck v. City of Albuquerque*, 549 F. 3d 1269 (10th Cir. 2008).

Evidence sufficient for conviction. — Since the defendant while attempting to drive on military base refused to show his identification to the officer at the gate and the prosecution's witnesses all testified that they perceived the defendant's actions as a physical threat to the officer, and the few inconsistencies in the recollections of three other witnesses did not detract from their account that the defendant was either struggling with the officer or attempting to hit him with his elbow, evidence was sufficient to convict defendant of disorderly conduct. *United States v. Stenzel*, 49 F.3d 658 (10th Cir.), cert. denied, 516 U.S. 840, 116 S. Ct. 123, 133 L. Ed. 2d 73 (1995).

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

12 Am. Jur. 2d Breach of Peace and Disorderly Conduct §§ 30 to 37.

Police officer, failure of one on street to obey order of, to move on, as disorderly conduct, 65 A.L.R.2d 1152.

Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing, 5 A.L.R.4th 956.

Insulting words addressed directly to police officer as breach of peace or disorderly conduct, 14 A.L.R.4th 1252.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

27 C.J.S. Disorderly Conduct § 1 (2).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and operation of federal disorderly conduct regulation (36 C.F.R. § 2.34), 180 A.L.R. Fed. 637.

30-20-2. Public affray.

Public affray consists of two or more persons voluntarily or by agreement engaging in any fight or using any blows or violence toward each other in an angry or quarrelsome manner in any public place, to the disturbance of others.

Whoever commits public affray is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-3, enacted by Laws 1963, ch. 303, § 20-3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Breach of Peace and Disorderly Conduct § 18.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

2A C.J.S. Affray §§ 5 to 14.

30-20-3. Unlawful assembly.

Unlawful assembly consists of three or more persons assembling together with intent to do any unlawful act with force or violence against the person or property of another, and who shall make any overt act to carry out such unlawful purpose.

Whoever commits unlawful assembly is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-4, enacted by Laws 1963, ch. 303, § 20-4.

ANNOTATIONS

Watermelon stealing. — Boys on a watermelon stealing escapade were guilty of having assembled unlawfully to do an unlawful act of force and violence against the property in question and to commit an unlawful act against the peace. *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152.

Interfering with mine. — Testimony that activities of accused prevented workmen from entering mine, that it was planned to shut off pump in mine, without which the mine would be flooded, and that gas bombs were necessary to disperse the crowd about mine shaft was sufficient to sustain a conviction of unlawful assembly under Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.). *State v. Gennis*, 1937-NMSC-042, 41 N.M. 453, 70 P.2d 902.

Attack on school bus driver. — Evidence that defendants acted in concert in meeting school bus and attacking driver thereof was sufficient to support verdict of unlawful assembly under Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.). *State v. Hawks*, 1923-NMSC-035, 28 N.M. 486, 214 P. 753.

Indictment sufficient. — Indictment charging defendant and 100 other persons with unlawful assembly was not defective for failure to allege names of others than defendants or that their names were unknown. *State v. Gennis*, 1937-NMSC-042, 41 N.M. 453, 70 P.2d 902.

Member of unlawful assembly may not recover for injuries inflicted upon him by a fellow member while they are carrying out the unlawful purposes of such assembly if there is a causal connection between such act and the injury. *Curry v. Vesely*, 1960-NMSC-007, 66 N.M. 372, 348 P.2d 490.

Unless unlawful plan abandoned. — Where boy who, along with a group of others, had been proceeding to picnic grounds to take part in a nighttime gang fight had either never intended to have any part in contemplated fight or had abandoned intention to do so prior to his injury, judgment against driver of other vehicle in the group for injuries in accident caused by his negligence would be affirmed. *Curry v. Vesely*, 1960-NMSC-007, 66 N.M. 372, 348 P.2d 490.

Suppression of riot as homicide defense. — Request for directed verdict based on defense of suppression of riot was properly refused in homicide prosecution where there was no proof of any common design by decedent's party to do some unlawful act. *State v. Martinez*, 1949-NMSC-053, 53 N.M. 432, 210 P.2d 620.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 54 Am. Jur. 2d Mobs and Riots §§ 19, 23 et seq.

What constitutes offense of unlawful assembly, 71 A.L.R.2d 875.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

91 C.J.S. Unlawful Assembly § 2.

30-20-4. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 22, § 4 recompiled former 30-20-4 NMSA 1978 as 12-10-16 NMSA 1978, effective July 1, 2005.

30-20-5. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 22, § 4 recompiled former 30-20-5 NMSA 1978 as 12-10-17 NMSA 1978, effective July 1, 2005.

30-20-6. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 22, § 4 recompiled former 30-20-6 NMSA 1978 as 12-10-18 NMSA 1978, effective July 1, 2005.

30-20-7. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 22, § 4 recompiled former 30-20-7 NMSA 1978 as 12-10-19 NMSA 1978, effective July 1, 2005.

30-20-8. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 22, § 4 recompiled former 30-20-8 NMSA 1978 as 12-10-20 NMSA 1978, effective July 1, 2005.

30-20-9. Recompiled.

ANNOTATIONS

Recompilations. — Laws 2005, ch. 22, § 4 recompiled former 30-20-9 NMSA 1978 as 12-10-21 NMSA 1978, effective July 1, 2005.

30-20-10. Loitering of minors.

Loitering of minors consists of the owner or operator of any saloon permitting a person under the age of twenty-one years to attend, frequent or loiter in or about such premises without being accompanied by the parent or guardian of the person.

Whoever commits loitering of minors is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-6, enacted by Laws 1963, ch. 303, § 20-6; 1973, ch. 138, § 17; 1977, ch. 35, § 1.

ANNOTATIONS

Instructions to employees no defense. — That proprietor of saloon in which gambling was permitted instructed his employees not to allow minors to gamble was no defense, where minors were permitted to gamble by his bartender. *Territory v. Church*, 1907-NMSC-025, 14 N.M. 226, 91 P. 720 (decided under prior law).

Absolute prohibition. — There is an absolute prohibition against the frequenting and loitering of any minor upon premises used for the sale and consumption of alcoholic beverages. 1958 Op. Att'y Gen. No. 58-151.

Public dance to be kept free of alcohol. — Where minors for the purposes of a public dance use a segregated part of the American Legion Hall, it must at all times during such use be kept entirely free from alcoholic beverages, such restriction including not only sales and services but the permitting of beverages to be carried into the hall by anyone regardless of the source or place of original purchase. 1958 Op. Att'y Gen. No. 58-151.

Principal business and purpose. — The only workable method of classifying an establishment as a poolroom (permission of unaccompanied minors to frequent which was prohibited prior to 1977 amendment) was the principal business and purpose test. 1964 Op. Att'y Gen. No. 64-32 (opinion rendered under prior law).

Establishment not poolroom. — Since principal business and purpose of bowling establishment which also contained four pool tables and a snack bar was not the playing of pool, the establishment was not a poolroom. 1964 Op. Att'y Gen. No. 64-32 (opinion rendered under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of loitering statutes and ordinances, 25 A.L.R.3d 836.

Validity, construction, and application of loitering statutes and ordinances, 72 A.L.R.5th 1.

30-20-11. Dueling.

Dueling consists of any person:

A. conveying by written or verbal message a challenge to any other person to fight a duel with any deadly weapon, and whether or not such duel ensues;

B. accepting a challenge from another person to fight a duel with any deadly weapon, and whether or not such duel ensues;

C. engaging in or fighting a duel with any deadly weapon; or

D. aiding, encouraging or seconding either party to a duel and being present at such duel when deadly weapons are used.

Whoever commits dueling is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-20-7, enacted by Laws 1963, ch. 303, § 20-7.

ANNOTATIONS

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

Purpose of antidueling statutes is to discourage and discountenance the settlement of quarrels by duel. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Dueling defined. — A duel is a combat with deadly weapons between two persons, fought according to the terms of a precedent agreement and under certain agreed and prescribed rules. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Duel distinguished from affray. — A duel differs from an affray in that the former is always a result of design while the latter is upon a sudden quarrel. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Characteristics of dueling. — A duel has none of the elements of sudden heat and passion. State v. Romero, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Duels are generally fought under rules of considerable formality. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Conviction reversed. — Conviction for dueling was reversed, where a formal agreement to fight a duel could not be inferred from evidence that the respective combatants went to their home and car to retrieve their weapons, that they were facing each other as they were shooting, and that gunfire took place in rapid succession. *State v. Romero*, 1990-NMCA-114, 111 N.M. 99, 801 P.2d 681, cert. denied, 111 N.M. 77, 801 P.2d 659.

Am. Jur. 2d, A.L.R. and C.J.S. references.— 25 Am. Jur. 2d Dueling § 1.

28A C.J.S. Dueling § 2.

30-20-12. Use of telephone to terrify, intimidate, threaten, harass, annoy or offend; penalty.

A. It shall be unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd, criminal or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It shall also be unlawful for any person to attempt by telephone to extort money or other thing of value from any other person, or to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any other person at the place where the telephone call or calls were received, or to maliciously make a telephone call, whether or not conversation ensues, with intent to annoy or disturb another, or to disrupt the telecommunications of another.

B. The use of obscene, lewd or profane language or the making of a threat or statement as set forth in Subsection A shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend.

C. Any offense committed by use of a telephone as set forth in this section shall be deemed to have been committed at either the place where the telephone call or calls originated or at the place where the telephone call or calls were received.

D. Whosoever violates this section is guilty of a misdemeanor, unless such person has previously been convicted of such offense or of an offense under the laws of another state or of the United States which would have been an offense under this section if committed in this state, in which case such person is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-20-8, enacted by Laws 1967, ch. 120, § 2.

ANNOTATIONS

Cross references. — For evidentiary rule relating to use of presumptions in criminal cases, *see* Rule 11-302 NMRA.

Severability. — Laws 1967, ch. 120, § 3, provides for the severability of the act if any part or application thereof is held invalid.

Constitutionality. — This section is not unconstitutionally overbroad, nor is it void for vagueness. *State v. Gattis*, 1986-NMCA-121, 105 N.M. 194, 730 P.2d 497.

Applicability of Subsection A. — The first sentence of Subsection A explicitly covers threats conveyed by telephone. The legislature did not intend that the later portion of the statute relating to malicious calls should duplicate that coverage. When a threat is the sole basis for finding that a call with an otherwise proper purpose is inexcusable, then

the first sentence of Subsection A controls. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

"Threats" under this section include, at most, threats of criminal or tortious misconduct. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

"Telephoning another". — Evidence that a third party connected the victim to an existing call between defendant and the third party as a three-way call was sufficient to conclude that defendant violated this section because one can violate Subsection A without physically conducting the acts which initiate a telephone call. *In re. Shaneace L*., 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330, cert. denied, 130 N.M. 154, 20 P.3d 811, *overruled on other grounds by State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

Determination of intent. — The language used in calls may be considered in determining defendant's intent in making the calls. Likewise, the time that the calls were made and the previous efforts to make defendant desist may be considered. *State v. Gattis*, 1986-NMCA-121, 105 N.M. 194, 730 P.2d 497.

The victim's testimony that defendant threatened to kill her and her baby shortly after the placing of the telephone call was sufficient evidence from which it could be inferred that defendant had the intent to annoy or harass the victim. *In re. Shaneace L*., 2001-NMCA-005, 130 N.M. 89, 18 P.3d 330, cert. denied, 130 N.M. 154, 20 P.3d 811, *overruled on other grounds by State v. Trossman*, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

Sufficient evidence to identify the defendant. — Where defendant was charged with use of a telephone to terrify, intimidate, threaten, harass, annoy or offend, and bribery or intimidation of a witness, and where, at trial, the victim testified that defendant was her husband, that they had been married for many years but that they had been separated since 2010, that in December 2016, defendant appeared at the victim's home and started an altercation, during which defendant broke the windshield on the victim's car, that later that same day, defendant left two voicemails on the victim's phone threatening to kill her for calling the police, that she was familiar with defendant's voice from the many years that they had been married, that she recognized defendant's voice and cell phone number from the voicemails, and that the day before a magistrate court trial on a domestic violence charge related to the broken windshield, defendant called the victim and threatened to hurt her if she showed up to court, and where the state presented to the jury recordings of the voicemails, the evidence was sufficient to identify defendant as the person who left the voicemails and called the victim directly, and was sufficient to support defendant's convictions. *State v. Vigil*, 2021-NMCA-024, cert. denied.

Legitimate purpose. — When a caller has a legitimate purpose and the call communicates that purpose, only in extreme circumstance is the call inexcusable. Such a circumstance can be created by a variety of factors. One factor would be the language employed in the call. Other factors could be the frequency of calls, the time of day of the

call, or the strength and frequency of the recipient's objections to such calls. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

Evidence insufficient. — Evidence was insufficient to sustain defendant's conviction, where defendant made telephone calls for the legitimate purpose of seeking assistance from the parents of her granddaughter's boyfriend to try to terminate what she saw as an unhealthy relationship. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

Evidence of the effect on the recipient of the calls cannot substitute for evidence of the defendant's misconduct. *State v. Stephens*, 1991-NMCA-019, 111 N.M. 543, 807 P.2d 241.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Misuse of telephone as minor criminal offense, 97 A.L.R.2d 503.

Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language, 32 A.L.R.3d 1041.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 A.L.R.3d 411.

Telephone company's liability for disclosure of number or address of subscriber holding unlisted number, 1 A.L.R.4th 218.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

Validity, Construction and Application of Telephone Consumer Protection Act (47 USCS § 227), 132 A.L.R. Fed. 625.

86 C.J.S. Telegraphs, Telephones, Radio and Television § 121.

30-20-13. Interference with members of staff, public officials or the general public; trespass; damage to property; misdemeanors; penalties.

A. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivisions, willfully deny to staff, public officials or the general public:

(1) lawful freedom of movement within the building or facility or the land on which it is situated;

(2) lawful use of the building or facility or the land on which it is situated; or

(3) the right of lawful ingress and egress to the building or facility or the land on which it is situated.

B. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivision [subdivisions], willfully impede the staff or a public official or a member of the general public through the use of restraint, abduction, coercion or intimidation or when force and violence are present or threatened.

C. No person shall willfully refuse or fail to leave the property of or any building or other facility owned, operated or controlled by the state or any of its political subdivisions when requested to do so by a lawful custodian of the building, facility or property if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the property, building or facility.

D. No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

E. Nothing in this section shall be construed to prevent lawful assembly and peaceful and orderly petition for the redress of grievances, including any labor dispute.

F. Any person who violates any of the provisions of this section shall be deemed guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-10, enacted by Laws 1970, ch. 86, § 2; 1975, ch. 52, § 2; 1981, ch. 32, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Statutory standard to sustain a conviction under Subsection D. — Section 30-20-13(D) NMSA 1978 refers to a defendant's intent to do some further act or achieve some additional consequence, interference with the educational process, and therefore 30-20-13(D) NMSA 1978 is a specific intent crime; the actus reas of the offense is threatening to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school. *State v. Quintin C.*, 2019-NMCA-069.

Insufficient evidence to support conviction for willful interference with the educational process. — Where, based on evidence presented by the state that child stated that he was creating a "kill list", the trial judge erred in finding that child

committed the delinquent act of willfully interfering with the educational process by threatening to commit an act that would disrupt the lawful mission, processes, procedures or functions of the school, because the trial court applied an incorrect legal standard to an essential element of the offense. There was insufficient evidence to support child's conviction. *State v. Quintin C*., 2019-NMCA-069.

Criminal trespass charges not a means to enforce rule until filing. — Criminal trespass charges under Section 30-20-13 NMSA 1978 are not a means to enforce a rule available to the state until the rule is properly filed in compliance with State Rules Act (Section 14-4-1 NMSA 1978). *State v. Joyce*, 1980-NMCA-086, 94 N.M. 618, 614 P.2d 30.

Flexibility not vagueness. — Subsection C of this section, referring prior to 1975 amendment specifically to institutions of higher education, allowed control of campus disturbances in terms marked by flexibility and reasonable breadth, rather than meticulous specificity, and was not void for vagueness. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Campus restrictions not overbroad. — Since this section, referring in Subsection C, prior to 1975 amendment, specifically to institutions of higher education, vindicated significant government interest in the control of campus disturbances, reasonable "time, place and manner" regulations were valid even though they incidentally suppressed otherwise protected conduct. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

No invalid delegation of power. — Subsection C of this section specifies adequate standards and guidelines to be followed, in that criminality is based first on a refusal to leave after requests, and second on a determination by the judge or jury that the person committed the specified disruptive acts. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Nor unbridled discretion. — Subsection C of this section does not put unbridled discretion in the hands of the administrator or police officer because the decision of each must be checked by the decision of the other, and the discretion of both is limited by the reasonably precise directive of the statute. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Meaning of "impair". — The term "impair" in Subsection C means, in context, a substantial physical diminution or damage and not just any diminution in quality. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Substantial physical invasion required. — The word "impair," along with the other operative verbs of present Subsection C (which subsection prior to 1975 amendment

referred specifically to institutions of higher education), denotes a substantial physical invasion, and requires interference with the actual functioning of the university. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Willfulness and intent essential. — Not only must the refusal contemplated by Subsection C of this section be willful but the disruption must also be accompanied by general intent. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Application constitutional. — Defendants' refusal to honor the request of the university president to leave his office although he had appointments to keep, substantially interfered with the functioning of the president's business, and hence Subsection C of this section (referring prior to 1975 amendment specifically to institutions of higher education) was constitutionally applied to warrant their convictions. *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903, cert. denied, 86 N.M. 528, 525 P.2d 888 (decided under prior law).

Limitations on sales of handicrafts on state property. — Since the legislature intended that those who set the lawful mission, processes, procedures or functions of state property are to be able to avail themselves of Subsection C's provisions in furtherance of those policies and functions, the board of regents of the museum of New Mexico may properly rely on the provisions of this section to effectuate the provisions of a resolution which permits only Indians to sell handicrafts under the portals of the governor's palace. *Livingston v. Ewing*, 1982-NMSC-110, 98 N.M. 685, 652 P.2d 235.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

30-20-14. Institutions permitted to adopt rules.

Nothing in this act [30-20-13 to 30-20-15 NMSA 1978] shall be construed as limiting the power or duty of any institution of higher education to establish standards of conduct and scholastic achievement relevant to its lawful missions, processes and functions and to invoke appropriate discipline for violations of the standards.

History: 1953 Comp., § 40A-20-11, enacted by Laws 1970, ch. 86, § 3.

ANNOTATIONS

Compiler's notes. — The words "this act" as used in this section refers to Laws 1970, ch. 86 which is compiled as sections 30-20-13 to 30-20-15 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Participation of student in demonstration on or near campus as warranting expulsion or suspension from school or college, 32 A.L.R.3d 864.

30-20-15. Construction.

This act [30-20-13 to 30-20-15 NMSA 1978] shall be construed to be an alternative to and not in lieu of the provisions of Laws 1969, Chapter 281 [30-20-4 to 30-20-9 NMSA 1978].

History: 1953 Comp., § 40A-20-12, enacted by Laws 1970, ch. 86, § 4.

30-20-16. Bomb scares and shooting threats unlawful.

A. Making a bomb scare consists of falsely and maliciously stating to another person that a bomb or other explosive has been placed in such a position that property or persons are likely to be injured or destroyed.

B. Making a shooting threat consists of intentionally communicating to another person an intent to bring a firearm to a property or use the firearm with the intent to:

(1) place a person or group of persons in fear of great bodily harm;

(2) prevent or interrupt the occupation or use of a public building; or

(3) cause a response to the threat by a law enforcement official or volunteer agency organized to deal with emergencies.

C. Whoever commits making a bomb scare is guilty of a fourth degree felony.

D. Whoever commits making a shooting threat is guilty of a misdemeanor.

E. A court may order a person convicted for the offense of making a bomb scare or shooting threat to reimburse the victim of the offense for economic harm caused by that offense.

F. As used in this section, "economic harm" means all direct, incidental and consequential financial harm suffered by a victim of the offense of making a bomb scare or shooting threat. "Economic harm" includes:

(1) wages, salaries or other compensation lost as a result of the commission of the offense of making a bomb scare or shooting threat;

(2) the cost of all wages, salaries or other compensation paid to employees for time that those employees are prevented from working as a result of the commission of the offense of making a bomb scare or shooting threat; and

(3) overhead costs incurred for the period of time that a business is shut down as a result of the commission of the offense of making a bomb scare or shooting threat.

History: 1953 Comp., § 40A-20-13, enacted by Laws 1975, ch. 285, § 1; 1981, ch. 15, § 1; 2003, ch. 35, § 1; 2022, ch. 56, § 24.

ANNOTATIONS

The 2022 amendment, effective May 18, 2022, made making a shooting threat unlawful, and provided a penalty; in the section heading, added "and shooting threats"; added a new Subsection B and redesignated former Subsection B as Subsection C; added a new Subsection D and redesignated former Subsection C and D as Subsections E and F, respectively; in Subsections E and F, after each occurrence of "bomb scare", added "or shooting threat"; and deleted former Subsection E.

The 2003 amendment, effective July 1, 2003, designated the former first and second paragraphs as Subsections A and B; added Subsections C, D and E; and substituted "commits making" for "makes" following "Whoever" at the beginning of Subsection B.

Restitution. — Although the trial court may request that an inquiry into defendant's ability to pay be made by a probation officer, it is mandatory that the actual determination of defendant's ability to pay be made by the court. Trial court may not delegate to probation officer determination of defendant's ability to pay obligations imposed by court. Amount of restitution and time of payment must be set by court and not be left to discretion of probation authorities. *State v. Carrasco*, 1997-NMCA-123, 124 N.M. 320, 950 P.2d 293

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

Imposition of state or local penalties for threatening to use explosive devices at schools or other buildings, 79 A.L.R.5th 1.

Validity, construction, and application of 18 U.S.C.A. § 844(e), prohibiting use of mail, telephone, telegraph, or other instrument of commerce to convey bomb threat, 160 A.L.R. Fed. 625.

30-20-17. Reward.

If a person provides information leading to the conviction, or adjudication of delinquency pursuant to the Children's Code [Chapter 32A NMSA 1978], of another for making a bomb scare, he shall, upon the recommendation of the district attorney, be entitled to a reward in the amount of one hundred dollars ($100).

History: 1953 Comp., § 40A-20-14, enacted by Laws 1975, ch. 285, § 2.

30-20-18. Interference with athletic event.

Interference with athletic event consists of intentionally throwing any object on or across the field of play of an athletic event with the intent to interfere with the normal conduct of that event while the contestants of that event are on that field. As used in this section, "athletic event" means a scheduled sports event for which an admission fee is charged to the public.

Any person other than an official or a contestant of an athletic event who commits interference with [an] athletic event is guilty of a petty misdemeanor.

History: Laws 1986, ch. 53, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For assault and battery on a sports official, *see* 30-3-9.1 NMSA 1978.

For sentencing for petty misdemeanors, *see* 31-19-1 NMSA 1978.

ARTICLE 20A
Antiterrorism

30-20A-1. Short title.

This act [30-20A-1 to 30-20A-4 NMSA 1978] may be cited as the "Antiterrorism Act".

History: Laws 1990, ch. 66, § 1.

ANNOTATIONS

Law reviews. — For comment, "Sacrificing People, Protecting Hate: An Analysis of Anti-Militia Statutes and the Incitement to Violence Exception to Freedom of Speech as Legal Protections for Members of Groups Targeted by Hate-Motivated Violence," see 30 N.M.L. Rev. 253 (2000).

For article, "Terrorism and the Rule of Law", see 35 N.M.L. Rev. 215 (2005).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Victim impact evidence in capital sentencing hearings - post-Payne v. Tennessee, 79 A.L.R.5th 33.

30-20A-2. Definitions.

As used in the Antiterrorism Act:

A. "civil disorder" means any planned act of violence by an assemblage of two or more persons with the intent to cause damage or injury to another individual or his property;

B. "destructive device" means:

(1) any explosive, incendiary or poison gas:

(a) bomb;

(b) grenade;

(c) rocket having a propellant charge of more than four ounces;

(d) missile having an explosive or incendiary charge of more than one-quarter ounce;

(e) mine; or

(f) similar device;

(2) any type of weapon that can expel or may be readily converted to expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than six-tenths inch in diameter, except a shotgun, shotgun shell or muzzle loading firearm that is generally recognized as particularly suitable for sporting purposes; or

(3) any part or combination of parts either designed or intended for use in converting or assembling any device described in Paragraphs (1) and (2) of this subsection.

The term "destructive device" shall not include any device that is neither designed nor redesigned for use as a weapon;

C. "firearm" means any weapon that can expel or is designed to or may readily be converted to expel a projectile by the action of an explosion, the frame or receiver of

any such weapon, any firearm muffler or firearm silencer. "Firearm" includes any handgun, rifle or shotgun; and

D. "law enforcement officer" means any employee of a police or public safety department administered by the state or any political subdivision of the state where the employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this state. "Law enforcement officer" includes any member of the New Mexico national guard; any peace officer of the United States, any state, any political subdivision of a state or the District of Columbia; any member of the New Mexico mounted patrol or the national guard, as defined in 10 U.S.C. Sec. 101(9); any member of the organized militia of any state or territory of the United States, the commonwealth of Puerto Rico or the District of Columbia not included within the definition of national guard; and any member of the armed forces of the United States. "Law enforcement officer" also means any person or entity acting as a contractor for any other law enforcement officer, police or public safety department described in this section.

History: Laws 1990, ch. 66, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Victim impact evidence in capital sentencing hearings - post-*Payne v. Tennessee*, 79 A.L.R.5th 33.

30-20A-3. Unlawful acts; penalty.

A. Any person who teaches or demonstrates the use, application or making of any firearm, destructive device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used in furtherance of a civil disorder is guilty of a fourth degree felony and shall be sentenced under the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978] to imprisonment for a definite term of eighteen months or, in the discretion of the sentencing court, to a fine of not more than five thousand dollars ($5,000), or both.

B. Any person who trains, practices or receives instruction in the use of any firearm, destructive device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used in furtherance of a civil disorder is guilty of a fourth degree felony and shall be sentenced under the provisions of the Criminal Sentencing Act to imprisonment for a definite term of eighteen months or, in the discretion of the sentencing court, to a fine of not more than five thousand dollars ($5,000), or both.

History: Laws 1990, ch. 66, § 3.

30-20A-4. Exemptions.

A. Nothing in the Antiterrorism Act shall make unlawful any activity:

(1) in accordance with Article 2, Section 6 of the constitution of New Mexico;

(2) of any governmental agency;

(3) of any law enforcement agency;

(4) of any hunting, rifle, pistol, shotgun, sportsmen's or conservation club;

(5) lawfully engaged in on a shooting range;

(6) lawfully undertaken pursuant to any shooting school or other program of instruction;

(7) intended to teach the safe handling, including marksmanship, or use of firearms, archery equipment or other weapons or techniques to individuals or groups;

(8) that teaches the use of martial arts or arms for the defense of home, person or property or the lawful use of force as defined in Section 30-2-7 NMSA 1978; or

(9) that is otherwise lawful.

B. Nothing in the Antiterrorism Act shall make unlawful any act of a law enforcement officer that is performed as a part of his official duties.

History: Laws 1990, ch. 66, § 4.

ARTICLE 20B
Demonstrations at Funerals and Memorial Services

30-20B-1. Short title.

This act [30-20B-1 to 30-20B-5 NMSA 1978] may be cited as the "Demonstrations at Funerals and Memorial Services Act".

History: Laws 2007, ch. 254, § 1.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

Severability. — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

30-20B-2. Definitions.

As used in the Demonstrations at Funerals and Memorial Services Act:

A. "funeral" means the ceremonies, rituals, processions and memorial services held at a funeral site in connection with the viewing, burial, cremation or memorial of or wake for a deceased person;

B. "funeral site" means a church, synagogue, mosque, funeral home, mortuary, cemetery, grave site, mausoleum or other place at which a funeral is being conducted or is scheduled to be conducted within the next sixty minutes or has been conducted within the last sixty minutes; and

C. "targeted residential picketing" includes the following acts:

(1) marching, standing or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security or privacy of an occupant of the building; or

(2) marching, standing or patrolling by one or more persons that prevents an occupant of a residential building from gaining access to or exiting from the property on which the residential building is located.

History: Laws 2007, ch. 254, § 2.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

Severability. — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

30-20B-3. Prohibited acts.

A person shall not, with knowledge of the existence of a funeral or funeral site:

A. engage in any loud singing, playing of music, chanting, whistling, yelling or noisemaking with or without noise amplification, including bullhorns, auto horns and microphones within five hundred feet of any ingress or egress of that funeral site, when

the volume of such singing, music, chanting, whistling, yelling or noisemaking is audible at and disturbing to the peace and good order of a funeral at that funeral site;

B. direct abusive epithets or make any threatening gesture that the person knows or reasonably should know is likely to provoke a violent reaction by another person;

C. display within five hundred feet of any ingress or egress of that funeral site any visual images that convey fighting words or actual threats against another person;

D. knowingly obstruct, hinder, impede or block another person's access to or egress from that funeral site or a facility containing that funeral site, except that the owner or occupant of property may take lawful actions to exclude others from that property;

E. knowingly obstruct, hinder, impede or block the progress of a vehicle participating in a procession to or from a funeral site; or

F. knowingly engage in targeted residential picketing at the home or domicile of any surviving member of the deceased person's family or household on the date of the funeral.

History: Laws 2007, ch. 254, § 3.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

Severability. — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

30-20B-4. Penalties.

Any person who violates Section 3 [30-20B-3 NMSA 1978] of the Demonstrations at Funerals and Memorial Services Act is:

A. for the first offense, guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

B. for the second offense, guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; and

C. for the third and subsequent offenses, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 2007, ch. 254, § 4.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

Severability. — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

30-20B-5. Injunctive relief.

In addition to the criminal penalties provided in Section 4 [30-20B-4 NMSA 1978] of the Demonstrations at Funerals and Memorial Services Act, the court may enjoin conduct prohibited in Section 3 [30-20B-3 NMSA 1978] of that act if there is credible evidence that a person is likely to violate Section 3 of the Demonstrations at Funerals and Memorial Services Act. Any surviving member of the deceased person's immediate family who is threatened with loss or injury by reason of a violation described in Section 3 of the Demonstrations at Funerals and Memorial Services Act is entitled to sue for and have injunctive relief in any court of competent jurisdiction against any damage or threatened loss or injury by reason of a violation thereof.

History: Laws 2007, ch. 254, § 5.

ANNOTATIONS

Emergency clause. — Laws 2007, ch. 254, § 7 contained an emergency clause and was approved on April 2, 2007.

Severability. — Laws 2007, ch. 254, § 6 provided for the severability of the Demonstrations at Funerals and Memorial Services Act if any part or application thereof is held invalid.

ARTICLE 21
Sabotage and Disloyalty

30-21-1. Sabotage.

Sabotage consists of:

A. intentionally destroying, impairing, injuring, interfering or tampering with real or personal property with reasonable grounds to believe that such act will delay or interfere with the preparation of the United States or of any of the states for defense or for war or with the prosecution of war by the United States; or

B. intentionally making or causing to be made or omitting to note on inspection any defect in any article or thing with reasonable grounds to believe that such article or thing is intended to be used in connection with the preparation of the United States or any of the states for defense or war or for the prosecution of war by the United States.

Whoever commits sabotage is guilty of a second degree felony.

History: 1953 Comp., § 40A-21-1, enacted by Laws 1963, ch. 303, § 21-1.

ANNOTATIONS

Cross references. — For conspiracy to commit a felony, *see* 30-28-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 70 Am. Jur. 2d Sedition, Subversive Activities and Treason § 61.

Validity of legislation against sabotage, 1 A.L.R. 336, 20 A.L.R. 1535, 73 A.L.R. 1494.

93 C.J.S. War and National Defense § 57.

30-21-2. Protection of rights of employees.

Nothing in this article [30-21-1 to 30-21-5 NMSA 1978] shall be construed to impair, curtail or destroy the lawful rights of employees and their representatives to self-organization, or [to] form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

History: 1953 Comp., § 40A-21-2, enacted by Laws 1963, ch. 303, § 21-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

30-21-3. Detention or arrest of trespassers upon restricted areas.

Any peace officer or person employed as a watchman, guard or in a supervisory capacity on premises utilized in the manufacture, transportation or storage of any product in the preparation of the United States or of any of the states for defense or for war, or the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water or of any public utility, may stop any person found on such premises to which entry without permission is forbidden and where such premises are clearly posted with signs prohibiting entry, and may detain such person for the purpose of demanding the name, address and the individual's business in such place. If such peace officer or employee has reason to believe from the answers or conduct of the

person so interrogated that the person detained has no right to be in such destricted [restricted] area, he shall forthwith either release such person, or may arrest the individual without a warrant on the charge of committing the crime of criminal trespass. In the event such peace officer or employee shall arrest such person found in the restricted area he shall forthwith turn the individual over to a peace officer who may arrest the individual without a warrant on the charge of committing criminal trespass.

History: 1953 Comp., § 40A-21-3, enacted by Laws 1963, ch. 303, § 21-3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For criminal trespass, *see* 30-14-1 NMSA 1978.

30-21-4. Improper use of official symbols.

Improper use of official symbols consists of:

A. the use of the state or national flags for any purpose other than the purposes for which it was designed by law;

B. offering any insult by word or act to the state or national flags; or

C. using the state or national flags for advertising purposes by painting, printing, stamping or otherwise placing thereon or affixing thereto any name or object not connected with the patriotic history of the nation or the state.

Whoever commits improper use of official symbols is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-21-4, enacted by Laws 1963, ch. 303, § 21-4.

ANNOTATIONS

Law reviews. — For comment, "Official Symbols: Use and Abuse," see 1 N.M.L. Rev. 352 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 Am. Jur. 2d Flag §§ 3 to 5.

Flag desecration: what constitutes violation of flag desecration statutes, 41 A.L.R.3d 502.

36A C.J.S. Flags § 2.

30-21-5. Improper use of official anthems.

Improper use of official anthems consists of singing, playing or rendering "The Star Spangled Banner" or "Oh Fair New Mexico" in any public place or assemblage in this state except as an entire or separate composition or number.

Whoever commits improper use of official anthems is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-21-5, enacted by Laws 1963, ch. 303, § 21-5.

ARTICLE 22
Interference with Law Enforcement

30-22-1. Resisting, evading or obstructing an officer.

Resisting, evading or obstructing an officer consists of:

A. knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;

B. intentionally fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or evasion has knowledge that the officer is attempting to apprehend or arrest him;

C. willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle; or

D. resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties.

Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-1, enacted by Laws 1963, ch. 303, § 22-1; 1981, ch. 248, § 1.

ANNOTATIONS

Cross references. — For authority of conservation officers to enforce these provisions under emergency circumstances, *see* 17-2-19 NMSA 1978.

Lesser included offense. — Resisting or abusing a peace officer is a lesser included offense within battery on a peace officer under the Blockburger test. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007 NMCERT 004, 141 N.M. 568, 158 P.3d 458.

Resisting an officer is a lesser included offense of peace officer battery; the only difference between the two is that peace officer battery requires the resisting or abusing to culminate in a touching, while resisting does not. *State v. Padilla*, 1983-NMCA-096, 101 N.M. 78, 678 P.2d 706, *aff'd in part, rev'd in part on other grounds*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686, *aff'd* sub nom. Fugate v. New Mexico, 470 U.S. 904, 105 S. Ct. 1858 (1985), 84 L. Ed. 2d 777.

Conduct constituting an offense. — Driving for two miles without responding to a police officer's emergency lights is behavior which violates Section 30-22-1C NMSA 1978. *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157 (10th Cir. 2003).

Violation of Subsection C. — If a stopped driver knows that an officer is trying to effectuate an arrest, then Section 30-22-1B NMSA 1978 applies if the driver tries to leave. *State v. Baldonado*, 1992-NMCA-140, 115 N.M. 106, 847 P.2d 751, cert. denied, 115 N.M. 145, 848 P.2d 531 (1993).

No probable cause. — Where police officers went to defendant's home to interview defendant about defendant's co-worker who was suspected to be involved in a rape; defendant was cooperative and invited the officers into defendant's home; during the interview, defendant decided to end the interview and asked the officers to leave; when the officers refused, defendant became agitated, and the officers arrested defendant because the officers speculated that defendant could have been more cooperative and shared more information about the suspect, the officers did not have probable cause to arrest defendant for resisting, evading, obstructing, or refusing to obey an officer. *Manzanares v. Higdon*, 575 F. 3d 1135 (10th Cir. 2009).

Where police officers were investigating defendant's child for commission of a felony; defendant told the officers that defendant did not know the child's birth date and address; when the officers asked defendant for identification, defendant responded that the identification was in defendant's house; and defendant started walking toward defendant's house, the officers did not have probable cause to arrest defendant for resisting, evading or obstructing an officer. *Keylon v. City of Albuquerque*, 535 F. 3d 1210 (10th Cir. 2008).

The word "apprehend" includes a situation in which an officer is attempting to briefly detain a person for questioning based on reasonable suspicion. *State v. Gutierrez*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

Sufficient evidence. — Where a police officer had one handcuff on defendant when defendant pulled away and the officer had to forcibly finish handcuffing defendant, the evidence was sufficient to support defendant's conviction for resisting, evading or obstructing an officer. *State v. Wilson*, 2007-NMCA-111, 142 N.M. 737, 169 P.3d 1184, cert. denied, 2007-NMCERT-008, 142 N.M. 435, 166 P.3d 1089.

Where police officers arrested defendant for DWI; defendant argued with the officers and refused to cooperate; defendant would not put defendant's legs into the police car

preventing the officers from closing the door; when the officers forced defendant's legs into the car, defendant placed defendant's head in a position that prevented the officer from closing the door; defendant intentionally fell out of the car; defendant twice kicked one officer, the evidence was sufficient to support defendant's conviction of resisting and abusing an officer. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where police officers were investigating potential drug manufacturing; the officers were in plain clothes and driving unmarked vehicles; the officers were following defendant when defendant made a U-turn and stopped; one officer approached defendant's vehicle, displayed a badge, and said that the officer wanted to talk with defendant; defendant asked the officer what was going on and the officer again identified the officer as a police officer; defendant began creeping defendant's vehicle toward the officer; the other officer then approached defendant's vehicle, identified the officer as a police officer and displayed a badge; and when the other officer opened the door of defendant's vehicle and told the occupants to show their hands, defendant accelerated the vehicle and the other officer was thrown from the vehicle, there was sufficient evidence to support defendant's conviction of resisting, evading, and obstructing an officer. *State v. Akers*, 2010-NMCA-103, 149 N.M. 53, 243 P.3d 757.

Where the defendant and the defendant's vehicle matched the descriptions given to the officer by the victim of stalking; the officer asked the defendant to stop; the defendant said he needed to use the bathroom in the house where he had parked his vehicle; the officer followed the defendant into the house, but the defendant ran out the back door after he turned and saw the officer behind him and began to run, the officer had reasonable suspicion to temporarily detain the defendant for questioning and the defendant did not have the right to walk away from the officer. *State v. Gutierrez*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

Section not vague. — There is no merit to claim that this section is vague on its face. *State v. Andazola*, 1981-NMCA-002, 95 N.M. 430, 622 P.2d 1050.

Section places those interfering with officer on notice of criminal sanctions. — In clear simple language, this statute puts everyone on notice that one would be exposed to criminal sanctions if he resisted or abused any peace officer who was engaged in the lawful discharge of his duties. *State v. Andazola*, 1981-NMCA-002, 95 N.M. 430, 622 P.2d 1050.

Conviction under this section does not bar civil rights claim. — Plaintiff's action under 42 U.S.C.S. § 1983 alleging that police officers used excessive force against him would not be barred by his conviction for resisting arrest, whether based on Subsection A or Subsection D. *Martinez v. City of Albuquerque*, 184 F.3d 1123 (10th Cir. 1999).

Construction of former law. — Former 40-31-4 and 40-31-5, 1953 Comp., made it unlawful to obstruct justice, the former relating to obstructing an officer in serving

process and the latter to resisting or abusing an officer while executing the duties of his office. *City of Clovis v. Archie*, 1955-NMSC-105, 60 N.M. 239, 290 P.2d 1075.

Applicability of former law. — Kearny Code, Crimes and Punishments, art. 3, § 4, prescribing penalty for obstruction or assaulting officer serving process was not applicable where the sheriff was not armed with process. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211 (decided under prior law).

Resisting sheriff formerly serious offense. — Under former law, resisting a sheriff was itself a felony. *State v. Smelcer*, 1924-NMSC-059, 30 N.M. 122, 228 P. 183; *see State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211 (resistance to a sheriff making a lawful arrest, but not armed with process, a misdemeanor) (decided under prior law).

Double jeopardy. — Where defendant led police on a high-speed automobile chase and then got out of his car and fled on foot, his acts supported only one crime founded on resisting, evading or obstructing an officer, and vacation of his convictions for two counts of evading an officer was required. *State v. Lefebre*, 2001-NMCA-009, 130 N.M. 130, 19 P.3d 825.

Jurisdictional exception. — The jurisdictional exception to double jeopardy permitted defendant's prosecution in the district court on a charge of peace officer battery, after he had pleaded guilty to several misdemeanors, including resisting arrest, in the magistrate court. *State v. Padilla*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686, *aff'd* sub nom., Fugate v. New Mexico, 470 U.S. 904, 105 S. Ct. 1858, 84 L. Ed. 2d 777 (1985).

Conviction varying from crime charged in information. — The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, *i.e.*, aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857, cert. denied, 107 N.M. 132, 753 P.2d 1320.

"Abusing" speech equated to "fighting" words. — "Abusing" speech in Subsection D covers only speech that can be called "fighting" words. Any other interpretation of that subsection applied to speech would render it unconstitutional. *State v. Wade*, 1983-NMCA-084, 100 N.M. 152, 667 P.2d 459.

"Fighting" words are those which tend to incite an immediate breach of the peace. *State v. Wade*, 1983-NMCA-084, 100 N.M. 152, 667 P.2d 459.

Self-defense distinguished from resisting unlawful arrest. — The right of self-defense against a police officer is a concept different from the right to resist an unlawful arrest, in that self-defense is for the purpose of protecting a person's bodily integrity and health, whereas the purpose of resisting an unlawful arrest is to prevent the arrest.

State v. Kraul, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Limits of right to self-defense. — One has a right to defend oneself from a police officer, whether the attempted arrest is lawful or unlawful; this right, however, is limited, so that one may defend oneself against excessive use of force by the officer, but one may not resort to self-defense when the officer is using necessary force to effect an arrest. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Involuntary manslaughter while resisting arrest. — Instruction that killing an officer while resisting a lawful arrest was murder in first or second degree was error, since resistance to arrest, where sheriff was not armed with process, was a misdemeanor and death without malice resulting therefrom was involuntary manslaughter. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211.

Lesser included offense instruction. — In a prosecution for aggravated assault on a peace officer, since there was evidence that resisting in violation of either Subsection B or D was the highest degree of crime committed, the defendant was entitled to a charge on the lesser offense. *State v. Diaz*, 1995-NMCA-137, 121 N.M. 28, 908 P.2d 258, cert. denied, 120 N.M. 828, 907 P.2d 1009.

Instruction on self-defense. — Defendant had a limited right of self-defense against police officer, and was entitled to an instruction on that limited right, which the instruction did not cover since it went only to the arrest and did not refer to the right to defend against excessive force whether or not the arrest was unlawful. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Defense of another against excessive police force is a viable defense. — The right to defense of another against a police officer is not absolute; it does not exist if the officer is using necessary force to effect an arrest. However, a defendant is entitled to a defense of another jury instruction if an officer used force against another that was unreasonable and unnecessary. *State v. Jones*, 2020-NMCA-029.

Where defendant was charged with battery upon a peace officer and resisting or abusing an officer, and where defendant requested a defense of another jury instruction, the district court erred in denying the request and in finding that defending another against excessive force by a police officer was not a viable defense, because defense of another against excessive police force is a viable defense and reasonable minds could differ as to whether the officers used excessive force in this case. *State v. Jones*, 2020-NMCA-029.

Acquittal bars retrial for battery. — After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery

on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. *State v. Orosco*, 1982-NMCA-181, 99 N.M. 180, 655 P.2d 1024.

Evidence insufficient for conviction. — In the absence of evidence that defendant verbally resisted, evaded or obstructed a police officer, her refusal to allow the officer admission into her home could not be considered unlawful, and the trial court erred in denying her motion for a directed verdict. *State v. Prince*, 1999-NMCA-010, 126 N.M. 547, 972 P.2d 859.

Insufficient evidence of evading an officer. — Where defendant was charged with intentionally fleeing, attempting to evade or evading an officer after taking a gun inside a Las Cruces club, there was insufficient evidence to support defendant's conviction, because although defendant refused to comply with the officer's orders to surrender from inside the club, the state failed to present any evidence that defendant fled, attempted to evade, or evaded the officers before they were able to arrest him, and there was no evidence presented to suggest that defendant surreptitiously tried to escape from the building, such as out the back or side door, in order to evade arrest. *State v. Jimenez*, 2017-NMCA-039, cert. denied.

Burden of proof. — In order to convict defendant of evading and eluding a police officer, the state had the burden of proving that officer was a peace officer engaged in the lawful discharge of his duty and defendant, with knowledge that officer was attempting to apprehend or arrest him, fled, attempted to evade, or evaded officer. *State v. Gutierrez*, 2005-NMCA-093, 138 N.M. 147, 117 P.3d 953, *aff'd in part, rev'd in part*, 2007-NMSC-033, 142 N.M. 1, 162 P.3d 156.

Reversal was warranted where defendant was convicted of a crime that the state had not charged. — Where defendant was charged and convicted of resisting, evading, or obstructing an officer pursuant to § 30-22-1(D) NMSA 1978, but where, at trial, the state used, with some customization, the alternative from the uniform jury instruction that corresponds to § 30-22-1(C) NMSA 1978, the jury was not instructed on the "resisting or abusing" elements of § 30-22-1(D) that differentiates the offense from other forms of resisting, evading, or obstructing an officer. Reversal was therefore warranted, because the jury convicted defendant of a crime for which he had not been charged. *State v. Ocon*, 2021-NMCA-032, cert. denied.

Law reviews. — For comment on State v. Selgado, 76 N.M. 187, 413 P.2d 469 (1966), see 7 Nat. Resources J. 119 (1967).

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 Procedure, see 20 N.M.L. Rev. 285 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 10 to 17.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

What constitutes obstructing or resisting officer, in absence of actual force, 66 A.L.R.5th 397.

Defenses to state obstruction of justice charge relating to interfering with criminal investigation or judicial proceeding, 87 A.L.R.5th 597.

67 C.J.S. Obstructing Justice §§ 7, 10-14.

30-22-1.1. Aggravated fleeing a law enforcement officer.

A. Aggravated fleeing a law enforcement officer consists of a person willfully and carelessly driving a vehicle in a manner that endangers the life of another person after being given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed law enforcement officer in an authorized emergency vehicle pursuant to Section 66-7-6 NMSA 1978 in pursuit in accordance with the provisions of the Law Enforcement Safe Pursuit Act [29-20-1 to 29-20-4 NMSA 1978].

B. Whoever commits aggravated fleeing a law enforcement officer that does not result in injury or great bodily harm to another person is guilty of a fourth degree felony.

C. Whoever commits aggravated fleeing a law enforcement officer that results in injury to another person is guilty of a third degree felony.

History: Laws 2003, ch. 260, § 5; 2022, ch. 56, § 27.

ANNOTATIONS

The 2022 amendment, effective May 18, 2022, added penalties for aggravated fleeing a law enforcement officer; in Subsection A, after "by a uniformed law enforcement officer in an", deleted "appropriately marked law enforcement vehicle" and added "authorized emergency vehicle pursuant to Section 66-7-6 NMSA 1978"; in Subsection B, after "fleeing a law enforcement officer", added "that does not result in injury or great bodily harm to another person"; and added Subsection C.

Compliance with the policies of the Law Enforcement Safe Pursuit Act (Section 29-20-1 NMSA 1978) is not an essential element of the crime of aggravated fleeing. *State v. Padilla*, 2008-NMSC-006, 143 N.M. 310, 176 P.3d 299.

Compliance with local policy is not an essential element of aggravated fleeing. — Where defendant was charged with aggravated fleeing, the district did not abuse its discretion in excluding evidence relating to the county's high speed pursuit policy, because a local policy adopted pursuant to the Law Enforcement Safe Pursuit Act

(Section 29–20–1 NMSA 1978] is not an element of the crime of aggravated fleeing. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Proof of compliance with the Pursuit Act (Law Enforcement Safe Pursuit Act, Section 29–20–1 NMSA 1978). — If defendant claims that a pursuit was not made in accordance with the Pursuit Act, the State must offer evidence to prove that the local pursuit policy complies with the requirements of the Act. *State v. Ross*, 2007-NMCA-126, 142 N.M. 597, 168 P.3d 169, cert. granted, 2007-NMCERT-009, 142 N.M. 716, 169 P.3d 409.

Substantial evidence. — Where defendant, who was being chased by a police officer, drove at speeds exceeding 100 miles per hour through residential areas and ignored and drove through several stop signs also while traveling at excessive speeds; and the chase ended only when defendant struck a curb and damaged defendant's vehicle rendering it immobile, there was sufficient evidence that defendant drove willfully and carelessly, endangering the life of other persons. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Sufficient evidence of aggravated fleeing. — In defendant's trial for first-degree murder for the killing of a police officer and aggravated fleeing, there was sufficient evidence to support the convictions where the evidence established that during a traffic stop, the officer attempted to approach the vehicle when the vehicle suddenly accelerated out of a parking lot, and where defendant later brought the vehicle to a stop and waited for the pursuing officer to catch up, and when the officer approached the vehicle a second time, defendant fired his gun four times at the officer, and that upon fleeing from the scene of the shooting, defendant drove his vehicle away from a uniformed law enforcement officer in an appropriately marked law enforcement vehicle and in a manner that endangered the lives of others. Defendant's flight from the fallen officer was part of a continuing course of aggravated fleeing. *State v. Romero*, 2019-NMSC-007.

Aggravated fleeing does not require that an identifiable person was actually endangered as a result of the driver's conduct. — Where defendant was convicted of aggravated fleeing a law enforcement officer after he led an officer on a high-speed chase through rain-slicked streets during the early morning hours, and where defendant argued that there was insufficient evidence to support his conviction because the crime of aggravated fleeing requires proof that a defendant drove in a manner that actually endangered the life of another individual and in this case, no person was actually in the vicinity of the pursuit, the New Mexico supreme court held that there was sufficient evidence to support defendant's conviction because the statute requires proof that the defendant drove so dangerously that his or her conduct endangered the lives of others, but does not require that an identifiable person was actually endangered as a result of the defendant's flight from law enforcement. It is the conduct of fleeing the police by driving dangerously, not the result of the conduct, that violates the aggravated fleeing statute, and in this case there was evidence that defendant displayed dangerous driving

that put people in the community at risk of harm when he sped at seventy miles per hour on town roads, refused to slow down while passing an apartment complex, and drove onto a sidewalk and crashed into a road sign. *State v. Vest*, 2021-NMSC-020, *rev'g* 2018-NMCA-060, 428 P.3d 287.

Actual endangerment of another person is an essential element of aggravated fleeing. — Where defendant was charged with aggravated fleeing of a law enforcement officer following a high-speed chase in which defendant drove at least seventy miles per hour through a residential area, on a wet and slippery road, with at least one curve in it, crashing the car into a traffic sign, rendering the car inoperable, and getting out of the car and leaving it in the middle of the roadway, the state failed to present sufficient evidence to prove that defendant's flight from police actually endangered another person when the uncontroverted testimony was that defendant never encountered any other motorists on the roadway. *State v. Vest*, 2018-NMCA-060, cert. granted.

Where defendant was charged with aggravated fleeing of a law enforcement officer following a high-speed chase in which defendant drove his motorcycle through parking lots, drove on several side streets in which he ran several stop signs, and drove on the highway exceeding the speed limit, causing other motorists to pull off the road, the state failed to present sufficient evidence to prove that defendant endangered another person when the uncontroverted testimony of two participating officers was that the pursuit did not create a public safety issue or place any person in danger. *State v. Chavez*, 2016-NMCA-016, 365 P.3d 61, *vacated by* N.M. Sup. Ct. Order No. S-1-SC-35614 (Aug. 24, 2016).

"Uniformed law enforcement officer" construed. — The meaning of "uniform" is a dress of a distinctive design or fashion that serves to identify the individual wearing it as a law enforcement officer. *State v. Montano*, 2020-NMSC-009, *aff'g in part and rev'g in part* 2018-NMCA-047, 423 P.3d 1 and *rev'g State v. Martinez*, A-1-CA-35111, mem. op. (May 14, 2018) (nonprecedential).

"Appropriately marked law enforcement vehicle" construed. — A plain meaning construction of "appropriately marked law enforcement vehicle" contemplates that such a vehicle must bear a character, device, label, brand, seal, or other sign that not only makes it suitable to be driven by a law enforcement officer, but also sets it apart as specially suitable to law enforcement use. *State v. Montano*, 2020-NMSC-009, *aff'g in part and rev'g in part* 2018-NMCA-047, 423 P.3d 1 and *rev'g State v. Martinez*, A-1-CA-35111, mem. op. (May 14, 2018) (nonprecedential).

Statute requires officer to be in uniform and in an appropriately marked law enforcement vehicle. — In consolidated cases where both defendants were charged with aggravated fleeing from a law enforcement officer where the deputies in each case were driving unmarked patrol vehicles that bore no insignias, stripes, decals, labels, seals, symbols, or other pictorial signs or lettering indicating their identity as law enforcement vehicles, and where in one case the officer's attire included a dress shirt with tie, dress slacks, and dress shoes, the New Mexico supreme court held that the

officer's attire was not a "uniform" as required by this section because his clothing did not in any way distinguish the deputy as a law enforcement officer, and that the vehicles that the deputies were driving were not "appropriately marked law enforcement vehicles" because they bore no insignias, stripes, decals, labels, seals, symbols or other pictorial signs or lettering indicating their identity as law enforcement vehicles. *State v. Montano*, 2020-NMSC-009, *aff'g in part and rev'g in part* 2018-NMCA-047, 423 P.3d 1 and *rev'g State v. Martinez*, A-1-CA-35111, mem. op. (May 14, 2018) (nonprecedential).

Plain meaning of "uniformed law enforcement officer". — A "uniformed law enforcement officer" consists of an officer wearing clothing of a distinctive design or fashion clearly indicating the peace officer's official status and distinguishing the wearer from the general public. *State v. Montano*, 2018-NMCA-047, cert. granted.

Plain meaning of "appropriately marked law enforcement vehicle". — A law enforcement vehicle that is "appropriately marked" is marked in a manner that is suitable for being driven by a law enforcement officer and identified as such. *State v. Montano*, 2018-NMCA-047, cert. granted.

Intent of the requirements that law enforcement officer be in uniform and in an appropriately marked vehicle. — The intent of this section's uniform and appropriately marked law enforcement vehicle requirements is to establish a defendant's knowledge that he is fleeing a police officer. *State v. Montano*, 2018-NMCA-047, cert. granted.

Where a deputy sheriff, working as an investigator and wearing a dress shirt with tie, dress slacks and dress shoes and displaying his badge on the breast pocket of his shirt, and driving a Ford expedition that had no decals, striping, insignia, or lettering, but had a government license plate, wigwag headlights, red and blue flashing lights mounted on the grill and the top of the rear window, flashing brake lights, and a siren, attempted to stop defendant's vehicle for a vehicle registration infraction by utilizing the red and blue flashing lights on his vehicle and siren, and where defendant failed to stop, drove through a residential neighborhood at speeds that exceeded the posted speed limit, and failed to stop at stop signs and intersections, there was insufficient evidence to convict defendant of aggravated fleeing, because although the deputy's vehicle was "appropriately marked" as that term is used in 30-22-1.1(A) NMSA 1978 because the emergency lights and siren identified the vehicle as a law enforcement vehicle, the deputy was not "uniformed" as that term is used in 30-22-1.1(A) because the deputy's clothing, even with his badge affixed to his shirt, was not sufficient to identify him as a law enforcement officer. *State v. Montano*, 2018-NMCA-047, cert. granted.

30-22-2. Refusing to aid an officer.

Refusing to aid an officer consists of refusing to assist any peace officer in the preservation of the peace when called upon by such officer in the name of the United States or the state of New Mexico.

Whoever commits refusing to aid an officer is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-22-2, enacted by Laws 1963, ch. 303, § 22-2.

ANNOTATIONS

Cross references. — For provisions authorizing officer to call on others for aid in execution of process, and setting penalty for refusal to provide such aid when called upon, *see* 29-1-7, 29-1-8 NMSA 1978.

Refusing assistance to sheriff. — A sheriff or his legally constituted deputy could call on any citizen or citizens to assist him in the execution of his office, and any person who refused such assistance without sufficient excuse was subject to penalty. *Territory v. Taylor*, 1903-NMSC-003, 11 N.M. 588, 71 P. 489.

Grounds for summoning posse. — The grounds for summoning the posse comitatus were found in the common law and statutes which were largely declaratory thereof and the court did not have authority to invest the sheriff with further grounds. *Eaton v. Bernalillo Cnty*., 1942-NMSC-040, 46 N.M. 318, 128 P.2d 738.

30-22-2.1. Entry into domestic violence safe house or shelter; search warrant.

A. It is not a violation of Section 30-22-1 or Section 30-22-4 NMSA 1978 for a person who is a member, resident, employee or volunteer of or is otherwise associated with a domestic violence safe house or shelter to request that a law enforcement officer show a valid search warrant before allowing the officer to enter the domestic violence safe house or shelter. Nothing in this section shall prevent a law enforcement officer from executing a valid search warrant.

B. Prior to attempting to serve an arrest warrant within a domestic violence safe house or shelter, a law enforcement officer shall obtain a valid search warrant, unless exigent circumstances exist necessitating immediate entry.

History: Laws 2009, ch. 84, § 1.

ANNOTATIONS

Effective dates. — Laws 2009, ch. 84 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 19, 2009, 90 days after the adjournment of the legislature.

30-22-3. Concealing identity.

Concealing identity consists of concealing one's true name or identity, or disguising oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty or the exercise of his rights under the laws of the United States or of this state.

Whoever commits concealing identity is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-22-3, enacted by Laws 1963, ch. 303, § 22-3.

ANNOTATIONS

Constitutionality. — This section is not unconstitutionally vague on the basis that it does not provide a time limit within which one must disclose one's identity. *State v. Dawson*, 1999-NMCA-072, 127 N.M. 472, 983 P.2d 421.

Time for response to request for identification. — This section requires a person to furnish identifying information immediately upon request or, if the person has reasonable concerns about the validity of the request, so soon thereafter as not to cause substantial inconvenience or expense to law enforcement officers. *State v. Dawson*, 1999-NMCA-072, 127 N.M. 472, 983 P.2d 421.

Concealing information other than true name. — Identity is not limited to name alone; thus, in the context of a valid traffic stop, a failure to provide the information contained in a driver's license (address, date of birth and social security number) falls within the reach of this section regardless of whether a driver also provides his or her true name. *State v. Andrews*, 1997-NMCA-017, 123 N.M. 95, 934 P.2d 289.

Information supplied during traffic stop. — This section is sufficiently definite, in the context of a valid traffic stop, so that ordinary drivers would understand that they had to provide more than just a name, and the authority to request such identification does not encourage arbitrary and discriminatory law enforcement. *State v. Andrews*, 1997-NMCA-017, 123 N.M. 95, 934 P.2d 289.

Use of section as defense to tort. — The defendant was entitled to qualified immunity since the facts and circumstances within his knowledge would have led a reasonable officer to conclude that the plaintiff concealed his identity in violation of this section. *Albright v. Rodriquez*, 51 F.3d 1531 (10th Cir. 1995).

Evidence sufficient for conviction. — Since the overwhelming evidence was that the defendant responded with profanity and recalcitrance to multiple requests that he produce some identification and a person genuinely puzzled by those requests most likely would have queried the officers rather than responding belligerently, the record contains sufficient evidence for the district court to reasonably conclude the defendant violated both 30-20-1 NMSA 1978 and this section. *United States v. Stenzel*, 49 F.3d 658 (10th Cir.), cert. denied, 516 U.S. 840, 116 S. Ct. 123, 133 L. Ed. 2d 73 (1995).

Sufficient evidence of concealing identity. — Where a law enforcement officer, in response to a report of a male subject acting suspiciously, observed defendant jumping back and forth over the fence of a business establishment in the early hours of the morning, and where defendant declined to give the officer his name, there was sufficient evidence to find that the officer was acting in the legal performance of her duty as a

police officer in stopping defendant, and that defendant concealed his name or identity with the intent to obstruct, hinder or delay the officer's investigation. *State v. Ortiz*, 2017-NMCA-006, cert. denied.

"Legal performance of duty" construed. — This section mandates that the officer asking for identity be acting in the "legal performance of his duty," which requires that the state prove that the officer had reasonable suspicion to detain and question a defendant. *State v. Aguilar*, 2021-NMCA-018, cert. denied.

The evidence of reasonable suspicion was insufficient to support defendant's concealing identity conviction. — Where defendant was charged with possession of a controlled substance and concealing identity after a restaurant manager called police to report that a group of people, which included defendant, was engaged in possible drug activity at the restaurant, and where defendant filed a motion to suppress evidence seized from him following his arrest, claiming that reasonable suspicion of the commission of a crime is a required element of concealing identity, and that the state failed to introduce sufficient evidence at trial to prove that the arresting officer had reasonable suspicion, defendant's conviction for concealing identity was not supported by substantial evidence, because a detention for questioning about identity is not within a "legal performance of the officer's duty" unless that officer has reasonable suspicion that a crime has been or is being committed, and in this case, the only evidence the officer offered at trial was that he was dispatched to the restaurant because the restaurant's manager suspected that a group of people, which included defendant, were using drugs inside the restroom. This evidence is insufficient to establish that the officer had a reasonable suspicion, based on the facts and circumstances known to him, that defendant had criminally trespassed on the restaurant premises or that defendant was engaged in drug activity. *State v. Aguilar*, 2021-NMCA-018, cert. denied.

Officer must have a reasonable suspicion of underlying crime before arresting for concealing identity. — Where plaintiff, an independent journalist who films content for his YouTube channel, brought a federal civil action against the city of Artesia and an Artesia police officer, alleging that his arrest for concealing his identity while filming a refinery in Artesia, New Mexico while on public property violated his constitutional rights, and where defendants moved for summary judgment, claiming that the arresting officer did not have to identify a specific crime to find reasonable suspicion existed, summary judgment was denied because this section requires that before an officer arrests an individual for concealing identity, the officer must have at least reasonable suspicion that the individual was involved in some predicate, underlying crime, and in this case, a genuine issue of material fact existed as to whether the police officer had reasonable suspicion to investigate, and thus demand identification from, the independent journalist who was filming a refinery from a public location while walking along a public way. *Bustillos v. City of Artesia*, 591 F. Supp.3d 1051 (D. N.M. 2022).

Qualified immunity of arresting officer. — In a civil rights action against a police officer who arrested the plaintiff for failing to provide proper identification during a traffic

stop, the officer did not violate the plaintiff's clearly established rights and was entitled to qualified immunity. *Nagol v. New Mexico*, 923 F. Supp. 190 (D.N.M. 1996).

Constitutional challenge not ripe. — Since the plaintiff was arrested but not convicted for a violation of this section and failed to show a credible threat that he might be arrested under this section in the future, he could not challenge the validity of the section in federal court. *Nagol v. New Mexico*, 923 F. Supp. 190 (D.N.M. 1996).

Am. Jur. 2d, A.L.R. and C.J.S. references. — What amounts to disguise, 1 A.L.R. 642.

Criminal liability for false personation during stop for traffic infraction, 26 A.L.R.5th 378.

30-22-4. Harboring or aiding a felon.

Harboring or aiding a felon consists of any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment.

In a prosecution under this section it shall not be necessary to aver, nor on the trial to prove, that the principal felon has been either arrested, prosecuted or tried.

Whoever commits harboring or aiding a felon is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-4, enacted by Laws 1963, ch. 303, § 22-4.

ANNOTATIONS

Constitutionality. — This section is not unconstitutional for vagueness. *State v. Rogers*, 1980-NMCA-059, 94 N.M. 527, 612 P.2d 1338, cert. denied, 94 N.M. 629, 614 P.2d 546 .

Common law. — This section grew out of the common law of accessories after the fact. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

The offense of harboring a felon had its genesis in the common law offense of accessory after the fact. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

Classifications reasonable. — Exemption of certain named groups of persons from application of this section on the basis of relationship to the felon are reasonable classifications and do not violate the equal protection clauses of the New Mexico and

United States constitutions. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Elements of offense. — Under this section and the common law applicable to accessories, in order to convict a defendant as an accessory, the state must prove that a felony has been committed and that the defendant knew the offender committed a felony. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

This section requires that the state prove that a specific felony has been committed, whether or not the perpetrator has been arrested, prosecuted, or tried. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

State failed to prove that defendant knew that the person that she allegedly "harbored" had committed a felony; the state had to prove that the person had actually committed the felony, and also had to prove that defendant knew that such felony had been committed by that person. *State v. Maes*, 2003-NMCA-054, 133 N.M. 536, 65 P.3d 584, cert. denied, 133 N.M. 593, 66 P.3d 962.

To aid means to assist, support or help. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

"Felon". — The legislature intended to include, within the meaning of the word "felon", felons already convicted but who are wanted for punishment as well as persons who have committed a felony but who have not been arrested, prosecuted, or tried. *State v. Serna*, 1991-NMCA-102, 112 N.M. 738, 819 P.2d 688.

A felony under this section is a crime defined at law as a felony; the status of the person harbored or aided, such as a juvenile, is not the determinant. *State v. Contreras*, 2002-NMCA-031, 131 N.M. 651, 41 P.3d 919, cert. denied, 131 N.M. 737, 42 P.3d 842.

If revealing felon would also reveal spouse. — This section does not exempt a defendant from prosecution where she could not have revealed the presence of a felon in her house without also revealing the presence of her husband, another felon. *State v. Mobbley*, 1982-NMCA-122, 98 N.M. 557, 650 P.2d 841, cert. denied, 98 N.M. 590, 651 P.2d 636.

Crimes of harboring felon and conspiracy to harbor felon do not merge. *State v. Smith*, 1985-NMCA-011, 102 N.M. 512, 697 P.2d 512, cert. denied.

Harboring does not supersede crime of assisting escape. — The offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

Evidence sufficient. — Evidence that defendant's girl friend, with whom he lived, was present and witnessed shootings by him (even though she claimed not to have seen gun or observed shootings), was with defendant at the place of the shootings afterwards and later at the house in which they were apprehended, that she undertook to close door upon the arresting officer, and that she ran toward the front of the house while defendant secreted himself in a closet, together with all inferences reasonably deducible therefrom, supported conviction for aiding defendant with intent that he escape or avoid arrest. *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Law reviews. — For article, "The Advocate's Role in the Legal System," see 6 N.M.L. Rev. 1 (1975). State v. Maes, 2003-NMCA-054, 133 N.M. 536, 65 P.3d 584.

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. — 39 Am. Jur. 2d Harboring Criminals, § 1 et seq.

30-22-5. Tampering with evidence.

A. Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.

B. Whoever commits tampering with evidence shall be punished as follows:

(1) if the highest crime for which tampering with evidence is committed is a capital or first degree felony or a second degree felony, the person committing tampering with evidence is guilty of a third degree felony;

(2) if the highest crime for which tampering with evidence is committed is a third degree felony or a fourth degree felony, the person committing tampering with evidence is guilty of a fourth degree felony;

(3) if the highest crime for which tampering with evidence is committed is a misdemeanor or a petty misdemeanor, the person committing tampering with evidence is guilty of a petty misdemeanor; and

(4) if the highest crime for which tampering with evidence is committed is indeterminate, the person committing tampering with evidence is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-5, enacted by Laws 1963, ch. 303, § 22-5; 2003, ch. 296, § 1.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, redesignated the text of the former section as Subsection A and the preliminary language of Subsection B and added Paragraphs B(1) to (4).

Standard for sufficiency of evidence to support a tampering conviction. — Absent either direct evidence of a defendant's specific intent to tamper or evidence from which the factfinder may infer such intent, the evidence cannot support a tampering conviction. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Where the state alleged that defendant tampered with evidence based on the fact that defendant had a weapon at the scene of the crime, defendant used the weapon to kill someone, the weapon was removed from the scene of the crime, and the weapon was never recovered, the evidence was insufficient as a matter of law to support defendant's conviction of tampering with evidence because the state cannot convict a defendant of tampering with evidence simply because evidence that must have once existed cannot be found. *State v. Guerra*, 2012-NMSC-027, 284 P.3d 1076.

Sentencing under the "indeterminate crime" provision. — When the state seeks a conviction under Section 30-22-5 NMSA 1978, tampering with evidence of a capital, first or second degree felony, a determination that defendant tampered with evidence related to a capital, first or second degree felony must be made by the jury. Absent this determination, the court is limited to sentencing defendant under the "indeterminate crime" provision. *State v. Alvarado*, 2012-NMCA-089, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where defendant was charged with first degree murder and tampering with evidence; and the jury acquitted defendant of murder and convicted defendant of tampering with evidence, defendant was properly sentenced under the indeterminate crime provision of Section 30-22-5 NMSA 1978. *State v. Alvarado*, 2012-NMCA-089, *overruled by State v. Radosevich*, 2018-NMSC-028.

Factors that determine punishment are elements of tampering with evidence. — The factors listed in Subsection B of Section 30-22-5 NMSA 1978 are elements of the offense of tampering with evidence, rather than mere sentencing factors. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Where after defendant shot and killed the victim, defendant put the gun in a crawl space under the house; defendant was charged with second-degree murder and tampering with evidence of a capital crime or a first or second degree felony; and the jury instruction on tampering with evidence required the jury to find that defendant hid the gun in an effort to avoid being apprehended, prosecuted or convicted, but did not require the jury to find that the evidence that was tampered with related to a first or second degree felony, the jury instruction omitted an essential element of the crime that the gun was evidence of a capital crime or a first or second degree felony and violated

defendant's right under the sixth and fourteenth amendments to have a jury find all elements of the offense beyond a reasonable doubt. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Unconstitutional application of tampering with evidence statute. — Section 30-22-5(B)(4) NMSA 1978 cannot be constitutionally applied to impose greater punishment for commission of tampering where the underlying crime is indeterminate than the punishment prescribed under 30-22-5(B)(3) NMSA 1978 where the underlying crime is a misdemeanor or petty misdemeanor. *State v. Radosevich*, 2018-NMSC-028, *rev'g* 2016-NMCA-060, 376 P.3d 871, and *overruling State v. Jackson*, 2010-NMSC-032, 237 P.3d 754 and *State v. Alvarado*, 2012-NMCA-089.

Where defendant was convicted of fourth-degree tampering with evidence pursuant to 30-22-5(B)(4) NMSA 1978, although the tampering jury instruction did not identify an underlying offense, defendant's conviction for fourth-degree felony tampering with evidence was a denial due process of law, because to impose a greater penalty for commission of tampering pursuant to Subsection (B)(4), where the evidence does not establish the underlying offense, than for commission of tampering pursuant to 30-22-5(B)(3) NMSA 1978, where the evidence establishes an underlying misdemeanor offense, is both a denial of due process of law and a violation of the accused's right to have a jury determine guilt beyond a reasonable doubt on every element that may establish the range of permissible penalties. *State v. Radosevich*, 2018-NMSC-028, *rev'g* 2016-NMCA-060, 376 P.3d 871, and *overruling State v. Jackson*, 2010-NMSC-032, 237 P.3d 754 and *State v. Alvarado*, 2012-NMCA-089.

Elements of tampering with evidence. — The degree and identification of the underlying crime to which the tampering offense relates, if any, are elements of tampering that should be decided by the jury. As such, the underlying crime to which tampering relates, if any, should be identified in the tampering instruction and found by the jury. Tampering with evidence can also be a stand-alone crime that is not tied to a separate offense. Where there is no separate identified crime, the tampering offense is linked to an indeterminate crime. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd,* 2018-NMSC-028.

Where defendant was initially charged with assault with intent to commit murder and tampering with evidence, and where the district court directed a verdict on the charged offense of assault with intent to commit murder and then sua sponte instructed the jury on a new and different charge of aggravated assault with a deadly weapon after the close of evidence, the offense to which defendant's tampering was related failed for insufficient evidence, and defendant's conviction for aggravated assault with a deadly weapon was reversed, rendering the underlying offense for which defendant might have tampered to be an unidentified, indeterminate crime. The district court, therefore, wrongfully convicted defendant of having tampered with evidence of a third- or fourth-degree felony in the absence of such a finding by the jury. *State v. Radosevich*, 2016-NMCA-060, 376 P.3d 871, *rev'd,* 2018-NMSC-028.

Elements of tampering with evidence. — The crime of tampering with evidence is complete when the accused commits an act of tampering with the requisite specific intent to prevent the apprehension, prosecution, or conviction of any person, regardless of whether the accused's objective is a separate crime or whether a separate criminal investigation ever exists or could exist. *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *rev'g* 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where defendant, who was required as a condition of probation to submit to random urinalyses, reported to the probation office to provide a urine sample with a bottle of clean urine hidden in defendant's pants; the probation officer discovered the bottle of urine when it fell from defendant's pants; and defendant admitted to the probation officer that defendant attempted to provide a false urine sample, defendant was guilty of tampering with evidence. *State v. Jackson*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *rev'g* 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117, *overruled by State v. Radosevich*, 2018-NMSC-028.

This section applies only to conduct which interferes with the investigation or prosecution of a crime. *State v. Jackson*, 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117; *rev'd*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *overruled by State v. Radosevich*, 2018-NMSC-028.

Partial destruction of evidence. — Where the defendant swiped a portion of white powder on a laminated card that was found in the defendant's wallet with his thumb and ate the powder, the defendant was guilty of tampering with evidence and an instruction on the lesser included offense of attempted tampering with evidence was not warranted, even though the defendant had not destroyed all of the white powder on the card. *State v. McClennen*, 2008-NMCA-130, 144 N.M. 878, 192 P.3d 1255.

The fact that the defendant once held a weapon at a murder scene that was not recovered is no basis from which to infer that the defendant acted to destroy or hide physical evidence of a crime. *State v. Silva*, 2007-NMCA-117, 142 N.M. 686, 168 P.3d 1110, *aff'd in part, rev'd in part*, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

Double jeopardy. — Convictions for both possession of a controlled substance (cocaine) and tampering with evidence (cocaine) did not violate defendant's double jeopardy rights. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Separate convictions of tampering with evidence did not violate double jeopardy. — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, shot the victim twice in the head while the victim was still alive, poured gasoline on the victim, and lit the victim on fire; defendant gave the vehicle to a friend; and when the friend returned the vehicle, defendant set fire to the vehicle, defendant's three convictions of tampering with evidence were not based on unitary conduct and did not violate defendant's right to be

free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

Possession and tampering distinguished. — Possession of a controlled substance can be committed without tampering with evidence. Conversely, tampering with evidence, even if the evidence is illegal drugs, can be committed without possessing the drugs. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Possession of a controlled substance requires proof defendant knew or believed it was cocaine or some other substance that is regulated, which is not required to prove tampering, while tampering with evidence requires proof defendant intended to prevent the apprehension, prosecution, or conviction of herself or others, which is not required to prove possession. State v. Franco, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Removing documents from their proper files amounts to "hiding" evidence prohibited by this section. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

Hiding evidence. — There was ample evidence of intent to tamper with evidence where directories crucial to the proof of the prosecution's case were removed from the defendant's offices to the office of someone not affiliated with defendant's association. In short, evidence relevant to a criminal prosecution for securities fraud was hidden for the purpose of avoiding the prosecution. *State v. Shade*, 1986-NMCA-072, 104 N.M. 710, 726 P.2d 864, cert. quashed, 104 N.M. 702, 726 P.2d 856, *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Accomplice liability. — One may be found guilty of tampering on a theory of accomplice liability in aiding the destruction of evidence. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

Intent requirements can be met regardless of whether a crime has in fact been committed and regardless of any belief or knowledge by the police concerning crimes or suspected crimes, or cause by the police to apprehend an individual. *State v. Arellano*, 1977-NMCA-126, 91 N.M. 195, 572 P.2d 223.

Series of acts. — The state presented sufficient evidence to support defendant's three separate convictions of tampering with evidence, given that defendant sent a note to three co-defendants in an attempt to cover up the crimes. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Where defendant disposed of evidence at three distinct times in different locations, defendant's acts supported three convictions for tampering with evidence. *State v. DeGraff*, 2006-NMSC-011, 139 N.M. 211, 131 P.3d 61.

Sufficient evidence of tampering with evidence. — At defendant's trial for murder, kidnapping and tampering with evidence, where the state provided evidence

establishing that defendant beat the victim with a baseball bat, mopped up the victim's blood and hid the bat behind a washing machine, there was sufficient evidence to prove, beyond a reasonable doubt, that defendant intended to hide evidence from the police in order to avoid apprehension or prosecution. *State v. Telles*, 2019-NMCA-039, cert. denied.

Sufficient evidence of attempted tampering with evidence. — At defendant's trial for murder, kidnapping and tampering with evidence, where the state provided evidence establishing that defendant beat the victim with a baseball bat, moved the victim's body to a back room and then rolled the body in a carpet, there was sufficient evidence to prove, beyond a reasonable doubt, that defendant hid the body in an unsuccessful attempt to prevent the police from discovering the victim. *State v. Telles*, 2019-NMCA-039, cert. denied.

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

Where defendant drove a pickup toward a group of children who were trick-or-treating on Halloween; the chaperone pushed the children out of the way but was struck and killed; and after the accident, defendant removed decals on the truck and cleaned the front of the truck, the evidence was sufficient to support defendant's conviction of tampering with evidence. *State v. Melendrez*, 2014-NMCA-062, cert. denied, 2014-NMCERT-006.

Where defendant testified that after defendant shot and killed the victim and then put the gun in a crawl space under the house; an officer testified that the gun was found in a crawl space under the house that was concealed behind a dog house where the dog was chained; and after defendant was arrested, defendant telephoned a person and asked the person to go under the house where the dog was because there was a water leak, the evidence was sufficient to support defendant's conviction for tampering with evidence of a capital crime or a first or second degree felony. *State v. Herrera*, 2014-NMCA-007, cert. denied, 2013-NMCERT-012.

Where defendant directed an accomplice to remove stolen property from defendant's car; defendant saw the accomplice take the property from the car to another location; and defendant drove the car to defendant's parents' home for the purpose of disposing

of the property, the evidence was sufficient to support defendant's conviction for tampering with evidence under a theory of accomplice liability. *State v. Johnson*, 2004-NMSC-029, 136 N.M. 348, 98 P.3d 998, cert. denied, 543 U.S. 1177, 125 S. Ct. 1334, 161 L. Ed. 2d 162 (2005).

Where, in a vehicular homicide case, the victim was carrying a twelve pack of a common brand of beer; defendant's vehicle hit the victim; defendant's friend discovered part of a twelve pack of the same brand of beer lodged in the damaged grille of defendant's car; and the police found beer cans near the victim's body, a partial twelve pack of the same brand of beer and damaged vehicle parts in a bag in defendant's home, and the friend's fingerprints on one of the cans of beer and on the grille of defendant's car, the evidence was sufficient to support defendant's conviction for tampering with evidence. *State v. Guzman*, 2004-NMCA-097, 136 N.M. 253, 96 P.3d 1173, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Where, as defendant was approaching defendant's truck, police officers were converging on defendant to arrest defendant on a warrant; when defendant saw the police, defendant dropped bags of drugs behind the seat of the truck; and the officers discovered the drugs behind the seat of the truck, the evidence was sufficient to support defendant's conviction for tampering with evidence. *State v. Graham*, 2003-NMCA-127, 134 N.M. 613, 81 P.3d 556, *rev'd on other grounds*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285.

Where the non-conflicting testimony of witnesses established that while defendant was attending a party, defendant went to the victim's apartment to purchase marijuana and shot and killed the victim; defendant returned to the party with the gun in defendant's hand; defendant was showing off the gun at the party and stated that defendant had taken the gun from the victim and "blasted" the victim; defendant twice asked a person at the party to hide the gun; defendant tried unsuccessfully to sell the gun to two persons at the party; and the police were unable to find the gun, there was sufficient evidence to support defendant's conviction of tampering with evidence. *State v. Garcia*, 2011-NMSC-003, 149 N.M. 185, 246 P.3d 1057.

Where the defendant fled the scene of a shooting with the weapons used in the crime; attempted to flee New Mexico; falsely identified himself to police officers; and concealed the weapons in his car, the evidence was sufficient to support the defendant's conviction of tampering with evidence. *State v. Rudolfo*, 2008-NMSC-036, 144 N.M. 305, 187 P.3d 170.

Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant did not object when the primary co-conspirator expressed an intention to kill the victim and burn the victim's car; defendant purchased charcoal lighter fluid at the direction of the primary co-conspirator; defendant did not object when defendant's co-conspirators

put the victim in the trunk of the victim's car; while defendant remained at the residence, defendant's co-conspirators used the lighter fluid to burn the car and kill the victim; and the following day, defendant washed the victim's blood splatter from the living room blinds, there was sufficient evidence to convict defendant of tampering with evidence. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Sufficient evidence of tampering with evidence. — Where defendant was charged with first-degree murder in the shooting death of two victims, tampering with evidence and breaking and entering, there was sufficient evidence to support his conviction for tampering with evidence where the state presented testimony from a witness who saw defendant in the possession of a firearm just hours after the time when the murders were believed to have occurred, but did not have a gun when police stopped him soon thereafter. The jury could logically infer that defendant had a gun, which he disposed of between the time of the murders and when he was arrested, and then lied about it to police, and that defendant hid the gun to prevent apprehension, prosecution, or conviction of that crime. *State v. Carrillo*, 2017-NMSC-023.

Sufficient evidence to support tampering with evidence conviction. — Where defendant was charged with first-degree murder and tampering with evidence, and where several witnesses observed defendant shoot the victim while he was sitting in his vehicle, and where the police found the gun that fired the bullets that killed the victim and discharged the bullet casings found at the crime scene, the jury was free to infer that defendant discarded the gun after killing the victim and fleeing the scene. There was sufficient evidence presented to prove beyond a reasonable doubt that defendant disposed of the gun to prevent apprehension, prosecution, or conviction. *State v. Ramirez*, 2018-NMSC-003.

Sufficient evidence to support a tampering conviction. — Where defendant's accomplices testified that the knife used to kill the victim belonged to defendant, and that after defendant learned that the victim had been killed, defendant let her accomplices into her house and allowed them to shower and change out of their bloody clothes, and that one of the accomplices cleaned the blood off of defendant's knife in defendant's restroom and in defendant's presence, and where there was evidence that the accomplice used bleach from defendant's home to clean the knife, the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that defendant intended the destruction of evidence, including the removal of the victim's blood from her knife, in order to avoid being prosecuted for murder, and that defendant helped the accomplice clean the knife by providing the accomplice with space and chemicals to do so. *State v. Montoya*, 2016-NMCA-098, cert. denied.

Substantial evidence of tampering with evidence. — Where the defendant was bent down behind a fence; when police officers approached, the defendant stood up and walked toward a shed; the defendant did not stop when the officers called out to the defendant; the defendant's body movements appeared as if the defendant had disposed of something; the defendant then walked back to the officers; the officers found a bag of cocaine in front of the shed; and when the cocaine was found, the defendant placed the

defendant's hands behind the defendant's back and turned around without any request by the officers, there was sufficient evidence to support a tampering with evidence conviction. *State v. Delgado*, 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Evidence sufficient. — Where defendant shot multiple times into a house with two different weapons, killing one victim and wounding one victim; and defendant testified that immediately after the shooting, defendant took the guns and put them behind defendant's refrigerator, there was sufficient evidence to support defendant's conviction of tampering with evidence. *State v. Torrez*, 2013-NMSC-034.

Evidence sufficient to convict. — Testimony by a witness whom the factfinder has believed may be rejected by an appellate court only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions. Where testimony is not inherently improbable under this standard, it must be given weight, and have attached to it the credibility, apparently assigned it by the jury. *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870.

Evidence that defendant stated that he had killed someone and thrown the body in the trash along with evidence that the victim's nude body was found without identification, covered with plastic bags and duct tape, inside a dumpster was sufficient for conviction. *State v. Rojo*, 1999-NMSC-001, 126 N.M. 438, 971 P.2d 829.

Where defendant admitted that he assisted accomplice in throwing victim into a well and that he threw the stolen firearms into the woods, the jury could infer that he committed these acts to avoid apprehension, and this is sufficient evidence for the conviction of tampering with evidence. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, *overruled on other grounds by State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

Sufficient evidence of intent. — Where defendant, charged with second-degree murder and tampering with evidence, testified that after he stabbed the victim, he threw the knife out the car window as he drove away from the crime scene, defendant's specific intent to prevent his apprehension or prosecution can be inferred from his overt act of disposing of the murder weapon; the evidence was sufficient to support defendant's conviction for tampering with evidence. *State v. Sanchez*, 2015-NMCA-077, cert. denied, 2015-NMCERT-006.

No fundamental error where state failed to prove an essential element of tampering with evidence when the evidence at trial clearly established the missing element. — Where defendant was charged with third-degree tampering with evidence of a second-degree felony, but where the jury instruction did not require the jury to find that defendant's act of tampering related to a second-degree felony, the failure to instruct the jury on one of the elements of the offense of third-degree tampering was error, offending defendant's sixth amendment right to a jury

determination of guilt beyond a reasonable doubt as to every element of the crime charged; the error, however, did not amount to fundamental error as it was clear from the record that the evidence presented at trial established the missing element. *State v. Sanchez*, 2015-NMCA-077, cert. denied, 2015-NMCERT-006.

Sufficient evidence of tampering with evidence. — Where defendant was convicted of second-degree murder and tampering with evidence, there was sufficient evidence to support defendant's conviction for tampering with evidence where the State sought to prove that defendant hid a vehicle connected to the shooting and that he intended to prevent the apprehension, prosecution or conviction of himself, and where the evidence at trial established that defendant drove the vehicle away from the shooting, left it parked in an alley and contacted an unidentified person who helped defendant obtain and pour gasoline on the vehicle and then start it on fire. Based on this evidence, the jury rationally could have inferred that defendant parked the car in the alley and returned to set it aflame and that his intent in doing so was to prevent his apprehension, prosecution, or conviction for the killing of the victim. *State v. Chavez*, 2022-NMCA-007, cert. granted.

Tampering with evidence conviction reversed where crime for which tampering with evidence was based was reversed. — Where defendant was convicted of second-degree murder and tampering with evidence in the third degree based on a finding that the highest degree for which tampering with evidence was committed was a second degree felony, and where the district court erred in denying defendant's proposed voluntary manslaughter instruction, thus requiring the reversal of defendant's second-degree murder conviction, defendant's tampering with evidence conviction also required reversal, because if the district court had correctly instructed the jury on voluntary manslaughter, the jury could have returned a guilty verdict on that charge, which is a third degree felony, and the jury's verdict would have amounted to a determination that defendant tampered with evidence of a third degree felony, and any conviction for tampering would have been a fourth degree felony. *State v. Chavez*, 2022-NMCA-007, cert. granted.

Evidence insufficient to convict. — Where the state alleged that the defendant had a gun at the scene of the crime, a gun was used to murder the victim, the murder weapon was removed from the scene of the murder, and the murder weapon was never recovered, the state failed to meet its burden of proof because the state failed to offer direct evidence of the defendant’s specific intent to tamper with evidence or evidence of an overt act from which the jury may infer such intent. *State v. Silva*, 2008-NMSC-051, 144 N.M. 815, 192 P.3d 1192.

Where defendant was convicted of tampering with a gun that defendant had used to shoot into an occupied house; the state provided evidence that defendant took the gun when defendant left the crime scene; the State offered no evidence that defendant actively hid or disposed of the gun; the police recovered the gun from another person during a traffic stop a few weeks after the shooting; the state did not offer any evidence regarding how the other person acquired possession of the gun; and the only evidence

that defendant tampered with the gun was that the police could not find the gun when they searched defendant's house, the evidence was insufficient to support defendant's conviction. *State v. Arrendondo*, 2012-NMSC-013, 278 P.3d 517.

Since defendant merely dropped some items from his hand to the ground upon the officers' announcement of police presence, there was insufficient evidence to support a finding of either element of intent or action under this section. *State v. Roybal*, 1992-NMCA-114, 115 N.M. 27, 846 P.2d 333, cert. denied, 114 N.M. 550, 844 P.2d 130.

Where there is no evidence suggesting that defendant encouraged his accomplice to dispose of the gun or was present when the accomplice threw it away, there was insufficient evidence to support defendant's convictions for tampering with evidence and conspiracy to tamper with evidence. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Insufficient evidence to support tampering with evidence conviction. — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia, and where defendant claimed there was insufficient evidence to support his conviction for tampering with evidence based on the state's evidence that defendant threw baggies of crack cocaine into a vehicle in plain view of multiple officers following a traffic stop, defendant's conviction for tampering with evidence was not supported by sufficient evidence because the evidence was never concealed from officers, and New Mexico courts have drawn a distinction between acts occurring in the presence of an officer and those that attempted to conceal evidence outside the view of an officer. *State v. Jackson*, 2021-NMCA-059, cert. denied.

Insufficient evidence. — Where the defendant, who was on probation, was required to submit to random urinalysis; the defendant provided a false urine sample; and there was no evidence that a violation of the criminal laws was being investigated or prosecuted by the probation officer, there was no evidence to support the defendant's conviction for tampering with evidence. *State v. Jackson*, 2009-NMCA-068, 146 N.M. 563, 212 P.3d 1117, *rev'd*, 2010-NMSC-032, 148 N.M. 452, 237 P.3d 754, *overruled by State v. Radosevich*, 2018-NMSC-028.

Where, in a case in which the victim died from multiple stab wounds, the only evidence presented by the state was that a knife or sharp object existed, that defendant's clothing might have been blood stained and that ten days passed between the murder and defendant's arrest, but there was no evidence of an overt act to destroy or hide any knife or blood stained clothing, the evidence was insufficient to support a finding beyond a reasonable doubt of intent by defendant to disrupt the police investigation or that defendant actively destroyed or hid evidence. *State v. Duran*, 2006-NMSC-035, 140 N.M. 94, 140 P.3d 515.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Intentional spoliation of evidence, interfering with prospective civil action, as actionable, 70 A.L.R.4th 984.

Criminal liability of attorney for tampering with evidence, 49 A.L.R. 5th 619.

Negligent spoliation of evidence, interfering with prospective civil action, as actionable, 101 A.L.R.5th 61.

30-22-6. Compounding a crime.

Compounding a crime consists of knowingly agreeing to take anything of value upon the agreement or understanding, express or implied, to compound or conceal a crime or to abstain from a prosecution therefor, or to withhold any evidence thereof.

For purposes of this section, a person may be prosecuted and convicted of compounding a crime though the person guilty of the original crime has not been charged, indicted or tried.

Whoever commits compounding a crime is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-6, enacted by Laws 1963, ch. 303, § 22-6.

ANNOTATIONS

Threat of prosecution for bad check. — Specific language of this section controls over the more general language of the Worthless Check Act (30-36-1 NMSA 1978 et seq.), even if the latter act could by implication be construed to authorize a threat of prosecution in a bad check notice. 1965 Op. Att'y Gen. No. 65-197.

Written notice that a check has been returned unpaid for lack of funds or credit, as called for in the Worthless Check Act (30-36-1 NMSA 1978 et seq.), may not contain a statement that the district attorney has been contacted and that criminal proceedings will be instituted unless the check is paid within a period of time. 1965 Op. Att'y Gen. No. 65-197.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 15A Am. Jur. 2d Compounding Crimes §§ 1 to 4.

15A C.J.S. Compounding Offenses § 3.

30-22-7. Unlawful rescue.

Unlawful rescue consists of intentionally, and without lawful authority, rescuing any person lawfully in custody or confinement.

Whoever commits unlawful rescue of a person charged with or convicted of a crime not constituting a capital felony, or who is charged with but not convicted of a capital felony, is guilty of a third degree felony.

Whoever commits unlawful rescue of an individual convicted of a capital felony is guilty of a first degree felony.

History: 1953 Comp., § 40A-22-7, enacted by Laws 1963, ch. 303, § 22-7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 5.

30A C.J.S. Escape and Related Offenses; Rescue § 28 et seq.

30-22-8. Escape from jail.

Escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail.

Whoever commits escape from jail is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-8, enacted by Laws 1963, ch. 303, § 22-8.

ANNOTATIONS

Section does not require commitment under criminal charge. — This section does not require commitment on a criminal charge. A literal reading of the statute would indicate that any person who has been committed to jail pursuant to lawful authority who escapes or attempts to escape is guilty of escape from jail. *State v. Alderette*, 1990-NMCA-132, 111 N.M. 297, 804 P.2d 1116.

Commitment pursuant to arrest warrant. — Whether "committed" in this section means "placing in confinement" or "an order of confinement," defendant held by virtue of an arrest warrant for a petty misdemeanor was "committed" to jail when he left the jail through the roof. *State v. Garcia*, 1968-NMCA-007, 78 N.M. 777, 438 P.2d 521.

Physical confinement not required. — Physical confinement in jail at the time a defendant escapes is not an element required for conviction under this section. "Lawfully committed", as used in this section, includes situations in which an inmate has been lawfully ordered to be confined in jail and thereafter is temporarily released on a furlough, but is legally obligated to return to jail at a specific time. *State v. Hill*, 1994-NMCA-069, 117 N.M. 807, 877 P.2d 1110, cert. denied, 118 N.M. 90, 879 P.2d 91.

Kitchen part of jail. — Evidence that kitchen was used for preparation of prisoners' meals and that it was part of the jail, supported guilty verdict which necessarily determined that the kitchen was an integral part and parcel of the jail and that the defendant had escaped therefrom. *State v. Weaver*, 1971-NMCA-172, 83 N.M. 362, 492 P.2d 144.

Escape deemed from penitentiary, not jail. — Where the trial court had ordered the defendant released from the penitentiary into the custody of the county sheriff until after his arraignment, the order provided for a change in the location of his physical confinement but did not change the fact that the defendant's lawful custody or confinement was in the penitentiary, and the defendant was properly convicted of escape from the penitentiary under 30-22-9B NMSA 1978, rather than escape from jail under this section. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

Escape from work detail while serving jail sentence. — Where the defendant was assigned to a work detail at the county fairgrounds while serving a lawful sentence at a county jail, and it was while so assigned that he escaped, the defendant was guilty of escape from jail. *State v. Gilman*, 1981-NMCA-123, 97 N.M. 67, 636 P.2d 886, cert. denied, 97 N.M. 483, 641 P.2d 514; *State v. Coleman*, 1984-NMCA-037, 101 N.M. 252, 680 P.2d 633, cert. denied, 101 N.M. 185, 679 P.2d 1283.

Defendant's failure to return home while being electronically monitored could not constitute an escape under this section since the statute requires the defendant to escape from a "jail" to which he or she has been committed and a person who is on home detention is not obliged to be in jail and cannot be said to be constructively in jail. *State v. Martinez*, 1998-NMCA-047, 125 N.M. 83, 957 P.2d 68, cert. denied, 125 N.M. 146, 958 P.2d 104.

Fundamental error to instruct the jury on escape from an inmate-release program when defendant was charged with escape from jail. — Where defendant was charged with escape from jail, and where, at trial, the district court judge instructed the jury using the uniform jury instruction that lists the essential elements for the crime of escape from an inmate-release program, defendant’s conviction for escape from jail resulted in fundamental error, because the district court instructed the jury on a crime for which defendant was never charged. It is improper to instruct the jury as to a crime not formally charged if that crime is not a lesser-included offense of the crime formally charged. *State v. Grubb*, 2020-NMCA-003.

Sufficient evidence of escape from jail. — Where defendant was charged with escape from jail, and where at trial the state presented evidence that the district court revoked defendant’s probation, sentenced him to two years and six months incarceration, and granted him furlough, and that defendant failed to report to the detention center at the end of the furlough period, there was sufficient evidence to support defendant’s conviction for escape from jail, because based on the evidence presented, the jury could reasonably conclude that defendant failed to return to lawful custody or confinement within the time fixed for his return and that his failure to return was done willfully. *State v. Grubb*, 2020-NMCA-003.

Invalid conviction as defense. — So long as the commitment to custody is valid on its face, it is no defense to a charge of escaping jail that the incarceration was based on a

violation of a law which was allegedly unconstitutionally applied. *State v. Lopez*, 1968-NMSC-098, 79 N.M. 235, 441 P.2d 764.

Law reviews. — For article, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" see 2 N.M.L. Rev. 141 (1972).

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. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

30A C.J.S. Escape §§ 2 to 15.

30-22-8.1. Escape from a community custody release program.

A. Escape from a community custody release program consists of a person, excluding a person on probation or parole, who has been lawfully committed to a judicially approved community custody release program, including a day reporting program, an electronic monitoring program, a day detention program or a community tracking program, escaping or attempting to escape from the community custody release program.

B. Whoever commits escape from a community custody release program, when the person was committed to the program for a misdemeanor charge, is guilty of a misdemeanor.

C. Whoever commits escape from a community custody release program, when the person was committed to the program for a felony charge, is guilty of a felony.

History: Laws 1999, ch. 118, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 118, § 2, made the act effective on July 1, 1999.

Willfulness is not an essential element of escape from a community custody release program. — Where, as a condition of release from jail during the course of a separate criminal proceeding, defendant was enrolled in a community custody release program, and where defendant, following an altercation with the custodian to whom defendant was released, fled the custodian's residence, and where defendant's community custody release program officer filed a criminal complaint charging defendant with escape from a community custody release program, and where, at trial, defendant argued that willfulness is an essential element of the crime of escape from a community custody release program and that the jury should be instructed accordingly, the district court did not err in denying defendant's requested instruction, because the plain language of NMSA 1978, § 30-22-8.1(A) indicates the legislature did not intend to include willfulness as an element of escape from a community custody release program. *State v. Coble*, 2023-NMCA-079, cert. denied.

Defendant was not entitled to a duress instruction. — Where, as a condition of release from jail during the course of a separate criminal proceeding, defendant was enrolled in a community custody release program, and where defendant, following an altercation with the custodian to whom defendant was released, fled the custodian's residence, and where defendant's community custody release program officer filed a criminal complaint charging defendant with escape from a community custody release program, and where, at trial, defendant claimed that he was entitled to a duress instruction as an affirmative defense to escape from a community custody release program and that his trial counsel's failure to request such an instruction amounted to ineffective assistance of counsel or alternatively, the district court's failure to sua sponte instruct on duress amounted to fundamental error, the district court did not err in failing to sua sponte instruct the jury on duress and trial counsel was not ineffective for failing to request a duress instruction, because duress is a continuing offense, and there was no evidence that any claimed duress continued during the entire thirty-four day period while defendant remained voluntarily at large. Defendant, therefore, was not entitled to a duress instruction. *State v. Coble*, 2023-NMCA-079, cert. denied.

Electronic monitoring programs. — Electronic monitoring programs may be used as part of a community custody release program: they are not limited to probation and parole programs. *State v. Frost*, 2003-NMCA-002, 133 N.M. 45, 60 P.3d 492, cert. denied, 133 N.M. 126, 61 P.3d 835.

Community release programs. — A case by case release of defendants may be considered as a judicially approved community release program. *State v. Duhon*, 2005-NMCA-120, 138 N.M. 466, 122 P.3d 50, cert. quashed, 2006-NMCERT-003, 139 N.M. 352, 132 P.3d 1038.

Habitual offender enhancement not prohibited. — Where defendant was convicted of felony possession of a controlled substance and subsequently committed to a community custody release program (CCP), and where two weeks after being committed to CCP, defendant cut off his ankle monitor and failed to respond to messages from monitoring officers, it was not error for the State to use Defendant’s

felony possession charge to determine whether to charge defendant for misdemeanor or felony escape from CCP and to use defendant's felony possession conviction to enhance his sentence for escape from CCP, because defendant's degree of escape from CCP was based upon the felony possession charge, while the enhancement of his felony escape sentence was based upon his three prior felony convictions. *State v. Sanchez*, 2019-NMCA-006, cert. denied.

30-22-8.2. Escape from a secure residential treatment facility.

A. Escape from a secure residential treatment facility consists of a person lawfully committed for a criminal offense to a secure residential treatment facility escaping from the facility.

B. Whoever commits escape from a secure residential treatment facility is guilty of a misdemeanor.

C. As used in this section, "secure residential treatment facility" means a secure facility not located within a correctional facility or detention center in which residents are being treated for substance abuse problems, and personnel and physical barriers prevent the residents from leaving.

History: Laws 2006, ch. 31, § 1.

ANNOTATIONS

Effective dates. — Laws 2006, ch. contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 17, 2006, 90 days after adjournment of the legislature.

30-22-9. Escape from penitentiary.

Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:

A. escaping or attempting to escape from such penitentiary; or

B. escaping or attempting to escape from any other lawful place of custody or confinement and although not actually within the confines of the penitentiary.

Whoever commits escape from penitentiary is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-9, enacted by Laws 1963, ch. 303, § 22-9.

ANNOTATIONS

Cross references. — For officer of penitentiary aiding escape of prisoner, *see* 33-2-8 NMSA 1978.

For escape by prisoners under inmate-release programs, *see* 33-2-46 NMSA 1978.

Escape constitutes a continuing offense so that an escapee continues to commit the offense as long as he voluntarily remains at large. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

Actual custody required. — In order to sustain a charge of escape under this section, a person who has been convicted and sentenced must first have undergone some moment of actual custody, either through an administrative booking or in-take processing with the department of corrections. Absent such custody, a person cannot be said to have committed escape from the penitentiary within the meaning of this section. *State v. Pearson*, 2000-NMCA-102, 129 N.M. 762, 13 P.3d 980.

Conviction not double jeopardy. — Assuming without deciding that some administrative sanctions had been levied against defendant for his escape from prison, conviction under this section did not constitute double jeopardy. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Application to honor farm constitutional. — Defendant's argument that application of this section to escapees from the prison honor farm constituted cruel and unusual punishment because of the difference in facilities at the farm compared with the state penitentiary was without merit. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Honor farm part of penitentiary. — Prison honor farm was an integral part and parcel of the state penitentiary, and escape therefrom was an escape from the state penitentiary. *State v. Budau*, 1973-NMCA-151, 86 N.M. 21, 518 P.2d 1225, cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); *State v. Peters*, 1961-NMSC-160, 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).

Escapee does not forfeit right of appeal. — A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement. He still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. *Mascarenas v. State*, 1980-NMSC-074, 94 N.M. 506, 612 P.2d 1317.

Regardless of the outcome of the appeal, the escapee may still be criminally liable for the act of escape; therefore, there is no need to use the forfeiture of the constitutional right of appeal as a further sanction. *Mascarenas v. State*, 1980-NMSC-074, 94 N.M. 506, 612 P.2d 1317.

Collateral attack of legality of commitment. — To collaterally attack the lawfulness of his commitment to the penitentiary prior to his escape, a defendant must come forward

with substantive evidence to show that at the time of his escape he was illegally incarcerated. *State v. Ellis*, 1980-NMCA-187, 95 N.M. 427, 622 P.2d 1047, cert. denied, 95 N.M. 426, 622 P.2d 1046.

Escape deemed from penitentiary, not jail. — Where the trial court had ordered the defendant released from the penitentiary into the custody of the county sheriff until after his arraignment, the order provided for a change in the location of his physical confinement but did not change the fact that the defendant's lawful custody or confinement was in the penitentiary, and the defendant was properly convicted of escape from the penitentiary under this section, rather than escape from jail under 30-22-8 NMSA 1978. *State v. Martin*, 1980-NMCA-019, 94 N.M. 251, 609 P.2d 333, cert. denied, 94 N.M. 628, 614 P.2d 545.

Law reviews. — For comment on State v. Vaughn, 74 N.M. 365, 393 P.2d 711 (1964), and Sanders v. Cox, 74 N.M. 524, 395 P.2d 353 (1964), see 4 Nat. Resources J. 616 (1964).

For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue §§ 1, 2, 3, 4.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

What constitutes "custody" under 18 USCS § 751(a) defining offense of escape from custody, 114 A.L.R. Fed. 581.

30A C.J.S. Escape §§ 16 to 18.

30-22-10. Escape from custody of a peace officer.

Escape from custody of a peace officer consists of any person who shall have been placed under lawful arrest for the commission or alleged commission of any felony, unlawfully escaping or attempting to escape from the custody or control of any peace officer.

Whoever commits escape from custody of a peace officer is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-10, enacted by Laws 1963, ch. 303, § 22-10.

ANNOTATIONS

Actual custody required. — The defendant, who was transported from jail to the state hospital for evaluation, from which hospital he escaped, could not be found guilty of escape from a peace officer. This section applies only to those who are in the actual custody or control of a peace officer while under arrest, and cannot be extended to legal or "constructive custody" as well. *State v. Trujillo*, 1987-NMCA-141, 106 N.M. 616, 747 P.2d 262.

Double jeopardy. — Combination of administrative punishment and judicial sentence following plea of guilty to escape from custody of peace officer (for escaping from penitentiary honor farm) did not amount to double jeopardy in violation of the state and federal constitutions. *State v. Millican*, 1972-NMSC-064, 84 N.M. 256, 501 P.2d 1076.

Escape from lawful arrest. — Although marijuana discovered by officer should have been suppressed, because the search and seizure was the fruit of an illegal detention, nonetheless arrests by the officer, after smelling and seeing the marijuana, were in the lawful discharge of his duties and thus defendants' convictions for escape from custody were proper. *State v. Bloom*, 1976-NMCA-035, 90 N.M. 226, 561 P.2d 925, *rev'd on other grounds*, 1977-NMSC-016, 90 N.M. 192, 561 P.2d 465.

Disposition of original charge immaterial. — Offense is committed if escape occurs after arrest for commission or alleged commission of a felony whether defendant is later found guilty of originally charged felony or not. *State v. Martinez*, 1968-NMSC-097, 79 N.M. 232, 441 P.2d 761.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "custody" under 18 USCS § 751(a) defining offense of escape from custody, 114 A.L.R. Fed. 581.

30-22-11. Assisting escape.

Assisting escape consists of:

A. intentionally aiding any person confined or held in lawful custody or confinement to escape; or

B. any officer, jailer or other employee, intentionally permitting any prisoner in his custody to escape.

Whoever commits assisting escape is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-11, enacted by Laws 1963, ch. 303, § 22-11.

ANNOTATIONS

Cross references. — For unlawful rescue of prisoner, *see* 30-22-7 NMSA 1978.

For officer of penitentiary aiding escape of prisoner, *see* 33-2-8 NMSA 1978.

Harboring or aiding felon does not supersede this offense. — The offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

Charge not double jeopardy. — Charging defendant with three counts of assisting escape, in a prosecution arising out of the escape of three prison inmates, did not violate the constitutional prohibition against double jeopardy. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

Person properly charged with offense. — An individual who intentionally aids a person to avoid recapture, who he knows has escaped from lawful custody, may properly be charged with the offense of assisting escape. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

Defenses of consanguinity or affinity not applicable. — Nothing in this section evinces a legislative intent to immunize a defendant from prosecution for assisting the escape of inmates because of consanguinity or affinity. The defenses of consanguinity or affinity recognized under 30-22-4 NMSA 1978 are not applicable to a charge filed under this section. *State v. Martinez*, 1989-NMCA-047, 109 N.M. 34, 781 P.2d 306, cert. denied, 108 N.M. 668, 777 P.2d 907.

Defect in indictment insubstantial. — Although the indictment charged that defendant assisted a prisoner in escaping from jail while the statute condemned assisting a prisoner in his endeavor to escape, such defect was formal rather than substantial as the act of escape includes endeavoring to escape, and as this slightly faulty allegation was not called to the attention of the trial court, it was cured by the verdict. *State v. Montgomery*, 1923-NMSC-001, 28 N.M. 344, 212 P. 341.

Merger of this section and furnishing articles for escape. — The charges of assisting escape and furnishing articles for escape should not be merged for sentencing purposes when the facts supporting the convictions are not identical in that the jury could properly have found that the defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30A C.J.S. Escape §§ 19 to 25.

30-22-11.1. Escape from the custody of the children, youth and families department; escape from juvenile detention.

Escape from the custody of the children, youth and families department consists of any person who has been adjudicated as a delinquent child and has been committed lawfully to the custody of a department juvenile justice facility or who is alleged to be a delinquent child and has been lawfully detained in a juvenile detention facility:

A. escaping or attempting to escape from custody within the confines of a children, youth and families department juvenile justice facility; or

B. escaping or attempting to escape from another lawful place of custody or confinement that is not within the confines of a children, youth and families department juvenile justice facility. Any person who commits escape from the custody of a children, youth and families department juvenile justice facility is guilty of a misdemeanor.

History: Laws 1993, ch. 121, § 1; 2009, ch. 239, § 3.

ANNOTATIONS

Effective dates. — Laws 1993, ch. 121, § 2 made the act effective on July 1, 1993.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

The 2009 amendment, effective July 1, 2009, in the first paragraph, after "juvenile justice facility", added the remainder of the sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of juvenile escape statues, 46 A.L.R.5th 523.

30-22-11.2. Aggravated escape from the custody of the children, youth and families department.

Aggravated escape from the custody of the children, youth and families department consists of any person who has been adjudicated as a delinquent child and has been committed lawfully to the custody of a department juvenile justice facility or who is alleged to be a delinquent child and has been lawfully detained in a juvenile detention facility:

A. escaping or attempting to escape from custody within the confines of a children, youth and families department juvenile justice facility and committing assault or battery on another person in the course of escaping or attempting to escape; or

B. escaping or attempting to escape from a lawful place of custody or confinement that is not within the confines of a children, youth and families department juvenile justice facility and committing assault or battery on another person in the course of escaping or attempting to escape.

Any person who commits aggravated escape from the custody of the children, youth and families department is guilty of a fourth degree felony.

History: Laws 1994, ch. 18, § 1; 2009, ch. 239, § 4.

ANNOTATIONS

Effective dates. — Laws 1994, ch. 18, § 3 made the act effective on July 1, 1994.

Applicability. — Laws 2009, ch. 239, § 71, provided that the provisions of this act apply to all children who, on July 1, 2009, are on release or are otherwise eligible to be placed on release as if the Juvenile Public Safety Advisory Board Act had been in effect at the time they were placed on release or became eligible to be released.

The 2009 amendment, effective July 1, 2009, in the first paragraph, after "juvenile justice facility", added the remainder of the sentence.

30-22-12. Furnished [Furnishing] articles for prisoner's escape.

Furnishing articles for prisoner's escape consists of:

A. intentionally giving to any person in lawful custody or confinement any deadly weapon or explosive substance, without the express consent of the officer in charge of such place of confinement; or

B. intentionally giving to any person in lawful custody or confinement any disguise, instrument, tool or other thing useful to aid any prisoner to effect an escape, with intent to assist a prisoner to escape from custody.

Whoever commits furnishing articles for prisoner's escape is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-12, enacted by Laws 1963, ch. 303, § 22-12.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

Merger of this section and assisting escape. — The charges of assisting escape and furnishing articles for escape should not be merged for sentencing purposes when the facts supporting the convictions are not identical in that the jury could properly have found that the defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Evidence sufficient to support conviction. — There was sufficient evidence to convict where (1) defendant planned the escape with others; (2) defendant agreed to provide a gun for the escape and said that he had obtained the gun; (3) a co-defendant delivered the gun to the escapees; and (4) after the escape defendant provided bullets for the gun. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

30-22-13. Furnishing drugs or liquor to a prisoner.

Furnishing drugs or liquor to a prisoner consists of directly or indirectly furnishing any narcotic drug or intoxicating liquor to any person held in lawful custody or confinement, unless such narcotic drug or intoxicating liquor is furnished pursuant to the direction or prescription of a regularly licensed physician attending such person or penal facility.

Whoever commits furnishings [furnishing] drugs or liquor to a prisoner is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-13, enacted by Laws 1963, ch. 303, § 22-13.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

Validity, construction, and application of state statue criminalizing possession of contraband by individual in penal or correctional institution, 45 A.L.R.5th 767.

72 C.J.S. Prisons § 75.

30-22-14. Bringing contraband into places of imprisonment; penalties; definitions.

A. Bringing contraband into a prison consists of knowingly and voluntarily carrying, transporting or depositing contraband onto the grounds of the penitentiary of New Mexico or any other institution designated by the corrections department for the confinement of adult prisoners. Whoever commits bringing contraband into a prison is guilty of a third degree felony.

B. Bringing contraband into a jail consists of knowingly and voluntarily carrying contraband into the confines of a county or municipal jail. Whoever commits bringing contraband into a jail is guilty of a fourth degree felony.

C. As used in this section, "contraband" means:

(1) a deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of duties;

(2) currency brought onto the grounds of the institution for the purpose of transfer to a prisoner, but does not include currency carried into areas designated by the warden as areas for the deposit and receipt of currency for credit to a prisoner's account before contact is made with the prisoner;

(3) an alcoholic beverage;

(4) a controlled substance, as defined in the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978], but does not include a controlled substance carried into a prison through regular prison channels and pursuant to the direction or prescription of a regularly licensed physician; or

(5) an electronic communication or recording device brought onto the grounds of the institution for the purpose of transfer to or use by a prisoner.

D. As used in this section, "electronic communication or recording device" means any type of instrument, device, machine or equipment that is designed to transmit or receive telephonic, electronic, digital, cellular, satellite or radio signals or communications or that is designed to have sound or image recording abilities or any part or component of such instrument, device, machine or equipment. "Electronic communication or recording device" does not include a device that is or will be used by prison or jail personnel in the regular course of business or that is otherwise authorized by the warden.

E. Nothing in this section shall prohibit the use of hearing aids, voice amplifiers or other equipment necessary to aid prisoners who have documented hearing or speech deficiencies or their visitors. Rules for such devices shall be established by the warden or director of each jail, detention center and prison.

History: 1953 Comp., § 40A-22-13.1, enacted by Laws 1976, ch. 15, § 1; 2013, ch. 55, § 1.

ANNOTATIONS

The 2013 amendment, effective July 1, 2013, provided that electronic communication devices are contraband and prohibited in jails and prisons; in Subsection A, in the first sentence, after "consists of", added "knowingly and voluntarily"; in Subsection B, after "consists of", added "knowingly and voluntarily"; in Paragraph (1) of Subsection C, after "Section", added "30-1-12 NMSA 1978"; added Paragraph (5) of Subsection C; and added Subsections D and E.

To be guilty of bringing contraband into a jail, a person must enter the jail voluntarily. *State v. Cole*, 2007-NMCA-099, 142 N.M. 325, 164 P.3d 1024.

Knowing possession. — Failing to include the element of knowing possession in the jury instructions for this crime constituted fundamental error. *State v. Gonzalez*, 2005-NMCA-031, 137 N.M. 107, 107 P.3d 547.

Erroneous instruction on conspiracy to bring contraband into a jail resulted in fundamental error. — Where defendant was tried on a single charge of conspiring to bring contraband into jail, and where the district court did not instruct the jury in accordance with UJI 14-2810 NMRA, but instead gave a hybrid instruction that incorporated aspects of the crime of conspiracy as well as the conspiracy's target offense of bringing contraband into a jail, fundamental error occurred because the instruction given to the jury in this case omitted the essential elements of conspiracy, did not fairly and accurately state the applicable law of conspiracy, and did not fall within an exception to the general rule of fundamental error because it cannot be concluded that the jury implicitly found the essential elements of conspiracy or that the parties' legal and factual presentations left no doubt that the jury would have found the omitted elements if properly instructed. *State v. Sivils*, 2023-NMCA-080.

Sufficient evidence supported defendant's conviction for conspiracy to bring contraband into a jail. — Where defendant was tried on a single charge of conspiring to bring contraband into jail, and where it was the state's burden to prove beyond a reasonable doubt that defendant and another person by words or acts agreed together to commit bringing contraband into the jail and that defendant and the other person intended to commit bringing contraband into the jail, and where the state presented recordings of phone conversations between defendant and her incarcerated boyfriend, which included vague and unnatural language that was potentially a coded discussion of the alleged conspiracy, and evidence that defendant picked up a box from a third party, drove that box to the courthouse, and left the contents of the box in the courthouse bathroom where the contraband was discovered, there was sufficient evidence for a reasonable juror to infer that defendant intentionally agreed with others to bring contraband into the jail and that defendant acted with the intent to bring contraband into the jail. *State v. Sivils*, 2023-NMCA-080.

Contraband includes cocaine. — Subsection C(4) of Section 30-22-14 NMSA 1978 includes cocaine in its definition of "contraband". *State v. Gonzalez*, 2005-NMCA-031, 137 N.M. 107, 107 P.3d 547.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

Validity and construction of prison regulation of inmates' possession of personal property, 66 A.L.R.4th 800.

30-22-14.1. Bringing contraband into a juvenile detention facility or juvenile correctional facility; penalty.

A. Bringing contraband into a juvenile detention facility or juvenile correctional facility consists of carrying, transporting or depositing contraband onto the grounds of any facility designated by the children, youth and families department for the detention or commitment of children. Whoever commits bringing contraband into a juvenile correctional facility is guilty of a third degree felony. Whoever commits bringing contraband into a juvenile detention facility is guilty of a fourth degree felony.

B. As used in this section, "contraband" means:

(1) any deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of his duties;

(2) currency brought onto the grounds of a juvenile detention facility or juvenile correctional facility and not declared upon entry to the facility for the purpose of transfer to a child detained in or committed to the facility, but does not include currency carried into areas designated by the facility administrator as areas for the deposit and receipt of currency for credit to a child's account before contact is made with any child;

(3) any alcoholic beverage brought within the physical confines of the juvenile detention or juvenile correctional facility; or

(4) any controlled substance, as defined in the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978], but does not include a controlled substance carried into a juvenile detention facility or juvenile correctional facility through regular facility channels and pursuant to the direction or prescription of a regularly licensed physician.

History: Laws 1997, ch. 44, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 44, § 2 made the act effective on July 1, 1997.

30-22-15. Maintaining male and female prisoners together.

Maintaining male and female prisoners together consists of any sheriff, jailer or guard, keeping male and female prisoners in the same cell or room, unless such prisoners are man and wife.

Whoever commits maintaining male and female prisoners together is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-14, enacted by Laws 1963, ch. 303, § 22-14.

30-22-16. Possession of deadly weapon or explosive by prisoner.

Possession of deadly weapon or explosive by prisoner in lawful custody consists of any inmate of a penal institution, reformatory, jail or prison farm or ranch possessing any deadly weapon or explosive substance.

Whoever commits possession of deadly weapon or explosive by prisoner is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-15, enacted by Laws 1963, ch. 303, § 22-15; 1986, ch. 4, § 1.

ANNOTATIONS

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For sentencing for second degree felonies, *see* 31-18-15 NMSA 1978.

The 1986 amendment substituted "second degree felony" for "third degree felony" in the second paragraph.

Indicia of distinctness was not sufficient to support separate convictions for possession of a deadly weapon by a prisoner. — Where defendant was convicted of two counts of possession of a deadly weapon by a prisoner based on evidence that, during a search of defendant's dormitory-style pod, prison staff found "two makeshift weapons" in defendant's bunk, defendant's two convictions violated his double jeopardy rights because evidence that the two weapons were similar in nature, were found in the same area of defendant's bunk, were found during the same search, and the fact that there was no evidence to suggest that defendant came into possession of the weapons at different times, do not support a reasonable inference of distinctness, and therefore it cannot be presumed that the legislature intended to punish defendant for each weapon he possessed under the circumstances of this case. *State v. Benally*, 2021-NMSC-027, *aff'g* 2019-NMCA-048, 448 P.3d 592.

Sufficient evidence of possession of a deadly weapon by a prisoner. — Where defendant was charged with two counts of possession of a deadly weapon by a prisoner, and where the state presented evidence that a razor blade was discovered concealed above defendant's bunk bed and a sharpened mop handle was discovered inside his mattress, in addition to statements made by defendant indicating that he had knowledge of the makeshift weapons, a jury could have reasonably inferred that defendant had knowledge of and control over both weapons, and therefore there was sufficient evidence to support defendant's convictions based on constructive possession. *State v. Benally*, 2019-NMCA-048, cert. granted.

Insufficient indicia of distinctness to justify multiple punishments for possession of a deadly weapon by a prisoner. — Where defendant was convicted of two counts of possession of a deadly weapon by a prisoner based on evidence that a razor blade was discovered concealed above his bunk bed and a sharpened mop handle was discovered inside his mattress, there was insufficient evidence to indicate possessory conduct sufficiently distinct in nature to support multiple punishments, and the minor differences in functionality between the two prison-made weapons possessed by defendant does not justify convicting him of separate counts of possession of a deadly weapon by a prisoner. *State v. Benally*, 2019-NMCA-048, cert. granted.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

30-22-17. Assault by prisoner.

Assault by prisoner consists of intentionally:

A. placing an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, in apprehension of an immediate battery likely to cause death or great bodily harm;

B. causing or attempting to cause great bodily harm to an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein; or

C. confining or restraining an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, with intent to use such person as a hostage.

Whoever commits assault by prisoner is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-16, enacted by Laws 1963, ch. 303, § 22-16.

ANNOTATIONS

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

For assault, generally, *see* 30-3-1 to 30-3-3 NMSA 1978.

For kidnapping, *see* 30-4-1 NMSA 1978.

This section and 30-22-24 NMSA 1978 relate to two different crimes. — Although it is possible for the same set of facts to fall within the ambit of this section and 30-22-24 NMSA 1978, relating to battery upon a peace officer, they do not deal with the same crime, but with two different crimes. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

Merger of this section and false imprisonment. — The charge of assault by a prisoner should not be merged for sentencing purposes with the charge of false imprisonment where the facts supporting the two charges are not identical. Merger is also inappropriate in such a case because the statute prohibiting assault and the statute prohibiting false imprisonment advance two distinct social norms. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Jailers as peace officers. — Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

Evidence sufficient. — Evidence introduced to show how the defendant and his cohorts carefully orchestrated a prison escape was sufficient for the jury to find that the defendant planned, anticipated, and intended the assault and false imprisonment of a peace officer during the escape. The defendant need not have known the peace officer's name, but only that the victim would be a peace officer. *State v. Gibson*, 1992-NMCA-017, 113 N.M. 547, 828 P.2d 980, cert. denied, 113 N.M. 524, 828 P.2d 957.

Evidence of great bodily harm. — Evidence that after throwing hot coffee at the sheriff, defendant attempted to choke him with one hand while he tried to get the sheriff's gun with the other hand, along with the sheriff's testimony that while being choked his breath was practically cut off and he realized that "it was he or I, one or the other," was evidence that the choking created a high probability of death, which is one part of the definition of great bodily harm, and justified instructing the jury to consider whether defendant caused great bodily harm under this section. *State v. Hollowell*, 1969-NMCA-105, 80 N.M. 756, 461 P.2d 238.

Acquittal of charge for which confined no defense. — Despite the fact that at the time he committed assault defendant was confined in the city jail on a charge for which he was later found not guilty, conviction imposed, upon his guilty plea, for assault by prisoner was not violative of defendant's constitutional rights. *Chavez v. State*, 1969-NMCA-085, 80 N.M. 560, 458 P.2d 812.

30-22-18. Encouraging violation of probation, parole or bail.

Encouraging violation of probation, parole or bail consists of intentionally aiding or encouraging a person known by him to be on parole, probation or bail to abscond or to violate a term or condition of his probation, parole or bail.

Whoever commits encouraging violation of probation, parole or bail is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-17, enacted by Laws 1963, ch. 303, § 22-17.

30-22-19. Unlawful assault on any jail.

Unlawful assault on any jail consists of any person or group of persons assaulting or attacking any jail, prison or other public building or place of confinement of prisoners held in lawful custody or confinement.

Whoever commits unlawful assault on any jail, prison or other public building or place of confinement of prisoners held in lawful custody or confinement is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-18, enacted by Laws 1963, ch. 303, § 22-18.

ANNOTATIONS

Statute not unconstitutionally vague. — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, and where defendants claimed that the assault on a jail statute is unconstitutionally vague, defendants' constitutional claim is without merit because a person of ordinary intelligence using common sense would understand that § 30-22-19 NMSA 1978 prohibits a violent attack on a jail's facilities or operations, regardless of whether the attack originates inside or outside of the jail, and defendants' conduct in barricading a door with a mattress and plastic cot and rushing officers with the mattresses to push them back down soaped-up stairs in an effort to prevent prison officials, law enforcement, or facility personnel from entering a pod, constituted unlawful assault on a jail. Moreover, the assault on a jail statute has guidelines prohibiting certain conduct, whether by persons incarcerated or not, and the decision to charge defendants with assault on a jail entailed no application of discretion, much less of an arbitrary nature. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

Disorderly conduct and evading or obstructing an officer are not lesser included offenses of unlawful assault on a jail. — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, and where defendants claimed that the district court erred in denying their lesser included offense instructions of disorderly conduct and evading or obstructing an officer, the district court did not err in denying the requested

instructions, because disorderly conduct and evading or obstructing an officer are not lesser included offenses of assault on a jail. Defendants' conduct did not occur in a public place as required by § 30-20-1(A) NMSA 1978, nor were their actions acts of violence capable of disturbing a community of the sort protected from such by § 30-22-19 NMSA 1978, and defendants' actions did not equate to an effort to avoid apprehension or arrest as contemplated by § 30-22-1(B) NMSA 1978. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

Substantial evidence of assault on a jail. — Where defendants were charged with unlawful assault on a jail based on evidence that they, and several other inmates, defied an order to lock down during a shift change of correction officers while incarcerated in the Otero county detention center, there was sufficient evidence to support defendants' convictions where the state presented video evidence that showed inmates' efforts to disobey the shift change lockdown order by misusing jail property to disable access into the pod by prison officials and law enforcement officers arriving to assist them, and the surveillance footage clearly depicted defendants participating in the conflict. Defendants' collective actions attacked the jail and imperiled the function and safety of the facility in a dangerous and destructive manner that satisfied the state's burden under § 30-22-19 NMSA 1978. *State v. Anderson* and *State v. Wilson*, 2021-NMCA-031, cert. granted.

Collateral estoppel. — Acquittal of defendant on charge of assault on a jail did not collaterally estop state from bringing subsequent prosecution against him on charge of assault with intent to commit a violent felony, even where both offenses allegedly occurred at same time and place, since charge of assault with intent to commit a violent felony required a jury to consider facts not required in the first trial. *State v. Tijerina*, 1973-NMSC-105, 86 N.M. 31, 519 P.2d 127, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

30-22-20. Unlawful distribution of convict-made goods.

Unlawful distribution of convict-made goods consists of any person knowingly distributing, exchanging, selling or offering for sale any goods, wares or merchandise manufactured, produced or mined, either wholly or in part, by prisoners held in lawful custody or confinement of any other state or country.

Nothing in this section shall be construed to forbid the sale or distribution of goods, wares or merchandise:

A. made by prisoners of this state;

B. made by prisoners on parole or probation; or

C. which are sold or exchanged to a qualified purchaser and where such goods are to be initially used or possessed solely by a qualified purchaser. As used in this subsection, "qualified purchaser" means a state agency, local public bodies, agencies of the federal government, tribal and pueblo governments, nonprofit organizations properly registered under state law and supported wholly or in part by funds derived from public taxation and persons, partnerships, corporations or associations which provide public school transportation services to a state agency or local public body pursuant to contract.

Whoever commits unlawful distribution of convict-made goods is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-19, enacted by Laws 1963, ch. 303, § 22-19; 1982, ch. 35, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 60 Am. Jur. 2d Penal and Correctional Institutions §§ 171, 172.

18 C.J.S. Convicts § 20.

30-22-21. Assault upon peace officer.

A. Assault upon a peace officer consists of:

(1) an attempt to commit a battery upon the person of a peace officer while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct which causes a peace officer while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

B. Whoever commits assault upon a peace officer is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-20, enacted by Laws 1971, ch. 265, § 1.

ANNOTATIONS

Cross references. — For assaults and batteries, *see* 30-3-1 to 30-3-5 NMSA 1978.

For petty misdemeanor of resisting or obstructing an officer, *see* 30-22-1 NMSA 1978.

For third-degree felony of assault by prisoner, *see* 30-22-17 NMSA 1978.

Sufficient evidence. — Where defendant approached a police officer with clenched fists, shouting and threatening to punch the officer, and defendant had chest-butted another officer, the evidence was sufficient to support defendant's conviction for assault upon a police officer. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 568, 158 P.3d 458.

Fact that defendant's gunfire hit police officers does not show an absence of evidence of assault, where there is evidence of an assault under Subsection A(2) of Section 30-22-21 NMSA 1978. *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, cert. quashed, 93 N.M. 172, 598 P.2d 215, and cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Extent of injuries: admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 A.L.R.2d 926.

6A C.J.S. Assault and Battery § 81.

30-22-22. Aggravated assault upon peace officer.

A. Aggravated assault upon a peace officer consists of:

(1) unlawfully assaulting or striking at a peace officer with a deadly weapon while he is in the lawful discharge of his duties;

(2) committing assault by threatening or menacing a peace officer who is engaged in the lawful discharge of his duties by a person wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner so as to conceal identity; or

(3) willfully and intentionally assaulting a peace officer while he is in the lawful discharge of his duties with intent to commit any felony.

B. Whoever commits aggravated assault upon a peace officer is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-21, enacted by Laws 1971, ch. 265, § 2.

ANNOTATIONS

Cross references. — For definition of deadly weapon, *see* 30-1-12 NMSA 1978.

For aggravated assault, *see* 30-3-2 NMSA 1978.

For third-degree felony of assault by prisoner, *see* 30-22-17 NMSA 1978.

Lesser included offense. — When an accused is charged under Section 30-22-1B NMSA 1978, the fleeing, evading method of resisting, evading or obstructing an officer, it is not a lesser included offense of aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857, cert. denied, 107 N.M. 132, 753 P.2d 1320.

Intent required to sustain conviction under this section is that of conscious wrongdoing. *Rutledge v. Fort*, 1986-NMSC-017, 104 N.M. 7, 715 P.2d 455, *overruled on other grounds by Reese v. State*, 1987-NMSC-079, 106 N.M. 498, 745 P.2d 1146.

Conscious wrongdoing required. — Conscious wrongdoing is an essential element of Paragraph (1) of Subsection A, and instructions in the language of the statute were insufficient to inform the jury of the intent required. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Sufficient evidence of aggravated assault on a peace officer based on a theory of accessory liability. — Where police officers attempted to execute a search of defendant's residence pursuant to a warrant, and where, as officers approached a camper on the property, the officers heard and saw gunfire coming from the camper, striking one of the officers, evidence that defendant owned the camper and was inside the camper at the time of the gunfire, and that DNA tests performed on several of the firearms retrieved from the camper found that defendant was either a major contributor of the DNA or could not be eliminated as a contributor, was sufficient for a reasonable jury to infer that defendant either shot at the officers himself, or, given the availability of firearms and ammunition inside his camper, defendant encouraged, helped, or caused others to shoot at the officers. *State v. Uribe-Vidal*, 2018-NMCA-008.

Defendant's knowledge as to identity of peace officer assaulted is a necessary element of the crimes defined in this section and Section 30-22-24 NMSA 1978. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119; *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

To deny the defendant the right to have the jury informed as to his knowledge of the identity of police officer he assaulted would be to deny him the right to have the jury apprised of a necessary element of the crime for which he is charged, and that in turn would be to deny him his constitutional guarantee of due process of law, *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

Officer's performance is essential element of crime because of the requirement that the jury be instructed that the officer must have been performing his duties and the restriction on fiddling with an elements instruction. *State v. Rhea*, 1979-NMCA-121, 93 N.M. 478, 601 P.2d 448.

Omission of essential elements in jury instruction did not amount to fundamental error. — Where defendant was charged with aggravated assault on a police officer based on facts that he walked towards a police officer, who was in the lawful

performance of his duties, with a knife and made a stabbing motion, and where, at trial, the given jury instruction erroneously failed to inform the jury that it was also required to find that defendant used a deadly weapon and that his conduct was unlawful, the omission did not rise to the level of fundamental error because an appellate court may affirm a conviction notwithstanding the absence of an implicit jury finding on an omitted element if the jury, having considered the parties' legal and factual presentations and having returned a guilty verdict on the given instructions, undoubtedly would have found the essential element if properly instructed, and the facts and circumstances of this case show that the jury implicitly found the missing elements in reaching its verdict. The jury explicitly found that defendant walked towards the officer with a large, sharp knife and made a stabbing motion, placing the officer in an objectively reasonable fear for his personal safety, amounting to a finding that defendant used the knife as a weapon, and undoubtedly would have found, if instructed properly, that the knife was capable of causing death or great bodily harm and that defendant acted unlawfully. *State v. Ocon*, 2021-NMCA-032, cert. denied.

Sufficient evidence to support jury's verdict despite erroneous instruction. — Where defendant was charged with aggravated assault on a police officer based on facts that he walked towards a police officer, who was in the lawful performance of his duties, with a knife and made a stabbing motion, and where, at trial, the given jury instruction erroneously failed to inform the jury that it was also required to find that defendant used a deadly weapon and that his conduct was unlawful, there was sufficient evidence to support the jury's verdict where the jury was instructed that to convict defendant of aggravated assault upon a peace officer, it had to find beyond a reasonable doubt that defendant walked toward the officer with a knife and made a stabbing motion, defendant's conduct caused the officer to believe defendant was about to intrude on the officer's personal safety by touching or applying force to the officer in a rude, insolent or angry manner, that a reasonable person in the same circumstances as the officer would have the same belief, and that defendant used a knife, and where the state presented lapel camera video and still photos showing the knife laying on the kitchen floor, and established, through testimony of the officer, that defendant thrusted and slashed at the officer with a knife and reared back in a stabbing motion, placing the officer in fear for his life. *State v. Ocon*, 2021-NMCA-032, cert. denied.

When officer in lawful discharge of duties. — Even if an officer makes an arrest without probable cause, the officer is performing official duties if the officer is acting in good faith and within the scope of what the officer is employed to do. *State v. Tapia*, 2000-NMCA-054, 129 N.M. 209, 4 P.3d 37, cert. denied, 129 N.M. 208, 4 P.3d 36.

Jury instruction on self-defense. — Where a police officer stopped defendant for failing to wear a seat belt; defendant became angry and grabbed defendant’s driver’s license from the officer; the officer drew a gun; defendant drove away; when the officer caught up with defendant, defendant approached the officer in an aggressive manner, cursing the officer; the officer sprayed defendant with pepper spray and drew the officer’s gun; and defendant picked up a tire iron and approached the officer, the officer used reasonable force and defendant was not entitled to a self-defense instruction.

State v. Ellis, 2008-NMSC-032, 144 N.M. 253, 186 P.3d 245, *rev'g* 2007-NMCA-037, 141 N.M. 370, 155 P.3d 775.

Failure to instruct reversible error. — The failure to instruct that the officer must have been performing his duties is the omission of an essential element, and this omission requires reversal of a conviction of aggravated assault upon a peace officer. *State v. Rhea*, 1979-NMCA-121, 93 N.M. 478, 601 P.2d 448.

Assault with razor. — Testimony of police officers concerning incidents where defendant struck at officers with a straight razor was substantial evidence to support defendant's conviction for aggravated assault upon a peace officer. *State v. Vallejos*, 1974-NMCA-009, 86 N.M. 39, 519 P.2d 135.

Lesser included offense instruction on resisting arrest. — In a prosecution for aggravated assault on a peace officer, since there was evidence that resisting in violation of either Subsection B or D of 30-22-1 NMSA 1978 was the highest degree of crime committed, the defendant was entitled to a charge on the lesser offense. *State v. Diaz*, 1995-NMCA-137, 121 N.M. 28, 908 P.2d 258, cert. denied, 120 N.M. 828, 907 P.2d 1009.

Conviction of resisting, evading, or obstructing police officer. — The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, i.e., aggravated assault upon a peace officer. *State v. Hamilton*, 1988-NMCA-023, 107 N.M. 186, 754 P.2d 857, cert. denied, 107 N.M. 132, 753 P.2d 1320.

Collateral estoppel. — The state is collaterally estopped from attempting to prove in district court that the defendant was the driver of a car used in an assault when it has already tried and failed to prove this same issue in municipal court. *Abramson v. Griffin*, 693 F.2d 1009 (10th Cir. 1982).

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon, 92 A.L.R.2d 635.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

30-22-23. Assault with intent to commit violent felony upon peace officer.

A. Assault with intent to commit a violent felony upon a peace officer consists of any person assaulting a peace officer while he is in the lawful discharge of his duties with intent to kill the peace officer.

B. Whoever commits assault with intent to commit a violent felony upon a peace officer is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-22, enacted by Laws 1971, ch. 265, § 3.

ANNOTATIONS

Cross references. — For assault with intent to commit a violent felony, generally, *see* 30-3-3 NMSA 1978.

For instruction on justifiable homicide, *see* UJI 14-5171 NMRA.

For instruction on self-defense, *see* UJI 14-5181 NMRA.

Sufficient evidence. — Where the defendant rapidly accelerated his vehicle toward the police officer who had been pursuing him in a high speed chase after the officer got out of his car and the defendant pointed a rifle or a shotgun at the officer after the defendant had already fired three shots at the officer, the evidence was sufficient to sustain the court's finding that the defendant committed an assault with intent to commit a violent felony upon a peace officer. *State v. Demongey*, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Insufficient evidence of assault with intent to commit a violent felony upon a peace officer. — Where, during a law enforcement officer's attempt to arrest defendant pursuant to a warrant, defendant first attempted to flee, and upon being tackled by the officer, defendant shot the officer in the leg and took off running, and where the officer testified at trial that prior to the shooting, it was very dark and it was very difficult for him to see because he did not have a flashlight and there was no outdoor lighting nearby, that once he was shot, defendant took off running, that he could not see defendant, that he did not know where defendant was, and that he figured defendant was going to try and kill him, there was insufficient evidence to support defendant's conviction for assault with intent to commit a violent felony upon a peace officer, because there was no evidence proving defendant's menacing conduct or an explicit or implied threat of further violence; the evidence presented merely allowed the jury to speculate, rather than infer, that defendant separately acted in a manner that caused the officer reasonable fear of an immediate battery after he was shot by defendant. *State v. Baca*, 2020-NMCA-049.

Standing to challenge section's validity. — Where defendant was convicted of committing aggravated battery upon peace officer (30-22-25 NMSA 1978), a lesser included offense of this section, defendant's rights under this section were not at issue, despite the fact that it had been charged in the indictment, and he had no standing to

challenge its constitutionality. *State v. Bojorquez*, 1975-NMCA-075, 88 N.M. 154, 538 P.2d 796, cert. denied, 88 N.M. 318, 540 P.2d 248.

Acts constituting one offense. — An assault arising from a series of three successive shots fired at a single victim, not separated by a significant amount of time, and arising from a single, continuous intent constituted one offense, and conviction of the defendant on two counts of assault violated his double jeopardy rights. *State v. Handa*, 1995-NMCA-042, 120 N.M. 38, 897 P.2d 225, cert. denied, 119 N.M. 771, 895 P.2d 671.

Lawful discharge of duties jury question. — Whether police officers were in the lawful discharge of their duties when they were shot by the defendant is a question for the jury to decide. *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, cert. quashed, 93 N.M. 172, 598 P.2d 215, and cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Malice or intent to kill where killing is by blow without weapon, 22 A.L.R.2d 854.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

30-22-24. Battery upon peace officer.

A. Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

B. Whoever commits battery upon a peace officer is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-23, enacted by Laws 1971, ch. 265, § 4.

ANNOTATIONS

Cross references. — For battery, *see* 30-3-4 NMSA 1978.

Lesser included offense. — Resisting or abusing a peace officer is a lesser included offense within battery on a peace officer under the Blockburger test. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

Lawful discharge of duties. — An officer detaining a person without legal authority other than the bare fact of the officer’s employment as a peace officer is not in the lawful

discharge of the officer's duties. *State v. Phillips*, 2009-NMCA-021, 145 N.M. 615, 203 P.3d 146, cert. quashed, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

The statutory requirement that the victim have been a peace officer in the lawful discharge of the officer's duties has two components: (1) whether the officer was discharging the officer's duties and (2) whether the officer's discharge of the officer's duties was lawful. *State v. Phillips*, 2009-NMCA-021, 145 N.M. 615, 203 P.3d 146, cert. quashed, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where the defendant was intoxicated to the point that the defendant was stumbling and unable to keep his balance; the defendant admitted the defendant had been drinking and gave off a strong odor of alcohol; the officer did not believe there was probable cause to arrest the defendant for any crime; the officer was concerned that the defendant's intoxication made the defendant a threat to the defendant or to others the defendant might encounter; the officer placed the defendant in the officer's patrol car for the purpose of driving the defendant to the defendant's home; and the defendant became angry and punched the officer, the officer was acting in the lawful discharge of the officer's duties because the officer had probable cause to believe that the defendant was unable to care for himself and the officer was acting within the officer's actual authority under Section 43-2-2 NMSA 1978 of the Detoxification Reform Act to detain the defendant. *State v. Phillips*, 2009-NMCA-021, 145 N.M. 615, 203 P.3d 146, cert. quashed, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Constitutionality since act coupled with words. — 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*, 1990-NMCA-103, 110 N.M. 780, 800 P.2d 214, cert. denied, 110 N.M. 749, 799 P.2d 1121.

Intent required to sustain conviction under this section is that of conscious wrongdoing. *Rutledge v. Fort*, 1986-NMSC-017, 104 N.M. 7, 715 P.2d 455, *overruled on other grounds by Reese v. State*, 1987-NMSC-079, 106 N.M. 498, 745 P.2d 1146.

Knowledge that victim is peace officer. — Defendant's knowledge as to the identity of the peace officer assaulted is a necessary element of the crimes defined in 30-22-22 NMSA 1978 and this section. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119; *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

To deny the defendant the right to have the jury informed as to his knowledge of the identity of police officer he assaulted would be to deny him the right to have the jury apprised of a necessary element of the crime for which he is charged, and that in turn would be to deny him his constitutional guarantee of due process of law. *Reese v. State*, 1987-NMSC-110, 106 N.M. 505, 745 P.2d 1153.

Instruction concerning knowledge. — An instruction regarding a defendant's knowledge that the victim is a peace officer is necessary only when defendant raises

lack of such knowledge as a defense to the charge and there is evidence that the defendant acted without knowing that the victim was a peace officer. *State v. Hilliard*, 1988-NMCA-066, 107 N.M. 506, 760 P.2d 799, cert. denied, 107 N.M. 468, 760 P.2d 160.

This section and 30-22-17 NMSA 1978 relate to two different crimes. — Although it is possible for the same set of facts to fall within the ambit of this section and 30-22-17 NMSA 1978, relating to assault by a prisoner, they do not deal with the same crime, but with two different crimes. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

Requirements for instruction on challenge to officer's authority. — Failure of the trial court to instruct jury that to convict defendant they had to find that her battery (slapping the detective's hand) posed an actual injury, actual threat to safety, or a meaningful challenge to authority was reversible error and mandated a new trial. *State v. Cooper*, 2000-NMCA-041, 129 N.M. 172, 3 P.3d 149.

Instruction requiring proof of merely rude, insolent or angry behavior insufficient. — Subsection A includes as unlawful only those acts that physically injure officers, that actually harm officers by jeopardizing their safety, or that meaningfully challenge their authority; an instruction that the state must prove the defendant acted in a rude, insolent or angry manner clearly did not describe the element of harm to the safety or authority of the officers, and was fundamental error. *State v. Padilla*, 1997-NMSC-022, 123 N.M. 216, 937 P.2d 492.

Finding by prison disciplinary committee was not a conviction under the statute. — Where defendant, who was serving a prison sentence, had an altercation with a prison guard; the guard filed a misconduct report; and a prison disciplinary committee found defendant "guilty of a Major Report of Charge, NMSA 30-22-24, Battery Upon a Police Officer", the fact that the conduct at issue in the hearing is also defined as a criminal offense did not mean that the disciplinary committee charged and convicted defendant under the criminal felony law. *Ramer v. Kerby*, 936 F.2d 1102 (10th Cir. 1991).

Jailers as peace officers. — Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 1980-NMSC-033, 94 N.M. 168, 608 P.2d 144.

Correctional officer is "peace officer". — The legislature has amended the correctional officers statute to provide that crimes against correctional officers and employees of the Corrections Department acting as peace officers were deemed crimes against peace officers. *State v. Gutierrez*, 1993-NMCA-058, 115 N.M. 551, 854 P.2d 878, cert. denied, 115 N.M. 545, 854 P.2d 872.

A public service officer is not a "peace officer". — Where defendant was charged with felony battery upon a peace officer after he hit the forearm of a public service officer (PSO) performing her duties under the Detoxication Reform Act (DRA), §§ 43-2-

1.1 through 43-2-23 NMSA 1978, by escorting defendant to her vehicle to place him into protective custody, and where defendant filed a motion to dismiss, asserting that the evidence presented was insufficient to support defendant's charge of felony battery upon a peace officer because a PSO is not a "peace officer" as a matter of law, the district court did not err in reducing defendant's criminal charge from felony battery upon a peace officer to petty misdemeanor battery, because PSOs are not vested with a duty to maintain public order or to make arrests and therefore are not peace officers. *State v. Becenti*, 2021-NMCA-060.

Sufficient evidence to find that the victim was a peace officer. — In defendant's trial for battery on a peace officer, the victim's testimony that he was a corrections officer employed by the metropolitan detention center was substantial evidence that he was a peace officer under this statute. *State v. Salas*, 2017-NMCA-057, cert. denied.

Juvenile correctional officer is peace officer for purposes of the battery on a peace officer statute, despite the fact that JCOs are no longer under the control of the New Mexico Corrections Department. *State v. Gutierrez*, 1993-NMCA-058, 115 N.M. 551, 854 P.2d 878, cert. denied, 115 N.M. 545, 854 P.2d 872.

Double jeopardy. — The jurisdictional exception to double jeopardy permitted defendant's prosecution in the district court on a charge of peace officer battery, after he had pleaded guilty to several misdemeanors, including resisting arrest, in the magistrate court. *State v. Padilla*, 1984-NMSC-026, 101 N.M. 58, 678 P.2d 686, *aff'd* sub nom., Fugate v. New Mexico, 470 U.S. 904, 105 S. Ct. 1858, 84 L. Ed. 2d 777 (1985).

Officers acting in good faith. — Even if an arrest was illegal, the courts cannot condone the use of force in resisting every subsequent act made in good faith by a law enforcement officer, as police officers acting in good faith, although mistakenly, should be relieved of the threat of physical harm. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

Test is whether officer engaged in performance of official duties. — Even if an arrest is effected without probable cause, a police officer is engaged in the performance of his official duties and therefore protected under this section if he is simply acting within the scope of what he is employed to do; the test is whether he is acting within that compass or is engaging in a personal frolic of his own. *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464.

When officer in lawful discharge of duties. — An officer is in the lawful discharge of his duties if he is acting within the scope of what he is employed to do. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

If there is evidence that a peace officer used excessive force, there is a factual issue for the jury as to whether the officer acted within the scope of what he was employed to do and, thus, a factual issue as to whether the officer was performing his duties. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Scope of contact with person. — The jury was properly instructed that it could find defendant guilty of battery under this section if it found that defendant knocked or took a flashlight out of the arresting officer's hand. The word "person" as used in this statute includes anything intimately connected with a person. *State v. Ortega*, 1992-NMCA-003, 113 N.M. 437, 827 P.2d 152.

Included offense. — Battery upon a peace officer is included within the charge of aggravated battery upon a peace officer, and thus defendant's conviction was for an offense included within charge of which he had notice. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

Lesser included offense. — Where defendant admitted to intentionally kicking a police officer to avoid being shot, he was not entitled to an instruction on resisting, obstructing or evading a police officer as a lesser included offense of battery on a peace officer. *State v. Hill*, 2001-NMCA-094, 131 N.M. 195, 34 P.3d 139.

Verbatim instruction not required. — In a prosecution for battery upon a police officer, the trial court did not commit error in refusing defendant's requested jury instruction seeking the use of the words "lawful discharge of his duties" instead of "performing the duties of a peace officer." *State v. Nemeth*, 2001-NMCA-029, 130 N.M. 261, 23 P.3d 936, *overruled on other grounds by State v. Ryon*, 2005-NMSC-005, 137 N.M. 174, 108 P.3d 1032.

Instruction on simple battery warranted. — One cannot batter a peace officer while in the lawful discharge of his duties without battering the person of another, and there being evidence that the police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

If there is a factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 1982-NMCA-043, 97 N.M. 607, 642 P.2d 210.

Instruction on right to detain. — There was no error in refusing a requested instruction on an officer's right to detain a person which focused only on the officer's initial approach to defendant and disregarded the officer's attempt to arrest after defendant allegedly hit the officer, since in light of the evidence, the requested instruction was incomplete and would have confused the jury on the issue of lawful discharge of duties. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

When charge barred by acquittal on other charges. — After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new

fact finder to relitigate that same factual issue. *State v. Orosco*, 1982-NMCA-181, 99 N.M. 180, 655 P.2d 1024.

Sufficient evidence. — Where police officers were attempting to arrest defendant's relative, defendant aggressively approached the officers by raising defendant's fists, shouting and coming close to the officers, and while one officer attempted to handcuff defendant, defendant kicked the officer in the leg, injuring the officer, there was sufficient evidence to support defendant's conviction for battery on a peace officer. *State v. Ford*, 2007-NMCA-052, 141 N.M. 512, 157 P.3d 77, cert. denied, 2007-NMCERT-004, 141 N.M. 569, 158 P.3d 459.

Conviction supported by evidence. — Testimony of police officer that he and defendant exchanged blows was sufficient evidence of intentional touching to support defendant's conviction for battery under this section, notwithstanding the officer's concession on cross-examination that he couldn't actually remember whether defendant had hit him. *State v. Ortega*, 1992-NMCA-003, 113 N.M. 437, 827 P.2d 152.

Spitting or throwing urine upon a peace officer could reasonably be found by a jury to come within the purview of battery upon a peace officer. *State v. Jones*, 2000-NMCA-047, 129 N.M. 165, 3 P.3d 142, cert. denied, 129 N.M. 207, 4 P.3d 35 .

Evidence sufficient to sustain defendant's conviction where he spit on and kicked an officer while being restrained. *State v. Martinez*, 2002-NMCA-036, 131 N.M. 746, 42 P.3d 851, cert. denied, 131 N.M. 737, 42 P.3d 842.

Defense of another against excessive police force is a viable defense. — The right to defense of another against a police officer is not absolute; it does not exist if the officer is using necessary force to effect an arrest. However, a defendant is entitled to a defense of another jury instruction if an officer used force against another that was unreasonable and unnecessary. *State v. Jones*, 2020-NMCA-029.

Where defendant was charged with battery upon a peace officer and resisting or abusing an officer, and where defendant requested a defense of another jury instruction, the district court erred in denying the request and in finding that defending another against excessive force by a police officer was not a viable defense, because defense of another against excessive police force is a viable defense and reasonable minds could differ as to whether the officers used excessive force in this case. *State v. Jones*, 2020-NMCA-029.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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 and procedure, 19 N.M.L. Rev. 655 (1990).

30-22-25. Aggravated battery upon peace officer.

A. Aggravated battery upon a peace officer consists of the unlawful touching or application of force to the person of a peace officer with intent to injure that peace officer while he is in the lawful discharge of his duties.

B. Whoever commits aggravated battery upon a peace officer, inflicting an injury to the peace officer which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

C. Whoever commits aggravated battery upon a peace officer, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-24, enacted by Laws 1971, ch. 265, § 5.

ANNOTATIONS

Cross references. — For definitions of deadly weapon and great bodily harm, *see* 30-1-12 NMSA 1978.

For aggravated battery, *see* 30-3-5 NMSA 1978.

Knowledge of the victim's identity as a peace officer. — Knowledge of the victim's identity as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, which the state has the burden to prove beyond a reasonable doubt. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Sufficient evidence of aggravated battery on a peace officer based on a theory of accessory liability. — Where police officers attempted to execute a search of defendant's residence pursuant to a warrant, and where, as officers approached a camper on the property, the officers heard and saw gunfire coming from the camper, striking one of the officers, evidence that defendant owned the camper and was inside the camper at the time of the gunfire, and that DNA tests performed on several of the firearms retrieved from the camper found that defendant was either a major contributor of the DNA or could not be eliminated as a contributor, was sufficient for a reasonable jury to infer that defendant either shot at the officers himself, or, given the availability of firearms and ammunition inside his camper, defendant encouraged, helped, or caused others to shoot at the officers. *State v. Uribe-Vidal*, 2018-NMCA-008.

Convictions of aggravated battery upon a peace officer and attempted first degree murder violated double jeopardy. — Where defendant, who was imprisoned in a county detention center, attacked and stabbed a correctional officer five times with a metal shank, defendant's convictions for attempted murder and aggravated battery of a peace officer did not violate double jeopardy. *State v. Urquizo*, 2012-NMCA-113, 288 P.3d 919, cert. granted, 2012-NMCERT-011.

Although the defendant's mental state, rather than the victim's conduct, is the touchstone of the defendant's knowledge that the victim is a peace officer, the defendant's intent to commit aggravated battery on a peace officer may be established by circumstantial evidence, which may include the fact that the victim was in full uniform, had a badge visibly displayed, was driving a marked police vehicle, or had identified himself or herself as a police officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Battery under Section 30-3-4 NMSA 1978 is a lesser included offense of aggravated battery upon a peace officer. *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119, *aff'g* 2007-NMCA-131, 142 N.M. 626, 168 P.3d 756.

Claim of self-defense negates a specific element of battery upon a peace officer. *State v. Flores*, 2005-NMCA-135, 138 N.M. 636, 124 P.3d 1175, cert. denied, 2005-NMCERT-011, 138 N.M. 636, 124 P.3d 564.

Lesser offense. — The offense of aggravated battery upon a peace officer is a lesser included offense of the crime of assault with intent to commit a violent felony upon a peace officer (30-22-23 NMSA 1978). *State v. Bojorquez*, 1975-NMCA-075, 88 N.M. 154, 538 P.2d 796, cert. denied, 88 N.M. 318, 540 P.2d 248.

Battery upon officer included. — Battery upon a peace officer is a charge included within the charge of aggravated battery upon a peace officer, and thus defendant's conviction was for an offense included within the charge of aggravated battery of an officer of which he had notice. *State v. Kraul*, 1977-NMCA-032, 90 N.M. 314, 563 P.2d 108, cert. denied, 90 N.M. 637, 567 P.2d 486.

30-22-26. Assisting in assault upon peace officer.

A. Every person who assists or is assisted by one or more other persons to commit a battery upon any peace officer while he is in the lawful discharge of his duties is guilty of a fourth degree felony.

B. This section is designed to protect officers from assaults and batteries by multiple assailants while quelling riots and other unlawful assemblages.

History: 1953 Comp., § 40A-22-25, enacted by Laws 1971, ch. 265, § 6.

ANNOTATIONS

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

30-22-27. Disarming a peace officer.

A. Disarming a peace officer consists of knowingly:

(1) removing a firearm or weapon from the person of a peace officer when the officer is acting within the scope of his duties; or

(2) depriving a peace officer of the use of a firearm or weapon when the officer is acting within the scope of his duties.

B. The provisions of Subsection A of this act shall not apply when a peace officer is engaged in criminal conduct.

C. Whoever commits disarming a peace officer is guilty of a third degree felony.

History: Laws 1997, ch. 122, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 122, § 2 makes the act effective July 1, 1997.

"Use of a firearm" defined. — The plain language of the statute penalizes a defendant for depriving an officer of the use of a firearm at any point during the officer's acting within the scope of his duties, rather than limiting its applicability to a deprivation that occurs only when the officer is attempting or intends an immediate use of the firearm. *State v. Ortiz*, 2017-NMCA-006, cert. denied.

Sufficient evidence of attempt to disarm a peace officer. — Where a law enforcement officer, in response to a report of a male subject acting suspiciously, detained and transported defendant to the police department due to his bizarre behavior, and where defendant began hitting his head against the wall and door of the holding cell requiring medical attention, and while being transported to the hospital, defendant grabbed the officer's shotgun from the front seat of the patrol vehicle with both hands, despite being handcuffed, and tried to pull the weapon from the front seat to the back seat of the patrol car, the evidence produced at trial was sufficient for the district court to conclude that defendant intentionally grabbed the shotgun intending to pull it through the partition between the front and back seat of the patrol vehicle, and that doing so would deprive the officer, who was acting within the scope of his duties, of its use. *State v. Ortiz*, 2017-NMCA-006, cert. denied.

ARTICLE 23
Misconduct by Officials

30-23-1. Demanding illegal fees.

Demanding illegal fees consists of any public officer or public employee knowingly asking or accepting anything of value greater than that fixed or allowed by law for the execution or performance of any service or duty.

Whoever commits demanding illegal fees is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-23-1, enacted by Laws 1963, ch. 303, § 23-1.

ANNOTATIONS

Cross references. — For section making knowingly demanding or receiving illegal fees one of the grounds for discharge of local officer, *see* 10-4-2 NMSA 1978.

Not lesser included offense of Section 30-23-2 NMSA 1978. — The offense of demanding illegal fees, as contained in this section, is not a lesser included offense of paying or receiving public money for services not rendered under Section 30-23-2 NMSA 1978. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

Municipal court fees. — Absent statutory authority, a municipality may not charge filing fees or other cost for cases filed in its municipal courts. 1968 Op. Att'y Gen. No. 68-65.

Unauthorized inspection fees. — For the cattle sanitary board (now the livestock board) to charge slaughterhouses any inspection fees which are not authorized expressly by statute might put the board in possible criminal jeopardy in view of this section. 1966 Op. Att'y Gen. No. 66-128.

Dual salaries. — An individual employed as a full-time district court reporter and as a deputy court clerk over the same period of time may not receive salaries for both jobs. 1964 Op. Att'y Gen. No. 64-152.

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. — 63A Am. Jur. 2d Public Officers and Employees §§ 407, 410.

67 C.J.S. Officers §§ 255 to 263.

30-23-2. Paying or receiving public money for services not rendered.

Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where

such payment purports to be for wages, salary or remuneration for personal servives [services] which have not in fact been rendered.

Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-23-2, enacted by Laws 1963, ch. 303, § 23-2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Section not vague. — This section gives fair warning against expenditure of public funds for services not rendered, while excluding lawful payments for vacation time or sick leave or other lawfully authorized purposes, and hence, there is no vagueness in the statute as written. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Application of this section is not left to administrative discretion, and lawfulness of authorization is not determined by an administrative official but by a court. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Section 30-23-1 NMSA 1978 not lesser included offense. — The offense of demanding illegal fees, as contained in Section 30-23-1 NMSA 1978, is not a lesser included offense of paying or receiving public money for services not rendered contained in this section. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

Charging in alternative. — Indictment charging defendant in the alternative with knowingly making or receiving payment or causing payment to be made from public funds charged one crime committed in various ways and was not legally deficient. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Indictment was not duplicitous because the statement of facts and subsequent proof related to a series of items, even though each might have been alleged as a separate violation. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Notice sufficient. — Where defendant asserted he could not properly prepare his defense because he was not informed as to which of 17 instances the state would attempt to prove, and the statement of facts informed defendant that the state was relying on each of the instances to prove the one offense charged in the indictment, defendant was informed of the crime charged in sufficient detail to enable him to prepare his defense. *State v. Gurule*, 1977-NMCA-001, 90 N.M. 87, 559 P.2d 1214, cert. denied, 90 N.M. 254, 561 P.2d 1347.

Section does not concern judgments for damages for breach of contract awarded to discharge tenured teacher. *Sanchez v. Board of Educ*., 1969-NMSC-063, 80 N.M. 286, 454 P.2d 768.

Public policy. — While the provisions of former 40-8-12, 1953 Comp., were probably not broad enough to cover travel expenses and per diem allowances, they indicated quite clearly a strong public policy of requiring rendition of services prior to any payment therefor or in connection therewith. 1962 Op. Att'y Gen. No. 62-55.

Locale of services rendered. — Former 40-8-12, 1953 Comp., required that payment was only to be made for services actually rendered to the state of New Mexico; however, it did not mean that the services would necessarily have to be rendered in the state. 1956 Op. Att'y Gen. No. 56-6469.

State funds covered. — This section places restrictions on the payment of funds which are the property of the state. 1975 Op. Att'y Gen. No. 75-10.

Separation of powers to be respected. — This section cannot be read to impose limits on the health and social services (now the human services) department's use of federal funds in administering social service programs, since the legislature is prevented by the separation of powers doctrine from imposing any conditions on the executive branch's use of federal or non-state money. 1975 Op. Att'y Gen. No. 75-10.

Executive departments not unreasonably obstructed. — This section is not applicable to disbursements from revolving funds established out of its general appropriation by the health and social services department (now the health care authority department) as advances to "providers" under certain federal programs conducted by the department, which advances the providers must return; to read these sections so as to prohibit such advances would unreasonably obstruct the department in the exercise of its statutory powers. 1975 Op. Att'y Gen. No. 75-10.

Dual salaries. — A person may not be employed as a juvenile probation officer and deputy court clerk and paid as both although performing no services as deputy court clerk since this section makes it a misdemeanor to pay or to receive public money for services not rendered. 1964 Op. Att'y Gen. No. 64-152.

Commencement of salary. — Contracts employing new faculty members cannot provide for the commencement of salary payments before teaching services are rendered. 1972 Op. Att'y Gen. No. 72-44.

Payment for sick leave authorized. — Continued payment during sick leave is not payment of public money for services not rendered, even though no services are rendered during the time the employee is absent from work because sick leave is part of the compensation for services which were rendered before the sick leave was taken. 1973 Op. Att'y Gen. No. 73-34.

When services already rendered. — Payment of wages to teachers during sick leave must be made in consideration of services performed; payments made before the services were performed would be payment of "public money for services not rendered" and would violate this section. 1972 Op. Att'y Gen. No. 72-33.

Use of sick leave for maternity purposes. — This section is not violated if the school board allows an employee to use sick leave for maternity purposes, where the employee received payment during "maternity leave" only to the extent of her accumulated sick leave. 1973 Op. Att'y Gen. No. 73-34.

Absence of professor from class. — Unless a faculty member's failure to meet a class on a particular day could be said as a matter of law to constitute a failure to render contracted-for services, no violation of this section would be involved if an institution of higher education failed to deduct salary for such day not actually taught. 1970 Op. Att'y Gen. No. 70-73.

Jury duty constitutes lawfully authorized purpose within the meaning of this section. 1975 Op. Att'y Gen. No. 75-33.

Fees for mileage for jury duty. — School employees need not lose regular compensation while serving on jury duty, but may receive no more than their ordinary rate of compensation during the period of jury duty; however, school employees serving on juries would be entitled to accept the allowance for mileage. 1975 Op. Att'y Gen. No. 75-33.

Payment for vacation periods. — If the board of regents of the school for the deaf decided that time spent by school employees on jury duty would be "vacation periods," then payment of wages during such absence would not be prohibited by former 40-8-12, 1953 Comp. 1962 Op. Att'y Gen. No. 62-73.

Educational leave is lawfully authorized purpose. — Grant of educational leave with pay to a state employee to attend university program on public science policy and administration is "for other lawfully authorized purposes" under this section and does not violate constitutional or statutory provisions. 1972 Op. Att'y Gen. No. 72-67.

Training public employee for special program. — The New Mexico boys' school may properly send one of the employees of the institution to another state for a period of one month for indoctrination in the duties of a youth forestry camp director so that such employee may assist the New Mexico boys' school in managing a forestry camp for boys established in New Mexico. 1963 Op. Att'y Gen. No. 63-126.

Restitution. — Upon conviction under this section, 30-23-7 NMSA 1978 would come into play and recovery thereunder could be had. 1964 Op. Att'y Gen. No. 64-152.

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

30-23-3. Making or permitting false public voucher.

Making or permitting false public voucher consists of knowingly, intentionally or wilfully [willfully] making, causing to be made or permitting to be made, a false material statement or forged signature upon any public voucher, or invoice supporting a public voucher, with intent that the voucher or invoice shall be relied upon for the expenditure of public money.

Whoever commits making or permitting false public voucher is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-23-3, enacted by Laws 1963, ch. 303, § 23-3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For forgery, *see* 30-16-10 NMSA 1978.

Section not vague. — Section is not unconstitutionally vague, ambiguous or indefinite; it gives fair warning of the prohibited acts and declares those acts to be a crime. *State v. Sierra*, 1977-NMCA-075, 90 N.M. 680, 568 P.2d 206, cert. denied, 91 N.M. 4, 569 P.2d 414.

"Material." — Meaning of "material" herein is not vague, ambiguous or indefinite, as it imports nothing less than a matter which is so substantial and important as to influence a party. *State v. Sierra*, 1977-NMCA-075, 90 N.M. 680, 568 P.2d 206, cert. denied, 91 N.M. 4, 569 P.2d 414.

"Public money". — The term "public money", as used in this section, is sufficiently specific to not require a person of ordinary intelligence to guess at the conduct the statute proscribes. *State v. Hearne*, 1991-NMCA-046, 112 N.M. 208, 813 P.2d 485.

Section applies to public employees. — This section is unambiguous and applies to public employees as well as public officials. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

The heading of this article, "Misconduct by Officials," does not restrict its application to public officials. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Applicability not determined by nature of expenditure. — It cannot be the nature of the expenditure which determines the applicability of this section. If the nature of the expenditure was relied upon to determine if funds were "public money", then absurd results are produced. Any public official could falsify public vouchers for his own purposes and then defend himself by claiming the funds were not "public money" because they were not spent for a "public purpose". *State v. Hearne*, 1991-NMCA-046, 112 N.M. 208, 813 P.2d 485.

Money donated to university by private individual. — It would be against public policy to allow a university official to enter into private agreements to expend funds made available only to pursue the agenda of the donating entity. To rule otherwise would mean any benefactor of the university could create a fund, give authority over the fund to a university official and claim the fund did not contain public money, thereby circumventing all university spending and accounting policies. *State v. Hearne*, 1991-NMCA-046, 112 N.M. 208, 813 P.2d 485.

State university head coach. — This section applies to a state university head coach. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Prosecution for both fraud and violation of this section permitted. — The double jeopardy clause does not prohibit the prosecution of an individual under both this section and 30-16-6 NMSA 1978. *State v. Ellenberger*, 1981-NMSC-056, 96 N.M. 287, 629 P.2d 1216.

Because the fraud statute does not require the making of a false voucher, and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 1990-NMCA-014, 110 N.M. 486, 797 P.2d 275, cert. denied, 109 N.M. 631, 788 P.2d 931.

Joinder of fraud, bribery and racketerring counts. — The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Evidence sufficient to convict. — *See State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Dual salaries prohibited. — A person may not be employed as a juvenile probation officer and deputy court clerk and paid as both although performing no services as deputy court clerk since this section makes it a fourth-degree felony to make or permit to be made a false public voucher for the expenditure of public money. 1964 Op. Att'y Gen. No. 64-152.

Restitution. — Upon conviction under this section, 30-23-7 NMSA 1978 would come into play and recovery thereunder could be had. 1964 Op. Att'y Gen. No. 64-152.

Law reviews. — For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: State v. Joe Nestor Chavez," see 10 N.M.L. Rev. 217 (1979-1980).

30-23-4. Injunction to restrain unlawful payment of public funds.

Any citizen of this state may file suit in the district court to restrain the payment or receipt of public money in violation of Sections 23-2 and 23-3 [30-23-2 and 30-23-3 NMSA 1978]. Jurisdiction to entertain and adjudicate such suits is conferred upon the district courts, and such suits shall be subject to the same rules, statutes and law with respect to procedure, venue and appeals as ordinary civil actions for injunctive relief.

History: 1953 Comp., § 40A-23-4, enacted by Laws 1963, ch. 303, § 23-4.

ANNOTATIONS

Cross references. — For civil actions for injunctive relief, *see* Rules 1-065 and 1-066 NMRA.

Citizen's authority restricted. — The authority granted private citizens by former law was restricted to the bringing of actions to restrain the payment or receipt of public funds. *Hatch v. Keehan*, 1956-NMSC-019, 61 N.M. 1, 293 P.2d 314.

Recovery of funds not authorized. — A private citizen was not authorized by former law to bring an action for the recovery or restoration of public funds. *Hatch v. Keehan*, 1956-NMSC-019, 61 N.M. 1, 293 P.2d 314.

30-23-5. Unlawful speculation in claims against state.

Unlawful speculation in claims against state consists of any public officer or public employee directly or indirectly buying, selling, bartering, dealing in or speculating in or with any certificate, warrant or other evidence of indebtedness issued by the state, a municipality or other political subdivision, unless such certificate, warrant or other evidence of indebtedness shall have been lawfully issued to such person in payment of his salary or in consideration for services rendered by such person for supplies furnished by him.

Whoever commits unlawful speculation in claims against state is guilty of a misdemeanor.

History: 1953 Comp., § 40A-23-5, enacted by Laws 1963, ch. 303, § 23-5.

30-23-6. Unlawful interest in a public contract.

Unlawful interest in a public contract consists of:

A. any public officer or public employee receiving anything of value, directly or indirectly, from either a seller or a seller's agents, or a purchaser or a purchaser's agents in connection with the sale or purchase of securities, goods, leases, lands or anything of value by the state or any of its political subdivisions, unless:

(1) prior written consent of the head of the department of the state or political subdivision involved in the transaction is obtained and filed as a matter of public record in the office of secretary of state; and

(2) subsequent to the transaction a statement is filed as a matter of public record in the office of secretary of state by the purchaser or seller giving anything of value to a public officer or public employee and this statement contains the date the services were rendered, the amount of remuneration for the rendered services and the nature of the rendered services;

B. any seller, or his agents, or a purchaser, or his agents, offering to pay or paying anything of value directly or indirectly to a public officer or public employee in connection with the sale or purchase of securities or goods by the state or any of its political subdivisions unless the requirements of Paragraphs (1) and (2) of Subsection A of this section ar [are] complied with.

Any person violating the provisions of Subsection B of this section, where such violations forms the basis for prosecution and conviction of a public officer or public employee, shall be disqualified from transacting any business with the state or its political subdivisions for a period of five years from the date of such violation.

Nothing in this section shall prohibit a public officer or public employee from receiving his regular remuneration for services rendered to the state or its political subdivisions in connection with the aforementioned transactions.

Whoever commits unlawful interest in public contracts where the value received by him is fifty dollars ($50.00) or less is guilty of a misdemeanor.

Whoever commits unlawful interest in public contracts where the value received by him is more than fifty dollars ($50.00) is guilty of a fourth degree felony. Any public officer or public employee convicted of a felony hereunder is forever disqualified from employment by the state or any of its political subdivisions.

History: 1953 Comp., § 40A-23-6, enacted by Laws 1963, ch. 303, § 23-6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 63A Am. Jur. 2d Public Officers and Employees § 411.

30-23-7. Civil damages for engaging in illegal acts.

In addition to any criminal penalties imposed by Section 23-6 [30-23-6 NMSA 1978], a public officer or public employee convicted of violating such section shall be liable for anything of value received by him to the department of the state or political subdivision in whose employ or service he was at the time of such violation of that section. Action for recovery of amounts under this section shall be brought in the district court of the county in which any element of the crime occurred. The actions shall be brought in the name of the state for the benefit and use of the department of the state or political subdivision in whose employ or service the public officer or public employee was at the time of the commission of the crime.

History: 1953 Comp., § 40A-23-7, enacted by Laws 1963, ch. 303, § 23-7.

ANNOTATIONS

Conviction required. — A judgment of conviction is the condition precedent to the maintenance by the state of an action for restitution. 1964 Op. Att'y Gen. No. 64-152.

Upon conviction under Sections 30-23-2 or 30-23-3 recovery could be had hereunder. 1964 Op. Att'y Gen. No. 64-152.

ARTICLE 24
Bribery

30-24-1. Bribery of public officer or public employee.

Bribery of public officer or public employee consists of any person giving or offering to give, directly or indirectly, anything of value to any public officer or public employee, with intent to induce or influence such public officer or public employee to:

A. give or render any official opinion, judgment or decree;

B. be more favorable to one party than to the other in any cause, action, suit, election, appointment, matter or thing pending or to be brought before such person;

C. procure him to vote or withhold his vote on any question, matter or proceeding which is then or may thereafter be pending, and which may by law come or be brought before him in his public capacity;

D. execute any of the powers in him vested; or

E. perform any public duty otherwise than as required by law, or to delay in or omit to perform any public duty required of him by law.

Whoever commits bribery of public officer or public employee is guilty of a third degree felony.

History: 1953 Comp., § 40A-24-1, enacted by Laws 1963, ch. 303, § 24-1.

ANNOTATIONS

Cross references. — For bribery of public treasurers or employees, *see* 6-10-53 NMSA 1978.

For bribery of contest participants, *see* 30-19-13 NMSA 1978.

Applicability to public employees. — This section includes bribery of public employees as well as public officers. *State v. Glen Slaughter & Assocs*., 1994-NMCA-169, 119 N.M. 219, 889 P.2d 254.

Bribery statute excludes operation of common law of bribery. *State v. Quinn*, 1930-NMSC-065, 35 N.M. 62, 290 P. 786; *State v. Collins*, 1922-NMSC-063, 28 N.M. 230, 210 P. 569 (decided under prior law).

Execution of powers vested. — The word "vested" in Subsection D does not mean "specifically granted by statute or regulation"; instead, "vested by law" should be read to mean "empowered by the sovereign authority of the government." *State v. Glen Slaughter & Assocs*., 1994-NMCA-169, 119 N.M. 219, 889 P.2d 254.

The improper acts alleged against the executive director of the New Mexico Public School Insurance Authority and the New Mexico Retiree Health Care Authority were ones that he could perform because of his employment by the sovereign authority of the state; if a public employee takes a bribe to execute powers possessed by virtue of holding public employment, Subsection D is violated. *State v. Glen Slaughter & Assocs*., 1994-NMCA-169, 119 N.M. 219, 889 P.2d 254.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Bribery §§ 1 to 17.

Charge of bribery or cognate offense predicated upon an unaccepted offer by or to an official, 52 A.L.R. 816.

Nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him, as defense to prosecution for bribery or acceptance of bribe, 158 A.L.R. 323.

Other bribery or acceptance of bribe, admissibility of evidence tending to show commission of, in prosecution for bribery or accepting bribes, 20 A.L.R.2d 1012.

Entrapment to commit bribery or offer to bribe, 69 A.L.R.2d 1397.

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee, 7 A.L.R.4th 1202.

11 C.J.S. Bribery § 3 et seq.

30-24-2. Demanding or receiving bribe by public officer or public employee.

Demanding or receiving bribe by public officer or public employee consists of any public officer or public employee soliciting or accepting, directly or indirectly, anything of value, with intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity.

Whoever commits demanding or receiving bribe by public officer or public employee is guilty of a third degree felony, and upon conviction thereof such public officer or public employee shall forfeit the office then held by him.

History: 1953 Comp., § 40A-24-2, enacted by Laws 1963, ch. 303, § 24-2.

ANNOTATIONS

Cross references. — For removal of local officers, *see* 10-4-1 NMSA 1978 et seq.

For acceptance of bribes by irrigation district officials, *see* 73-9-33, 73-10-18, NMSA 1978.

Statutory crime void. — The statutory crime of demanding or receiving a bribe as a public official (Section 30-24-2 NMSA 1978) to the extent that it relates specifically to legislators is voided by the constitutional crime of soliciting a bribe as a member of the legislature (N.M. Const., art. IV, § 39). *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Demand for sexual favor to forego arrest deemed bribe. — Where police officer coerced victim to perform fellatio on him so she would not be arrested for driving violations, police officer could properly be charged with demanding a bribe and with

criminal sexual penetration. *State v. Johnson*, 1984-NMCA-094, 102 N.M. 110, 692 P.2d 35, *overruled in part on other grounds by Manlove v. Sullivan*, 1989-NMSC-029, 108 N.M. 471, 775 P.2d 237.

Assistant district attorney could be prosecuted for attempted bribery under Laws 1912, ch. 75. *State v. Collins*, 1922-NMSC-063, 28 N.M. 230, 210 P. 569 (decided under prior law).

Attorney was disbarred for conviction of bribery under this section. *In re Esquibel*, 1992-NMSC-007, 113 N.M. 24, 822 P.2d 121.

Indictment sufficient. — Indictment charging justice of the peace with having wrongfully handed over papers in a case, decided by him and appealed, to a third party upon payment of a bribe, instead of transmitting them to the clerk of the district court, was not insufficient. *State v. Williams*, 1916-NMSC-073, 22 N.M. 337, 161 P. 334 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 12 Am. Jur. 2d Bribery § 11.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery, 55 A.L.R.2d 1137.

Construction and application of § 2C1.1 of United States Sentencing Guidelines (18 USCS APPX § 2C1.1) pertaining to offenses involving public officials offering, giving, soliciting, or receiving bribes, or extortion under color of official right, 144 A.L.R. Fed. 615.

Who is public official within meaning of federal statute punishing bribery of public official (18 U.S.C.A. § 201), 161 A.L.R. Fed. 491.

11 C.J.S. Bribery § 11.

30-24-3. Bribery or intimidation of a witness; retaliation against a witness.

A. Bribery or intimidation of a witness consists of any person knowingly:

(1) giving or offering to give anything of value to any witness or to any person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding to testify falsely or to abstain from testifying to any fact in such cause or proceeding;

(2) intimidating or threatening any witness or person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding for the purpose of preventing such individual from testifying to any fact, to abstain from testifying or to testify falsely; or

(3) intimidating or threatening any person or giving or offering to give anything of value to any person with the intent to keep the person from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.

B. Retaliation against a witness consists of any person knowingly engaging in conduct that causes bodily injury to another person or damage to the tangible property of another person, or threatening to do so, with the intent to retaliate against any person for any information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings given by a person to a law enforcement officer.

C. Whoever commits bribery or intimidation of a witness is guilty of a third degree felony.

D. Whoever commits retaliation against a witness is guilty of a second degree felony.

History: 1953 Comp., § 40A-24-3, enacted by Laws 1963, ch. 303, § 24-3; 1987, ch. 227, § 1; 1991, ch. 84, § 1; 1997, ch. 208, § 1.

ANNOTATIONS

Cross references. — For perjury, *see* 30-25-1 NMSA 1978.

The 1997 amendment, effective July 1, 1997, substituted "is guilty of a third degree felony" for "or retaliation against a witness is guilty of a fourth degree felony" at the end of Subsection C, and added Subsection D.

The 1991 amendment, effective April 2, 1991, redesignated former Subsections A and C as Paragraphs (1) and (2) of Subsection A and former Subsection D as Subsections B and C; deleted "and maliciously" following "knowingly" in the introductory phrase of Subsection A; deleted former Subsection B which read "who is a witness or is likely to become a witness, receiving or agreeing to receive any bribe or anything of value to testify falsely or to abstain from testifying to any fact in any cause in any judicial, administrative, legislative or other official cause or proceeding"; added Paragraph (3) of Subsection A; substituted "engaging in conduct that causes" for "and maliciously engaging in any conduct and thereby causing" near the beginning of Subsection B; and made related stylistic changes.

The 1987 amendment, effective June 19, 1987, rewrote the catchline, which read "Bribery of witness," substituted "or intimidation of a witness consists of any person knowingly and maliciously" for "of witness consists of any person" in the introductory language, deleted "pending or about to be brought" preceding "to testify" in Subsection

A, added "or" at the end of Subsection A, deleted "pending or about to be brought in this state or" at the end of Subsection B and "pending or about to be brought" following "proceeding" in Subsection C, inserted Subsection D and substituted "or intimidation of a witness or retaliation against a witness" for "of witness" in the last undesignated paragraph.

Constitutionality. — The phrase "possible commission of a felony" was not shown to be unconstitutionally vague with respect to the defendant, who held a knife to the victim's throat and committed other violent acts, taunted the victim to call the police, and told her that he would kill her before they arrived. *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

Strict construction. — This section is criminal in nature and must be construed strictly. *State v. Bell*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50.

Elements of offense. — In a prosecution for intimidation of a witness, the state is not required to prove that defendant knew that he committed certain acts that under the law amounted to a felony. *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

Conviction of crime charged not required. — A defendant may be convicted of bribery or intimidation of witness even if the defendant is acquitted of any crime associated with the actions relating to "the commission or possible commission of a felony." *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

Nature of offense. — Liability for retaliation against a witness may be imposed even if the threat is communicated to a person other than the witness, so long as it is reasonable to expect that the person who receives the threat would inform the victim, and liability does not depend on whether defendant intended to carry out his threat. *State v. Warsop*, 1998-NMCA-033, 124 N.M. 683, 954 P.2d 748, cert. denied, 124 N.M. 589, 953 P.2d 1087.

Juvenile offender. — A juvenile may be convicted of intimidation of a witness even though he may only be found delinquent in the underlying offense. *In re Gabriel M*., 2002-NMCA-047, 132 N.M. 124, 45 P.3d 64, cert. denied, 132 N.M. 193, 46 P.3d 100.

Cause not pending. — Where alleged acts of bribery of witnesses in a homicide case took place after the death of defendant's wife but long before any final decision was made concerning the holding of an inquest or the filing of a criminal complaint against the defendant no proceeding was pending or about to be brought within the meaning of this section at the time of those alleged acts of bribery. *State v. Bell*, 1967-NMSC-184, 78 N.M. 317, 431 P.2d 50, superseded by statute, *State v. Clements*, 2009-NMCA-85, 146 N.M. 745, 215 P.3d 54.

Allegation of knowledge or intent. — In prosecution for intimidating witness, indictment was not defective for failing to charge that accused knowingly committed the act or that he did it with corrupt intent. *State v. Lazarovich*, 1921-NMSC-071, 27 N.M. 282, 200 P. 422.

Jury instructions. — Giving of instruction that allowed the jury to convict defendant of intimidation of a witness without making the requisite finding that the information related to "the commission or possible commission of a felony" as opposed to a misdemeanor was reversible error. *State v. Perea*, 1999-NMCA-138, 128 N.M. 263, 992 P.2d 276, cert. denied, 128 N.M. 149, 990 P.2d 823.

Lesser included offenses. — Under the *State v. Meadors* , 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731, analysis because retaliation against a witness did not subsume the elements of the crime of intimidation of a witness nor was the defendant provided notice, defendant was erroneously convicted of intimidation of a witness as an uncharged lesser included offense of retaliation. *State v. McGee*, 2002-NMCA-090, 132 N.M. 537, 51 P.3d 1191, cert. denied, 132 N.M. 551, 52 P.3d 411.

Circumstantial evidence. — Because proof of intent is rarely provable by direct evidence, circumstantial evidence must often be relied upon for its proof. Thus, circumstantial evidence, like direct evidence, will support a jury's finding of specific intent. *State v. McGee*, 2004-NMCA-014, 135 N.M. 73, 84 P.3d 690, cert. denied, 2004-NMCERT-001, 135 N.M. 160, 85 P.3d 802.

Sufficient evidence. — Where a witness had testified at defendant’s trial which resulted in defendant’s conviction for three charges and when defendant encountered the witness after the trial, defendant said "There’s the son of a bitch. I’ll kill that mother fucker", the evidence was sufficient to support defendant’s conviction for retaliating against a witness. *State v. Estrada*, 2001-NMCA-034, 130 N.M. 358, 24 P.3d 793, cert. denied, 130 N.M. 459, 26 P.3d 163.

Where defendant had telephone conversations with a murder suspect during which they agreed that defendant would attend the murder suspect’s trial because defendant’s presence might intimidate a key witness into not testifying against the murder suspect, the evidence was sufficient to support defendant’s conviction for conspiracy to intimidate a witness. *State v. Martinez*, 2008-NMCA-019, 143 N.M. 428, 176 P.3d 1160, cert. denied, 2008-NMCERT-001, 143 N.M. 397, 176 P.3d 1129.

Where a police officer charged defendant, who was a county commissioner, with DWI and defendant, in defendant’s capacity as chairperson of the county commission, wrote the officer a letter stating that defendant had received information indicating that the officer and the officer’s spouse were violating the guidelines of a federal food commodities program, there was sufficient evidence to support defendant’s conviction for intimidation of a witness. *State v. Fernandez*, 1994-NMCA-056, 117 N.M. 673, 875 P.2d 1104, cert. denied, 117 N.M. 744, 877 P.2d 44.

Sufficient evidence of intimidation of a witness. — In defendant's trial for criminal sexual contact of a minor and intimidation of a witness, where, in response to the prosecutor's leading questions, the nine-year-old child testified that defendant told the child not to tell anyone what happened, that defendant said that if the child told someone, defendant would take the child far away and leave him there, and that the child was afraid of defendant, there was a factual basis upon which the jury could conclude that defendant threatened the child, and the jury could reasonably infer that defendant intimidated the child with the intent to keep him from reporting the incident to law enforcement. *State v. Luna*, 2018-NMCA-025, cert. denied.

Sufficient evidence to identify the defendant. — Where defendant was charged with use of a telephone to terrify, intimidate, threaten, harass, annoy or offend, and bribery or intimidation of a witness, and where, at trial, the victim testified that defendant was her husband, that they had been married for many years but that they had been separated since 2010, that in December 2016, defendant appeared at the victim's home and started an altercation, during which defendant broke the windshield on the victim's car, that later that same day, defendant left two voicemails on the victim's phone threatening to kill her for calling the police, that she was familiar with defendant's voice from the many years that they had been married, that she recognized defendant's voice and cell phone number from the voicemails, and that the day before a magistrate court trial on a domestic violence charge related to the broken windshield, defendant called the victim and threatened to hurt her if she showed up to court, and where the state presented to the jury recordings of the voicemails, the evidence was sufficient to identify defendant as the person who left the voicemails and called the victim directly, and was sufficient to support defendant's convictions. *State v. Vigil*, 2021-NMCA-024, cert. denied.

Insufficient evidence. — Where the witness told police that the witness suspected that defendant had burned down one of defendant's houses and that the witness had observed defendant attempt to set fire to another of defendant's houses; two years later, defendant was convicted of a misdemeanor charge of criminal damage to property; the witness testified at defendant's trial, and two days after the trial, the witness received a threatening letter from defendant, there was insufficient evidence to support defendant's conviction for retaliating against a witness because the letter was sent in retaliation for the witness' misdemeanor trial testimony, not in retaliation for the witness' arson report. *Torres v. Lytle*, 461 F. 3d 1301 (10th Cir. 2006).

Insufficient evidence of intimidation or threatening of a witness. — Where defendant was charged with criminal sexual penetration of a minor and intimidation or threatening of a witness, and where the state relied on testimony elicited from the victim that defendant's son called her on the telephone after the incident and threatened her, there was insufficient evidence to support defendant's conviction for intimidation or threatening of a witness, because the state did not present any evidence that defendant helped or encouraged his son to intimidate or threaten the victim, nor did it establish that defendant requested his son place the call to the victim or was even aware that his son had called the victim. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Sufficient evidence of bribery of a witness. — Where defendant was charged with criminal sexual penetration of a minor and bribery of a witness, and where the state relied on testimony elicited from the victim that after the assault, defendant threw her pants at her, instructed her to put them on, and stated, "remember, if you say anything, I'll get you again," there was sufficient evidence to prove beyond a reasonable doubt that defendant intended to keep the victim from truthfully reporting to a law enforcement officer or any agency of governing information relating to the commission of the felony of criminal sexual penetration. *State v. Garcia*, 2019-NMCA-056, cert. denied.

Evidence sufficient. — Where defendant assaulted defendant's spouse; defendant was aware of and afraid that defendant might go to jail because of the assault; and before the police arrived to investigate the incident, defendant told the spouse that defendant would kill the spouse and the spouse's children if the spouse said anything, there was sufficient evidence to support defendant's conviction for intimidation. *State v. Clements*, 2009-NMCA-085,146 N.M. 745, 215 P.3d 54, cert. denied, 2009-NMCERT-007, 147 N.M. 362, 223 P.3d 359.

Testimony from witness that the defendant ordered him to "keep his mouth shut" and offered to buy the witness an airline ticket to get out of town was sufficient for a rational jury to find each element of the crime of bribery of a witness beyond a reasonable doubt. *State v. Coffin*, 1999-NMSC-038, 128 N.M. 192, 991 P.2d 477.

Defendant's conviction for intimidation of a witness was time-barred. — Where defendant was charged with numerous counts of criminal sexual penetration of a minor (CSPM), one count of attempt to commit CSPM, and one count of intimidation of a witness, a third-degree felony, and where defendant's intimidation of the victim occurred in 2008 and defendant was not charged or indicted until 2016, defendant's conviction for intimidation of a witness was time-barred because the defendant's prosecution for that charge exceeded the applicable limitations period of five years, pursuant to 30-1-8(B) NMSA 1978, between when the crime was committed in August 2008 and when the information was filed in March 2016. *State v. Costillo*, 2020-NMCA-051.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 58 Am. Jur. 2d Obstructing Justice §§ 46, 47, 64 to 66.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, 8 A.L.R.4th 769.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

67 C.J.S. Obstructing Justice §§ 16 to 18.

30-24-3.1. Acceptance of a bribe by a witness.

A. No person who is a witness or is likely to become a witness shall receive, agree to receive or solicit any bribe or anything of value to:

(1) testify falsely or to abstain from testifying to any fact in any cause in any judicial, administrative, legislative or other proceeding; or

(2) abstain from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.

B. Whoever receives, agrees to receive or solicits a bribe is guilty of a fourth degree felony.

History: Laws 1991, ch. 84, § 2.

ARTICLE 25
Perjury and False Affirmations

30-25-1. Perjury.

A. Perjury consists of making a false statement under oath, affirmation or penalty of perjury, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding or matter, knowing such statement to be untrue.

B. Whoever commits perjury is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-25-1, enacted by Laws 1963, ch. 303, § 25-1; 2009, ch. 78, § 9.

ANNOTATIONS

Cross references. — For provision making false swearing to accounts by county officers perjury, *see* 4-44-32 NMSA 1978.

For perjury in land contest proceedings, *see* 19-7-66 NMSA 1978.

For bribery of witness, *see* 30-24-3 NMSA 1978.

For perjury concerning regulated oil and gas wells, *see* 70-2-10 NMSA 1978.

The 2009 amendment, effective July 1, 2009, in Subsection A, after "affirmation", added "or penalty of perjury" and after "official proceeding" added "or matter".

I. GENERAL CONSIDERATION.

Essential elements of perjury are that the testimony of the defendant in the prior case was false testimony under oath made on a material matter with knowledge that it was false. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Materiality essential element of perjury. — Under the Fifth and Sixth Amendments of the United States constitution, a defendant is entitled to have the question of materiality submitted to the jury, and *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, and *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, are overruled to the extent they hold that materiality is an element for the trial court to decide as a matter of law. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *aff'd in pertinent part*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

"Willfulness" not required. — "Willfulness" as an aspect distinct from "knowledge" is not a part of the offense established by the statute and the trial court did not err in refusing to instruct on "willfulness." *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975.

Rule for proving perjury. — In prosecution for perjury, it is necessary to prove the falsity of defendant's sworn statements beyond a reasonable doubt. This may be done by the testimony of one witness supported by corroborating evidence or circumstances, but the corroboration must go beyond slight or indifferent particulars; it must strongly support the accusing witness. *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975; *Territory v. Remuzon*, 1886-NMSC-019, 3 N.M. (Gild.) 648, 9 P. 598, *overruled on other grounds by Territory v. Lockhart*, 1896-NMSC-014, 8 N.M. 523, 45 P. 1106; *Territory v. Williams*, 1898-NMSC-015, 9 N.M. 400, 54 P. 232; *State v. Naranjo*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Reason for special rule. — Justification for special rule in perjury cases is that it is not unreasonable that a conviction for perjury ought not to rest entirely upon an oath against an oath. *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975.

Requirements of proof in perjury case are strictest in law, outside of treason charges. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Presumption of truth under oath until dispelled. — In a perjury prosecution, the state must begin with the fact that an accused is clothed with a presumption that one will tell the truth when under oath and that, until this presumption is dispelled, one did tell the truth under oath: if the state does not prove the falsity of the statement under oath, the presumption must prevail that he did tell the truth. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Knowledge inferred. — The jury could have inferred that defendant knew his testimony to be false when he gave it through reasoning that an ordinary person under similar circumstances testifying as to a specific date and time as defendant did should have known that his testimony was not true. *State v. Montoya*, 1966-NMSC-224, 77 N.M. 129, 419 P.2d 970.

Perjury before grand jury. — Penalty provided by former 40-32-1, 1953 Comp., for perjury "committed in any other case" applied to a conviction under former 40-32-2, 1953 Comp., for perjury before the grand jury. *State v. Reed*, 1957-NMSC-009, 62 N.M. 147, 306 P.2d 640, distinguished in *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975 (decided under prior law).

False value given property. — A surety who swore falsely as to value of his property was guilty of perjury. *Territory v. Weller*, 1883-NMSC-004, 2 N.M. 470.

Statements at variance with previous unsworn statements. — The state is not entitled to a conviction for perjury merely on proof that statements under oath were at variance with previous unsworn statements. *State v. Naranjo*, 1979-NMCA-150, 94 N.M. 413, 611 P.2d 1107, *rev'd on other grounds*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Evidence was sufficient to find that defendant testified falsely when he claimed in a prior homicide trial that he, and not the defendant therein, had committed the murder, where along with direct evidence to that effect, the testimony of four witnesses placed the other man at the scene of the crime, one of whom saw gun in his hand. *State v. Borunda*, 1972-NMCA-018, 83 N.M. 563, 494 P.2d 976, cert. denied, 83 N.M. 562, 494 P.2d 975.

Evidence establishing that defendant made false statements when he testified that the false testimony of another was correct was sufficient for conviction. *State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *aff'd in pertinent part*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

Allegations of charge must be direct and specific. — Before a charge of perjury can be sustained, the allegations must be direct and specific, the indictment must particularize where the testimony was false, a general allegation of falsity being insufficient, and, if the offense encompasses many allegedly perjurious statements, the defendant must be told in the indictment where and to what extent the statements alleged to have been made by him were false. *State v. Naranjo*, 1980-NMSC-061, 94 N.M. 407, 611 P.2d 1101.

Evidence admissible. — On trial for perjury for false swearing in a prosecution for adultery, defendant's admissions of marriage were admissible. *United States v. Chaves*, 1891-NMSC-027, 6 N.M. 180, 27 P. 489; *United States v. de Amador*, 1891-NMSC-025, 6 N.M. 173, 27 P. 488; *United States v. de Lujan*, 1891-NMSC-026, 6 N.M. 179, 27 P. 489.

Perjury as basis for post-conviction relief. — Defendant's contention that he was convicted on the basis of perjured testimony given by an informer was not supported with the requisite showing of a factual basis for the claim, and hence his motion for post-conviction relief was properly denied without a hearing. *Nieto v. State*, 1968-NMCA-045, 79 N.M. 330, 443 P.2d 500.

II. MATERIALITY.

"Material" construed. — The false testimony giving rise to a charge of perjury in a grand jury investigation does not actually have to impede or influence the investigation to be material; rather the false testimony is material if it has the capacity or tendency to influence or impede the investigation. *State v. Watkins*, 1979-NMCA-003, 92 N.M. 470, 590 P.2d 169.

Materiality of testimony. — False testimony is material if it has the capacity or tendency to influence the decision of the tribunal or the inquiring or investigative body, or to impede the proceeding, with respect to matters which such tribunal is competent to consider. *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, cert. denied, 98 N.M. 336, 648 P.2d 794, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

A lie removing a murder suspect from the scene of the murder has the capacity or tendency to impede the administration of justice. *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, cert. denied, 98 N.M. 336, 648 P.2d 794, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

Question of law. — Materiality is a question of law to be decided by the trial court. *State v. Gallegos*, 1982-NMCA-062, 98 N.M. 31, 644 P.2d 545, cert. denied, 98 N.M. 336, 648 P.2d 794, *overruled on other grounds by State v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234.

Testimony held material. — False testimony given by defendant in larceny proceedings, which was designed to establish an alibi, was material to the issues involved in the larceny case and therefore constituted perjury. *State v. Montoya*, 1966-NMSC-224, 77 N.M. 129, 419 P.2d 970.

Averment of materiality. — Where the indictment fully set forth the question averred to be material, in relation to which the testimony was given, it was sufficient in this respect. *Territory v. Lockhart*, 1896-NMSC-014, 8 N.M. 523, 45 P. 1106.

Evidentiary basis for determining materiality. — In order for the trial court to make a determination of materiality as a matter of law of an allegedly perjured statement, all that is needed, by way of evidentiary support, is the text of the statement and knowledge of the principal issue in the judicial proceeding in which the statement was made. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104

N.M. 246, 719 P.2d 1267, *overruled by State v. Benavidez*, 1999-NMCA-53, 127 N.M. 189, 979 P.2d 234.

Since materiality is properly determinable as an issue of law, there cannot appropriately be any evidentiary or factual burden. *State v. Albin*, 1986-NMCA-046, 104 N.M. 315, 720 P.2d 1256, cert. denied, 104 N.M. 246, 719 P.2d 1267, *overruled by State v. Benavidez*, 1999-NMCA-53, 127 N.M. 189, 979 P.2d 234.

Law reviews. — For article, "Lawyers, Linguists, Story-Tellers, and Limited English-Speaking Witnesses," see 27 N.M.L. Rev. 77 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 60A Am. Jur. 2d Perjury §§ 1 to 4, 7, 8 to 14, 22 to 24, 27 to 35, 91.

Fear or compulsion, false statement made under, as perjury, 4 A.L.R. 1319.

Perjury in verifying pleadings, 7 A.L.R. 1283.

Marriage license, perjury as predicated upon statements upon application for, 101 A.L.R. 1263.

Administrative requirement, oath taken in pursuance of, as predicate for criminal offense of perjury, 108 A.L.R. 1240.

Recantation as defense in perjury prosecution, 64 A.L.R.2d 276.

Statement of belief or opinion as perjury, 66 A.L.R.2d 791.

Circumstantial evidence, conviction of perjury where one or more of elements is established solely by, 88 A.L.R.2d 852.

Perjury or false swearing as contempt, 89 A.L.R.2d 1258.

Defense: invalidity of statute or ordinance giving rise to proceedings in which false testimony was received as defense for prosecution for perjury, 34 A.L.R.3d 413.

Jurisdiction: offense of perjury as affected by lack of jurisdiction by court or government body before which false testimony was given, 36 A.L.R.3d 1038.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial, 34 A.L.R.4th 888.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial, 37 A.L.R.4th 948.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Right of defendant in prosecution for perjury to have the "two witnesses, or one witness and corroborating circumstances," rule included in charge to jury - state cases, 41 A.L.R.5th 1.

Two-witness rule in perjury prosecutions under 18 USCS § 1621, 49 A.L.R. Fed. 185.

Determination of "materiality" under 18 USCS § 1623, penalizing false material declarations before grand jury or court, 60 A.L.R. Fed. 76.

Construction and application of § 2J1.3 of United States sentencing guidelines (18 USCS Appx 1.3 § 2J), pertaining to sentencing for perjury, subornation of perjury, witness bribery, and departures therefrom, 130 A.L.R. Fed. 269.

70 C.J.S. Perjury §§ 1 to 28.

30-25-2. Refusal to take oath or affirmation.

Refusal to take oath or affirmation consists of the refusal of any person, when legally called upon to give testimony before any court, administrative proceeding, legislative proceeding or other authority in this state, authorized to administer oaths or affirmations, to take such oath or affirmation.

Whoever commits refusal to take oath or affirmation is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-25-2, enacted by Laws 1963, ch. 303, § 25-2.

ARTICLE 26
Interference with Public Records

30-26-1. Tampering with public records.

Tampering with public records consists of:

A. knowingly altering any public record without lawful authority;

B. any public officer or public employee knowingly filing or recording any written instrument, judicial order, judgment or decree in a form other than as the original thereof in fact appeared;

C. any public officer or public employee knowingly falsifying or falsely making any record or file, authorized or required by law to be kept;

D. any public officer or public employee knowingly issuing or causing to be issued, any false or untrue certified copy of a public record; or

E. knowingly destroying, concealing, mutilating or removing without lawful authority any public record or public document belonging to or received or kept by any public authority for information, record or pursuant to law.

Whoever commits tampering with public records is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-26-1, enacted by Laws 1963, ch. 303, § 26-1.

ANNOTATIONS

Cross references. — For altering, changing or making away with bill pending in or passed by the legislature, *see* N.M. Const., art. IV, § 21.

Medicaid documents. — Evidence that Medicaid cards sold by defendant to undercover agents were public documents was sufficient for conviction under this section. *State v. Dartez*, 1998-NMCA-009, 124 N.M. 455, 952 P.2d 450, cert. denied, 124 N.M. 311, 950 P.2d 284.

Falsifying record. — Public officer or employee who knowingly and willfully made as a matter of public record in his office any false or untrue statement of fact, or so caused or permitted the same to be made or entered, or otherwise falsified or made falsely any public record of his office, violated Laws 1939, ch. 8, § 1 (former 40-36-1, 1953 Comp.) and incurred its penalties. *State v. Gallegos*, 1944-NMSC-009, 48 N.M. 72, 145 P.2d 999 (decided under prior law).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 66 Am. Jur. 2d Records and Recording Laws §§ 10, 11.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

76 C.J.S. Records § 57 et seq.

30-26-2. Refusal to surrender public record.

Refusal to surrender public record consists of any person wrongfully or unlawfully refusing or neglecting to deliver unto the proper authority, any record of either house of the legislature, of any court of this state or of any department of the state or local government which he has in his possession, within three days after demand therefor shall have been made by the proper officer.

Whoever commits refusal to surrender public records is guilty of a misdemeanor.

History: 1953 Comp., § 40A-26-2, enacted by Laws 1963, ch. 303, § 26-2.

ANNOTATIONS

Cross references. — For altering, changing or making away with bill pending in or passed by the legislature, *see* N.M. Const., art. IV, § 21.

For duty of public officers to deliver records to their successors, *see* 10-17-5 NMSA 1978.

ARTICLE 27
Malicious Prosecution, etc.

30-27-1. Malicious criminal prosecution.

Malicious criminal prosecution consists of maliciously procuring or attempting to procure an indictment or otherwise causing or attempting to cause a criminal charge to be preferred or prosecuted against an innocent person, knowing him to be innocent.

Whoever commits malicious criminal prosecution is guilty of a misdemeanor.

History: 1953 Comp., § 40A-27-1, enacted by Laws 1963, ch. 303, § 27-1.

ANNOTATIONS

Bad check as probable cause. — Allegation of complaint that two years before prosecution took place plaintiff had given a fraudulent check sufficiently showed that "probable cause" existed for bringing the criminal action and made immaterial other allegations with reference to defendant's motive in commencing prosecution. *Marchbanks v. Young*, 1943-NMSC-024, 47 N.M. 213, 139 P.2d 594.

Mayor not liable. — Under the circumstances mayor charged by plaintiff with false arrest and imprisonment and malicious prosecution had probable cause to believe that a crime or misdemeanor was being committed in his presence where plaintiff, stockholder and manager of a racing firm whose lease of racetrack had been canceled by the city, stopped a circus cortege on the highway before it could enter the track for the purpose of wintering therein; hence, verdict in mayor's favor was supported by the evidence. *Cherry v. Williams*, 1957-NMSC-086, 63 N.M. 244, 316 P.2d 880.

Law reviews. — For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 52 Am. Jur. 2d Malicious Prosecution § 197.

Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution, 87 A.L.R.3d 554.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution, 94 A.L.R.3d 791.

Venue in action for malicious prosecution, 12 A.L.R.4th 1278.

Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution action, 26 A.L.R.4th 565.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution, 30 A.L.R.4th 572.

Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Malicious prosecution: defense of acting on advice of justice of the peace, magistrate, or lay person, 48 A.L.R.4th 250.

Liability of better business bureau or similar organization in tort, 50 A.L.R.4th 745.

Excessiveness or inadequacy of compensatory damages for malicious prosecution, 50 A.L.R.4th 843.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Admissibility of evidence of polygraph test result, or offer or refusal to take test, in action for malicious prosecution, 10 A.L.R.5th 663.

54 C.J.S. Malicious Prosecution § 7.

30-27-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 120, § 2 repealed 30-27-2 NMSA 1978, as enacted by Laws 1963, ch. 303, § 27-2, relating to impersonation of a public officer, effective July 1, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 30-27-2.1 NMSA 1978.

30-27-2.1. Impersonating a peace officer.

A. Impersonating a peace officer consists of:

(1) without due authority exercising or attempting to exercise the functions of a peace officer; or

(2) pretending to be a peace officer with the intent to deceive another person.

B. Whoever commits impersonating a peace officer is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

C. As used in this section, "peace officer" means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

History: Laws 1999, ch. 120, § 1.

ANNOTATIONS

Cross references. — For unauthorized wearing of state police uniform or badge or unauthorized marking of car, *see* 29-2-14 NMSA 1978.

Effective dates. — Laws 1999, ch. 120, § 3, makes the act effective on July 1, 1999.

Public officials of other states and the federal government. — Section 30-27-2.1 NMSA 1978 is not limited to only those persons impersonating public officials of the state of New Mexico, but includes impersonating public officials of other states and the federal government. *State v. Ramos-Arenas*, 2012-NMCA-117, 290 P.3d 733, cert. denied, 2012-NMCERT-010.

Impersonating a border patrol agent. — Where defendant impersonated a border patrol agent, defendant impersonated a peace officer in violation of Section 30-27-2.1 NMSA 1978. *State v. Ramos-Arenas*, 2012-NMCA-117, 290 P.3d 733, cert. denied, 2012-NMCERT-010.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 32 Am. Jur. 2d False Personation § 1 et seq.

Intent as affecting false personation, 97 A.L.R. 1510.

Criminal liability for false personation during stop for traffic infraction, 26 A.L.R.5th 378.

35 C.J.S. False Personation § 3.

30-27-3. Barratry.

Barratry consists of:

A. intentionally instigating, maintaining, exciting, prosecuting or encouraging the bringing of any suit in any court of this state in which such person has no interest, with the intent to distress or harass the defendant;

B. intentionally bringing or prosecuting any false suit by a person on his own account, with intent to distress or harass the defendant therein;

C. any attorney-at-law seeking or obtaining employment in any suit or case to prosecute or defend the same by means of personal solicitation of such employment or, procuring another to solicit employment for him; or

D. any attorney-at-law seeking or obtaining employment in any suit, by giving to the person from whom the employment is sought anything of value or directly or indirectly paying the debts or liabilities of the person from whom such employment is sought or loaning or promising to give or otherwise grant anything of value to the person from whom such employment is sought before such employment in order to induce such employment.

Whoever commits barratry is guilty of a misdemeanor.

History: 1953 Comp., § 40A-27-3, enacted by Laws 1963, ch. 303, § 27-3.

ANNOTATIONS

Cross references. — For rule relating to attorney conflict of interest, *see* Rule 16-108 NMRA.

For requirement that attorney's claims and contentions be meritorious, *see* Rule 16-301 NMRA.

For rule relating to attorney advertising, *see* Rule 16-702 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 14 Am. Jur. 2d Champerty and Maintenance § 20.

Purchase of cause of action by attorney as champertous, 4 A.L.R. 173.

Quantum meruit or implied contract, right of attorney to recover upon, for services rendered under champertous contract, 85 A.L.R. 1365.

Validity of agreement between attorney and layman to divide attorney's fees or compensation for business of third person, 86 A.L.R. 195.

Solicitation, right of attorney to recover for services performed under contract procured by, 86 A.L.R. 517.

Government or agencies of government, law as to champerty or maintenance as applied to agreement with respect to bringing and prosecution of claims against, 106 A.L.R. 1494.

Contract by one person to defend litigation that has been or may be instituted against another as champertous, 121 A.L.R. 847.

Assertion of defense of champerty in action by champertous assignee, 22 A.L.R.2d 1000.

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 A.L.R.3d 1155.

Maintenance of lawyer reference system by organization having no legal interest in proceedings, 11 A.L.R.3d 1206.

7A C.J.S. Attorney and Client § 149; 14 C.J.S. Champerty and Maintenance §§ 25, 26.

30-27-4. Securing signature to petition by unlawful means.

Securing signature to petition by unlawful means consists of securing the signature of any person to any petition now or hereafter provided for by the laws of this state, by paying or promising to pay the signer anything of value, direct or indirect, or by securing such signature by force, threats or intimidation, or by forging or copying the names of any person to any such petition.

Whoever commits securing signature to petition by unlawful means is guilty of a misdemeanor.

History: 1953 Comp., § 40A-27-4, enacted by Laws 1963, ch. 303, § 27-4.

ANNOTATIONS

Cross references. — For forgery, *see* 30-16-10 NMSA 1978.

30-27-5. Simulating legal process.

A. Simulating legal process consists of knowingly issuing or delivering to a person a document that falsely simulates civil or criminal process. "Civil or criminal process" means a document or order, including but not limited to a summons, lien, complaint, warrant, injunction, writ, notice, pleading or subpoena.

B. Whoever commits simulating legal process is guilty of a misdemeanor.

History: Laws 2005, ch. 327, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 327 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

ARTICLE 28
Initiatory Crimes

30-28-1. Attempt to commit a felony.

Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.

Whoever commits attempt to commit a felony upon conviction thereof, shall be punished as follows:

A. if the crime attempted is a capital or first degree felony, the person committing such attempt is guilty of a second degree felony;

B. if the crime attempted is a second degree felony, the person committing such attempt is guilty of a third degree felony;

C. if the crime attempted is a third degree felony, the person committing such attempt is guilty of a fourth degree felony; and

D. if the crime attempted is a fourth degree felony, the person committing such attempt is guilty of a misdemeanor.

No person shall be sentenced for an attempt to commit a misdemeanor.

History: 1953 Comp., § 40A-28-1, enacted by Laws 1963, ch. 303, § 28-1.

ANNOTATIONS

Single intent crime. — The crime of attempt to commit a felony requires the specific intent to commit the underlying crime. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46, *aff'd in part, rev'd in part*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Legal adequacy. — If a jury could have found a defendant guilty of attempted second degree murder without determining that he intended to kill his ex-wife, it could have convicted him of an attempt to commit reckless or unintentional second degree murder, a crime that does not exist. *State v. Carrasco*, 2007-NMCA-152, 143 N.M. 62, 172 P.3d 611, cert. quashed, 2008-NMCERT-011, 145 N.M. 531, 202 P.3d 124.

Child abuse. — There is such a crime as attempt to commit child abuse when the theory of the case is intentional child abuse. *State v. Herrera*, 2001-NMCA-073, 131 N.M. 22, 33 P.3d 22, cert. denied, 131 N.M. 64, 33 P.3d 284, 182.

Sufficient evidence. — Where a videotape of a transaction in which the victim's ATM card was inserted into an ATM machine showed that the person using the ATM machine had tattoos on the person's arms, the jury was able to compare stills of the videotape with the tattoos on defendant's arms; and several days after the victim's purse had been stolen, the victim's driver's license was found in defendant's vehicle, and defendant told a police offer that defendant tried to use the victim's ATM card, but the machine ate it, the evidence was sufficient to support defendant's conviction for attempt to commit unauthorized use of an ATM card of another. *State v. Verdugo*, 2007-NMCA-095, 142 N.M. 267, 164 P.3d 966, cert. quashed, 2008-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Where defendant purchased nine gallons of iodine and possessed over 5,000 pseudoephedrine pills, a quart of acetone, scales, and an air purifier; and most of the pills had been removed from their blister packs, the evidence was sufficient to support defendant's conviction for attempted trafficking in methamphetamine by manufacturing, even though defendant did not possess all of the materials necessary to manufacture methamphetamine. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Where the evidence showed that defendant purchased thirty-five boxes of matches from several different stores, one right after the other; the matchboxes contained red phosphorous, a key ingredient in the manufacture of methamphetamine; defendant bought the boxes of matches for her sister and turned them over to her sister; defendant knew that the matchboxes were scraped for red phosphorous and that the substance was used in the manufacture of methamphetamine; the matchboxes were going to be used in the manufacture of methamphetamine; and together with her sister, defendant purchased or financed the purchase of Coleman fuel and distilled water, which are ingredients commonly used in the manufacture of methamphetamine, there was substantial evidence to convict defendant of attempted manufacture of methamphetamine. *State v. Kent*, 2006-NMCA-134, 140 N.M. 606, 145 P.3d 86, cert. denied, 2006-NMCERT-010, 140 N.M. 674, 146 P.3d 809.

Sufficient evidence of attempted second degree murder. — Where the defendant rapidly accelerated his vehicle toward the police officer who had been pursuing him in a high speed chase after the officer got out of his car and the defendant pointed a rifle or a shotgun at the officer after the defendant had already fired three shots at the officer, the evidence was sufficient to sustain the court's finding that the defendant committed attempted second degree murder. *State v. Demongey*, 2008-NMCA-066, 144 N.M. 333, 187 P.3d 679, cert. quashed, 2011-NMCERT-001, 150 N.M. 558, 263 P.3d 900.

Double jeopardy. — Defendant's convictions for aggravated battery with a deadly weapon and attempted murder arising out of unitary conduct did not violate the double jeopardy clause. *State v. Armandarez*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Where defendant intended to steal the property of only one victim and defendant used separate and discrete acts of force and threats against two victims, defendant's convictions for two counts of attempted armed robbery did not violate the double jeopardy clause. *State v. Bernal*, 2006-NMSC-050, 140 N.M. 644, 146 P.3d 289.

The crime of attempted CSP III is subsumed within assault with attempt to commit CSP. *State v. Schackow*, 2006-NMCA-123, 140 N.M. 506, 143 P.3d 745, cert. denied, 2006-NMCERT-009, 140 N.M. 542, 144 P.3d 101.

Since defendant was not tried on charge of attempt to commit aggravated battery, which charge was dismissed before any evidence was presented, there was no issue as to double punishment or merged offenses when defendant was tried and convicted of aggravated burglary. *State v. Hibbs*, 1971-NMCA-100, 82 N.M. 722, 487 P.2d 150.

Crime of attempt to commit a felony (burglary) did not merge with the crime of possession of burglary tools, as the "overt act" required in the attempt statute did not necessarily involve possession of burglary tools; hence defendant's sentence for each crime did not constitute double punishment. *State v. Everitt*, 1969-NMCA-010, 80 N.M. 41, 450 P.2d 927.

Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015,128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part on other grounds*, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518.

Convictions of aggravated battery upon a peace officer and attempted first degree murder violated double jeopardy. — Where defendant, who was imprisoned in a county detention center, attacked and stabbed a correctional officer five times with a metal shank, defendant's convictions for attempted murder and aggravated battery of a peace officer did not violate double jeopardy. *State v. Urquizo*, 2012-NMCA-113, 288 P.3d 919, cert. granted, 2012-NMCERT-011.

Convictions of attempted murder and aggravated battery violated double jeopardy. — Where defendant was convicted of attempted murder and aggravated battery with a deadly weapon; defendant's conduct was unitary; the indictment for attempted murder required the state to prove that defendant attempted to commit murder and "began to do an act which constituted a substantial part of murder" but failed to commit the offense; the indictment for aggravated battery required the state to prove that defendant touched or applied force to the victims with a deadly weapon intending to injure the victims; the state's theory of the case to support both charges was that defendant beat, stabbed, and slashed the victims; and the state offered the

same testimony to prove both charges, the aggravated battery elements were subsumed within the attempted murder elements and defendant's convictions violated the prohibition against double jeopardy. *State v. Swick*, 2012-NMSC-018, 279 P.3d 747, *rev'g* 2010-NMCA-098, 148 N.M. 895, 242 P.3d 462, *overruling State v. Armendariz*, 2006-NMSC-036, 140 N.M. 182, 141 P.3d 526.

Statute is general law, inapplicable if special law covers same matter. — Albuquerque's ordinance making it unlawful for any person under the influence to operate a vehicle is enforceable under and consistent with state law. The fact that the ordinance defines an attempted misdemeanor does not render it invalid under this section, which is a general law not applicable if a special law covers the same matter. Moreover, former 64-15-7, 1953 Comp. (similar to 66-7-8 NMSA 1978), specifically authorized Albuquerque to adopt additional traffic regulations. *City of Albuquerque v. Chavez*, 1978-NMCA-032, 91 N.M. 559, 577 P.2d 457, cert. denied, 91 N.M. 610, 577 P.2d 1256.

Overt act necessary. — To constitute an attempt, defendant must do an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

An attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission of the felony, has been performed or undertaken with intent to commit the felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178).

Attempted murder does not require that victim be injured. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Overt act described. — Overt act required hereunder must be more than preparation; it must be in part execution of the intent to commit the crime, and slight acts in furtherance of that intent will constitute an attempt. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173; *State v. Stettheimer*, 1980-NMCA-023, 94 N.M. 149, 607 P.2d 1167.

Purpose and effort involved. — The word "attempt" was more comprehensive than the word "intent," implying both the purpose and the actual effort to carry that purpose into execution. *State v. Grayson*, 1946-NMSC-025, 50 N.M. 147, 172 P.2d 1019.

Nature of attempted act. — If the intended act is not criminal there can be no criminal liability for an attempt to commit it. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Attempt under this section requires intent to commit felony; therefore, this is a specific intent crime and the statutory language states this requisite intent. *State v.*

Dosier, 1975-NMCA-031, 88 N.M. 32, 536 P.2d 1088, cert. denied, 88 N.M. 28, 536 P.2d 1084.

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

Sufficient evidence of unlawful transportation of a firearm. — Where defendant was convicted of unlawful transportation of a firearm, and where defendant admitted that he was a felon at the time of the charged offense, and where the state presented evidence at trial that he was driving his accomplice around town and was aware that his accomplice had brought a gun into the car, there was sufficient evidence for a jury to find that defendant transported a firearm. *State v. Torres*, 2018-NMSC-013.

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

Intent must be corroborated by objective facts. — To convict a defendant of an attempt, the required criminal intent must be sufficiently corroborated by objective facts. Such corroboration is required to prevent conviction on the basis of criminal intent alone. *State v. Lopez*, 1983-NMSC-069, 100 N.M. 291, 669 P.2d 1086.

Instruction on intent essential. — Since specific intent to murder was gist of crime of attempt to commit murder under Laws 1853-1854, p. 92 (former 40-6-10, 1953 Comp.), refusal to instruct on question of intent constituted error. *State v. Grayson*, 1946-NMSC-025, 50 N.M. 147, 172 P.2d 1019.

Intent instruction. — The crime of attempted sodomy (now criminal sexual penetration, Section 30-9-11 NMSA 1978) was a specific intent crime, and where there were no instructions regarding the element of specific intent, conviction would be reversed. *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

Factual impossibility not defense. — A defense of impossibility is not available to a defendant charged with an attempt to traffic in a controlled substance, i.e., cocaine, where the defendant received money for what he represented as cocaine, but which due to a circumstance unknown to him, in fact was not. *State v. Lopez*, 1983-NMSC-069, 100 N.M. 291, 669 P.2d 1086.

Section does not apply to attempts regarding controlled substances. — The legislature intended to punish attempts regarding controlled substances under 30-31-25A(3) NMSA 1978 specifically as felonies and consequently, this section does not apply to such attempts covered by 30-31-25A(3) NMSA 1978. *State v. Mirabal*, 1989-NMCA-057, 108 N.M. 749, 779 P.2d 126, cert. denied, 108 N.M. 713, 778 P.2d 911.

"Attempt" inconsistent with completed crime. — For an attempt under this section, the perpetrator must have failed to effect commission of the crime, and if the evidence is of the completed crime, then the crime of "attempt" is not involved. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

Evidence of completed crime. — An attempt to commit a felony is an act done with intent to commit such crime but which fails of completion. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

To instruct on an "attempt" where there is no evidence tending to establish failure to complete the crime would present a false issue to the jury. *State v. Andrada*, 1971-NMCA-033, 82 N.M. 543, 484 P.2d 763, cert. denied, 82 N.M. 534, 484 P.2d 754.

Attempted burglary. — The jury, after it had found that the defendant shattered grocery store window, validly inferred that the window was broken in an attempt to enter and unlawfully take property from inside the store. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262.

Attempted forgery. — It is possible to have a physical act which is an attempt to transfer one's interest in forged item but to have such an attempt thwarted at some stage of perpetration. *State v. Tooke*, 1970-NMCA-068, 81 N.M. 618, 471 P.2d 188, *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Evidence that defendant represented himself as being person named as payee of check, and presented identification to this effect, supported conviction for attempted forgery, regardless of fact that state did not undertake to prove that the checks if presented to drawee bank would not have been paid, or that defendant did not have the right to use the payee's name. *State v. Lopez*, 1969-NMCA-115, 81 N.M. 107, 464 P.2d 23, cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), *overruled on other grounds by State v. Ruffins*, 1990-NMSC-035, 109 N.M. 668, 789 P.2d 616.

Attempted trafficking in cocaine. — Defendant failed to effect the crime of possession with intent to distribute because he never actually possessed the package containing cocaine which was addressed to him; nevertheless, the fact that he never actually possessed the package did not negate his intent to possess the package, as evidenced by his attempting to pick up the package, nor did it negate his intent to distribute the cocaine, as is evidenced by the amount of cocaine found in the package. Therefore, he was properly convicted of attempted trafficking under this section and 30-31-20A(3). *State v. Curry*, 1988-NMCA-031, 107 N.M. 133, 753 P.2d 1321, cert. denied, 107 N.M. 132, 753 P.2d 1320.

Defendant was properly convicted for attempted trafficking in cocaine since he committed the overt acts of accepting a sizeable amount of cash from an undercover narcotics officer and engaging in prior discussion of the illicit transaction. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

Attempted sodomy. — Defendant's beating of minor, partially stripping him and straddling him with his fly open constituted active efforts to consummate the crime of sodomy (now criminal sexual penetration) and were more than mere preparation. *State v. Trejo*, 1972-NMCA-019, 83 N.M. 511, 494 P.2d 173.

Murder during attempt to commit felony. — Felony-murder provision is applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

There was ample evidence to support a finding that defendant had accomplished an attempt to unlawfully take decedent's automobile before the bullet struck decedent in the head, and that defendant, at the time he killed decedent, was in the act of committing at least this felony. *State v. Flowers*, 1971-NMSC-091, 83 N.M. 113, 489 P.2d 178.

Transferred intent applicable to attempted murder. — The doctrine of transferred intent applies to both murder and attempted murder. *State v. Gillette*, 1985-NMCA-037, 102 N.M. 695, 699 P.2d 626.

Multiple counts proper where there are multiple victims. — The single violent act of firebombing a residence with six people inside gives rise to six counts of attempted second degree murder. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

No such crime as attempted "depraved mind" murder. — The crime of attempted "depraved mind" murder does not exist since in order to convict for such an offense, the jury would have to find that the defendant intended to perpetrate an unintentional killing, a logical impossibility. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

Attempted second degree murder of unintended victims. — If defendant committed an act, intending to kill someone but knowing that his act created a strong probability of death or great bodily harm to others, he is guilty of attempted second degree murder as to the others. *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, 707 P.2d 1174, cert. quashed, 103 N.M. 344, 707 P.2d 552.

Information adequate. — Information charging defendant with attempting to break and enter a certain grocery in the nighttime with intent to take property therefrom, alleged a felony offense, and since under the applicable statutory sections, theft of property of any value would have been a felony, value need not have been specified in the information. *State v. Serrano*, 1964-NMSC-161, 74 N.M. 412, 394 P.2d 262.

Information insufficient. — An information that merely stated that crime was committed by assault failed to charge an attempt to commit the crime of murder by poisoning, drowning or strangling contemplated under Laws 1854-1855, p. 92 (former 40-6-10, 1953 Comp.). *State v. Grayson*, 1946-NMSC-025, 50 N.M. 147, 172 P.2d 1019 (decided under prior law).

Circumstantial evidence. — A conviction of poisoning with intent to kill or injure under Laws 1854-1855, p. 94 (former 40-6-11, 1953 Comp.) could be had on circumstantial evidence. *State v. Holden*, 1941-NMSC-017, 45 N.M. 147, 113 P.2d 171.

Inadmissible hearsay. — In prosecution for murder and attempted murder admission of extra-judicial statements attributed to children of victims was error where the children were not called as witnesses because defendant was denied his constitutional right of confrontation, being deprived of opportunity to cross-examine. *State v. Lunn*, 1971-NMCA-048, 82 N.M. 526, 484 P.2d 368.

Instruction on abandoned intent not warranted. — Where defendant was charged with aiding and abetting in an attempted rape, and the evidence was uncontradicted that codefendant ripped off victim's shirt and attempted to take off her pants before he stopped his aggression, that the defendant had been in the automobile prior to this action, and was in close proximity at the time, having left the automobile at the request of codefendant, therefore implicating himself in and giving his tacit consent to codefendant's actions, defendant's requested instruction on abandonment of criminal intent was properly refused. *State v. LeMarr*, 1971-NMSC-082, 83 N.M. 18, 487 P.2d 1088.

Instruction on attempted rape. — In prosecution under federal act for rape on an Indian reservation, the federal court had jurisdiction to instruct on lesser included offenses under state law, and it was error not to instruct on attempted rape and other lesser offenses for which there was some evidence. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Defendant could not create provocation which would reduce attempted murder to attempted manslaughter, and his requested instruction on attempted voluntary

manslaughter was therefore properly refused. *State v. Durante*, 1986-NMCA-024, 104 N.M. 639, 725 P.2d 839.

Instruction on aggravated battery as lesser included offense. — Where there is no showing that the defendant either intended to scare or intended to injure the victim, but the facts clearly show that the defendant intended to kill the victim, the trial court is correct in rejecting an aggravated battery instruction as a lesser included offense of attempted murder with a firearm. *State v. Simonson*, 1983-NMSC-075, 100 N.M. 297, 669 P.2d 1092.

In a prosecution for attempted murder, the trial court properly instructed the jury on aggravated battery as a lesser included offense at the state's request, because the elements of the lesser crime were a subset of the elements of the charged crime and, further, the defendant could not have committed the greater offense in the manner charged in the indictment without also committing the lesser offense. *State v. Meadors*, 1995-NMSC-073, 121 N.M. 38, 908 P.2d 731.

Evidence sufficient to sustain conviction of attempted fraud. — Because of defendant's intimate knowledge of the workings of the county government – he had recently been county manager – the jury could properly find that defendant made knowingly false representations. This information coupled with the testimony of two commissioners contradicting defendant’s testimony was found sufficient for conviction of attempted fraud. *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

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

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 158 to 160, 601.

Assault: attempt to commit assault as criminal offense, 79 A.L.R.2d 597.

Receiving stolen goods: attempts to receive stolen property, 85 A.L.R.2d 259.

Escape from prison, attempt to escape or commit prison breach as affected by means employed, 96 A.L.R.2d 520.

Larceny by trick, confidence game, false pretenses, and the like, attempts to commit offenses of, 6 A.L.R.3d 241.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 A.L.R.3d 858.

Impossibility: comment note on impossibility of consummation of substantive crime as defense in criminal prosecution or for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Drunken driving: attempt to commit crime as to driving, being in control of, or operating a motor vehicle while intoxicated, 93 A.L.R.3d 7.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime, 41 A.L.R.4th 588.

Duress, necessity, or conditions of confinement as justification for escape from prison, 54 A.L.R.5th 141.

22 C.J.S. Criminal Law §§ 114, 116 to 121.

30-28-2. Conspiracy.

A. Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.

B. Whoever commits conspiracy shall be punished as follows:

(1) if the highest crime conspired to be committed is a capital or first degree felony, the person committing such conspiracy is guilty of a second degree felony;

(2) if the highest crime conspired to be committed is a second degree felony, the person committing such conspiracy is guilty of a third degree felony; and

(3) if the highest crime conspired to be committed is a third degree felony or a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-28-2, enacted by Laws 1963, ch. 303, § 28-2; 1979, ch. 257, § 1.

ANNOTATIONS

Cross references. — For compounding a crime, *see* 30-22-6 NMSA 1978.

I. GENERAL CONSIDERATION.

Search of rental vehicle. — A passenger in a rental vehicle who is charged with conspiracy and is not on the rental contract does not have standing to challenge a search of the vehicle. *State v. Van Dang*, 2005-NMSC-033, 138 N.M. 408, 120 P.3d 830.

Section applicable to crimes within and outside of Criminal Code. — This section applies to conspiracies to commit crimes whether they are contained in the Criminal Code or are found elsewhere in the New Mexico statutes, *e.g*., securities laws. *State v. Shafer*, 1985-NMCA-018, 102 N.M. 629, 698 P.2d 902, cert. denied, 102 N.M. 613, 698 P.2d 886.

Conspiracy to commit depraved-mind murder. — This section does not encompass conspiracy to commit depraved-mind murder. *State v. Baca*, 1997-NMSC-059, 124 N.M. 333, 950 P.2d 776.

Conspiracy to manufacture methamphetamine. — Subsection A of this section does not clearly and unequivocally alert a person to the possibility of prosecution and punishment for conspiracy to manufacture methamphetamine. The court was not persuaded that a defendant-seller shares a purchaser's intent to commit a crime merely because the defendant had knowledge of the purchaser's intended use of those goods or services at the time of the sale. In this context, knowledge of the other's criminal objective is not necessarily equivalent to an intention to bring about the objective. *State v. Maldonado*, 2005-NMCA-072, 137 N.M. 699, 114 P.3d 379, cert. quashed, 2006-NMCERT-001, 139 N.M. 272, 131 P.3d 659.

Number of criminal conspiracies. — The number of agreements to break the law determines the number of criminal conspiracies subject to prosecution. *State v. Sanders*, 1994-NMSC-043, 117 N.M. 452, 872 P.2d 870.

Convictions of all conspirators unnecessary. — Although it takes two or more to effect a conspiracy, conviction of all conspirators, or even more than one, is not required and ordinarily, the entry of a nolle prosequi as to other alleged conspirators does not vitiate the conviction of a remaining defendant charged with conspiring with them. *State v. Verdugo*, 1969-NMSC-008, 79 N.M. 765, 449 P.2d 781.

Fact that co-defendant's substantive crimes dismissed not determinative for conspiracy convictions. — There was sufficient evidence from which the jury could have inferred that defendant had agreed with co-defendant, as a sales representative and later as a sales manager of the condominium project, to sell unregistered securities and to engage in sales practices which had the effect of operating as a fraud upon purchasers. The fact that the substantive crimes of fraudulent practices and the sale or offer to sell unregistered securities as to the co-defendant were dismissed by the trial court is not determinative for the conspiracy convictions. The substantive crimes and the crime of conspiracy are different, and involve separate concepts; and failure to

convict on one does not prevent a conviction on the other. *State v. Shade*, 1986-NMCA-072, 104 N.M. 710, 726 P.2d 864, cert. quashed, 104 N.M. 702, 726 P.2d 856, *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Applicability of Wharton's rule. — Wharton's rule provides that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the particular crime is of such a nature as to necessarily require the participation of two persons for its commission. The conduct involved in a conspiracy to commit trafficking under the Controlled Substances Act (Section 30-31-1 NMSA 1978 et seq.) is not like those offenses to which Wharton's rule traditionally applies and therefore the rule's presumption does not apply to such a conspiracy. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Expansion of Wharton's Rule discouraged. — Where the conspiracy and the substantive offense are the same crime because the concerted action was logically necessary to prove the substantive offense, the multiple punishment, double-description analysis under principles of double jeopardy is the better analysis to be applied, and the future expansion of Wharton's Rule is expressly discouraged. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

Trafficking controlled substances with intent to distribute and conspiracy based on a single act. — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of 30-31-20(A) NMSA 1978, and conspiracy to commit the same crime in violation of this section, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the same offense, resulting in a double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

Wharton's Rule precluded a charge of conspiracy conspiracy to commit trafficking drugs. — Where defendant was convicted for trafficking by possession with intent to distribute methamphetamine and for conspiracy to commit trafficking; the trafficking charge was based on a single sale of methamphetamine by defendant and to defendant's co-conspirator; defendant and the co-conspirator were the only parties involved in the transaction; and the conspiracy charge was based on the same conduct as the trafficking charge, Wharton's Rule precluded the charge of conspiracy. *State v. Silvas*, 2013-NMCA-093, cert. granted, 2013-NMCERT-009.

Conspiracy not barred by incarceration. — Incarceration may prevent active participation in carrying out some of the acts of a conspiracy; it has no effect whatever

in dampening initiatory conspiratorial activity. *State v. Gilbert*, 1982-NMCA-081, 98 N.M. 77, 644 P.2d 1066.

Conspiracy not susceptible to firearm enhancement. — Since conspiracy is an initiatory crime which involves no physical act other than communication, it is not conceivable how a firearm could be used in the commission of that offense. Accordingly, the crime of conspiracy is not susceptible to firearm enhancement under § 31-18-16 NMSA 1978. *State v. Padilla*, 1994-NMCA-067, 118 N.M. 189, 879 P.2d 1208.

Derivative liability. — Defendant, as a conspirator, can be guilty of a substantive offense on a theory of derivative liability. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Aiding and abetting and conspiracy are distinct and separate concepts. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Knowledge essential to aiding and abetting. — One does not become a party to a conspiracy by aiding and abetting it unless one knows of the conspiracy. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187.

Jury question. — When a series of illegal transactions has occurred, the issue of whether there is one conspiracy directed toward several acts or multiple conspiracies is a factual one for the jury. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

Sentencing for conspiracy to commit murder. — Conspiracy to commit murder is a felony "resulting in the death of a human being" within the meaning of Section 31-18-15A(2) (now Section 31-18-15A(4)) NMSA 1978. *State v. Shije*, 1998-NMCA-102, 125 N.M. 581, 964 P.2d 142.

Conspiracy as basis for post-conviction relief. — Where defendant claimed that an assistant district attorney, a state police officer and two other persons violated this section, that this conspiracy was directed against him and that as a result his conviction, judgment and sentence were illegal, but did not allege in what manner the alleged conspiracy affected him, he failed to state a basis for post-conviction relief. *State v. Dominguez*, 1969-NMCA-045, 80 N.M. 328, 455 P.2d 194.

Unit of prosecution for conspiracy is an agreement. — The unit of prosecution for conspiracy is the agreement to commit crime, not the criminal objectives of the agreement, that is, the individual crimes that the agreement sets out to accomplish. The legislature established a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one severe punishment set at the highest crime conspired to commit. The totality of the circumstances test is the mechanism to determine the exceptional instances in which the presumption of singularity may be overcome by demonstrating the existence of more than one conspiracy. The factor considered in the totality of circumstances analysis include

whether the location of the conspiracies is the same, whether there is a significant degree of temporal overlap between the conspiracies, whether there is an overlap of personnel between the conspiracies, whether overt acts charged and the role played by the defendant in the conspiracies are similar, whether there was a common goal among the conspirators, and whether the agreement contemplated bringing to pass a continuous result that would not continue without the continuous cooperation of the conspirators. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

II. ELEMENTS OF CONSPIRACY.

Conspiracy is defined as a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. *State v. Chavez*, 1983-NMSC-037, 99 N.M. 609, 661 P.2d 887.

Overt act not required. — Section does not require overt act in connection with the conspiracy, as conspiracy in New Mexico is complete when the prohibited agreement is reached. *State v. Davis*, 1978-NMCA-122, 92 N.M. 341, 587 P.2d 1352, cert. denied, 92 N.M. 353, 588 P.2d 554.

The overt act which constitutes the object of a conspiracy is no part of the crime of conspiracy; an overt act is not required, but the crime is complete when the felonious agreement is reached. *State v. Leyba*, 1979-NMCA-105, 93 N.M. 366, 600 P.2d 312; *State v. Gilbert*, 1982-NMCA-081, 98 N.M. 77, 644 P.2d 1066.

Common design is essence of conspiracy. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151; *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

Mutually implied understanding is sufficient so far as combination or confederacy is concerned. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561; *State v. Davis*, 1978-NMCA-122, 92 N.M. 341, 587 P.2d 1352, cert. denied, 92 N.M. 353, 588 P.2d 554.

Common design or mutually implied understanding. — Conspiracy is defined in terms of a common design or mutually implied understanding. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

For a conspiracy to exist there must be a common design or a mutually implied understanding; an agreement. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Common design may be established by circumstantial evidence. *State v. Davis*, 1978-NMCA-122, 92 N.M. 341, 587 P.2d 1352, cert. denied, 92 N.M. 353, 588 P.2d 554.

Formal agreement not necessary. — To establish conspiracy formal agreement need not be proved; a mutually implied understanding is sufficient to establish the conspiracy.

State v. Dressel, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187; *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

Knowledge of conspiracy necessary. — One cannot be a party to a conspiracy unless one knows of the conspiracy. *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

Mere passive submission or acquiescence of conduct of others insufficient. — To be guilty of conspiracy to shoot from a motor vehicle, there must have been an agreement that one of the parties thereto would shoot a firearm recklessly from the vehicle; the agreement could be explicit or a mutually implied understanding, but mere passive submission or acquiescence in the conduct of others would not suffice. *State v. Mariano R*., 1997-NMCA-018, 123 N.M. 121, 934 P.2d 315.

It takes at least two persons to effect a conspiracy as the essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187; *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

Conspiracy as single agreement. — Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Mere presence insufficient. — Where there was no evidence that defendant's partner had any knowledge whatsoever of defendant's scheme, even though she was present with him while he was effectuating it, the evidence was insufficient to sustain a conviction for conspiracy. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187.

III. DOUBLE JEOPARDY.

Entailing single punishment. — The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one; thus, where there is only one conspiracy and, therefore, only one conspiracy offense, only a single penalty can be validly imposed. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Conspiracy and the completed offense are separate offenses and conviction of both does not amount to double jeopardy. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Double jeopardy not bar to conspiracy and substantive crime convictions. — Plea of double jeopardy is no defense to convictions for a substantive offense and a

conspiracy to commit that offense. *State v. Smith*, 1985-NMCA-011, 102 N.M. 512, 697 P.2d 512.

Conspiracy to commit first-degree murder is a second-degree felony and a fifteen-year term of imprisonment is an appropriate sentence. — Where defendant was convicted of first-degree murder, conspiracy to commit first-degree murder, arson, and tampering with evidence due to his involvement in the murder of a man, and where defendant claimed that his fifteen-year sentence for conspiracy to commit first-degree murder violated double jeopardy and was an unconstitutional sentencing enhancement based on the victim's death, defendant's fifteen year sentence was the proper basic sentence for a second-degree felony that resulted in the death of a human being. The fact that defendant's sentence for conspiracy to commit first-degree murder took into account the factual consequence of the conduct, the victim's death, did not violate double jeopardy and was not an unconstitutional enhancement but rather the appropriate basic sentence for a second-degree felony that resulted in the death of a human being. *State v. Chavez*, 2021-NMSC-017.

Punishment for both constitutional. — Although defendant had been convicted and was being punished for his conspiracy at the time of his trial, he was not placed in double jeopardy by being convicted and sentenced on the substantive counts. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Conspiracy does not arise out of same transaction as shoplifting. — A charge of conspiracy does not arise out of the same transaction which results in an indictment for shoplifting, and thus cannot be dismissed as in violation of a statute prohibiting the charging of separate or additional offense if it arises out of the same transaction, notwithstanding proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge. *State v. Leyba*, 1979-NMCA-105, 93 N.M. 366, 600 P.2d 312.

Two distinct crimes shown. — Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 1975-NMCA-126, 88 N.M. 561, 543 P.2d 1189, cert. denied, 89 N.M. 6, 546 P.2d 71.

Convictions for trafficking controlled substances with intent to distribute and conspiracy based on a single act. — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of 30-31-20(A) NMSA 1978 and conspiracy to commit the same crime in violation of this section, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the

same offense, resulting in a double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

Two convictions for one conspiracy unconstitutional. — Because the defendant robbed two different victims but only one conspiracy to commit the robberies existed, it was a violation of double jeopardy to convict the defendant for two conspiracies, as he was punished twice for the same offense. *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772, cert. denied, 115 N.M. 795, 858 P.2d 1274.

Rebuttable presumption that multiple crimes are the object of only one overarching conspiratorial agreement. — Where the jury returned four conspiracy convictions against defendant arising from one shooting, conspiracy to commit aggravated battery (great bodily harm), conspiracy to commit aggravated battery (deadly weapon), conspiracy to commit aggravated assault and conspiracy to commit shooting at a dwelling, the state failed to overcome the presumption of a single overarching conspiratorial agreement where the evidence established that the location and time of the alleged conspiracies were the same, the personnel involved in the several charged conspiracies were the same, and defendant's role in the several charged conspiracies was the same. Defendant's multiple conspiracy convictions violated double jeopardy. *State v. Comitz*, 2019-NMSC-011.

Rebuttable presumption of one conspiratorial agreement. — Where defendant was found guilty of conspiracy to commit criminal sexual penetration (CSPM) of a minor, conspiracy to commit kidnapping, conspiracy to commit intimidation or threatening a witness, and conspiracy to commit bribery of a witness, and where the evidence established that the conspiracy convictions involved the same victim and the same perpetrators, and occurred in the same location during the same time period, without any intervening events, the state did not present any evidence to overcome the presumption of singularity. Moreover, the actions of defendant and defendant's son were aimed at furthering a single goal or purpose, facilitating the commission of CSPM upon the victim. *State v. Garcia*, 2019-NMCA-056, cert. denied.

The state failed to rebut the presumption of singularity. — Where petitioner pleaded guilty to three conspiracy crimes, two conspiracies to commit nonresidential burglary and conspiracy to commit larceny, the state failed to overcome the presumption of singularity where although the three conspiracies occurred at three separate locations and the elements of nonresidential burglary and larceny do not have similar overt acts, the state failed to introduce evidence of intervening conduct or distinct conspiratorial agreements, there was no conclusive evidence that there was more than one other coconspirator, and the record establishes that petitioner was the constant actor in each of the three alleged conspiracies. The evidence did not demonstrate more than one agreement between two or more coconspirators nor that two conspirators made multiple agreements in such a way that would justify multiple punishments under the conspiracy statute. *Torres v. Santistevan*, 2023-NMSC-021.

Conviction for multiple conspiracies violated double jeopardy. — Where defendant and another assailant broke into the home of the victim armed with metal bars or bats and defendant struck victim with a metal bar, there was only one conspiracy to commit multiple crimes and defendant's conviction of the lesser conspiracy to commit aggravated battery violated double jeopardy. *State v. Trujillo*, 2012-NMCA-112, 289 P.3d 238, cert. granted, 2012-NMCERT-011.

Where, following a fight at a bar between the victim and a conspirator, defendant and a conspirator assaulted the victim at a conspirator's residence and tied the victim up; defendant guarded the victim with a knife; another conspirator gave the victim an overdose of heroin; defendant and conspirators carried the victim to the victim's car and drove the car to a church; the victim was still alive; defendant tried three times to snap the victim's neck, a conspirator tried to suffocate the victim with a plastic bag, and defendant tried to strangle the victim with the victim's shoelaces; defendant and the conspirators left the church and after consulting with other conspirators, returned to the church and set the victim and the victim's car on fire; defendant and other conspirators went to the residence of a conspirator with whom the victim had the bar fight and the conspirator paid fifty dollars to each conspirator; the entire sequence of events from the bar fight to the arson of the victim's car occurred within an eight hour period; during that time, the conspirators exchanged numerous phone calls; and defendant was convicted of conspiracies to commit kidnapping, first degree murder, and aggravated arson, defendant entered into only one agreement and took part in only one conspiracy and the court vacated defendant's convictions of conspiracy to commit kidnapping and arson. *State v. Gallegos*, 2011-NMSC-027, 149 N.M. 704, 254 P.3d 655.

IV. EVIDENCE AND PROOF.

A. IN GENERAL.

Traffic in drugs in a drug-free school zone. — To convict a defendant of conspiracy to traffic drugs in a drug-free school zone, the state must prove that the defendant had knowledge that the transaction was occurring within a drug-free school zone. *State v. Wilson*, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Other evidence. — While common design is the essence of a conspiracy, this fact may be established by evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of the offense. *State v. Deaton*, 1964-NMSC-062, 74 N.M. 87, 390 P.2d 966.

Laying foundation for testimony. — When a sufficient foundation is laid by the evidence to establish the existence of a conspiracy, the acts and declarations of coconspirators in pursuance of the common purpose are admissible, whether conspiracy is directly charged or not. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

Out-of-court statements made by a coconspirator about matters relating to the conspiracy are not admissible unless and until a prima facie case of conspiracy is shown by other independent evidence. *State v. Harge*, 1979-NMCA-120, 94 N.M. 11, 606 P.2d 1105, *overruled on other grounds by State v. Penner*, 1983-NMCA-116, 100 N.M. 377, 671 P.2d 38.

Order of proof not dispositive. — The trial court has wide discretion in supervising the order of proof in a conspiracy case, and hence regardless of whether acts and declarations of one coconspirator were admitted prior to prima facie proof of a conspiracy, the dispositive issue was whether there was prima facie proof of a conspiracy apart from those acts and declarations, that is, evidence sufficient to make a prima facie case which would support a finding. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Presenting co-defendant's guilty plea in defendant's conspiracy trial. — The fact that a co-defendant has pled guilty to conspiracy to commit murder, presented to the jury in a case involving the defendant's conspiracy, does not come within Rule 803(22), N.M.R. Evid. (*now see* Paragraph V of Rule 11-803 NMRA), and is hearsay. *State v. Urioste*, 1980-NMCA-103, 94 N.M. 767, 617 P.2d 156, cert. denied, 94 N.M. 806, 617 P.2d 1321.

B. CIRCUMSTANTIAL EVIDENCE.

Conspiracy proved by inference. — Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state. Direct evidence of an overt act is not required and the crime of conspiracy is complete when the felonious agreement is reached. The agreement may be inferred from statements relating circumstances from which the jury could infer that defendant had agreed to act with another. *State v. Gonzales*, 2008-NMCA-146, 145 N.M. 110, 194 P.3d 725, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488; *State v. Lopez*, 2007-NMSC-049, 142 N.M. 613, 168 P.3d 743; *State v. Walters*, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068.

Established through circumstantial evidence. — A conspiracy may be established by circumstantial evidence, the agreement being a matter of inference from the facts and circumstances, which, considered as a whole, show the parties united to accomplish the fraudulent scheme. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Whether the defendant combined with another for an unlawful purpose may be shown by circumstantial evidence or by a showing that evidence exists from which reasonable inferences may be drawn supporting the existence of a conspiracy as shown from the facts and circumstances. *In re Ruben O*., 1995-NMCA-051, 120 N.M. 160, 899 P.2d 603, cert. denied, 120 N.M. 68, 898 P.2d 120.

Circumstantial evidence for fact of inception of common design. — Question of when conspirators began to act in pursuance of a common design is ordinarily not the subject of direct proof; circumstances must be relied on to establish the fact. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

Agreement a matter of inference. — A mutually implied understanding is sufficient so far as combination or confederacy is concerned, which agreement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151; *State v. Deaton*, 1964-NMSC-062, 74 N.M. 87, 390 P.2d 966.

Inference of conspiracy. — Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. *State v. Dressel*, 1973-NMCA-113, 85 N.M. 450, 513 P.2d 187; *State v. Sheets*, 1981-NMCA-064, 96 N.M. 75, 628 P.2d 320, cert. quashed, 96 N.M. 116, 628 P.2d 686.

C. ACTS OF CONSPIRATORS.

Acts and declarations of coconspirators may be admitted into evidence whether or not conspiracy is directly charged. *State v. Armijo*, 1976-NMCA-126, 90 N.M. 12, 558 P.2d 1151.

Acts made during existence of conspiracy. — The acts and declarations of a conspirator to be admissible against his coconspirator must occur during the existence of the conspiracy. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

Act made prior to consummation of crime. — A conspirator may testify to acts done or statements made by a coconspirator from the commencement to the consummation of the offense. *State v. Robinson*, 1972-NMCA-080, 84 N.M. 2, 498 P.2d 694.

Acts made prior to abandonment. — Rule that statements of a conspirator made after abandonment of the conspiracy or after it has terminated without accomplishing its object are inadmissible as against a co-conspirator, refers to those statements originally made among conspirators, and not the testimony given at trial about those statements. *State v. Robinson*, 1972-NMCA-080, 84 N.M. 2, 498 P.2d 694.

Acts prior to inception of conspiracy. — While the acts and declarations of one conspirator during the existence of a conspiracy are competent evidence against his coconspirators, no act or declaration made before the inception of the conspiracy may be binding, or given in evidence against the coconspirator on trial. *State v. Farris*, 1970-NMCA-067, 81 N.M. 589, 470 P.2d 561.

D. SUFFICIENCY OF EVIDENCE.

Conspiracy to manufacture methamphetamine. — Where the evidence showed that defendant and others went into a store to purchase Sudafed for methamphetamine, that each person went into the store separately in order to purchase a larger quantity of Sudafed, that Sudafed was used in the manufacture of methamphetamine, and that defendant actually manufactured methamphetamine on the day after the trip to the store to purchase the Sudafed, the jury could reasonably conclude that defendant conspired to manufacture methamphetamine. *State v. Brown*, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007, 148 N.M. 611, 241 P.3d 612.

Conspiracy to intimidate a witness. — Evidence that defendant agreed with an accused murderer to appear in court to shake up an eye witness to the murder and make him afraid to testify truthfully or to have a lapse of memory in the murder trial and to otherwise attempt to make sure that the witness refrained from testifying in a manner that would harm the accused murderer, was sufficient to support the conviction of defendant for conspiracy to intimidate a witness. State v. Martinez, 2008-NMCA-019, 143 N.M. 428, 176 P.3d 1160, cert. denied, 2008-NMCERT-001, 143 N.M. 397, 176 P.3d 1129.

Conspiracy to commit kidnapping. — Evidence that defendants, following an argument with the victims about missing drugs, made the victims strip to their underwear and sit on a couch, that one defendant held a knife to the throat of one victim, that defendants searched victims' clothes for the missing drugs, and that defendants removed money and identification from the victims' clothes, was sufficient to support an inference that the defendants worked together to confine the victims in the apartment and was sufficient to support the convictions for conspiracy to commit kidnapping. *State v. Herrera*, 2015-NMCA-116, cert. denied, 2015-NMCERT-010.

Conspiracy to commit forgery. — In defendant's trial for forgery, where the evidence established beyond a reasonable doubt that four personal checks belonging to four different people were washed and passed at four different times, and where there was testimony that defendant had entered into an agreement with others to change genuine checks so that their effect was different from the original, there was sufficient evidence to prove beyond a reasonable doubt that defendant committed conspiracy to commit forgery. *State v. Estrada*, 2016-NMCA-066, cert. denied.

Sufficient evidence of conspiracy to commit fraudulent use of a credit card. — Where defendant was convicted of fourth-degree fraudulent use of a credit card (over $500) and conspiracy to commit fraudulent use of a credit card, and where defendant claimed that there was insufficient evidence to support her conviction for conspiracy, arguing that the state did not present direct or circumstantial evidence from which the jury could determine that an agreement was reached with another person, there was sufficient circumstantial evidence to support the jury's determination that defendant agreed with at least one other person to commit fraudulent use of a credit card where, at trial, the state admitted into evidence the receipts for nine unauthorized credit card transactions made over the course of five consecutive days and offered testimony that defendant appeared in surveillance footage conducting one of the credit card

transactions and used the same job identifier for her purchase as did another unauthorized user of the credit card in a separate transaction. From this evidence, a rational jury could reasonably infer that there was some level of agreement and coordination among the users of the credit card based on the use of the same job identifier in multiple transactions, that defendant must have received the credit card from another unauthorized user of the credit card because she used the credit card to make a purchase one day after it was used in the first transaction by another person, and that defendant must have given the credit card to another person who used the credit card three more times in the two days after defendant used the credit card. *State v. Herrera*, 2024-NMCA-025, cert. denied.

Sufficient evidence of conspiracy to commit first-degree murder. — Where defendant was convicted of conspiracy to commit first-degree murder, and where the state presented evidence at trial that defendant spent the day before the murder with another man who had a motive to kill the victim, that defendant secured for himself and the other man a ride to the apartment complex where the victim lived, that defendant and the other man disappeared from sight before gunshots were heard, that defendant and the other man were seen running back to their vehicle before driving off, and that occupants of the vehicle testified that defendant smelled like burnt matches, which is similar to the smell of gunpowder, there was sufficient evidence for a reasonable jury to find that defendant was part of an agreement with one or more to murder the victim. *State v. Torres*, 2018-NMSC-013.

Evidence sufficient. — Where defendant's primary co-conspirator beat, drugged, and tied the victim to a bed in defendant's residence; defendant did not object to the treatment of the victim; while the primary co-conspirator was absent from the residence for a lengthy period of time, defendant watched the victim and did not assist the victim or call the police; defendant did not object when the primary co-conspirator expressed an intention to kill the victim and burn the victim's car; defendant purchased charcoal lighter fluid at the direction of the primary co-conspirator; defendant did not object when defendant's co-conspirators put the victim in the trunk of the victim's car; and while defendant remained at the residence, defendant's co-conspirators used the lighter fluid to burn the car and kill the victim, there was sufficient evidence to convict defendant of conspiracy to commit kidnapping. *State v. Bahney*, 2012-NMCA-039, 274 P.3d 134, cert. denied, 2012-NMCERT-003.

Where defendant's friends asked defendant for a ride from a party; one of the friends suggested that they go "do some shootings"; defendant agreed to the plan and drove to the location of a trailer selected by the friend; the friend exited defendant's vehicle and fired three shots at the trailer; the owner of the trailer had recently moved from the trailer, but kept some possessions in the trailer and parked two vehicles in front of the trailer; and defendant claimed that defendant had no reason to know that the trailer was occupied at the time of the shooting, the evidence was sufficient to prove that defendant had the requisite intent to agree and the intent to commit shooting at a dwelling. *State v. Coleman*, 2011-NMCA-087, 150 N.M. 622, 264 P.3d 523, cert. denied, 2011-NMCERT-008, 268 P.3d 513.

Where there was evidence that defendant or accomplice or both assaulted victim and split the money taken from the victim, this is sufficient evidence for the conviction of conspiracy to commit a robbery. *State v. Lopez*, 2005-NMSC-036, 138 N.M. 521, 123 P.3d 754, overruled on other grounds, *State v. Frawley*, 2007-NMSC-057, 143 N.M. 7, 172 P.3d 144.

The size, frequency and manner of the transactions were evidence sustaining defendant's conviction for conspiracy with two others to traffic in heroin. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

Review of the record indicates the existence of substantial evidence to support the jury verdicts for conspiracy to commit fraud, and the evidence was such that the jury could reasonably determine that defendants knowingly committed the offense of conspiracy to commit fraud upon the district and state in excess of $20,000. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

Series of agreements. — The evidence was sufficient to convict defendant of separate counts of conspiracy to commit murder, kidnapping and armed robbery, where the evidence in the light most favorable to the state showed a distinct agreement to commit each crime. *State v. Reyes*, 2002-NMSC-024, 132 N.M. 576, 52 P.3d 948.

Tampering with evidence. — Where there is no evidence suggesting that defendant encouraged his accomplice to dispose of the gun or was present when the accomplice threw it away, there was insufficient evidence to support defendant's convictions for tampering with evidence and conspiracy to tamper with evidence. *State v. Armijo*, 2005-NMCA-010, 136 N.M. 723, 104 P.3d 1114.

Sufficient evidence of conspiracy to commit tampering with evidence. — Where defendant was convicted of second-degree murder, tampering with evidence and conspiracy to commit tampering with evidence, there was sufficient evidence to support defendant's conviction for conspiracy to commit tampering with evidence where the State sought to prove that defendant and another person by words or conduct agreed together to commit tampering with evidence by destroying a vehicle linked to the murder, and where the evidence at trial established that defendant drove the vehicle away from the shooting, left it parked in an alley and contacted an unidentified person who helped defendant obtain and pour gasoline on the vehicle and then start it on fire. Based on this evidence, the jury rationally could have concluded that defendant and the unidentified person who accompanied him to the gas station and the alley where the vehicle was parked agreed by words or conduct to set the car on fire with the intent to destroy evidence. *State v. Chavez*, 2022-NMCA-007, cert. granted.

Conspiracy to commit tampering with evidence conviction reversed where conviction for underlying offense was reversed. — Where defendant was convicted of conspiracy to commit tampering with evidence in the fourth degree, based on a finding that defendant tampered with evidence of second degree murder, making the tampering at issue a third degree tampering with evidence, and where the district court

erred in instructing the jury, thus requiring the reversal of defendant's second-degree murder conviction, defendant's conviction for conspiracy to commit tampering with evidence also required reversal, because the reversal of defendant's murder conviction rendered the degree of tampering that was conspired to be committed indeterminate, and where a jury does not find the level of the underlying offense, its determination that the defendant tampered with evidence can only support a conviction for misdemeanor tampering with evidence. This section only prohibits conspiracy to commit felonies, and therefore conspiracy to commit a misdemeanor is not a crime in New Mexico. *State v. Chavez*, 2022-NMCA-007, cert. granted.

Sufficient evidence. — Defendant’s appearance along with several other people in a hardware store’s surveillance footage showing burglaries was sufficient circumstantial evidence to show that defendant had agreed with at least one of the other people to commit the burglaries to support defendant’s conviction for conspiracy to commit burglary. *State v. Gonzales*, 2008-NMCA-146, 145 N.M. 110, 194 P.3d 725, cert. denied, 2008-NMCERT-009, 145 N.M. 257, 196 P.3d 488.

There was sufficient evidence to support defendant’s conviction for conspiracy to commit first-degree murder where defendant testified that defendant incapacitated one of the occupants of a cabin while defendant’s companions murdered and robbed the other occupants of the cabin. *State v. Nieto*, 2000-NMSC-031, 129 N.M. 688, 12 P.3d 442.

Sufficient evidence of underlying crime(s). — Where the jury must determine which of two underlying crimes is supported by evidence, as opposed to determining the legality or constitutionality of the underlying crimes, a conviction for conspiracy will be upheld, notwithstanding that one of the underlying crimes may not have been supported by sufficient evidence. *State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Evidence found sufficient for conviction. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370; *State v. Sellers*, 1994-NMCA-053, 117 N.M. 644, 875 P.2d 400, cert. denied, 118 N.M. 90, 879 P.2d 91; *State v. Hernandez*, 1997-NMCA-006, 122 N.M. 809, 932 P.2d 499.

Evidence was insufficient to support verdict of conspiracy to commit trafficking by manufacture where the evidence established that there was a meth lab in the kitchen of defendant's friend's trailer and additional meth lab equipment in a bedroom; that defendant was present in the trailer, hiding in a closet in a different bedroom when the meth lab was discovered; and that both defendant and his friend were present in the trailer when the meth lab was discovered because the evidence did not lead to an inference that defendant had an agreement with friend to commit the offense of trafficking by manufacture. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Evidence that defendant used his truck to block the victim from leaving defendant's property; that defendant told the other defendants involved in the beating of the victim by telephone to "hurry up" because defendant did not know how long he could hold the victim; that when the other defendants arrived, the defendant became involved in the beating of the victim, permitted the jury to conclude that the defendants shared an intent to hold the victim and then beat him. *State v. Huber*, 2006-NMCA-087, 140 N.M. 147, 140 P.3d 1096, cert. denied, 2006-NMCERT-007, 140 N.M. 279, 142 P.3d 360.

V. INDICTMENT AND INFORMATION.

Sufficiency of indictment. — An indictment for conspiracy to commit perjury did not need to specify the perjury defendant allegedly conspired to commit because the offense of conspiracy was complete when the agreement was reached. S*tate v. Benavidez*, 1999-NMCA-053, 127 N.M. 189, 979 P.2d 234, *aff'd in part*, 1999-NMSC-041, 128 N.M. 261, 992 P.2d 274.

Charging in alternative. — Where defendant was charged under two counts enveloping a single conspiracy which violated two statutes, the trial court did not err in refusing to dismiss either count as duplicitous, as although there was only one conspiracy, the two counts alternatively charged the single conspiracy. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

Where the conspiracy to burglarize and vandalize an insured business involved acts not covered by the arson statute (Section 30-17-5 NMSA 1978), that section was not a special provision prohibiting the prosecution of defendant under Section 30-15-3 NMSA 1978 relating to damaging insured property, for the aspect of the conspiracy directed toward burglary and vandalism. *State v. Ross*, 1974-NMCA-028, 86 N.M. 212, 521 P.2d 1161.

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

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Conspiracy §§ 1 to 11.

Right of accused to bill of particulars, 5 A.L.R.2d 444.

Joint liability for slander, 26 A.L.R.2d 1031.

Liability for procuring breach of contract, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Limitation of actions: when does statute of limitations begin to run against civil action or criminal prosecution for conspiracy, 62 A.L.R.2d 1369.

Gambling, criminal conspiracies as to, 91 A.L.R.2d 1148.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 A.L.R.3d 671.

Jurisdiction to prosecute conspirator who is not in state at time of substantive criminal act, for offense committed pursuant to conspiracy, 5 A.L.R.3d 887.

False testimony: actionability of conspiracy to give or procure false testimony or other evidence, 31 A.L.R.3d 1423.

Impossibility: comment note on impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Spouses, criminal conspiracy between, 74 A.L.R.3d 838.

Entrapment: availability of defense of entrapment where one accused of conspiracy denies participation in offense, 5 A.L.R.4th 1128.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 A.L.R.4th 192.

Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

30-28-3. Criminal solicitation; penalty.

A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

B. In any prosecution for criminal solicitation, it is an affirmative defense that under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant:

(1) notified the person solicited; and

(2) gave timely and adequate warning to law enforcement authorities or otherwise made a substantial effort to prevent the criminal conduct solicited.

The burden of raising this issue is on the defendant, but does not shift the burden of proof of the state to prove all of the elements of the crime of solicitation beyond a reasonable doubt.

C. It is not a defense that the person solicited could not be guilty of the offense solicited due to insanity, minority or other lack of criminal responsibility or incapacity. It is not a defense that the person solicited is unable to commit the crime solicited because of lack of capacity, status or other characteristic needed to commit the crime solicited, so long as the person soliciting or the person solicited believes that he or they have such capacity, status or characteristics.

D. A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or co-conspirators [coconspirators], or the crime or crimes committed by the person solicited.

E. Any person convicted of criminal solicitation shall be punished as follows:

(1) if the highest crime solicited is a capital or first degree felony, the person soliciting such felony is guilty of a second degree felony;

(2) if the highest crime solicited is a second degree felony, the person soliciting such a felony is guilty of a third degree felony; and

(3) if the highest crime solicited is a third degree felony or a fourth degree felony, the person soliciting such felony is guilty of a fourth degree felony.

History: Laws 1979, ch. 265, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Intent. — Criminal solicitation is not committed in a vacuum; it is a specific intent crime that requires the solicitation of a substantive underlying crime. A person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting

a felony, the soliciting person solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state. *State v. Martinez*, 2008-NMSC-060, 145 N.M. 220, 195 P.3d 1232.

Offense of solicitation requires some form of actual communication from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation. *State v. Cotton*, 1990-NMCA-025, 109 N.M. 769, 790 P.2d 1050, cert. denied, 109 N.M. 751, 790 P.2d 1032.

Under this section, proof that defendant solicited, commanded, requested, induced, or employed another to commit a felony necessarily requires evidence that the defendant, in some manner, in fact communicated the solicitation to the person or persons intended to be solicited. *State v. Cotton*, 1990-NMCA-025, 109 N.M. 769, 790 P.2d 1050, cert. denied, 109 N.M. 751, 790 P.2d 1032.

Offense complete when solicitation made. — The offense of solicitation is complete when the solicitation is made and it is immaterial that the object of the solicitation is never consummated, or that no overt steps are subsequently taken toward its consummation. *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

Agreement not required. — The crime of solicitation does not require an agreement. There need be only unilateral acts on the part of the accused of an inducement or request for another to commit a felony. *State v. Gilbert*, 1982-NMCA-081, 98 N.M. 77, 644 P.2d 1066.

"Facilitate" and "promote" construed. — The terms "facilitate" and "promote" have common, well defined definitions, meaning respectively "to make easier or less difficult," and to "further, or encourage." *State v. Casteneda*, 1982-NMCA-046, 97 N.M. 670, 642 P.2d 1129.

Sufficient evidence of criminal solicitation to commit tampering with evidence. — Where defendant was charged with voluntary manslaughter in the stabbing death of his friend, and where the evidence established that defendant called his girlfriend from the jail knowing that the police were investigating the stabbing, and told her to take his backpack, which contained cans of Dust-Off that the victim had been sniffing or "huffing", and when defendant’s girlfriend told defendant that she could not because the police were everywhere, defendant asked her to take the Dust-Off cans out of the backpack and tell the police the backpack belonged to someone else, the evidence supports findings that defendant intended his girlfriend to tamper with evidence consisting of his backpack and the Dust-Off cans inside it and that defendant requested his girlfriend to tamper with evidence by concealing it and lying about ownership of the backpack, for the purpose of preventing his prosecution or conviction for stabbing the victim. *State v. Fox*, 2017-NMCA-029, cert. granted.

Double jeopardy. — Even though, under Subsection D of this section, defendant could be convicted of criminal solicitation and conspiracy to commit murder, the trial court's merger of the two offenses for sentencing purposes violated his right to be protected from double jeopardy. *State v. Vallejos*, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68.

Convictions of voluntary manslaughter and aggravated burglary did not violate double jeopardy. — Where defendant shot the victim in the chest in defendant's vehicle, drove the unconscious victim in the vehicle to an isolated area, and defendant shot the victim twice in the head while the victim was still alive, defendant's convictions of voluntary manslaughter for shooting the victim in the chest and aggravated battery for shooting the victim in the head were not based on unitary conduct and did not violate defendant's right to be free from double jeopardy. *State v. Urioste*, 2011-NMCA-121, 267 P.3d 820, cert. granted, 2011-NMCERT-012.

Solicitation incidental to conspiracy to commit murder. — The last sentence of Subsection D means that the charges of both criminal solicitation and conspiracy to commit murder can be prosecuted and submitted to the jury which can convict defendant of both charges; however, according to the first two sentences, defendant will not be held "liable" or "guilty" of criminal solicitation upon formal adjudication or entry of judgment and sentence by the trial court. *State v. Vallejos*, 2000-NMCA-075, 129 N.M. 424, 9 P.3d 668, cert. denied, 129 N.M. 385, 9 P.3d 68.

Solicitation incidental to conspiracy or liability as accessory. — If the theory of guilt of the principal offense is that of accessory liability for fraud or conspiracy to commit fraud, solicitation will be necessarily incidental to it and there can be no liability for solicitation. *State v. McCall*, 1983-NMCA-109, 101 N.M. 616, 686 P.2d 958, *rev'd on other grounds*, 1984-NMSC-007, 101 N.M. 32, 677 P.2d 1068.

Separate sentences for conspiracy and solicitation, if solicitation constitutes conspiracy, impermissible. — A formal adjudication of guilt of both conspiracy to commit and solicitation of the same felony is proper; however, the imposition of a separate sentence for solicitation when (1) a defendant is convicted and sentenced for conspiracy and (2) the solicitation also constitutes the conspiracy is not permissible. *State v. Shade*, 1986-NMCA-072, 104 N.M. 710, 726 P.2d 864, cert. quashed, 104 N.M. 702, 726 P.2d 856, *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Conduct incidental to commission of the offense committed. — Even though the defendant's actions in negotiating for the purchase of drugs fall within the definition of criminal solicitation, his conduct was necessarily incidental to the crime of trafficking through the sale of a controlled substance and he could not be guilty of solicitation to traffic. *State v. Pinson*, 1995-NMCA-045, 119 N.M. 752, 895 P.2d 274.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Solicitation to commit crime against more than one person or property, made in single conversation, as single or multiple crimes, 24 A.L.R.4th 1324.

15A C.J.S. Conspiracy §§ 34 to 78.

ARTICLE 29
Glues

30-29-1. Glues; limiting the sales; requiring records; penalty.

A. No person shall sell glue to any person under eighteen years of age. A New Mexico driver's license shall be prima facie proof of age.

B. Wholesale distributors of glue shall make available to the health services division of the health and environment department [department of health] and to law enforcement agencies of the state, county and municipality during business hours their records of all sales to retailers of glue.

C. As used in this section, "glue" means what is commonly referred to as plastic or model airplane cement and includes any cement containing hexane, benzene, toluene, xylene, carbon tetrachloride, chloroform, ethylene dichloride, acetone, cyclohexanone, methyl ethyl ketone, methylisobutyl ketone, amyl acetate, butyl acetate, ethyl acetate, tricresyl phosphate, butyl alcohol, ethyl alcohol, isopropyl alcohol or methylcellosolve acetate.

D. Any person violating any provision of this section is guilty of a petty misdemeanor.

History: 1953 Comp., § 12-3-40, enacted by Laws 1968, ch. 23, § 1; 1977, ch. 253, § 24; 1979, ch. 82, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the health and environment department, and enacted a new 9-7-4 NMSA 1978, creating the department of health.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Penal offense of sniffing glue or similar volatile intoxicants, 32 A.L.R.3d 1438.

30-29-2. Glue; aerosol spray; abuse or possession for abuse; penalty.

A. No person shall intentionally smell, sniff or inhale the fumes or vapors from a glue, aerosol spray product or other chemical substance for the purpose of causing a condition of or inducing symptoms of intoxication, elation, euphoria, dizziness, excitement, irrational behavior, exhilaration, stupefaction or dulling of the senses, or for the purpose of in any manner changing, distorting or disturbing the audio, visual or mental processes.

B. No person shall intentionally possess a glue, aerosol spray product or other chemical substance for any purpose set forth in Subsection A of this section.

C. As used in this section, "glue" means what is commonly referred to as plastic or model airplane cement and includes any cement containing hexane, benzene, toluene, xylene, carbon tetrachloride, chloroform, ethylene dichloride, acetone, cyclohexanone, methyl ethyl ketone, methylisobutyl ketone, amyl acetate, butyl acetate, ethyl acetate, tricresyl phosphate, butyl alcohol, ethyl alcohol, isopropyl alcohol or methylcellosolve acetate.

D. The provisions of this section do not apply to any aerosol spray product or other chemical substance used for legitimate medicinal purposes and obtained either on a prescription basis or for medicinal purposes by a person over the age of eighteen.

E. Any person who violates any provision of this section is guilty of a misdemeanor. The sentence or fine may be waived in the discretion of the court in the case of any person who has not been previously convicted of violating this section and who has successfully completed a drug education or treatment program approved by the court.

History: Laws 1979, ch. 82, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Products liability: recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect, 50 A.L.R.5th 275.

ARTICLE 30
Mercury

30-30-1. Illegal possession of mercury.

Illegal possession of mercury consists of possessing more than one pound of mercury without also possessing a bona fide bill of sale or other instrument in writing relating to the mercury in possession stating the name and address of the seller, the name and address of the purchaser, the date of the sale, the amount sold and the price paid therefor; provided however, this section shall not be applicable to any person engaged in the business of mining, processing mercury, or to any person using mercury

as an integral part of a tool, instrument or device in his business, or to a law enforcement officer in discharge of his duties.

Whoever commits illegal possession of mercury is guilty of a fourth degree felony.

History: 1953 Comp., § 54-5-17, enacted by Laws 1967, ch. 88, § 1.

ANNOTATIONS

Cross references. — For evidentiary rule relating to the use of presumptions in criminal cases, *see* Rule 11-302 NMRA.

Section is not an unreasonable restriction of property rights in violation of due process requirements. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

Reasonable regulation of possession. — As physical characteristics of mercury are such that there is no way to identify a particular lot of mercury, it is reasonably necessary to regulate possession of mercury in order to prevent theft, and the regulation of possession, as limited in this section, is reasonable, and does not violate the requirements of due process. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

While it is true that this section prohibits a formerly legal possession, the act prohibited is intentional possession of mercury in those instances covered hereunder. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

Section neither destroys presumption of innocence nor shifts burden of proof. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

State required to prove possession. — The presumption of innocence in this section is not destroyed by an inference of guilt based either on a suspicion or an unproven fact as it requires the state to prove possession of a specified item (mercury) in a stated amount (more than one pound). *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

Along with absence of bill of sale. — The state has the burden of proving that the defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in defendant's possession; this negative may be proved by the unexplained absence of a bill of sale or instrument in writing from which it may be (but is not required to be) inferred that defendant did not possess such an item, such inference being an evidentiary matter. *State v. Cranford*, 1971-NMCA-008, 82 N.M. 331, 481 P.2d 410.

Locus of bill of sale. — The bill of sale or other written instrument need not be on defendant's person in order to be possessed by the defendant. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

Intent essential. — Criminal intent, an intent to possess the mercury, is required for violation of this section. *State v. Davis*, 1969-NMCA-047, 80 N.M. 347, 455 P.2d 851, cert. denied, 80 N.M. 316, 454 P.2d 973.

Evidence sufficient. — Evidence that, according to defendant, 60 pounds of mercury found in his closet was not supposed to be there, along with evidence that defendant acknowledged his guilt to investigating officer, permitted the inference that defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in his possession. *State v. Cranford*, 1971-NMCA-008, 82 N.M. 331, 481 P.2d 410.

ARTICLE 31
Controlled Substances

30-31-1. Short title.

Chapter 30, Article 31 NMSA 1978 may be cited as the "Controlled Substances Act".

History: 1953 Comp., § 54-11-1, enacted by Laws 1972, ch. 84, § 1; 2005, ch. 280, § 1.

ANNOTATIONS

The 2005 amendment, effective June 17, 2005, added the statutory reference to the act.

Civil and criminal penalties. — The Double Jeopardy Clause of the New Mexico constitution does not prohibit the legislature from assessing both civil and criminal penalties for violations of the Controlled Substances Act. However, if the state elects to seek both criminal conviction and forfeiture of assets, the penalties must be parsed in a single, bifurcated proceeding. *State v. Esparza*, 2003-NMCA-075, 133 N.M. 772, 70 P.3d 762, cert. denied, 133 N.M. 771, 70 P.3d 761.

Constitutionality. — The title of Laws 1972, Chapter 84 does not violate N.M. Const., art. IV, § 16 by embracing more than one subject, because although the act amends sections of the state Drug and Cosmetic Act, the amendments are all concerned with drugs. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

Uniform scheme for controlling registrants and nonregistrants. — The legislature did not establish a parallel scheme for punishing violations of the Controlled Substances Act. That is, there is not one system for controlling registrants authorized to conduct transactions in controlled substances and another for nonregistrants. The punishment

for violating a provision of the act depends not on the offender's status but on the nature of the violation. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Law reviews. — For note, "Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For note and comment, "Complying with Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after State v. Esparza," see 34 N.M. L. Rev. 561 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33, 130, 141, 191, 206.

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws, 92 A.L.R.3d 47.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Liability for discharge of at-will employee for refusal to submit to drug testing, 79 A.L.R.4th 105.

Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws, 1 A.L.R.5th 938.

Validity, construction and application of state "drug kingpin" statutes, 30 A.L.R.5th 121.

Validity, construction and application of state or local law prohibiting maintenance of vehicle for purpose of keeping or selling controlled substances, 31 A.L.R.5th 760.

Validity, construction, and application of state statue criminalizing possession of contraband by individual in penal or correctional institution, 45 A.L.R.5th 767.

Availability of defense of duress or coercion in prosecution for violation of federal narcotics laws, 75 A.L.R. Fed. 722.

When may offender found guilty of multiple crimes under Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS §§ 841-851) be punished for only one offense, 80 A.L.R. Fed. 794.

Validity under federal constitution of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government, 86 A.L.R. Fed. 420.

Supreme Court's views on mandatory testing for drugs or alcohol, 145 A.L.R. Fed. 335.

28 C.J.S. Drugs and Narcotics § 8 et seq.

30-31-2. Definitions.

As used in the Controlled Substances Act:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or the practitioner's agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. It does not include a common or contract carrier, public warehouseperson or employee of the carrier or warehouseperson;

C. "board" means the board of pharmacy;

D. "bureau" means the narcotic and dangerous drug section of the criminal division of the United States department of justice, or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act or rules adopted thereto;

F. "counterfeit substance" means a controlled substance that bears the unauthorized trademark, trade name, imprint, number, device or other identifying mark or likeness of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the controlled substance;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" or "substance" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States

or official national formulary or any respective supplement to those publications. It does not include devices or their components, parts or accessories;

L. "manufacture" means the production, preparation, compounding, conversion or processing of a controlled substance or controlled substance analog by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance:

(1) by a practitioner as an incident to administering or dispensing a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's agent under the practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

M. "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:

(1) opium and opiate and any salt, compound, derivative or preparation of opium or opiate;

(2) any salt, compound, isomer, derivative or preparation that is a chemical equivalent of any of the substances referred to in Paragraph (1) of this subsection, except the isoquinoline alkaloids of opium;

(3) opium poppy and poppy straw, including all parts of the plant of the species Papaver somniferum L. except its seeds; or

(4) coca leaves and any salt, compound, derivative or preparation of coca leaves, any salt, compound, isomer, derivative or preparation that is a chemical equivalent of any of these substances except decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine;

N. "opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. "Opiate" does not include, unless specifically designated as controlled under Section 30-31-5 NMSA 1978, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts, dextromethorphan. "Opiate" does include its racemic and levorotatory forms;

O. "person" means an individual, partnership, corporation, association, institution, political subdivision, government agency or other legal entity;

P. "practitioner" means a physician, certified advanced practice chiropractic physician, doctor of oriental medicine, dentist, physician assistant, certified nurse practitioner, clinical nurse specialist, certified nurse-midwife, prescribing psychologist, veterinarian, euthanasia technician, pharmacist, pharmacist clinician or other person licensed or certified to prescribe and administer drugs that are subject to the Controlled Substances Act;

Q. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from a licensed practitioner or the practitioner's agent to the pharmacist, including by means of electronic transmission, or indirectly by means of a written order signed by the prescriber, bearing the name and address of the prescriber, the prescriber's license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use and the date of issue and in accordance with the Controlled Substances Act or rules adopted thereto;

R. "scientific investigator" means a person registered to conduct research with controlled substances in the course of the person's professional practice or research and includes analytical laboratories;

S. "ultimate user" means a person who lawfully possesses a controlled substance for the person's own use or for the use of a member of the person's household or for administering to an animal under the care, custody and control of the person or by a member of the person's household;

T. "drug paraphernalia" means, except as to use in accordance with the Cannabis Regulation Act [26-2C-1 to 26-2C-42 NMSA 1978] or the Lynn and Erin Compassionate Use Act [Chapter 26, Article 2B NMSA 1978], all equipment, products and materials of any kind that are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance or controlled substance analog in violation of the Controlled Substances Act. It includes:

(1) kits used, intended for use or designed for use in planting, propagating, cultivating, growing or harvesting any species of plant that is a controlled substance or controlled substance analog or from which a controlled substance can be derived;

(2) kits used, intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances or controlled substance analogs;

(3) isomerization devices used, intended for use or designed for use in increasing the potency of any species of plant that is a controlled substance;

(4) testing equipment used, intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances or controlled substance analogs;

(5) scales or balances used, intended for use or designed for use in weighing or measuring controlled substances or controlled substance analogs;

(6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite dextrose and lactose, used, intended for use or designed for use in cutting controlled substances or controlled substance analogs;

(7) blenders, bowls, containers, spoons and mixing devices used, intended for use or designed for use in compounding controlled substances or controlled substance analogs;

(8) capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances or controlled substance analogs;

(9) containers and other objects used, intended for use or designed for use in storing or concealing controlled substances or controlled substance analogs;

(10) hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injecting controlled substances or controlled substance analogs into the human body;

(11) objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing cocaine into the human body, such as:

(a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, with or without screens, permanent screens, hashish heads or punctured metal bowls;

(b) water pipes;

(c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) miniature cocaine spoons and cocaine vials;

(f) chamber pipes;

(g) carburetor pipes;

(h) electric pipes;

(i) air-driven pipes;

(j) chilams;

(k) bongs; or

(l) ice pipes or chillers; and

(12) in determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) statements by the owner or by anyone in control of the object concerning its use;

(b) the proximity of the object, in time and space, to a direct violation of the Controlled Substances Act or any other law relating to controlled substances or controlled substance analogs;

(c) the proximity of the object to controlled substances or controlled substance analogs;

(d) the existence of any residue of a controlled substance or controlled substance analog on the object;

(e) instructions, written or oral, provided with the object concerning its use;

(f) descriptive materials accompanying the object that explain or depict its use;

(g) the manner in which the object is displayed for sale; and

(h) expert testimony concerning its use;

U. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or that was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found:

(1) include:

(a) phenethylamines;

(b) N-substituted piperidines;

(c) morphinans;

(d) ecgonines;

(e) quinazolinones;

(f) substituted indoles; and

(g) arylcycloalkylamines; and

(2) do not include those substances that are generally recognized as safe and effective within the meaning of the Federal Food, Drug, and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug, and Cosmetic Act;

V. "human consumption" includes application, injection, inhalation, ingestion or any other manner of introduction;

W. "drug-free school zone" means a public school, parochial school or private school or property that is used for a public, parochial or private school purpose and the area within one thousand feet of the school property line, but it does not mean any post-secondary school; and

X. "valid practitioner-patient relationship" means a professional relationship, as defined by the practitioner's licensing board, between the practitioner and the patient.

History: 1953 Comp., § 54-11-2, enacted by Laws 1972, ch. 84, § 2; 1979, ch. 2, § 1; 1981, ch. 31, § 1; 1987, ch. 68, § 1; 1989, ch. 177, § 19; 1990, ch. 19, § 2; 1997, ch. 244, § 2; 1997, ch. 253, § 3; 2000, ch. 53, § 1; 2001, ch. 50, § 2; 2002, ch. 100, § 2; 2005, ch. 152, § 9; 2006, ch. 17, § 1; 2008, ch. 44, § 5; 2009, ch. 102, § 2; 2017, ch. 140, § 2; 2019, ch. 116, § 9; 2021 (1st S.S.), ch. 4, § 63.

ANNOTATIONS

Cross references. — For the Federal Food, Drug and Cosmetic Act, referred to in the last undesignated paragraph of Subsection W, *see* 21 U.S.C. § 301 et seq. For Section 505 of that act, also referred to in the last undesignated paragraph of Subsection W, *see* 21 U.S.C. § 355.

Compiler's notes. — Senate Bill 6, enacted by the Fifty-Third Legislature, First Session, 2017, was vetoed by the governor on March 11, 2017. Pursuant to the First Judicial District Court's decision in State ex rel. New Mexico Legislative Council v. Honorable Susana Martinez, Governor of the State of New Mexico et al., D-101-CV-2017-01550, and affirmed by S.Ct. Order No. S-1-SC-36731, on April 25, 2018, which held that Article IV, Section 22 of the New Mexico Constitution requires that objections must accompany a returned bill, Senate Bill 6 was chaptered into law by the Secretary of State.

The 2021 (1st S.S.) amendment, effective June 29, 2021, removed the definitions of "hashish", "hemp", and "marijuana", and revised the definition of "drug paraphernalia", as used in the Controlled Substances Act; deleted former Subsections L and M and redesignated former Subsection N as Subsection L; deleted former Subsection O and redesignated former Subsections P through AA as Subsections M through X, respectively; in Subsection T, after "means", added "except as to use in accordance with the Cannabis Regulation Act or the Lynn and Erin Compassionate Use Act", deleted former Paragraph W(7) and redesignated former Paragraphs W(8) through W(13) as Paragraphs T(7) through T(12), respectively, in Paragraph T(11), after "introducing", deleted "marijuana", after "cocaine", deleted "hashish or hashish oil", deleted former Subparagraph W(12)(e) and redesignated former Subparagraphs W(12)(f) through W(12)(m) as Subparagraphs T(11)(e) through T(11)(l), respectively; and in Subsection U, added new paragraph designations "(1)" and "(2)" and redesignated former Paragraphs X(1) through X(7) as Subparagraphs U(1)(a) through U(1)(g), respectively, after Subparagraph U(1)(g), deleted "Specifically excluded from the definition of 'controlled substance analog' are", and in Paragraph U(2), added "do not include".

The 2019 amendment, effective July 1, 2019, defined "hemp" as used in the Controlled Substances Act; and added a new Subsection M and redesignated former Subsections M through Z as Subsections N through AA, respectively.

The 2017 amendment, effective June 16, 2017, excluded the plant Cannabis sativa L, and any part of the plant, from the definition of "marijuana" in the Controlled Substances Act; in Subsection N, after "that is incapable of germination", added "or the plant Cannabis sativa L, and any part of the plant, whether growing or not, containing a delta-9 tetrahydrocannabinol concentration of no more than three-tenths percent on a dry weight basis".

The 2009 amendment, effective June 19, 2009, in Subsection R, added "euthanasia technician".

The 2008 amendment, effective May 14, 2008, added "certified advanced practice chiropractic physician" in Subsection R.

The 2006 amendment, effective July 1, 2006, revised Subsection Y to add parochial and private schools to the definition of a drug-free school zone.

The 2005 amendment, effective June 17, 2005, provided in Subsection S that a "prescription" means an order given by a licensed practitioner or the practitioner's agent, including an order given by electronic transmission, and providing that the order bear the name and address of the prescriber, his license classification, the name and address of the patient, the name and quantity of the drug prescribed, directions for use, and the date of issue; and added the definition of "valid practitioner-patient relationship" in Subsection Z to mean the relationship defined by the practitioner's licensing board.

The 2002 amendment, effective July 1, 2002, inserted "physician assistant, prescribing psychologist" in Subsection R.

The 2001 amendment, effective June 15, 2001, substituted "rules" for "regulations" in Subsections E and S, and inserted "pharmacist, pharmacist clinician" to the definition of "practitioner" in Subsection R.

The 1997 amendment, effective June 20, 1997, added "certified nurse-midwife" and "or certified" following "licensed" in Subsection R.

The 1990 amendment, effective July 1, 1990, added Subsection Y and made minor stylistic changes throughout the section.

The 1989 amendment, effective July 1, 1989, substituted "drug or substance" for "drug, substance or immediate precursor" in Subsection E; deleted former Subsection M, which read: "'immediate precursor' means a substance which the board has designated by regulation as being the principal compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit manufacture"; redesignated former Subsections N through Y as present Subsections M through X; made minor stylistic changes in Paragraph (4) of Subsection O, in the first sentence of Subsection W, and in Subsection X; and in Subsection V inserted "or controlled substance analogs" in Paragraph (9) and in subparagraph (c) of Paragraph (13).

Drug paraphernalia defined. — Section 30-31-2V NMSA 1978 clearly and unambiguously does not include ephedrine within its definition of drug paraphernalia. *State v. Mcwhorter*, 2005-NMCA-133, 138 N.M. 580, 124 P.3d 215, cert. denied, 138 N.M. 586, 124 P.3d 564.

Constitutionality. — The Drug Paraphernalia Act is not vague or overbroad. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

Personal use exception. — Trafficking by manufacture as defined in Section 30-31-2M NMSA 1978 does not allow for a personal use exception. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Search for "controlled substances". — Specification in a search warrant of "controlled substances" kept on premises contrary to law was as precise as the situation permitted considering the wide variety of drugs used by addicts, the words used in the warrant having a definite meaning in that they referred to certain and definite lists of drugs and their derivatives, and left nothing to the discretion of the officers. *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 29, 536 P.2d 1085, and cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Term "constructive transfer" is not void under due process clause on the grounds of vagueness. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

Constructive delivery. — A "constructive delivery" occurs when the conduct of the parties is such as to be inconsistent with any other supposition than that there has been a change in the nature of the holding. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

Aiding actual transfer. — Testimony that seller handed marijuana to defendant, who in turn handed it to undercover agent, was sufficient evidence of aiding and abetting "actual transfer" of marijuana. *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100.

"Distributing" includes prescription for other than legitimate medical purpose. — When a physician writes a prescription neither for a legitimate medical purpose nor in the usual course of his professional practice, he is "distributing" drugs. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Agency not defense to distribution charge. — Court properly refused instructions defining agency and telling the jury that if the accused had acted as agent for police officers in obtaining heroin he could not be convicted of distributing it, since agency is not a defense to a distribution charge. *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

Mailing as distribution. — Placing a controlled substance in the mail was a constructive transfer which had the effect of turning the controlled substance over to an agent for delivery and constituted a distribution. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

Distribution to minor. — Neither the federal constitution nor 18 U.S.C. § 1716 preempt New Mexico jurisdiction over distribution of controlled substances to a minor through the use of the mails. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

Subsection M virtually identical to USCA. — Subsection M of this section is virtually identical to the definition of manufacturing found in the Uniform Controlled Substances Act (1994). *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Distribution not required from manufacturing. — There is nothing in the language of Subsection M of this section to suggest that manufacturing requires distribution or an intent to distribute. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

No personal use exception in Subsection M. — The legislature has not included personal use as one of the exceptions specifically set forth in Subsection M of this section. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Growing marijuana as manufacturer. — Defendant was a "manufacturer" of marijuana within the contemplation of 54-7-2, 1953 Comp. (now repealed), by reason of his being a grower and cultivator thereof. *State v. Gonzales*, 1967-NMCA-030, 78 N.M. 591, 435 P.2d 210; *State v. Ortiz*, 1967-NMCA-019, 78 N.M. 507, 433 P.2d 92 (decided under former law, statute repealed).

Marijuana is not a narcotic drug under present statutes. *State v. Mabrey*, 1975-NMCA-098, 88 N.M. 227, 539 P.2d 617.

Marijuana was formerly classified as narcotic. — Expert witness' identification of substance as cannabis leaves, or a substance neither chemically or physically distinguishable from cannabis, was sufficient evidence for jury to find that the substance was a "narcotic drug" under former law. *State v. Tapia*, 1966-NMSC-245, 77 N.M. 168, 420 P.2d 436 (decided under prior law).

Cannabis sativa. — State was not required to show that the cannabis leaves were sown or cultivated, as indicated by the name "sativa." *State v. Tapia*, 1966-NMSC-245, 77 N.M. 168, 420 P.2d 436 (decided under prior law).

Substances held identical. — Marijuana, cannabis indica and cannabis sativa L. have been held to be identical as a matter of law. *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, 424 P.2d 787, cert. denied, sub nom. Greene v. United States, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967); *State v. Romero*, 1964-NMSC-245, 74 N.M. 642, 397 P.2d 26 (decided before 1979 amendment).

"Marijuana" and "cannabis indica" are merely geographical oriented names of cannabis, whereas "cannabis sativa L." is the botanical name of cannabis. *State v. Romero*, 1964-NMSC-245, 74 N.M. 642, 397 P.2d 26 (decided before 1979 amendment).

"Mature stalks" of marijuana exempt. — Where expert testified that marijuana in defendant's possession was a "mature stalk" which is specifically exempted under this section, conviction for unlawful possession of marijuana could not be sustained. *State v. Benavidez*, 1962-NMSC-137, 71 N.M. 19, 375 P.2d 333.

Cocaine may be classified as "narcotic". — The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes. *State v. Chouinard*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Heroin is narcotic drug as matter of law. *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916, *overruled on other grounds by* State v. Bender, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796 (decided under prior law).

Jury instruction. — Trial court did not err in instructing the jury, as a matter of law, that heroin was a narcotic drug, since Subsection P (now Subsection O) of this section includes opium and any derivative of opium within the definition of narcotic drug, and 30-31-6 NMSA 1978 lists heroin as one of the opium derivatives. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

A natural person is included within definition of "person." *State v. Tucker*, 1974-NMCA-049, 86 N.M. 553, 525 P.2d 913, cert. denied, 86 N.M. 528, 525 P.2d 888; *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180; *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

"Prescription" construed. — If a written direction is not for a substance to be used in treating illness, it is not a prescription as that term is used in the Controlled Substances Act (30-31-1 NMSA 1978). *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Drug paraphernalia guidelines adequately clear. — The guidelines present in Subsection W (now Subsection V) are adequate to alert law enforcement officers as to what activity is specifically proscribed. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

Drug paraphernalia. — The "intended for use" language in Subsection W (now Subsection V) is applicable to the state of mind of the individual charged with the offense of selling, distributing or displaying drug paraphernalia. The statutory definition of "drug paraphernalia" is thus clear and provides notice of what is prohibited. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

Drug paraphernalia descriptive materials. — Subsection W(13)(f) (now Subsection V(13(f)), regarding descriptive materials accompanying an object, does not constitute a chilling factor nor invade the right of free speech. Any effect on protected speech is incidental. *The General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 1, 2, 6, 8, 9, 10, 14 et seq., 33, 40, 43, 47, 48, 49, 54 et seq., 66, 67, 69, 72, 75, 76, 96, 98, 100, 120 et seq., 130, 136, 140, 141, 153, 161 et seq., 179 et seq., 191, 200, 206, 211, 212, 229 et seq.

Chemically synthesized LSD, STP, MDA or other hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 A.L.R.3d 1284.

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.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

28 C.J.S. Drugs and Narcotics § 1 et seq.

30-31-3. Duty to administer.

A. The board shall administer the Controlled Substances Act and may add by regulation substances to the list of substances enumerated in Schedules I through IV pursuant to the procedures of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978]. In determining whether a substance has the potential for abuse, the board shall consider the following:

(1) the actual or relative abuse of the substance;

(2) the scientific evidence of the pharmacological effect of the substance, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration and significance of abuse;

(6) the risk to the public health; and

(7) the potential of the substance to produce psychic or physiological dependence liability.

B. After considering the factors enumerated in Subsection A of this section, the board shall make findings and issue regulations controlling the substance if it finds the substance has a potential for abuse.

C. If any substance is designated as a controlled substance under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Controlled Substances Act after providing for a hearing pursuant to the Uniform Licensing Act.

D. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 to 76-4-39 NMSA 1978].

History: 1953 Comp., § 54-11-3, enacted by Laws 1972, ch. 84, § 3; 1989, ch. 177, § 20; 2006, ch. 16, § 1.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, deleted former Subsection E which provided that the board exclude any nonnarcotic substance from a schedule if the substance may, under 61-11-22 NMSA 1978, be lawfully sold over the counter without a prescription.

The 1989 amendment, effective July 1, 1989, in Subsection A deleted former Paragraph (8), which read: "whether the substance is an immediate precursor of a substance already controlled under the Controlled Substances Act"; inserted "of this section" in Subsection B; deleted former Subsection C, which read: "If the board designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor"; redesignated former Subsections D through F as present Subsections C through E; substituted all of the language of Subsection D beginning with "pesticides" for "economic poisons as defined in Section 45-9-2 NMSA 1953"; and in Subsection E substituted "Section 61-11-22 NMSA 1978" for "Section 67-9-53 NMSA 1953".

Board's scheduling of drugs not unconstitutional delegation of authority. — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is not an unconstitutional delegation of authority under N.M. Const., art. III, § 1. *Montoya v. O'Toole*, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190.

Penalty provisions applicable to drugs scheduled by regulation. — Express legislative authority is not required to make the penalty provisions of the Controlled Substances Act (30-31-1 NMSA 1978) applicable to drugs scheduled by administrative regulation. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd on other grounds*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33, 179, 181, 187, 188.

28 C.J.S. Drugs and Narcotics § 117 et seq.

30-31-4. Nomenclature.

The controlled substances listed or to be listed in Schedules I through V are included by whatever official, common, usual, chemical or trade name designated.

History: 1953 Comp., § 54-11-4, enacted by Laws 1972, ch. 84, § 4.

30-31-5. Schedules; criteria.

There are established five schedules of controlled substances to be known as Schedules I, II, III, IV and V.

A. The board shall place a substance in Schedule I if it finds that the substance:

(1) has a high potential for abuse; and

(2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

B. The board shall place a substance in Schedule II if it finds that:

(1) the substance has a high potential for abuse;

(2) the substance has a currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and

(3) the abuse of the substance may lead to severe psychic or physical dependence.

C. The board shall place a substance in Schedule III if it finds that:

(1) the substance has a potential for abuse less than the substances listed in Schedules I and II;

(2) the substance has a currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

D. The board shall place a substance in Schedule IV if it finds that:

(1) the substance has a low potential for abuse relative to the substances in Schedule III;

(2) the substance has a currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substance in Schedule III.

E. The board shall place a substance in Schedule V if it finds that:

(1) the substance has a currently accepted medical use in treatment in the United States; and

(2) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule IV.

History: 1953 Comp., § 54-11-5, enacted by Laws 1972, ch. 84, § 5.

ANNOTATIONS

Board's scheduling of drugs not unconstitutional delegation of authority. — To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is not an unconstitutional delegation of authority under N.M. Const., art. III, § 1. *Montoya v. O'Toole*, 1980-NMSC-045, 94 N.M. 303, 610 P.2d 190.

Cocaine may be classified as narcotic. — The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes because of the similarity between cocaine and narcotic drugs in terms of cocaine's potential for societal harm. *Chouinard v. State*, 1980-NMCA-168, 96 N.M. 783, 635 P.2d 986, *rev'd on other grounds*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

30-31-6. Schedule I.

The following controlled substances are included in Schedule I:

A. any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters and ethers, unless specifically exempted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) acetylmethadol;

(2) allylprodine;

(3) alphacetylmethadol;

(4) alphameprodine;

(5) alphamethadol;

(6) benzethidine;

(7) betacetylmethadol;

(8) betameprodine;

(9) betamethadol;

(10) betaprodine;

(11) clonitazene;

(12) dextromoramide;

(13) dextrorphan;

(14) diampromide;

(15) diethylthiambutene;

(16) dimenoxadol;

(17) dimepheptanol;

(18) dimethylthiambutene;

(19) dioxaphetyl butyrate;

(20) dipipanone;

(21) ethylmethylthiambutene;

(22) etonitazene;

(23) etoxeridine;

(24) furethidine;

(25) hydroxypethidine;

(26) ketobemidone;

(27) levomoramide;

(28) levophenacylmorphan;

(29) morpheridine;

(30) noracymethadol;

(31) norlevorphanol;

(32) normethadone;

(33) norpipanone;

(34) phenadoxone;

(35) phenampromide;

(36) phenomorphan;

(37) phenoperidine;

(38) piritramide;

(39) proheptazine;

(40) properidine;

(41) racemoramide; and

(42) trimeperidine;

B. any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) acetorphine;

(2) acetyldihydrocodeine;

(3) benzylmorphine;

(4) codeine methylbromide;

(5) codeine-N-oxide;

(6) cyprenorphine;

(7) desomorphine;

(8) dihydromorphine;

(9) etorphine;

(10) heroin;

(11) hydromorphinol;

(12) methyldesorphine;

(13) methyldihydromorphine;

(14) morphine methylbromide;

(15) morphine methylsulfonate;

(16) morphine-N-oxide;

(17) myrophine;

(18) nicocodeine;

(19) nicomorphine;

(20) normorphine;

(21) pholcodine; and

(22) thebacon;

C. any material, compound, mixture or preparation that contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) 3,4-methylenedioxy amphetamine;

(2) 5-methoxy-3,4-methylenedioxy amphetamine;

(3) 3,4,5-trimethoxy amphetamine;

(4) bufotenine;

(5) diethyltryptamine;

(6) dimethyltryptamine;

(7) 4-methyl-2,5-dimethoxy amphetamine;

(8) ibogaine;

(9) lysergic acid diethylamide;

(10) mescaline;

(11) peyote, except as otherwise provided in the Controlled Substances Act;

(12) N-ethyl-3-piperidyl benzilate;

(13) N-methyl-3-piperidyl benzilate;

(14) psilocybin;

(15) psilocyn;

(16) synthetic cannabinoids, including:

(a) 1-[2-(4-(morpholinyl)ethyl]-3-(1-naphthoyl)indole;

(b) 1-butyl-3-(1-napthoyl)indole;

(c) 1-hexyl-3-(1-naphthoyl)indole;

(d) 1-pentyl-3-(1-naphthoyl)indole;

(e) 1-pentyl-3-(2-methoxyphenylacetyl) indole;

(f) cannabicyclohexanol (CP 47, 497 and homologues: 5-(1,1-dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP-47,497); and 5-(1,1-dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol;

(g) 6aR,10aR)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10, 10a-tetrahydrobenzo[c]chromen-1-ol);

(h) dexanabinol, (6aS,10aS)-9-(hydroxymethyl)-6,6-dimethyl-3-(2-methyloctan-2-yl)-6a,7,10,10a-tetrahydrobenzo[c]chromen-1-ol;

(i) 1-pentyl-3-(4-chloro naphthoyl) indole;

(j) (2-methyl-1-propyl-1H-indol-3-yl)-1-naphthalenyl-methanone; and

(k) 5-(1,1-dimethylheptyl)-2-(3-hydroxy cyclohexyl)-phenol;

(17) 3,4-methylenedioxymethcathinone;

(18) 3,4-methylenedioxypyrovalerone;

(19) 4-methylmethcathinone;

(20) 4-methoxymethcathinone;

(21) 3-fluoromethcathinone; and

(22) 4-fluoromethcathinone;

D. the enumeration of peyote as a controlled substance does not apply to the use of peyote in bona fide religious ceremonies by a bona fide religious organization, and members of the organization so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the organization or its members shall comply with the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 and all other requirements of law;

E. the enumeration of Schedule I controlled substances does not apply to:

(1) hemp pursuant to rules promulgated by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture;

(2) cultivation of hemp by persons pursuant to rules promulgated by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture;

(3) tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols, including tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols with concentrations of up to five percent as measured using a post-decarboxylation method and based on percentage dry weight, possessed by a person in connection with the cultivation, transportation, testing, researching, manufacturing or other processing of the plant Cannabis sativa L., or any part of the plant whether growing or not, if authorized pursuant to rules promulgated, pursuant to the Hemp Manufacturing Act [Chapter 76, Article 24 NMSA 1978], by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture or the department of environment; or

(4) tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols, including tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols in any concentration possessed by a person in connection with the extraction of tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols, if authorized pursuant to rules promulgated, pursuant to the Hemp Manufacturing Act, by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture or the department of environment; and

F. controlled substances added to Schedule I by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978.

History: 1953 Comp., § 54-11-6, enacted by Laws 1972, ch. 84, § 6; 1978, ch. 22, § 8; 2005, ch. 280, § 2; 2007, ch. 210, § 8; 2011, ch. 16, § 1; 2017, ch. 139, § 2; 2017, ch. 140, § 3; 2018, ch. 41, § 1; 2019, ch. 116, § 10; 2021 (1st S.S.), ch. 4, § 64.

ANNOTATIONS

Cross references. — For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

Compiler's notes. — Laws 2018, ch. 41, § 2 provided that if acts making amendments to Section 30-31-6 NMSA 1978 are enacted by the first and second sessions of the fifty-third legislature, the provisions of those acts shall be reconciled and compiled in accordance with the provisions of Section 12-1-8 NMSA 1978, notwithstanding that the amendments were not made in the same session of the legislature. This section includes language enacted by Laws 2017, ch. 139, § 2 and Laws 2017, ch. 140, § 3, which were given force of law by the New Mexico Supreme Court in State of ex rel. New Mexico Legislative Council v. Honorable Susana Martinez, Governor of the State of New Mexico et al., S.Ct. Order No. S-1-SC-36731, which held that Article IV, Section 22 of the New Mexico Constitution requires that objections must accompany a returned bill, and has been reconciled with Laws 2018, ch. 41, § 1 pursuant to Laws 2018, ch. 41, § 2.

The 2021 (1st S.S.) amendment, effective June 29, 2021, removed "marijuana", "tetrahydrocannabinols" and "hashish" from the list of Schedule I controlled substances, and made conforming amendments; in Subsection C, deleted Paragraph C(10) and redesignated former Paragraphs C(11) through C(16) as Paragraphs C(10) through C(15), respectively, deleted former Paragraphs C(17) and C(18) and redesignated former Paragraphs C(19) through C(25) as Paragraphs C(16) through C(22), respectively; and in Subsection E, after "the enumeration of", deleted "marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol as", and deleted former Paragraphs E(5) and E(6), which related to the use of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols and the use, dispensing and prescribing of prescription drugs that contain marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinols.

The 2019 amendment, effective July 1, 2019, exempted hemp from the list of Schedule I controlled substances; in Subsection E, Paragraph E(1), deleted "industrial", after "hemp by", deleted "qualified entities" and added "persons", and after "pursuant to rules", deleted "adopted by" and added "promulgated by the board of regents of New Mexico state university on behalf of", and added new Paragraphs E(3) and E(4) and redesignated former Paragraphs E(3) and E(4) as Paragraphs E(5) and E(6), respectively.

The 2018 amendment, effective July 25, 2018, exempted the use, dispensing, possession, prescribing, storage or transport of a prescription drug that the United States food and drug administration has approved and that contains marijuana, a tetrahydrocannabinol derivative or a chemical derivative of tetrahydrocannabinol from the enumeration of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances; and in Subsection E, added Paragraph E(4).

Laws 2018, ch. 41, § 3 provided that the effective date of the provisions of Laws 2018, ch. 41, § 1 is thirty days following the date that the board of pharmacy certifies to the New Mexico compilation commission and the director of the legislative council service that the United States food and drug administration has approved one or more drugs containing a marijuana derivative.

On June 26, 2018, the board of pharmacy certified to the New Mexico compilation commission and the director of the legislative council service that on June 25, 2018, the United States food and drug administration approved one or more drugs containing a marijuana derivative. Pursuant to Laws 2018, ch. 41, § 3, the effective date of Laws 2018, ch. 41, §§ 1 and 2 is July 25, 2018.

2017 Amendments. — Laws 2017, ch. 140, § 3, effective June 16, 2017, specified that the enumeration of marijuana, tetrahydrocannabinols, or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances does not apply to cultivation of industrial hemp by qualified entities pursuant to rules adopted by the New Mexico department of agriculture; and added Paragraph E(1) and designated the remaining language of Subsection E as Paragraph E(2).

Laws 2017, ch. 139, § 2, effective June 16, 2017, specified that the enumeration of marijuana, tetrahydrocannabinols, or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances does not apply to industrial hemp, pursuant to rules promulgated by the board of regents of New Mexico state university on behalf of the New Mexico department of agriculture; and added Paragraph E(1) and designated the remaining language of Subsection E as Paragraph E(2).

The 2011 amendment, effective March 31, 2011, in Paragraphs (19) through (25) of Subsection C, added synthetic cannabinoids and other synthetic drugs to the list of Schedule I controlled substances.

The 2007 amendment, effective July 1, 2007, amended Subsection E to exclude from Schedule I marijuana that is used by qualified patients pursuant to the Lynn and Erin Compassionate Use Act.

The 2005 amendment, effective June 17, 2005, added Subsection F to provide that the board may by rule add controlled substances to Schedule I.

Sufficient evidence that chemicals were synthetic cannabinoids. — Where defendant was convicted of trafficking methamphetamine and distribution of synthetic cannabinoids based on evidence that an accomplice, at the direction of defendant, delivered methamphetamine and the chemicals PB-22 and 5F-PB22 hidden in deodorant sticks to an inmate confined in the Curry county detention center, and where defendant claimed that the state failed to prove that the substances were synthetic cannabinoids because the particular chemicals were not listed as controlled substances under the New Mexico Controlled Substances Act (CSA), there was sufficient evidence to establish beyond a reasonable doubt that the chemicals collected from the deodorant sticks were "synthetic cannabinoids" within the meaning of this section where the state presented testimony from an expert in forensic chemistry that the chemicals PB-22 and 5F-PB22 are categorized as synthetic cannabinoids because while completely synthetic, the chemicals mimic the effects of cannabis. *State v. Salazar*, 2018-NMCA-030, cert. denied.

Insufficient evidence that substance was synthetic cannabinoid. — Where defendant was arrested and charged with a single count of possession of synthetic cannabinoids, and where defendant claimed that there was insufficient evidence to support his conviction because the state failed to meet its burden of proving that the substance in his possession was a synthetic cannabinoid, there was insufficient evidence to support defendant's conviction where the state failed to introduce evidence that scientific testing was ever done to determine what chemicals were present in or applied to the substance found in defendant's possession, and therefore could not prove that the substance contained a chemical that falls either into one of the classes of chemicals listed in a statute or regulation or within the neurochemical definition of synthetic cannabinoid. *State v. Arias*, 2018-NMCA-057.

Law reviews. — For discussion of Indian law concerning peyote's use for religious purposes, see 18 N.M.L. Rev. 403 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

30-31-7. Schedule II.

A. The following controlled substances are included in Schedule II:

(1) any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(a) opium and opiate, and any salt, compound, derivative or preparation of opium or opiate;

(b) any salt, compound, isomer, derivative or preparation thereof that is chemically equivalent or identical with any of the substances referred to in Subparagraph (a) of this paragraph, but not including the isoquinoline alkaloids of opium;

(c) opium poppy and poppy straw; and

(d) coca leaves and any salt, compound, derivative or preparation of coca leaves, and any salt, compound, derivative or preparation thereof that is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions that do not contain cocaine or ecgonine;

(2) any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(a) alphaprodine;

(b) anileridine;

(c) bezitramide;

(d) dihydrocodeine;

(e) diphenoxylate;

(f) fentanyl;

(g) hydromorphone;

(h) isomethadone;

(i) levomethorphan;

(j) levorphanol;

(k) meperidine;

(l) metazocine;

(m)methadone;

(n) methadone--intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;

(o) moramide--intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid;

(p) oxycodone;

(q) pethidine;

(r) pethidine--intermediate--A, 4-cyano-1-methyl-4-phenylpiperidine;

(s) pethidine--intermediate--B, ethyl-4-phenyl-piperidine-4-carboxylate;

(t) pethidine--intermediate--C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;

(u) phenazocine;

(v) piminodine;

(w) racemethorphan; and

(x) racemorphan;

(3) unless listed in another schedule, any material, compound, mixture or preparation that contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(a) amphetamine, its salts, optical isomers and salts of its optical isomers;

(b) phenmetrazine and its salts;

(c) methamphetamine, its salts, isomers and salts of isomers; and

(d) methylphenidate; and

(4) controlled substances added to Schedule II by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978.

B. Where methadone is prescribed, administered or dispensed by a practitioner of a drug abuse rehabilitation program while acting in the course of the practitioner's professional practice, or otherwise lawfully obtained or possessed by a person, such person shall not possess such methadone beyond the date stamped or typed on the label of the container of the methadone, nor shall any person possess methadone except in the container in which it was originally administered or dispensed to such person, and such container shall include a label showing the name of the prescribing physician or practitioner, the identity of methadone, the name of the ultimate user, the date when the methadone is to be administered to or used or consumed by the named ultimate user shown on the label and a warning on the label of the methadone container that the ultimate user must use, consume or administer to the ultimate user the methadone in such container. Any person who violates this subsection is guilty of a

felony and shall be punished by imprisonment for not less than one year nor more than five years, or by a fine of up to five thousand dollars ($5,000), or both.

History: 1953 Comp., § 54-11-7, enacted by Laws 1972, ch. 84, § 7; 1978, ch. 22, § 9; 1979, ch. 112, § 1; 2005, ch. 280, § 3; 2007, ch. 210, § 9; 2021 (1st S.S.), ch. 4, § 65.

ANNOTATIONS

The 2021 (1st S.S.) amendment, effective June 29, 2021, removed marijuana, tetrahydrocannabinols and chemical derivatives of tetrahydrocannabinols from the list of Schedule II controlled substances; and in Subsection A, deleted Subparagraphs A(1)(e) and A(1)(f).

The 2007 amendment, effective July 1, 2007, included in Schedule II marijuana, tetrahydrocannabinols and its derivatives that are used by qualified patients pursuant to the Lynn and Erin Compassionate Use Act.

The 2005 amendment, effective June 17, 2005, added Subsection A(4) to provide that the board may by rule add controlled substances to Schedule II; deleted the former provision in Subsection B that a drug abuse rehabilitation program was defined in Section 26-2-13A(3) NMSA 1978.

Morphine. — Although the word "morphine" does not appear in the schedules in this act, the trial court could properly take judicial notice that morphine is an opium derivative under this section. *State v. Yanez*, 1976-NMCA-073, 89 N.M. 397, 553 P.2d 252.

Percodan. — Percodan is a Schedule II controlled substance. *State v. Sanchez*, 1979-NMCA-133, 93 N.M. 596, 603 P.2d 335.

Cocaine may be classified as narcotic. — The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes because of the similarity between cocaine and narcotic drugs in terms of cocaine's potential for societal harm. *Chouinard v. State*, 1980-NMCA-168, 96 N.M. 783, 635 P.2d 986, *rev'd on other grounds*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Proof of abusive quantity of amphetamine not required. — The state need not prove that an amphetamine alleged to have been sold by the defendant was of a sufficient quantity to have a potential for abuse associated with a stimulant effect, since, in Subsection A(3), the statutory words "having a potential for abuse" modify "substances," not "any quantity." *State v. Hernandez*, 1986-NMCA-017, 104 N.M. 97, 717 P.2d 73, cert. denied, 103 N.M. 798, 715 P.2d 71; *State v. Martinez*, 1986-NMCA-069, 104 N.M. 584, 725 P.2d 263.

Identification of cocaine by expert. — Expert testimony is not required to establish that a witness sold cocaine to a defendant. *State v. Rubio*, 1990-NMCA-090, 110 N.M. 605, 798 P.2d 206.

30-31-8. Schedule III.

The following controlled substances are included in Schedule III:

A. any material, compound, mixture or preparation containing limited quantities of any substance having a stimulant effect on the central nervous system which is controlled and listed in Schedule II;

B. unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances which are specifically listed in another schedule;

(2) chlorhexadol;

(3) glutethimide;

(4) lysergic acid;

(5) lysergic acid amide;

(6) methyprylon;

(7) phencyclidine;

(8) sulfondiethylmethane;

(9) sulfonethylmethane; or

(10) sulfonmethane;

C. nalorphine;

D. any material, compound, mixture or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) not more than one and eight-tenths grams of codeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(2) not more than one and eight-tenths grams of codeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(3) not more than three hundred milligrams of dihydrocodeinone, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(4) not more than three hundred milligrams of dihydrocodeinone, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(5) not more than one and eight-tenths grams of dihydrocodeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

(6) not more than three hundred milligrams of ethylmorphine, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active non-narcotic ingredients in recognized therapeutic amounts;

(7) not more than five hundred milligrams of opium per one hundred milliliters or per one hundred grams, or not more than twenty-five milligrams per dosage unit, with one or more active, non-narcotic ingredients in recognized therapeutic amounts; or

(8) not more than fifty milligrams of morphine, or any of its salts, per one hundred milliliters or per one hundred grams with one or more active, non-narcotic ingredients in recognized therapeutic amounts;

E. controlled substances added to Schedule III by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978; and

F. the board may exempt by regulation any compound, mixture or preparation containing any stimulant or depressant substance listed in Subsections A and B of this section from the application of any part of the Controlled Substances Act if the compound, mixture or preparation contains any active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and if the admixtures are included in combinations, quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

History: 1953 Comp., § 54-11-8, enacted by Laws 1972, ch. 84, § 8; 2005, ch. 280, § 4.

ANNOTATIONS

Compiler's notes. — For conditions under which the board may exempt certain compounds, mixtures or preparations enumerated in this section from the application of the Controlled Substances Act, *see* 30-31-10 NMSA 1978.

The 2005 amendment, effective June 17, 2005, added Subsection E to provide that the board may by rule add controlled substances to Schedule III.

30-31-9. Schedule IV.

The following controlled substances are included in Schedule IV:

A. any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) barbital;

(2) chloral betaine;

(3) chloral hydrate;

(4) ethchlorvynol;

(5) ethinamate;

(6) methohexital;

(7) meprobamate;

(8) methylphenobarbital;

(9) paraldehyde;

(10) petrichloral; or

(11) phenobarbital;

B. controlled substances added to Schedule IV by rule adopted by the board pursuant to Section 30-31-3 NMSA 1978; and

C. the board may exempt by regulation any compound, mixture or preparation containing any depressant substance listed in Subsection A of this section from the application of all or any part of the Controlled Substances Act if the compound, mixture or preparation contains any active medicinal ingredients not having a depressant effect on the central nervous system and if the admixtures are included in combinations,

quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

History: 1953 Comp., § 54-11-9, enacted by Laws 1972, ch. 84, § 9; 2005, ch. 280, § 5.

ANNOTATIONS

Compiler's notes. — For conditions under which the board may exempt certain compounds, mixtures or preparations enumerated in this section from the application of the Controlled Substances Act, *see* 30-31-10 NMSA 1978.

The 2005 amendment, effective June 17, 2005, added Subsection E to provide that the board may by rule add controlled substances to Schedule IV.

30-31-10. Schedule V.

A. The following controlled substances are included in Schedule V:

(1) any compound, mixture or preparation that contains the following limited quantities of any of the following narcotic drugs, and that also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone:

(a) not more than two hundred milligrams of codeine, or any of its salts, per one hundred milliliters or per one hundred grams;

(b) not more than one hundred milligrams of dihydrocodeine, or any of its salts, per one hundred milliliters or per one hundred grams;

(c) not more than one hundred milligrams of ethylmorphine, or any of its salts, per one hundred milliliters or per one hundred grams;

(d) not more than two and five-tenths milligrams of diphenoxylate and not less than twenty-five micrograms of atropine sulfate per dosage unit; or

(e) not more than one hundred milligrams of opium per one hundred milliliters or per one hundred grams; and

(2) any compound, mixture or preparation that contains any detectable quantity of pseudoephedrine, its salts or its optical isomers, or salts of its optical isomers. A compound, mixture or preparation as specified in this paragraph shall be dispensed, sold or distributed only by a licensed pharmacist or pharmacist intern or a registered pharmacy technician. Unless pursuant to a valid prescription, a person purchasing, receiving or otherwise acquiring the compound, mixture or preparation shall:

(a) produce a driver's license or other government-issued photo identification showing the date of birth of the person;

(b) sign a written log, receipt or other program or mechanism indicating the date of the transaction, name of the person, driver's license number or government-issued identification number, name of the pharmacist, pharmacist intern or pharmacy technician conducting the transaction, the product sold and the total quantity, in grams or milligrams, of pseudoephedrine purchased; and

(c) be limited to no more than nine grams of any product, mixture or preparation within a thirty-day period.

B. The board may by regulation exempt any compound, mixture or preparation containing any depressant or stimulant substance enumerated in Schedules III, IV or V from the application of the Controlled Substances Act if:

(1) the compound, mixture or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system; and

(2) such ingredients are included in such combinations, quantity, proportion or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the nervous system.

C. The board may, by rule, exempt a product containing pseudoephedrine from Schedule V if the board determines that the product is formulated as to effectively prevent the conversion of pseudoephedrine into methamphetamine.

D. The board shall monitor prices charged for compounds, mixtures and preparations that contain pseudoephedrine and may adopt rules to prevent unwarranted price increases as a result of compliance with this section.

History: 1953 Comp., § 54-11-10, enacted by Laws 1972, ch. 84, § 10; 2006, ch. 16, § 2.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, added Paragraph (2) of Subsection A to include pseudoephedrine as a controlled substance; permitted only licensed pharmacists, interns or technicians to sell pseudoephedrine; limited the amount of pseudoephedrine that may be sold to a purchaser; and unless pursuant to a prescription, required persons who purchase pseudoephedrine to provide identification and to sign a log; added Subsection C to provide that the board may exempt a product containing pseudoephedrine from Schedule V if the board determines the product is formulated to prevent the conversion of the product to methamphetamine; and added

Subsection D to provide that the board shall monitor prices charged for products with pseudoephedrine and adopt rules to prevent unwarranted price increases.

30-31-11. Regulations.

The board may promulgate regulations and charge reasonable fees relating to the registration and control of the manufacture, distribution and dispensing of controlled substances; provided, however, that in no case shall the fees exceed eighty dollars ($80.00) per year. If the board determines to increase any fee, the board shall notify, in addition to any other notice required by law, the affected professional group of the board's intention to increase the fee and the date for the scheduled hearing to review the matter.

History: 1953 Comp., § 54-11-11, enacted by Laws 1972, ch. 84, § 11; 1989, ch. 57, § 1; 1994, ch. 42, § 1.

ANNOTATIONS

The 1994 amendment, effective May 18, 1994, substituted "eighty dollars ($80.00) per year" for "sixty dollars per year for a period of three years after January 1, 1989" in the first sentence and deleted the former second sentence, which read: "After January 1, 1992, if the board determines, for good cause shown, that a fee increase is necessary, the board may increase the fees, but in no case shall the fees exceed seventy-five dollars ($75.00) per year".

The 1989 amendment, effective June 16, 1989, added the proviso at the end of the first sentence and added the last two sentences.

Interests of state legitimate. — The regulations propounded under this section and 26-1-18 NMSA 1978 do not violate due process since the state has a legitimate interest in the control of dangerous drugs sold or distributed therein and has not brought within the orbit of state power any matters unrelated to local interests. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

License fee not violative of commerce clause. — Although the regulations adopted pursuant to this section and Section 26-1-18 NMSA 1978 include a license fee to cover administrative costs, their primary purpose is the protection of the public from dangerous drugs, a purpose within the traditional definition of police power; and where the burden of a small fee does not outweigh the substantial state benefit derived from the control, and the regulations do not discriminate against interstate commerce since there are no drug manufacturers within the state, there is no violation of the commerce clause. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

Formal findings unnecessary. — In propounding regulations the board of pharmacy need not make formal findings, but must only insure that the public and the reviewing courts are informed as to the reasoning behind the regulation; the comments of the one board member suffice in this regard. *Pharmaceutical Mfrs. Ass'n v. N.M. Bd. of Pharmacy*, 1974-NMCA-038, 86 N.M. 571, 525 P.2d 931, cert. quashed, 86 N.M. 657, 526 P.2d 799.

No unconstitutional delegation of power. — Granting of authority to the board of pharmacy was not an unconstitutional delegation of legislative authority nor is there any constitutional prohibition to granting the board the power to adopt registration fees without specification of any statutory minimum. 1973 Op. Att'y Gen. No. 73-07.

Registration fees authorized. — This section grants to the state board of pharmacy authority to set registration fees for all persons required to register under the Controlled Substances Act. 1973 Op. Att'y Gen. No. 73-07.

It is presumed that the authority conferred on the board of pharmacy would be exercised with fair and just regard for the interest affected; and a $10.00 registration fee appears to meet this standard. 1973 Op. Att'y Gen. No. 73-07.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33.

28 C.J.S. Drugs and Narcotics § 117 et seq.

30-31-12. Registration requirements.

A. A person who manufactures, distributes or dispenses a controlled substance or who proposes to engage in the manufacture, distribution or dispensing of a controlled substance shall obtain a registration issued by the board in accordance with its regulations.

B. Persons registered by the board to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense, prescribe or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of the Controlled Substances Act.

C. The following persons need not register and may lawfully possess controlled substances:

(1) an agent of a registered manufacturer, distributor or dispenser of a controlled substance if the agent is acting in the usual course of the agent's principal's business or employment;

(2) a common or contract carrier or warehouseman, or an employee whose possession of a controlled substance is in the usual course of the common or contract carrier or warehouseman's business; or

(3) an ultimate user.

D. The board may waive by regulation the requirement for registration of certain manufacturers, distributors or dispensers if it is consistent with the public health and safety.

E. The board may inspect the establishment of a registrant or applicant for registration in accordance with the board's regulations.

History: 1953 Comp., § 54-11-12, enacted by Laws 1972, ch. 84, § 12; 1975, ch. 346, § 1; 2002, ch. 55, § 1; 2009, ch. 72, § 1.

ANNOTATIONS

The 2009 amendment, effective July 1, 2009, in Subsection A, after "shall obtain", deleted "annually".

The 2002 amendment, effective May 15, 2002, in Subsection A, deleted the former second to fourth sentences, which related to the annual registration of practitioners by their respective examining and licensing authorities rather than directly by the board of pharmacy.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 69, 72, 75, 76.

28 C.J.S. Drugs and Narcotics § 29 et seq.

30-31-13. Registrations.

A. The board shall register an applicant to manufacture or distribute controlled substances unless it determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific or industrial channels;

(2) compliance with applicable state and local law;

(3) any convictions of the applicant under any federal or state laws relating to any controlled substance;

(4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the Controlled Substances Act;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

B. Registration under this section does not entitle a registrant to manufacture and distribute controlled substances in Schedules I or II other than those allowed in the registration.

C. Compliance by manufacturers and distributors with the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 respecting registration, excluding state registration fees entitles them to be registered under the Controlled Substances Act.

D. Practitioners must be registered to dispense any controlled substances or to conduct research with controlled substances in Schedules II through V if they are authorized to dispense or conduct research under Section 39 [30-31-40 NMSA 1978] of the Controlled Substances Act. The board need not require separate registration under this act for practitioners engaging in research with nonnarcotic controlled substances in Schedules II through V where the registrant is already registered under the Controlled Substances Act in another capacity. Practitioners or scientific investigators registered under the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 to conduct research with Schedule I substances may conduct research with Schedule I substances within this state upon furnishing the board evidence of that federal registration.

History: 1953 Comp., § 54-11-13, enacted by Laws 1972, ch. 84, § 13.

ANNOTATIONS

Cross references. — For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 69.

28 C.J.S. Drugs and Narcotics § 31 et seq.

30-31-14. Revocation and suspension of registration.

A. A registration under Section 30-31-13 NMSA 1978 to manufacture, distribute or dispense a controlled substance may be suspended or revoked upon a finding that the registrant:

(1) has furnished false or fraudulent material information in any application filed with the board;

(2) has been convicted of a felony under any state or federal law relating to a controlled substance;

(3) has had his federal registration suspended or revoked to manufacture, distribute or dispense controlled substances; or

(4) has had his practitioner's license suspended or revoked by his professional licensing board.

B. A hearing to revoke or suspend a registration of a practitioner shall be held before a special hearing panel consisting of the board and two additional persons designated to sit on the hearing panel by the practitioner's own examining and licensing authority.

C. The special hearing panel may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a registration, all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell all controlled substances under seal. The court shall order the sale of such controlled substances under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking registration and all sales of controlled substances.

History: 1953 Comp., § 54-11-14, enacted by Laws 1972, ch. 84, § 14; 1975, ch. 346, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 76.

Revocation or suspension of license or permit to practice pharmacy or operate drugstore because of improper sale or distribution of narcotic or dangerous drugs, 17 A.L.R.3d 1408.

28 C.J.S. Drugs and Narcotics § 42.

30-31-15. Order to show cause.

A. Before denying, suspending or revoking a registration or refusing a renewal of registration, the board shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of registration the order shall be served not later than thirty days before the expiration of the registration unless the proceedings relate to suspension or revocation of a registration. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a registration or to refuse renewal of registration shall not abate the existing registration which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any registrant simultaneously with the institution of proceedings under Section 14 [30-31-14 NMSA 1978] or where renewal of registration is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

History: 1953 Comp., § 54-11-15, enacted by Laws 1972, ch. 84, § 15.

30-31-16. Records of registrants.

A. Every registrant under the Controlled Substances Act manufacturing, distributing or dispensing a controlled substance shall maintain, on a current basis, a complete and accurate record of each substance manufactured, received, sold or delivered by him in accordance with regulations of the board.

Inventories as required in the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 shall be deemed in compliance with inventory requirements under this section.

B. Records for drugs under Schedules I and II shall be kept separate from other records. Prescriptions for all Schedule I and II drugs and narcotic prescriptions for controlled substances listed in Schedules III, IV and V shall be maintained separately from other prescription drugs in accordance with regulations of the board.

C. Records for nonnarcotic controlled substances under Schedules III, IV and V shall be maintained either separately or in such form that they are readily retrievable and are marked for ready identification in accordance with regulations of the board. Prescriptions for nonnarcotic controlled substances shall be maintained either in a separate prescription file or in such form that they are readily retrievable from other prescription records and are marked for ready identification in accordance with regulations of the board.

D. Records shall be maintained for a period of at least three years from the date of the record and may be inspected as required by authorized agents of the board.

E. A practitioner is not required to keep records of controlled substances listed in Schedules II through V that he prescribes or administers in the lawful course of his professional practice. He shall keep records of controlled substances that he dispenses other than by prescribing or administering.

F. Each pharmacy licensed in the state shall provide information relating to the dispensing of any controlled substance designated by the board. The board shall administer the collection and dissemination of the information obtained. The manner of reporting and the extent of the required information shall be designated by regulation of the board.

History: 1953 Comp., § 54-11-16, enacted by Laws 1972, ch. 84, § 16; 1994, ch. 42, § 2.

ANNOTATIONS

Cross references. — For definitions applicable to Medical Practice Act, *see* 61-6-6 NMSA 1978.

For definitions applicable to Physician Assistants Act, *see* 61-6-7.1 NMSA 1978.

For pharmacist clinician prescriptive authority, *see* 61-11B-3 NMSA 1978.

For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

The 1994 amendment, effective May 18, 1994, substituted "that" for "which" in both sentences in Subsection E and added Subsection F.

30-31-17. Order forms.

Controlled substances in Schedules I and II shall be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 respecting order forms shall be deemed compliance with this section.

History: 1953 Comp., § 54-11-17, enacted by Laws 1972, ch. 84, § 17.

ANNOTATIONS

Cross references. — For the Comprehensive Drug Abuse Prevention and Control Act of 1970, *see* 21 U.S.C. § 801 et seq.

30-31-18. Prescriptions.

A. No controlled substance listed in Schedule II, which is a prescription drug as determined by the federal food and drug administration, may be dispensed without a written prescription of a practitioner, unless administered directly to an ultimate user. No prescription for a Schedule II substance may be refilled. No person other than a practitioner shall prescribe or write a prescription.

B. Prescriptions for Schedules II through IV shall contain the following information:

(1) the name and address of the patient for whom the drug is prescribed;

(2) the name, address and registry number of the person prescribing the drug; and

(3) the identity of the pharmacist of record.

C. A controlled substance included in Schedules III or IV, which is a prescription drug as determined under the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act, Chapter 26, Article 1 NMSA 1978], shall not be dispensed without a written or oral prescription of a practitioner, except when administered directly by a practitioner to an ultimate user. The prescription shall not be filled or refilled more than six months after the date of issue or be refilled more than five times, unless renewed by the practitioner and a new prescription is placed in the file. Prescriptions shall be retained in conformity with the regulations of the board.

D. The label affixed to the dispensing container of a drug listed in Schedules II, III or IV, when dispensed to or for a patient, shall contain the following information:

(1) date of dispensing and prescription number;

(2) name and address of the pharmacy;

(3) name of the patient;

(4) name of the practitioner; and

(5) directions for use and cautionary statements, if any.

E. The label affixed to the dispensing container of a drug listed in Schedule II, III or IV, when dispensed to or for a patient, shall contain a clear concise warning that it is a crime to transfer the drug to any person other than the patient.

F. No controlled substance included in Schedule V, which is a proprietary nonprescription drug, shall be distributed, offered for sale or dispensed other than for a medical purpose and a record of the sale shall be made in accordance with the regulations of the board.

G. In emergency situations, as defined by regulation, Schedule II drugs may be dispensed upon oral prescription of a practitioner, if reduced promptly to writing and filed by the pharmacy in accordance with regulations of the board.

History: 1953 Comp., § 54-11-18, enacted by Laws 1972, ch. 84, § 18; 2005, ch. 152, § 10.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not a part of the law. Laws 1987, ch. 270, § 1 changed the "New Mexico Drug and Cosmetic Act" to the "New Mexico Drug, Device and Cosmetic Act".

The 2005 amendment, effective June 17, 2005, deleted the provision in Subsection B(2) which required prescriptions to contain the name of the pharmacist and dispensing date of the drug be inscribed on the face of the prescription; added Subsection B(3) to require that prescriptions contain the identity of the pharmacist of record.

Physician's assistants are not authorized to prescribe controlled substances in violation of Subsection A. *N.M. Bd. of Pharmacy v. N.M. Bd. of Osteopathic Medical Exm'rs*., 1981-NMCA-034, 95 N.M. 780, 626 P.2d 854.

Law reviews. — For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

30-31-19. Distributions by manufacturers or distributors.

A registered manufacturer or distributor may distribute controlled substances to the following:

A. a registered manufacturer, pharmacy or distributor;

B. a registered practitioner;

C. a registered hospital or clinic; and

D. to a person in charge of a registered laboratory, but only for use by that laboratory for scientific and medical purposes.

History: 1953 Comp., § 54-11-19, enacted by Laws 1972, ch. 84, § 19.

30-31-20. Trafficking controlled substances; violation.

A. As used in the Controlled Substances Act, "traffic" means the:

(1) manufacture of a controlled substance enumerated in Schedules I through V or a controlled substance analog as defined in Subsection W of Section 30-31-2 NMSA 1978;

(2) distribution, sale, barter or giving away of:

(a) a controlled substance enumerated in Schedule I or II that is a narcotic drug;

(b) a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug; or

(c) methamphetamine, its salts, isomers and salts of isomers; or

(3) possession with intent to distribute:

(a) a controlled substance enumerated in Schedule I or II that is a narcotic drug;

(b) controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug; or

(c) methamphetamine, its salts, isomers and salts of isomers.

B. Except as authorized by the Controlled Substances Act, it is unlawful for a person to intentionally traffic. A person who violates this subsection is:

(1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. A person who knowingly violates Subsection B of this section within a drug-free school zone excluding private property residentially zoned or used primarily as a residence is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-20, enacted by Laws 1972, ch. 84, § 20; 1974, ch. 9, § 1; 1980, ch. 23, § 1; 1987, ch. 68, § 2; 1990, ch. 19, § 3; 2006, ch. 17, § 2.

ANNOTATIONS

Cross references. — For instructions as to trafficking in controlled substances, *see* UJI 14-3110 NMRA et seq.

The 2006 amendment, effective July 1, 2006, added Subparagraph (c) to Paragraph (2) of Subsection A to provide that traffic means distribution, sale, barter or giving away of methamphetamine and its salts and isomers and added Subparagraph (c) to Paragraph (3) of Subsection A to provide that traffic means the possession with intent to distribute methamphetamine and its salts and isomers.

The 1990 amendment, effective July 1, 1990, substituted "Subsection W" for "Subsection X" in Paragraph (1) and made minor stylistic changes in Paragraphs (2) and (3) of Subsection A, and added Subsection C.

I. GENERAL CONSIDERATION.

Advice about possible sentence enhancements. — Where the defendant entered a no contest plea to trafficking cocaine; the district court informed the defendant that the trafficking charge would be a second degree felony with a maximum basic sentence of nine years and that the basic sentence could be enhanced under the habitual offender statute if the defendant had any undisclosed prior felony convictions; the state filed supplemental criminal information alleging that the defendant had three prior felony convictions, two of which were trafficking offenses; there was no indication in the record that before the defendant entered a plea of no contest to the three prior convictions that the defendant was advised about a potential enhancement under the trafficking statute or that the trafficking charge could be treated as a first degree felony with a basic sentence of eighteen years, the court did not adequately and accurately advise the defendant of the possible sentencing enhancements the defendant faced by pleading no contest. *Marquez v. Hatch*, 2009-NMSC-040, 146 N.M. 556, 212 P.3d 1110.

Act not applicable. — Where defendant did not engage in extraction from substance of natural origin or chemical synthesis, cultivating and growing psilocybin mushrooms, even if by artificial means, is not prohibited by this section. *State v. Pratt*, 2005-NMCA-

099, 138 N.M. 161, 117 P.3d 967, cert. denied, 2005-NMCERT-008, 138 N.M. 328, 119 P.3d 1265.

Title constitutional. — The title of Laws 1972, Chapter 84, of which this section is a part, does not violate N.M. Const., art. IV, § 16, by embracing more than one subject, because although the act also amends sections of the state Drug and Cosmetic Act (Drug, Device and Cosmetic Act, 26-1-1 NMSA 1978), the amendments are all concerned with drugs. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

Defendant's contention that this section violated N.M. Const., art. IV, § 16, because it is concerned with trafficking in controlled substances, while title of the act of which it is a part does not include trafficking, was without merit since prohibition on trafficking was a detail germane to drugs, their administration and penalties. *State v. Romero*, 1974-NMCA-015, 86 N.M. 99, 519 P.2d 1180.

Title of act constitutional. — Sections 30-31-21 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties, are not unconstitutional because "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Constitutionality. — Subsection A(3) is not unconstitutionally overbroad, as it does not sweep within its ambit actions that would ordinarily be deemed to be constitutionally-protected activities. *State v. Curry*, 1988-NMCA-031, 107 N.M. 133, 753 P.2d 1321, cert. denied, 107 N.M. 132, 753 P.2d 1320.

Special laws prohibited. — Section 30-31-20B(2) NMSA 1978 applies to all second and subsequent trafficking offenses, and, therefore, does not violate the prohibition against special laws of N.M. Const., art. IV, § 24; nor does it violate the requirements of equal protection. *State v. Bejar*, 1985-NMCA-093, 104 N.M. 138, 717 P.2d 591, cert. quashed, 104 N.M. 54, 716 P.2d 245 (1986).

Section applicable to physician. — This section applies to a physician who gives out drugs for something other than a legitimate medical purpose. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Delivery which is effected by a physician which is not for a legitimate medical purpose is not excepted from the prohibitions of the Controlled Substances Act. When a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances, his conduct should be treated like that of any street-corner pill pusher. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981),

overruled on other grounds by State v. Olguin, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Miranda warnings from informer unnecessary. — Claim that defendant should have been given Miranda warnings immediately prior to selling heroin to informer, who was accompanied by an undercover policewoman, was without merit. *State v. Anaya*, 1969-NMCA-120, 81 N.M. 52, 462 P.2d 637.

Sections not inconsistent. — There is no conflict between Section 30-31-22A NMSA 1978 which excludes narcotic drugs enumerated in Schedule I, such as heroin, from its purview, and this section, under which trafficking in narcotic drugs is prohibited. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Plain meaning of this section should be given effect, unless this leads to an absurd or unreasonable result. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 492, 100 P.3d 197.

Heroin is narcotic drug as matter of law. *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796 (decided under prior law).

Because there is no evidence that defendant engaged in "extraction from substances of natural origin or chemical synthesis" as defined by Section 30-31-2 M NMSA 1978, his acts of cultivating or growing mushrooms, even if by artificial means, are not prohibited by Subsection A(1) of this section. *State v. Pratt*, 2005-NMCA-099, 138 N.M. 161, 117 P.3d 967, cert. denied, 2005-NMCERT-008, 138 N.M. 163, 117 P.3d 967.

Attempt to acquire by misrepresentation not more specific statute. — A defendant charged with attempt to traffic cocaine under Subsection A of this section was not entitled to be charged under Section 30-31-25A(3) NMSA 1978 ("attempt to acquire controlled substance by misrepresentation") since the elements defined in both offenses are so distinct that the specific-statute doctrine does not apply. *State v. Villalobos*, 1995-NMCA-105, 120 N.M. 694, 905 P.2d 732, cert. quashed, 121 N.M. 676, 916 P.2d 1343 (1996).

Trafficking committed irrespective of manufacturer's intention. — The crime of trafficking by manufacturing is committed irrespective of any consideration of whether the manufacturer intended to distribute the controlled substance or keep it for his or her personal use. *State v. Marshall*, 2004-NMCA-104, 136 N.M. 240, 96 P.3d 801, cert. denied, 2004-NMCERT-008, 136 N.M. 491, 100 P.3d 197.

Entrapment submitted to jury. — Issue of entrapment in prosecution for selling and distribution of heroin was properly submitted to the jury, where the evidence raised a factual question concerning defendant's predisposition to sell or distribute heroin and

concerning the extent of agent's activity in connection with the heroin. *State v. Wilson*, 1974-NMCA-059, 86 N.M. 348, 524 P.2d 520.

Severance not necessary. — It was not error for the trial court to refuse to grant motion for severance where defendant was charged with having made three sales to the same individual in the same community and all within a comparatively short period of time, and no prejudice to defendant had been shown. *State v. Riordan*, 1974-NMCA-013, 86 N.M. 92, 519 P.2d 1029.

First offense punishable as second degree felony. — Sentence of 10 to 50 years imposed on defendant, convicted of trafficking prior to the 1974 amendment to this section, was proper; as the statute then declared the crime to be a second degree felony, Section 31-18-11 NMSA 1978 (now repealed), making a "felony" as to which a penalty is not specified a fourth degree felony, was not applicable. *State v. Herrera*, 1974-NMSC-037, 86 N.M. 224, 522 P.2d 76 (decided under prior law).

Procedure upon conviction of subsequent offense. — Upon proof that a conviction is a second or subsequent conviction for trafficking, Subsection B requires that the previous sentence be vacated and that the sentence imposed by law be imposed. *State v. Bejar*, 1985-NMCA-093, 104 N.M. 138, 717 P.2d 591, cert. quashed, 104 N.M. 54, 716 P.2d 245 (1986).

Notice prior to sentencing as second offender. — Although former narcotic drug statute failed to specify the precise manner in which a prior conviction was to be brought to the attention of the defendant and the court, essential fairness required that there be some pleading filed by the state, whether it be by motion or otherwise, by which a defendant would be given notice and opportunity to be heard before an increased penalty could be imposed. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214, appeal after remand, 1967-NMSC-052, 77 N.M. 536, 425 P.2d 47; *State v. Santillanes*, 1981-NMSC-064, 96 N.M. 477, 632 P.2d 354.

Since there was never any charge filed against defendant which would give him notice that, if convicted, he would be sentenced as a second offender, and even though no objection was made by the defendant or his counsel to the questioning by the court as to the prior conviction, sentencing him as a second offender was a denial of due process of law, in that there was no notice or true opportunity to be heard, in a constitutional sense. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214, appeal after remand, 1967-NMSC-052, 77 N.M. 536, 425 P.2d 47.

Enhancement proceeding. — When an enhancement proceeding is brought after the defendant has begun serving his sentence on the most recent convictions, there is no violation of either the right of due process or the right against double jeopardy, even in the absence of statutory authorization of such a procedure. *State v. Santillanes*, 1981-NMSC-064, 96 N.M. 477, 632 P.2d 354.

Since defendant's prior convictions for cocaine trafficking and possession of marijuana with intent to distribute resulted from a single arrest, the court did not make an impermissible "double use" of the prior convictions by utilizing the prior cocaine trafficking conviction to enhance the defendant's present cocaine trafficking conviction to a first degree felony pursuant to Section 30-31-20B(2) NMSA 1978, and then using the other prior conviction for possession of marijuana to enhance defendant's sentence under the general habitual-offender statute, Section 31-18-17 NMSA 1978. *State v. Hubbard*, 1992-NMCA-014, 113 N.M. 538, 828 P.2d 971, cert. denied, 113 N.M. 352, 826 P.2d 573.

Conditional discharge is not a prior offense for enhancement purposes. — Where defendant received a conditional discharge dismissing his first drug trafficking offense, and four years later was arrested and charged with trafficking methamphetamine, the conditional discharge could not be considered a prior offense for purposes of enhancement, because a conditional discharge entered without an adjudication of guilt is not considered a conviction. *State v. Lassiter*, 2016-NMCA-078, cert. denied.

When federal offense is prior conviction. — State convictions of trafficking of a controlled substance are "subsequent" to a federal conviction since the elements necessary to prove the federal offense are the same as those required to prove the state charges. Therefore, the federal offense is a prior conviction for purposes of the penalty provisions of the Controlled Substances Act. *State v. Garduno*, 1979-NMSC-072, 93 N.M. 335, 600 P.2d 281.

Applicability of habitual offender statute. — In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 1966-NMSC-051, 76 N.M. 111, 412 P.2d 405, which held that the Habitual Offender Act (Habitual Criminal Act) did not apply to persons convicted under the Controlled Substances Act. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

II. ELEMENTS OF TRAFFICKING CONTROLLED SUBSTANCE.

Proof of knowledge of drug-free school zone required. — The term "knowingly" in Subsection C of Section 30-31-20 NMSA 1978 requires specific knowledge that the offense of trafficking controlled substances will occur within the drug-free school zone, and the state must prove knowledge of the drug-free school zone as an essential element of distributing drugs in a drug-free school zone. *State v. Wilson*, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Where undercover police officers stopped defendant and asked defendant for drugs; defendant told the officers that defendant was going to buy drugs down the street; defendant left and returned with a third person to the officers’ car; the third person sold cocaine to the officers; the sale occurred within a drug-free school zone; and there was no evidence that defendant knew that the sale of the drugs would occur within a drug-free school zone, the evidence was insufficient to support defendant’s conviction of

conspiracy to traffic cocaine within a drug-free school zone. *State v. Wilson*, 2010-NMCA-018, 147 N.M. 706, 228 P.3d 490, cert. denied, 2010-NMCERT-001, 147 N.M. 673, 227 P.3d 1055.

Section does not require specific intent. — Trafficking in a controlled substance by distribution is not a specific intent crime. Since this section prohibiting trafficking by "distribution, sale, barter or giving away any controlled substance . . . which is a narcotic drug" only describes a particular act without reference to a defendant's intent to do some further act or achieve some additional consequence, the crime is properly one of general intent. *State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

Trafficking by distribution is not a specific intent crime. *State v. Turner*, 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178, cert. quashed, 98 N.M. 51, 644 P.2d 1039 (1982).

Elements of offense of transferring controlled substance. — In order to find a defendant guilty of transferring a controlled substance, the state must prove beyond a reasonable doubt that: (1) the defendant transferred a controlled substance; (2) the defendant knew or believed it was a controlled substance; and (3) the transfer occurred in New Mexico on a particular date. *Martinez v. State*, 1978-NMSC-051, 91 N.M. 747, 580 P.2d 968.

Knowledge of presence and narcotic character of drug essential. — In a prosecution for trafficking in narcotics, the state must prove that defendant knew of the presence and narcotic character of the object possessed. *State v. Gonzales*, 1974-NMCA-080, 86 N.M. 556, 525 P.2d 916, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

Knowledge with control. — Since he was not in physical possession of the heroin when it was found by the officers, to be convicted defendant must have constructively possessed it, that is, he must have had knowledge of the presence of the heroin and control over it. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

Ownership not element. — This section prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: Ownership is not an element. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

III. DOUBLE JEOPARDY.

Trafficking methamphetamine by manufacture and possession of drug paraphernalia. — Where the defendant was convicted of trafficking methamphetamine by manufacture for possession of items that could be used to manufacture methamphetamine and possession of drug paraphernalia for possession of items that could be used to consume methamphetamine and marijuana, and where the items used

to consume drugs were not necessary to manufacture methamphetamine, the defendant's conduct was not unitary and the defendant's convictions did not violate double jeopardy. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Double jeopardy. — Since marijuana is not defined as a narcotic drug, trial court acquired no jurisdiction when defendant was charged with violating this section by selling marijuana, hence, there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. *State v. Mabrey*, 1975-NMCA-098, 88 N.M. 227, 539 P.2d 617.

The defendant's distribution of drug samples and subsequent distribution of larger quantities of the same drugs to the same persons constituted separate transaction under this section and convictions on distinct counts of trafficking a controlled substance did not violate double jeopardy. *State v. Borja-Guzman*, 1996-NMCA-025, 121 N.M. 401, 912 P.2d 277, cert. denied, 121 N.M. 375, 911 P.2d 883.

Where a trial court convicted defendant of one count of a second offense of trafficking a controlled substance and one count of conspiracy to commit that offense, and in sentencing defendant, the trial court used defendant's prior convictions twice to increase the punishment, the prior trafficking conviction could not be used to set defendant's underlying conspiracy to commit trafficking conviction as a second degree felony, and then be used to enhance defendant's sentence under the habitual offender statute. *State v. Lacey*, 2002-NMCA-032, 131 N.M. 684, 41 P.3d 952, cert. denied, 131 N.M. 737, 42 P.3d 842.

Convictions for trafficking controlled substances with intent to distribute and conspiracy based on a single act. — Where defendant was convicted of trafficking a controlled substance by possession with intent to distribute in violation of Subsection A of this section and conspiracy to commit the same crime in violation of 30-28-2 NMSA 1978, both charges based on evidence of a single sale of drugs by defendant; the defendant's conduct underlying both crimes was unitary, and the state relied on the same evidence, the single sale of drugs from defendant to the co-conspirator, as the basis to convict for both crimes; the defendant was convicted twice and is being punished twice for the same offense, resulting in a double jeopardy violation. *State v. Silvas*, 2015-NMSC-006, *aff'g* 2013-NMCA-093, 310 P.3d 621.

Merger with charge of conspiracy to racketeer. — In order for the jury to have convicted defendant of conspiracy to racketeer pursuant to the court's instruction, it was also necessary for the state to prove, and the jury to find, that she and another conspired to traffic by manufacture. Thus, the two offenses for which defendant was convicted merged under the facts and circumstances of the case. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

Possession deemed lesser offense. — Possession of heroin is a lesser offense included within the offense of possession with intent to distribute heroin. *State v. Alderete*, 1977-NMCA-130, 91 N.M. 373, 574 P.2d 592, cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Separate offenses. — As there is no ambiguity in this section, which prohibits the sale of "any" controlled substance, where evidence showed sales to two separate people, there were two offenses and consecutive sentences received by defendant did not constitute an abuse of the trial court's discretion. *State v. Burrell*, 1976-NMCA-025, 89 N.M. 64, 547 P.2d 69.

Drug trafficking statute authorizes separate prosecution and punishment for distinct transfers of controlled substances. — Where defendant was convicted of trafficking cocaine by distribution and possession of cocaine with intent to distribute, his constitutional right to be free from double jeopardy was not violated, because the legislature clearly intended, in its enactment of 30-31-20 NMSA 1978 criminalizing drug trafficking, to authorize separate prosecution and punishment for each individual transfer or delivery under the circumstances where the transfer is not contemporaneous, and the evidence presented at trial showed that defendant's convictions arose from two separate transfers of a controlled substance, where in each exchange defendant transferred a distinct quantity of cocaine to the undercover officer in exchange for a distinct sum of money. *State v. Bello*, 2017-NMCA-049, cert. denied.

IV. EVIDENCE AND PROOF.

A. IN GENERAL.

Inference of knowledge of presence of drugs. — While knowledge of the presence of drugs may be inferred where exclusive possession of the premises is shown, where exclusive possession is not shown, additional evidence is required to support such an inference. *State v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, cert. denied, 112 N.M. 440, 816 P.2d 509.

Inference of control of drugs. — Control of the premises on which contraband is found is not sufficient to support a determination of criminal liability. There must be knowledge of the presence of the contraband, and there must be evidence sufficient to support an inference of control of the contraband. *State v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, cert. denied, 112 N.M. 440, 816 P.2d 509.

Constructive possession. — Constructive possession is sufficient to convict for trafficking by possession with intent to distribute. *State v. Zamora*, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517, cert. quashed, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

Narcotic character. — The burden of proof was on the defendant to prove that substance identified as heroin was not a narcotic drug as an exemption or exception.

State v. Atencio, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Proving intent by inference. — Intent may be proved by inference from the surrounding facts and circumstances, such as the quantity and manner of packaging of the controlled substance. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

Proving knowledge of narcotic character. — While there is no requirement that proof of possession with knowledge of narcotic character should be by direct or uncontradicted evidence, nevertheless, the evidence must be such as discloses some conduct, declarations or actions on the part of the defendant sufficient to satisfy the fact finder beyond a reasonable doubt that he had knowledge of the presence and nature of the narcotics. *State v. Garcia*, 1966-NMSC-063, 76 N.M. 171, 413 P.2d 210, *overruled on other gounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Proof of possession of controlled substance may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting the defendant with the crime. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

When inference of constructive possession proper. — Since defendant's wife resided with him, he was not in exclusive possession of the premises, and an inference of constructive possession could not be drawn against him unless there were incriminating statements or circumstances tending to support the inference. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

Admission of gun evidence was harmless error. — Where defendant was charged with trafficking a controlled substance, tampering with evidence, resisting, evading, or obstructing an officer, and possession of drug paraphernalia after law enforcement officers conducted a traffic stop, during which defendant was found with a large amount of money on his lap and sixty-three small baggies of crack cocaine, and subsequently searched defendant's home, finding a .380 caliber semi-automatic pistol, several small zip-lock baggies, several digital scales, and a brown bag with small zip-lock baggies inside, and where, at trial, defendant objected to the admission of evidence that a gun was found at his residence, claiming that he was not armed at the time of his arrest and that the gun evidence created the impression that he was dangerous and that, in turn, encouraged the jury to convict him of trafficking a controlled substance rather than simple possession, the admission of the gun evidence, assuming error, was harmless. It was doubtful that the admission of the gun evidence had any probable impact on the jury's deliberations regarding trafficking versus possession, considering the evidence that defendant was apprehended with sixty-three baggies of crack cocaine, individually packaged, indicating that the drugs were intended for sale to individuals, in addition to the discovery of digital scales and empty small baggies at defendant's residence. *State v. Jackson*, 2021-NMCA-059, cert. denied.

B. CIRCUMSTANTIAL EVIDENCE.

Conviction sustained by circumstantial evidence. — A conviction for trafficking in a controlled substance can be sustained by circumstantial evidence. *State v. Chouinard*, 1981-NMSC-096, 96 N.M. 658, 634 P.2d 680, cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Circumstantial evidence is sufficient to support a conviction for possession of heroin with an intent to distribute where the defendant was caught with a small amount of heroin, there is an inference that more heroin was flushed down a toilet, and there was paraphernalia at the scene of the arrest consistent with distribution of heroin. *State v. Bejar*, 1984-NMCA-031, 101 N.M. 190, 679 P.2d 1288, cert. denied, 101 N.M. 189, 679 P.2d 1287; *State v. Bejar*, 1985-NMCA-093, 104 N.M. 138, 717 P.2d 591, cert. quashed, 104 N.M. 54, 716 P.2d 245.

Circumstantial evidence on nature of substance. — Although there was no direct scientific evidence that the substance which defendant was convicted of trafficking in by possession with intent to distribute was heroin, there was substantial, almost overwhelming, circumstantial evidence to that effect, which was sufficient to sustain the convictions. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

Inference of trafficking from amount of drug found. — Evidence that the heroin found weighed 3.3 grams and was 16% pure while street heroin is usually 3% to 5% pure and packaged in weights of 20 to 40 milligrams, that reduction of the heroin to street purity packaged for street sale would result in at least 264 caps of heroin, that heroin is generally packaged for resale on the street in small tinfoil packets such as were found and that search failed to disclose paraphernalia indicating use of the heroin on the premises, permitted the inference that defendant intended to distribute the heroin. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

Proof of possession of a large quantity of a controlled substance, inconsistent with personal use, is sufficient proof of trafficking in a controlled substance. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

Amount of drug inconsistent with personal use. — If the amount of an illegal drug found in an accused's possession is not by itself sufficient to prove inconsistency with personal use, then the state must present testimony that the amount of drugs in the accused's possession is inconsistent with personal use or that the other items found in possession of the accused, such as drug paraphernalia or significant sums of cash, showed that the accused intended to transfer drugs. *State v. Hubbard*, 1992-NMCA-014, 113 N.M. 538, 828 P.2d 971, cert. denied, 113 N.M. 352, 826 P.2d 573.

Using weight alone to show intent to distribute. — Where there was no evidence of the concentration of the drug, and no evidence of how long it would normally take a

single drug user to consume a given quantity, the weight of the amount recovered (just under two ounces) could not in itself enable a fact finder to conclude, beyond a reasonable doubt, that defendant intended to distribute the substance. *State v. Becerra*, 1991-NMCA-090, 112 N.M. 604, 817 P.2d 1246, cert. denied, 112 N.M. 440, 816 P.2d 509.

Conspiracy to traffic. — The size (one-half to one ounce amounts), frequency (nine transactions in approximately seven weeks) and manner of the transactions (cash, after the receipt of a phone call) were evidence sustaining defendant's conviction for conspiracy with two others to traffic in heroin, and the jury could properly conclude that the heroin defendant supplied was for resale. *State v. Armijo*, 1976-NMCA-125, 90 N.M. 10, 558 P.2d 1149.

C. SUFFICIENCY OF EVIDENCE.

Evidence of trafficking by possession was sufficient. — Where a police officer found defendant passed out in a car; when defendant stepped out of the car, a plastic bag containing crack cocaine fell out of defendant’s purse; the officer arrested defendant and conducted inventory searches of the car; the officer found two separate amounts of cash totaling $520, a crack pipe, a second bag containing nineteen "rocks" of crack cocaine, three cell phones and baggies in the console of the car; the car was owned by defendant and defendant was the sole occupant of the car; and an expert witness testified that based on the amount of cocaine, baggies, multiple cell phones and amount of cash found in the car, defendant was a trafficker, there was sufficient evidence to support defendant’s conviction of trafficking by possession with intent to distribute cocaine. *State v. Rael-Gallegos*, 2013-NMCA-092, cert. denied, 2013-NMCERT-009.

Sufficient evidence to convict of manufacturing methamphetamine. — Where a police officer was dispatched to investigate a trash fire; the officer observed bottles of acetone in the burnt trash pile; the officer discovered a meth lab in the house near the trash fire; the officer discovered mail in the house with defendant’s name on it; two persons who were on the property stated that defendant lived in the house; one person testified that defendant used Sudafed and the acetone to make methamphetamine, and that the person had obtained methamphetamine from defendant on the day the officer discovered the meth lab; and the other person testified that defendant had been at the house on the morning the officer discovered the meth lab, the evidence was sufficient to permit the jury to reasonably infer that defendant manufactured methamphetamine. *State v. Brown*, 2010-NMCA-079, 148 N.M. 888, 242 P.3d 455, cert. denied, 2010-NMCERT-007, 148 N.M. 611, 241 P.3d 612.

Sufficient evidence. — Where defendant quoted a price for methamphetamine to two contacts who wanted to sell the methamphetamine to undercover police officers; the contacts left defendant to meet the officers to confirm that the price was acceptable; the contacts returned to defendant and purchased the methamphetamine; and the contacts then delivered the methamphetamine to the officers in a public school parking lot, there

was sufficient evidence to convict defendant, as a principal, of causing the transfer of methamphetamine in a drug free zone. *State v. Montes*, 2007-NMCA-083, 142 N.M. 211, 164 P.3d 102.

Sufficient evidence of trafficking cocaine by distribution and by possession with intent to distribute. — Where defendant was convicted of trafficking cocaine by distribution and by possession with intent to distribute, there was sufficient evidence to support defendant's convictions where the state presented evidence that the undercover officer gave an intermediary a $20 bill and watched as defendant removed an unknown substance from his mouth, gave it to the intermediary in exchange for the buy money, and the intermediary returned and gave the officer a package containing a small rock, which later tested positive as cocaine, and evidence that defendant sold the officer a second rock for $10 after the officer complained about the small size of the first rock of cocaine, from which a jury could reasonably infer that defendant was in possession of the first rock of cocaine and intended to transfer it to the officer through the intermediary and that defendant transferred the second rock of cocaine directly to the undercover officer. *State v. Bello*, 2017-NMCA-049, cert. denied.

Sufficient evidence of trafficking controlled substances. — Where defendant was charged with trafficking methamphetamine and distribution of synthetic cannabinoids after the state alleged that an accomplice, at the direction of defendant, delivered methamphetamine and synthetic cannabinoids hidden in deodorant sticks to an inmate confined in the Curry county detention center, there was sufficient evidence to sustain defendant's convictions beyond a reasonable doubt where the state presented evidence of recorded phone calls between defendant and the inmate where, according to testimony by the investigating officer, the two men used code words to discuss that defendant was going to obtain illegal narcotics by using the inmate's money from the jail, hide the narcotics in hygiene products, and send the hygiene products into the jail through a third person, and evidence that an inspection of the hygiene products at issue contained a green leafy substance and crystal-like substance wrapped in small baggies in the bottom of deodorant sticks, which were later identified as methamphetamine and synthetic cannabinoids. *State v. Salazar*, 2018-NMCA-030, cert. denied.

Sufficient evidence of conspiracy to commit drug trafficking. — Where defendant was convicted by a jury of conspiracy to commit drug trafficking, there was sufficient evidence to support the conviction where evidence established that defendant was associated with a methamphetamine trafficking organization known as the AZ Boys, that the organization was run by defendant's boyfriend and his brother, that defendant had asked a friend, who later became a police informant, to transport drugs, that the informant made several trips transporting drugs with defendant and her boyfriend in exchange for cash and drugs, and that law enforcement recovered four pounds of methamphetamine from the spare tire of the truck the informant had driven for the organization, and, based on evidence that defendant had options available to her other than committing the offense, a rational jury could have determined beyond a reasonable doubt that defendant did not act under duress. *State v. Catt*, 2019-NMCA-013, cert. denied.

Overt act for attempt to manufacture methamphetamine. — Defendant's acts, including obtaining and possessing suspiciously large amounts of pseudoephedrine and iodine, by traveling to Clovis to obtain inexpensive iodine, renting a motel room where unpackaged pseudoephedrine was stored, and smoking methamphetamine in a room containing over 5,000 pseudoephredrine pills, are sufficient to constitute an overt act in furtherance of the manufacture of methamphetamine. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Conviction despite no actual possession. — Defendant failed to effect the crime of possession with intent to distribute because he never actually possessed the package containing cocaine which was addressed to him; nevertheless, the fact that he never actually possessed the package did not negate his intent to possess the package, as evidenced by his attempting to pick up the package, nor did it negate his intent to distribute the cocaine, as is evidenced by the amount of cocaine found in the package. Therefore, he was properly convicted of attempted trafficking under Section 30-28-1 NMSA 1978 and Subsection A(3) of this section. *State v. Curry*, 1988-NMCA-031, 107 N.M. 133, 753 P.2d 1321, cert. denied, 107 N.M. 132, 753 P.2d 1320.

When the evidence shows a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and the defendant is the third party's accomplice, the evidence is sufficient to support a conviction under Subsection A(3). The fact defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370.

There was sufficient evidence for conviction since it was shown that the defendant was the owner of the premises from which the sale of illegal drugs was carried out in her presence and within her view. *State v. Chandler*, 1995-NMCA-033, 119 N.M. 727, 895 P.2d 249, cert. denied, 119 N.M. 617, 894 P.2d 394.

Expert testimony identifying substance. — Direct testimony by expert that he analyzed substance according to standard tests and found it to be morphine was sufficient evidence that the substance, which had been sold by defendant, was morphine, despite the fact that on cross-examination the expert did not remember specifically which tests he had used, nor how many different tests he conducted. *State v. Baca*, 1970-NMCA-075, 81 N.M. 686, 472 P.2d 651, cert. denied, 81 N.M. 721, 472 P.2d 984.

Sufficient evidence to convict. — Where (1) defendant "transferred cocaine to another"; (2) defendant "knew that it was cocaine or believed it to be cocaine or believed it to be some drug or other substance the possession of which is regulated or prohibited by law"; and (3) "this happened in New Mexico on or about the 21st day of July, 1994" there was sufficient evidence to convict. *State v. Cooper*, 1998-NMCA-180, 126 N.M. 500, 972 P.2d 1, cert. denied, 126 N.M. 532, 972 P.2d 351.

The following substantial evidence supports a conviction for trafficking cocaine with intent to distribute: (1) testimony that people came to the motel door asking for defendant; (2) the presence of a digital scale and razor blade indicating that cocaine was being cut and weighed for distribution; (3) evidence that a portion of the crack cocaine was ready for sale while another bundle was not yet cut in the bathroom; (4) defendant's presence in the bathroom area; and (5) the testimony of one of the detectives that the quantity seized and the drug paraphernalia were consistent with trafficking. *State v. Zamora*, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517, cert. quashed, 2005-NMCERT-012, 138 N.M. 772, 126 P.3d 1136.

Identity of substance a jury question. — Evidence that defendant stated he had brought five vials of morphine to an arranged meeting, that the vial sold, which was sealed and contained a yellowish liquid labeled dilaudid HCL, was taken from the same pocket as other vials and looked the same as others tested and shown to contain a morphine derivative, along with defendant's statement that he had injected the contents of a vial several hours before and was still feeling the effects, and fact that one of the users of the contents of the vial in question claimed to experience a "tingly feeling" was sufficient to present a jury question as to whether the contents of the vial sold were a controlled substance, and being substantial was sufficient to sustain conviction. *State v. Burrell*, 1976-NMCA-025, 89 N.M. 64, 547 P.2d 69.

Inference of trafficking from possession by nonuser. — Where evidence showed that defendant was in possession of more than 30 caps of heroin, while defendant himself testified that he was not and had never been a heroin user, the only possible inference was that defendant, at the least, intended to give the heroin away, and this evidence was sufficient to conclude that he was trafficking in heroin. *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 28, 536 P.2d 1085, and cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Attempted trafficking of cocaine. — Defendant was properly convicted for attempted trafficking in cocaine since he committed the overt acts of accepting a sizeable amount of cash from an undercover narcotics officer and engaging in prior discussion of the illicit transaction. *State v. Green*, 1993-NMSC-056, 116 N.M. 273, 861 P.2d 954.

Purchaser not guilty of solicitation to traffic. — Even though the defendant's actions in negotiating for the purchase of drugs fall within the definition of criminal solicitation, his conduct was necessarily incidental to the crime of trafficking through the sale of a controlled substance and he could not be guilty of solicitation to traffic. *State v. Pinson*, 1995-NMCA-045, 119 N.M. 752, 895 P.2d 274.

Growing marijuana. — Growing marijuana, without more, does not support a charge of trafficking in marijuana by manufacture. *State v. Shaulis-Powell*, 1999-NMCA-090, 127 N.M. 667, 986 P.2d 463, cert. denied, 127 N.M. 391, 981 P.2d 1209.

Sufficient evidence. — Where a police officer conducted a search incident to the arrest of defendant for DWI; the officer found a uniquely folded dollar bill in defendant’s

pocket; the officer unfolded the dollar bill and uncovered a white, powdery substance that was later confirmed to be cocaine; and the officer testified that dollar bills were often used as a way to conceal and later ingest cocaine, the evidence was sufficient for a reasonable jury to conclude that the evidence found on defendant was cocaine and that based on the way the dollar bill was folded and its location in defendant's pocket, defendant was aware that the substance was cocaine or another controlled substance. *State v. Armendariz-Nunez*, 2012-NMCA-041, 276 P.3d 963, cert. denied, 2012-NMCERT-003.

V. INDICTMENT AND INFORMATION.

Indictment charging alternatives. — 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," the indictment gave each defendant notice that he must defend against each of these alternatives. *State v. Turner*, 1981-NMCA-144, 97 N.M. 575, 642 P.2d 178, cert. quashed, 98 N.M. 51, 644 P.2d 1039 (1982).

Failure of indictment to refer to Subsection B does not render it invalid. *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

VI. JURY INSTRUCTIONS.

Jury instruction for attempt to manufacture. — The jury was properly instructed that it could convict defendant of attempt to manufacture methamphetamine under the theory of accessory liability if it found, beyond a reasonable doubt, that defendant intended that the crime of manufacturing be committed, an attempt to commit the crime was committed, and defendant helped, encouraged or caused the attempt to commit the crime. *State v. Brenn*, 2005-NMCA-121, 138 N.M. 451, 121 P.3d 1050, cert. denied, 2005-NMCERT-010, 138 N.M. 494, 122 P.3d 1263.

Instructing on lesser included offense. — Although possession of heroin is a lesser included offense of trafficking in heroin, it should not be instructed on when the evidence does not support the defendant's claim that possession was the highest crime which occurred. *State v. Hernandez*, 1986-NMCA-040, 104 N.M. 268, 720 P.2d 303, cert. denied, 104 N.M. 201, 718 P.2d 1349.

Although possession is not an element of trafficking by manufacture and a jury instruction on possession was not required to be given with the instruction on trafficking by manufacture, where possession is an issue in dispute, it would be error not to give the instruction on possession. *State v. Stefani*, 2006-NMCA-073, 139 N.M. 719, 137 P.3d 659, cert. denied, 2006-NMCERT-006, 140 N.M. 224, 141 P.3d 1278.

Law reviews. — For note and comment, "State v. Urioste: A Prosecutor's Dream and Defendant's Nightmare," see 34 N.M. L. Rev. 517 (2004).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 179, 181, 187, 188, 191.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 81 A.L.R.3d 1192.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

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.

Validity, construction, and application of state laws imposing tax or license fee on possession, sale, or the like, of illegal narcotics, 12 A.L.R.5th 89.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

Validity, construction, and application of state statutes prohibiting sale or possession of controlled substances within specified distance of schools, 27 A.L.R.5th 593.

Criminality of act of directing to, or recommending, source from which illicit drugs may be purchased, 34 A.L.R.5th 125.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of cocaine had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 397.

Admissibility of expert evidence concerning meaning of narcotics code language in federal prosecution for narcotics dealing - modern cases, 104 A.L.R. Fed. 230.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 A.L.R. Fed. 363.

Propriety of instruction of jury on "conscious avoidance" of knowledge of nature of substance or transaction in prosecution for possession or distribution of drugs, 109 A.L.R. Fed. 710.

Under what circumstances should total weight of mixture or substance in which detectable amount of controlled substance is incorporated be used in assessing sentence under United States sentencing guideline § 2D1.1 - post-*Chapman* cases, 113 A.L.R. Fed. 91.

28 C.J.S. Drugs and Narcotics § 159 et seq.

30-31-21. Distribution to a minor.

Except as authorized by the Controlled Substances Act, no person who is eighteen years of age or older shall intentionally distribute a controlled substance to a person under the age of eighteen years. Any person who violates this section with respect to a controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of any controlled substance enumerated in Schedule I, II, III or IV is:

(1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-21, enacted by Laws 1972, ch. 84, § 21; 1974, ch. 9, § 2; 1980, ch. 23, § 2; 1987, ch. 68, § 3; 2021 (1st S.S.), ch. 4, § 66.

ANNOTATIONS

The 2021 (1st S.S.) amendment, effective June 29, 2021, removed the distribution of marijuana from the application of the section; and deleted former Subsection A and former subsection designation "B".

Constitutionality. — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional under N.M. Const., art. IV, § 16, because of the fact that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Greater penalty imposed on seller than on user. — The legislature clearly intended to impose greater penalties on the seller of a controlled substance than upon the user. *State v. Sandoval*, 1982-NMCA-091, 98 N.M. 417, 649 P.2d 485.

Distribution by mail. — Neither the federal constitution nor 18 U.S.C. § 1716 preempts New Mexico jurisdiction over distribution of controlled substances to a minor through the use of the mails. *State v. McHorse*, 1973-NMCA-144, 85 N.M. 753, 517 P.2d 75.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For note and comment, "State v. Urioste: A Prosecutor's Dream and Defender's Nightmare," see 34 N.M. L. Rev. 517 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Giving, selling or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

30-31-22. Controlled or counterfeit substances; distribution prohibited.

A. Except as authorized by the Controlled Substances Act, it is unlawful for a person to intentionally distribute or possess with intent to distribute a controlled substance or a controlled substance analog except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers. A person who violates this subsection with respect to:

(1) synthetic cannabinoids is:

(a) for the first offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers, is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(3) a controlled substance enumerated in Schedule V or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than five hundred dollars ($500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

B. It is unlawful for a person to distribute gamma hydroxybutyric acid or flunitrazepam to another person without that person's knowledge and with intent to commit a crime against that person, including criminal sexual penetration. For the purposes of this subsection, "without that person's knowledge" means the person is unaware that a substance with the ability to alter that person's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is being distributed to that person. Any person who violates this subsection is:

(1) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as authorized by the Controlled Substances Act, it is unlawful for a person to intentionally create or deliver, or possess with intent to deliver, a counterfeit substance. A person who violates this subsection with respect to:

(1) a counterfeit substance enumerated in Schedule I, II, III or IV is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) a counterfeit substance enumerated in Schedule V is guilty of a petty misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100) or by imprisonment for a definite term not to exceed six months, or both.

D. A person who knowingly violates Subsection A or C of this section while within a drug-free school zone with respect to:

(1) synthetic cannabinoids is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug, a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug or methamphetamine, its salts, isomers and salts of isomers, is:

(a) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) a controlled substance enumerated in Schedule V or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(4) the intentional creation, delivery or possession with the intent to deliver:

(a) a counterfeit substance enumerated in Schedule I, II, III or IV is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) a counterfeit substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

E. Notwithstanding the provisions of Subsection A of this section, distribution of a small amount of synthetic cannabinoids for no remuneration shall be treated as provided in Paragraph (1) of Subsection B of Section 30-31-23 NMSA 1978.

History: 1953 Comp., § 54-11-22, enacted by Laws 1972, ch. 84, § 22; 1974, ch. 9, § 3; 1977, ch. 183, § 1; 1980, ch. 23, § 3; 1987, ch. 68, § 4; 1990, ch. 19, § 4; 2005, ch. 280, § 6; 2006, ch. 17, § 3; 2011, ch. 16, § 2; 2021 (1st S.S.), ch. 4, § 67.

ANNOTATIONS

Cross references. — For legal use of marijuana in research, *see* 26-2A-1 to 26-2A-7 NMSA 1978.

The 2021 (1st S.S.) amendment, effective June 29, 2021, removed the distribution of marijuana from the application of the section; in Subsection A, Paragraph A(1), after the paragraph designation, deleted "marijuana or"; and in Subsection D, Paragraph D(1), after the paragraph designation, deleted "marijuana or".

The 2011 amendment, effective March 31, 2011, made it a crime to possess and distribute synthetic cannabinoids.

The 2006 amendment, effective July 1, 2006, added a provision to Subsection A to provide that it is unlawful to possess with intent to distribute methamphetamine and its salts and isomers; added the provision to Paragraph (2) of Subsection A that a person who violates Subsection A with respect to methamphetamine and its salts and isomers is subject to the penalties specified in Paragraph (2) of Subsection A; deleted the former provision in Subsection D that excluded private property residentially zoned or used primarily as a residence; and added the provision in Paragraph (2) of Subsection D that a person who violates Subsections A and C while in a drug-free school zone with respect to methamphetamine and its salts and isomers is subject to the penalties specified in Paragraph (2) of Subsection D.

The 2005 amendment, effective June 17, 2005, added Subsection B to provide that it is unlawful distribute the specified chemicals to a person without that person's knowledge with the intent to commit a crime against that person; defined "without that person's knowledge"; and provided that a first offense of violating Subsection B is a third degree felony and a second and subsequent offense is a second degree felony.

The 1990 amendment, effective July 1, 1990, added Subsection C, designated the former last sentence of Subsection B as present Subsection D, and made minor stylistic changes in Subsections A and B.

I. GENERAL CONSIDERATION.

Title constitutional. — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Greater penalty imposed on seller than on user. — The legislature clearly intended to impose greater penalties on the seller of a controlled substance than upon the user. *State v. Sandoval*, 1982-NMCA-091, 98 N.M. 417, 649 P.2d 485.

Marijuana use not intrinsic part of religion. — Where the evidence shows that defendant's belief was derived from defendant's personal views of the bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. *State v. Brashear*, 1979-NMCA-027, 92 N.M. 622, 593 P.2d 63.

Effect of Subsection C (now Subsection E). — The "notwithstanding" provision of Subsection C (now E) does not provide for a lesser penalty for the first marijuana distribution offense but rather affects only the penalties for second and subsequent marijuana distribution offenses; for second and subsequent marijuana distribution offenses that factually come within Subsection C (now Subsection E), the penalty of Section 30-31-23B(3) NMSA 1978 applies, and a defendant thus avoids the higher penalty stated in Subsection A(1)(b) of this section. *State v. Bustamante*, 1978-NMCA-062, 91 N.M. 772, 581 P.2d 460.

Penalty applicable to drugs scheduled by regulation. — Express legislative authority is not required to make the penalty provisions of the Controlled Substances Act applicable to drugs scheduled by administrative regulation. *State v. Reams*, 1981-NMCA-158, 98 N.M. 372, 648 P.2d 1185, *aff'd in part, rev'd on other grounds*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

Sections not conflicting. — There is no conflict between Subsection A of this section and Sections 30-31-20A(3) and B NMSA 1978. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Distribution of quaalude. — This section, and not Section 26-1-16A NMSA 1978, is the appropriate legislation under which defendants are to be prosecuted for allegedly unauthorized distribution of quaalude. *State v. Reams*, 1982-NMSC-075, 98 N.M. 215, 647 P.2d 417.

Sentencing under Habitual Offenders Act. — In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 1966-NMSC-051, 76 N.M. 111, 412 P.2d 405, which held that the Habitual Offender Act did not apply to persons convicted under the Controlled Substances Act. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

Applicability of former habitual criminal law to burglary conviction after drug offense. — There was no conflict between the provisions of Subsection A of this section and Section 31-18-5 NMSA 1978 (repealed, *see* Section 31-18-17 NMSA 1978), nor any legislative intent within the Controlled Substances Act, to prohibit use of a Controlled Substances Act conviction to enhance a subsequent burglary conviction,

since it was the fact of the prior felony that was the basis for the enhanced sentence for the current burglary. *State v. Jordan*, 1975-NMCA-102, 88 N.M. 230, 539 P.2d 620.

II. ELEMENTS OF DISTRIBUTION OF CONTROLLED OR COUNTERFEIT SUBSTANCE.

Distribution by prescription. — When a physician writes a prescription neither for a legitimate medical purpose nor in the usual course of his professional practice, he is "distributing" drugs. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Narcotic drugs not included. — Subsection A of this section concerns unlawful conduct involving controlled substances other than the narcotic drugs enumerated in Schedules I and II. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Drugs excluded. — The "except" language in Subsection A excludes a narcotic drug such as heroin, enumerated in Schedule I, from the purview of the subsection. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Sale of narcotics is not involved under this section. *State v. Montoya*, 1974-NMCA-025, 86 N.M. 155, 520 P.2d 1100, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

Mere possession insufficient. — A conviction based on the offense of possession of marijuana with intent to illegally sell and deliver cannot be sustained upon proof of illegal possession alone and the verdict and judgment based thereon must be reversed. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

Place of distribution immaterial. — The crime of possession with intent to distribute is complete if there is possession with the requisite intent, and the state is not required to prove the place of the intended distribution. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

III. DOUBLE JEOPARDY.

Double jeopardy. — Defendant’s convictions for possession of methamphetamine and possession of methamphetamine with intent to distribute based on a single act of possessing methamphetamine violated the Double Jeopardy Clause. *State v. Quick*, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

Lesser included offense. — The separate crimes of possession of methamphetamine and possession of methamphetamine with intent to distribute apply in the alternative

when based on a single act of possession. *State v. Quick*, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

Possession is lesser offense necessarily included in distribution of marijuana. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

Distribution prosecution barred by conviction of possession. — Where defendant was convicted of the lesser offense of possession of marijuana, the principles of double jeopardy barred his subsequent prosecution of the greater offense of distribution. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

Retrial for possession barred. — When two counts were 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 was to disregard the possession count if it found defendant guilty of the latter offense operated as an acquittal on the possession count and prevented retrial of this issue when the verdict on possession with intent to distribute was overturned. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

Constructive proof of possession sufficient. — Proof of actual possession is not necessary to sustain a conviction of possession of marijuana with intent to distribute. Constructive possession will suffice. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

IV. EVIDENCE AND PROOF.

A. IN GENERAL.

Police officer's suspicions based on experience. — Where the police officer had 11 years of experience, of which he had spent eight years in the drug interdiction program actively participating in exercises on the freeways in various counties, and he estimated making an average of five drug trafficking arrests per year during that time, with up to 85 percent of those arrests involving rental cars and he testified that in his experience, it was common to find rental cars being used to transport drugs, frequently where the actual renter of the vehicle was not present, in light of the totality of the circumstances and the officer's training and experience, the officer's suspicion about drugs was based on specific articulable facts and the reasonable inferences that could be drawn from those facts. *State v. Van Dang*, 2005-NMSC-033, 138 N.M. 408, 120 P.3d 830.

Nature of substance inferred. — Where all of the alleged marijuana was in the form of bricks having the same size, color and appearance as those tested, the fact finder could infer from the evidence that the remaining substance was the same as the tested portion. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Evidence not inherently improbable. — Testimony in prosecution for unlawful sale and possession of marijuana was not inherently improbable despite fact that defendant was claimed to have insisted on delivering the cigarettes in question in the restroom where only he and undercover officer were present, yet afterwards supposedly received the money for the transaction and discussed other possible dealings in a car in the presence of several other persons. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

Establishing entrapment. — The necessity of having to resort to a greater degree of subterfuge, or to exercise more persistence, in making inquiries to set up an illegal sale of marijuana, without more, does not constitute evidence of illegal entrapment, nor is it necessary that a suspected crime be in the process of being committed in order to show a predisposition to commit that crime. *State v. Akin*, 1965-NMSC-078, 75 N.M. 308, 404 P.2d 134.

Similar offenses indicative of predisposition. — When the defense is entrapment, evidence of similar narcotics offenses bears on the defendant's predisposition, or readiness and willingness, to commit the offenses for which he is charged; and evidence of prior similar sales of heroin within a period shortly before those in question was admissible on the issue of entrapment. *State v. Anaya*, 1969-NMCA-120, 81 N.M. 52, 462 P.2d 637.

Entrapment for the jury. — Defendant's testimony that he was having financial difficulties, with his wife expecting a baby and his daughter having problems, and that he considered agent's numerous requests that he obtain marijuana for a month or two before he finally agreed to involve himself, raised a factual issue as to whether the criminal conduct was the product of the agent's creative activity. *State v. Martinez*, 1971-NMCA-110, 83 N.M. 13, 487 P.2d 923.

Entrapment not shown. — Suggestion that the act of officer in supplying the defendant with his favorite brand of whiskey constituted undue inducement was without merit where defendant not only dealt in the illegal sale of beer but also drank beer and whiskey of his own as well as that furnished by others. *State v. Akin*, 1965-NMSC-078, 75 N.M. 308, 404 P.2d 134.

Evidence of knowledge and control. — Even if someone else had knowledge of the presence of marijuana in defendant's bedroom and exercised some control over it, defendant could also have had sufficient knowledge and control to be in constructive possession, and the link establishing defendant's knowledge and control was evidence of his commerce in illicit drugs. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

B. CIRCUMSTANTIAL EVIDENCE.

Inference of intent to distribute. — While there was no evidence of defendants' sale or an attempted sale of marijuana, the possession of 246.15 pounds of the substance,

together with the defendants' activities, allowed the court to infer that the defendants had the necessary intent to distribute. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Evidence of the amount of the cocaine possessed, about three grams, and evidence of the packaging and purity of the cocaine, as well as evidence that defendant had on his person a relatively large amount of cash, supported the state's argument that appellant intended to distribute the cocaine. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

C. SUFFICIENCY OF EVIDENCE.

Shared criminal intent. — Evidence regarding marijuana transaction established more than the mere presence of the defendant during the consummation of the sale, supporting a finding that he was in charge and directing the sale, or at least counseling, aiding and abetting in its consummation and sharing a criminal intent and purpose with the others. *State v. Favela*, 1968-NMCA-065, 79 N.M. 490, 444 P.2d 1001.

Evidence of possession. — There was sufficient evidence for conviction since it was shown that the defendant was the owner of the premises from which the sale of illegal drugs was carried out in her presence and within her view. *State v. Chandler*, 1995-NMCA-033, 119 N.M. 727, 895 P.2d 249, cert. denied, 119 N.M. 617, 894 P.2d 394.

Constructive possession and sale shown. — Evidence that witness bought six ounces of marijuana from defendant, who then gave witness detailed instructions as to the location of the drug behind a metal shack near the road leading to the airport, was ample evidence that defendant had constructive possession of and sold the marijuana to the witness. *State v. Wesson*, 1972-NMCA-013, 83 N.M. 480, 493 P.2d 965.

Testimony of a single witness was sufficient evidence for conviction of unlawful possession and sale of marijuana. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

Modified trustworthiness standard did not apply to defendant’s extrajudicial statements. — Where defendant was convicted of conspiracy to commit drug trafficking by distribution, his pre-crime and course-of-crime statements were not subject to the modified trustworthiness standard, because the majority position views statements made prior to and in the course of the crime as bearing none of the indicia of unreliability as post-crime confessions and that there is little need for independent proof that the crime occurred as a safeguard against a conviction for an imagined crime where the defendant’s statements at issue were made in the course of the crime. *State v. Saiz*, 2017-NMCA-072, cert. denied.

Sufficient evidence of conspiracy to commit trafficking by distribution. — Where defendant was convicted of conspiracy to commit drug trafficking by distribution, defendant’s statements assuring the undercover officer of the existence of an agreement to sell him methamphetamine and his actions attempting to achieve the sale

were sufficient evidence to prove beyond a reasonable doubt that defendant committed conspiracy to commit drug trafficking by distribution, and it was irrelevant that defendant did not receive money from the undercover officer, no drugs were ever produced or verified, and no co-conspirator was ever seen, identified, or verified. *State v. Saiz*, 2017-NMCA-072, cert. denied.

Evidence sufficient to find intent to distribute. — In prosecution for possession of methamphetamine with intent to distribute, based upon the record, where the state presented enough circumstantial evidence to support an inference of both knowledge and control, and therefore possession of methamphetamine, there was sufficient evidence from which a rational jury could have found that defendant intended to distribute that methamphetamine. *State v. Barber*, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

Evidence sufficient to infer knowledge. — Defendant's conduct in selling pills, coupled with his assertion that they would get an undercover agent "good and high," was sufficient evidence from which to infer defendant's knowledge of a controlled substance. *State v. Martinez*, 1986-NMCA-069, 104 N.M. 584, 725 P.2d 263.

Evidence sufficient to support conviction. — Evidence, including defendant's exclusive control of the vehicle in which marijuana was found, his lies to the arresting officer, and his nervous demeanor were sufficient to allow a jury to find that he had knowledge of the marijuana. *State v. Hernandez*, 1998-NMCA-082, 125 N.M. 661, 964 P.2d 825.

An undercover agent's testimony that defendant sold him marijuana on two occasions was sufficient evidence to support defendant's conviction for distributing marijuana. *State v. Laskay*, 1986-NMCA-008, 103 N.M. 799, 715 P.2d 72.

Defendant's conviction for possession of marijuana with intent to distribute was affirmed, where the evidence showed that: (1) the black book that defendant used for his drug transactions was kept in his residence, (2) defendant used the bedroom in which the marijuana was found at least to the extent of keeping his correspondence, including a bill for the pager used in his drug transactions, and (3) the marijuana found in a closet was packaged for distribution. *State v. Muniz*, 1990-NMCA-105, 110 N.M. 799, 800 P.2d 734, cert. denied, 110 N.M. 749, 799 P.2d 1121.

Evidence was sufficient to support defendant's conviction for possession of a controlled substance with intent to distribute where he was in a closed bathroom alone with the drugs and paraphernalia, he had no clean clothes with him, and after five minutes in the bathroom, he had not taken a shower and there was no indication that he was planning to do so; additionally, the folded business card found on the toilet with a powdery substance in the crease and with handwritten notations of what appeared to have been drug transactions, connected defendant to the control over and distribution of the drugs. *State v. Barber*, 2003-NMCA-053, 133 N.M. 540, 65 P.3d 1095, *aff'd*, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

Sufficient evidence that chemicals were synthetic cannabinoids. — Where defendant was convicted of trafficking methamphetamine and distribution of synthetic cannabinoids based on evidence that an accomplice, at the direction of defendant, delivered methamphetamine and the chemicals PB-22 and 5F-PB22 hidden in deodorant sticks to an inmate confined in the Curry county detention center, and where defendant claimed that the state failed to prove that the substances were synthetic cannabinoids because the particular chemicals were not listed as controlled substances under the New Mexico Controlled Substances Act (CSA), there was sufficient evidence to establish beyond a reasonable doubt that the chemicals collected from the deodorant sticks were "synthetic cannabinoids" within the meaning of this section where the state presented testimony from an expert in forensic chemistry that the chemicals PB-22 and 5F-PB22 are categorized as synthetic cannabinoids because while completely synthetic, the chemicals mimic the effects of cannabis. *State v. Salazar*, 2018-NMCA-030, cert. denied.

Sufficient evidence of distribution of synthetic cannabinoids. — Where defendant was charged with trafficking methamphetamine and distribution of synthetic cannabinoids after the state alleged that an accomplice, at the direction of defendant, delivered methamphetamine and synthetic cannabinoids hidden in deodorant sticks to an inmate confined in the Curry county detention center, there was sufficient evidence to sustain defendant's convictions beyond a reasonable doubt where the state presented evidence of recorded phone calls between defendant and the inmate where, according to testimony by the investigating officer, the two men used code words to discuss that defendant was going to obtain illegal narcotics by using the inmate's money from the jail, hide the narcotics in hygiene products, and send the hygiene products into the jail through a third person, and evidence that an inspection of the hygiene products at issue contained a green leafy substance and crystal-like substance wrapped in small baggies in the bottom of deodorant sticks, which were later identified as methamphetamine and synthetic cannabinoids. *State v. Salazar*, 2018-NMCA-030, cert. denied.

V. JURY INSTRUCTIONS.

Instructing on intent. — An instruction substantially in terms of the statute is sufficient. *State v. Tucker*, 1974-NMCA-049, 86 N.M. 553, 525 P.2d 913, cert. denied, 86 N.M. 528, 525 P.2d 888, *overruled on other grounds by State v. Bender*, 1978-NMSC-044, 91 N.M. 670, 579 P.2d 796.

Instructions which are phrased in the terms of this statute were sufficient on element of intent. *State v. Fuentes*, 1973-NMCA-069, 85 N.M. 274, 511 P.2d 760, cert. denied, 85 N.M. 265, 511 P.2d 751.

Instruction defining possession. — In prosecution for possession of methamphetamine with intent to distribute, although defendant would have been entitled to a jury instruction defining possession, absent defense counsel’s request, the trial

court was not required to provide the instruction sua sponte. *State v. Barber*, 2004-NMSC-019, 135 N.M. 621, 92 P.3d 633.

Presumption of innocence. — In prosecution for unlawfully selling and unlawfully furnishing or giving away marijuana, it was error for the trial court to fail to instruct the jury on the presumption of innocence, where defendant requested an instruction thereon. *State v. Henderson*, 1970-NMCA-022, 81 N.M. 270, 466 P.2d 116.

Law reviews. — For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 179, 181, 187, 188, 191.

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 A.L.R.3d 939.

Permitting unlawful use of narcotics in private home as criminal offense, 54 A.L.R.3d 1297.

Conviction of possession of illicit drugs found in premises or of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

Sufficiency of random sampling of drug or contraband to establish jurisdictional amount required for conviction, 45 A.L.R.5th 1.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 79 A.L.R. Fed. 113.

Sufficiency of evidence that possessor of controlled substance other than cocaine, heroin, or marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 507.

Sufficiency of showing, in prosecution under Travel Act (18 USC § 1952), of act by accused, subsequent to accused's travel or use of facilities in interstate or foreign commerce, which furthers unlawful activity involving narcotics or controlled substances, 113 A.L.R. Fed. 625.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USCS Appx, Federal Rules of Evidence, Rule 404(b)), of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 A.L.R. Fed. 511.

28 C.J.S. Drugs and Narcotics § 156 et seq.

30-31-23. Controlled substances; possession prohibited.

A. It is unlawful for a person intentionally to possess a controlled substance unless the substance was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of professional practice or except as otherwise authorized by the Controlled Substances Act. It is unlawful for a person intentionally to possess a controlled substance analog.

B. A person who violates this section with respect to:

(1) one ounce or less of synthetic cannabinoids is, for the first offense, guilty of a petty misdemeanor and shall be punished by a fine of not less than fifty dollars ($50.00) or more than one hundred dollars ($100) and by imprisonment for not more than fifteen days, and, for the second and subsequent offenses, is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both;

(2) more than one ounce and less than eight ounces of synthetic cannabinoids is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both; or

(3) eight ounces or more of synthetic cannabinoids is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. A minor who violates this section with respect to the substances listed in this subsection is guilty of a petty misdemeanor and, notwithstanding the provisions of Sections 32A-1-5 and 32A-2-19 NMSA 1978, shall be required to perform no more than forty-eight hours of community service. For the third or subsequent violation by a minor of this section with respect to those substances, the provisions of Section 32A-2-19 NMSA 1978 shall govern punishment of the minor. As used in this subsection, "minor" means a person who is less than eighteen years of age. The provisions of this subsection apply to the following substances:

(1) synthetic cannabinoids;

(2) any of the substances listed in Paragraphs (17) through (22) of Subsection C of Section 30-31-6 NMSA 1978; or

(3) a substance added to Schedule I by a rule of the board adopted on or after March 31, 2011 if the board determines that the pharmacological effect of the substance, the risk to the public health by abuse of the substance and the potential of the substance to produce psychic or physiological dependence liability is similar to the substances described in Paragraph (1) or (2) of this subsection.

D. Except as provided in Subsections B and F of this section, and for those substances listed in Subsection E of this section, a person who violates this section with respect to any amount of any controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a substance enumerated in Schedule I, II, III or IV is guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars ($500) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both.

E. A person who violates this section with respect to phencyclidine as enumerated in Schedule III or a controlled substance analog of phencyclidine; methamphetamine, its salts, isomers or salts of isomers as enumerated in Schedule II or a controlled substance analog of methamphetamine, its salts, isomers or salts of isomers; flunitrazepam, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of flunitrazepam, including naturally occurring metabolites, its salts, isomers or salts of isomers; gamma hydroxybutyric acid and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of gamma hydroxybutyric acid, its salts, isomers or salts of isomers; gamma butyrolactone and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of gamma butyrolactone, its salts, isomers or salts of isomers; 1-4 butane diol and any chemical compound that is metabolically converted to gamma hydroxybutyric acid, its salts, isomers or salts of isomers as enumerated in Schedule I or a controlled substance analog of 1-4 butane diol, its salts, isomers or salts of isomers; or a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. Except for a minor as provided in Subsection C of this section, a person who violates Subsection A of this section while within a posted drug-free school zone, excluding private property residentially zoned or used primarily as a residence and excluding a person in or on a motor vehicle in transit through the posted drug-free school zone, with respect to:

(1) one ounce or less of synthetic cannabinoids is, for the first offense, guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or by imprisonment for a definite term less than one year, or both, and for the second or subsequent offense, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) more than one ounce and less than eight ounces of synthetic cannabinoids is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) eight ounces or more of synthetic cannabinoids is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(4) any amount of any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a substance enumerated in Schedule I, II, III or IV, except phencyclidine as enumerated in Schedule III, a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(5) phencyclidine as enumerated in Schedule III, a narcotic drug enumerated in Schedule I or II, a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-23, enacted by Laws 1972, ch. 84, § 23; 1974, ch. 9, § 4; 1980, ch. 23, § 4; 1983, ch. 183, § 1; 1987, ch. 68, § 5; 1989, ch. 123, § 1; 1990, ch. 19, § 5; 1990, ch. 33, § 1; 2005, ch. 280, § 7; 2011, ch. 16, § 3; 2019, ch. 217, § 1; 2021, ch. 15, § 1; 2021 (1st S.S.), ch. 4, § 68.

ANNOTATIONS

Cross references. — For penalty for consumption or possession of alcoholic beverages on school property, *see* 22-5A-5 NMSA 1978.

For legal use of marijuana in research, *see* 26-2A-1 to 26-2A-7 NMSA 1978.

For provision authorizing conditional discharge for first possession offense, and providing for expungement of records relating to a minor so discharged, *see* 30-31-28 NMSA 1978.

The 2021 (1st S.S.) amendment, effective June 29, 2021, removed the possession of marijuana from the application of the section; deleted former Subsection B and

redesignated former Subsections C through G as Subsections B through F, respectively; in Subsection C, Paragraph C(2), after "Paragraphs", changed "(2) through (25)" to "(17) through (22)"; in Subsection D, after "Subsections B", deleted "C" and after the next occurrence of "and", deleted "G" and added "F", and after "Subsection", changed "F" to "E"; and in Subsection F, after "Subsection", changed "D" to "C", in Paragraph F(1), after "one ounce or less of", deleted "marijuana or", in Paragraph F(2), after "less than eight ounces of", deleted "marijuana or", and in Paragraph F(3), after "eight ounces or more of", deleted "marijuana or".

The 2021 amendment, effective June 18, 2021, eliminated the fine for possession of certain controlled substances committed by minors as a first offense, capped the number of hours of community service that may be imposed for minors who have committed the crime of possession of certain controlled substances as a first offense, and made technical changes; in Paragraph B(1), after "Section", changed "3 of this 2019 act" to "31-19A-1 NMSA 1978"; and in Subsection D, after "shall be", deleted "punished by a fine not to exceed one hundred dollars ($100) or" and added "required to perform no more than".

The 2019 amendment, effective July 1, 2019, decreased penalties for possession of marijuana; added a new Subsection B and redesignated former Subsections B through D as Subsections C through E, respectively; in Subsection C, Paragraph C(1), after "one ounce or less of", deleted "marijuana or", in Paragraph C(2), after "less than eight ounces of", deleted "marijuana or", in Paragraph C(3), after "eight ounces or more of", deleted "marijuana or"; and in Subsection E, after "Except", added "as provided in Subsections B, C and G of this section, and", and after "listed in Subsection", deleted "E" and added "F".

The 2011 amendment, effective March 31, 2011, made it a crime to possess synthetic cannabinoids and added Subsection C to make it a crime for a minor to possess synthetic cannabinoids, other synthetic drugs and substances added to Schedule I by the board of pharmacy.

The 2005 amendment, effective June 17, 2005, provided in Subsection D that it is a fourth degree felony to violate this section with respect to flunitrazepam, gamma hydroxybutyric acid and gamma butyrolactone, 1-4 butane diol; added Subsections E (1) through (5) to provide penalties for violations of Subsection A of this section in posted drug-free school zones, excluding certain private residential property and motor vehicles, with respect to the listed substances.

The 1990 amendment, effective July 1, 1990, substituted "or" for "and" at the end of Paragraph (2) of Subsection B, deleted former Paragraph (4) of Subsection B pertaining to violations with respect to specific controlled substances and providing a penalty, added Subsection C, redesignated former Paragraph (5) of Subsection B as Subsection D, and rewrote the provision which read "phencyclidine as enumerated in Schedule III a narcotic drug enumerated in Schedule I or II or a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in

Schedule I or II, is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.".

The 1989 amendment, effective July 1, 1989, inserted "or a controlled substance analog of phencyclidine" in Subsection B(4) and "or a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II" in Subsection B(5); and made minor stylistic changes throughout Subsection B.

I. GENERAL CONSIDERATION.

Jury unanimity as to the form of cocaine involved in a lesser included offense of possession was not required. — Where police officers found crack cocaine in defendant's vehicle and powder cocaine that belonged to defendant in the vehicle of defendant's friend; defendant was charged with one count of trafficking and one count of the lesser included offense of possession; the jury found defendant guilty of possession of cocaine; defendant claimed that there were two substances at issue and that the trial court failed to instruct the jury that any conviction of possession had to be based on the same substance considered by the jury for the trafficking offense; the state's theories of possession were based on the crack cocaine found in defendant's vehicle and the powder cocaine found in the friend's vehicle; and witnesses testified that a lab analysis does not distinguish between crack cocaine and powder cocaine and that both forms of cocaine were in quantities large enough to qualify for a count of trafficking, jury unanimity was not required as to the specific form of cocaine involved, jury unanimity was required only on the overall verdict. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Section is within scope of state's power and is valid on its face. *Yanez v. Romero*, 619 F.2d 851 (10th Cir.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980).

Possession of heroin deemed felony under Habitual Offender Act. — When a federal conviction is had in New Mexico upon a purchase of heroin in New Mexico, the "purchase" of heroin necessarily includes the actual or constructive "possession" of heroin, and actual or constructive possession of heroin is a felony under the laws of New Mexico for purposes of the Habitual Offender Act. *State v. Montoya*, 1980-NMSC-093, 94 N.M. 704, 616 P.2d 417.

Habitual offender law inapplicable. — Since the legislature intended an enhanced penalty to apply to a violation of the Controlled Substances Act it so provided within the act, the legislature did not intend that the habitual offender law was to apply to second or subsequent violations of Subsection B(5) (now D) of this section. *State v. Alderete*, 1975-NMCA-080, 88 N.M. 150, 538 P.2d 422.

Comparison not warranted. — Former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) was completely lacking in any legislative direction as to procedures in the event of

second or subsequent convictions, and a comparison between the Narcotic Drug Act and former habitual criminal law was of no value. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214.

Due process certainty. — The language of definitional Section 30-31-20 NMSA 1978 (now 30-31-2N NMSA 1978), referring to all parts of the cannabis plant whether growing or not, coupled with Subsection B(3) of this section, is not so indefinite that men of common intelligence must guess at its meaning and scope. *State v. Olive*, 1973-NMCA-131, 85 N.M. 664, 515 P.2d 668, cert. denied, 85 N.M. 639, 515 P.2d 643.

Equal protection. — Fact that the Controlled Substances Act does not specifically state when weighing of marijuana is to be done does not mean that Subsection B(3) of this section, as applied to defendant convicted of possession of more than eight ounces of "green" marijuana, was a violation of his rights to equal protection since it was the possession of marijuana, on the date of the offense, which was the prohibited act and not the amount in some subsequent form suitable to a particular defendant. *State v. Olive*, 1973-NMCA-131, 85 N.M. 664, 515 P.2d 668, cert. denied, 85 N.M. 639, 515 P.2d 643.

Due process requirements in sentence enhancement. — To meet due process requirements of essential fairness in sentencing defendant for a second drug offense, there must be some pleading filed by the state, whether by motion or otherwise, by which defendant is given notice of the state's charges, and defendant must be given an opportunity to be heard on the charges before an increased penalty can be imposed. *State v. Rhodes*, 1966-NMSC-064, 76 N.M. 177, 413 P.2d 214.

Title constitutionally adequate. — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Standing to challenge section. — Defendant's contention that this section violated his constitutional rights because he was a narcotic addict, where there was no evidence that he was an addict, was without merit. *State v. Jaramillo*, 1975-NMCA-091, 88 N.M. 179, 538 P.2d 1201.

Marijuana use not intrinsic part of religion. — Where the evidence shows that defendant's belief was derived from defendant's personal views of the bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. *State v. Brashear*, 1979-NMCA-027, 92 N.M. 622, 593 P.2d 63.

Possession of narcotics, not addiction can be subject of prosecution. — Addiction is a disease which cannot be the subject of prosecution under the eighth and fourteenth

amendments of the United States constitution: possession of narcotics as a crime is valid and distinguishable. *Yanez v. Romero*, 619 F.2d 851 (10th Cir.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980).

Legal to search defendant admitting "dope" possession. — Once the defendant voluntarily made the statement that there was "dope" in his pocket, a police officer had probable cause to believe that a crime was being committed, specifically, possession of a controlled substance. This provided a proper legal foundation for both a full search and the actual arrest of the defendant. *State v. Blakely*, 1993-NMCA-053, 115 N.M. 466, 853 P.2d 168, cert. denied, 115 N.M. 535, 854 P.2d 362.

II. ELEMENTS OF POSSESSION.

Possession. — Mere proximity to illegal drugs, mere presence on the property where they are located, or mere association with persons who do control them, without more, is insufficient to support a finding of possession. *United States v. Espinosa*, 771 F.2d 1382 (10th Cir.), cert. denied, 474 U.S. 1023, 106 S.Ct. 579, 88 L. Ed. 2d 561 (1985).

Possession and tampering distinguished. — Possession of a controlled substance requires proof defendant knew or believed it was cocaine or some other substance that is regulated, which is not required to prove tampering, while tampering with evidence requires proof defendant intended to prevent the apprehension, prosecution or conviction of herself or others, which is not required to prove possession. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Possession of a controlled substance can be committed without tampering with evidence. Conversely, tampering with evidence, even if the evidence is illegal drugs, can be committed without possessing the drugs. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

Prohibition of "use" not vague. — Former section prohibiting "unlawful use" of marijuana was not unconstitutionally vague, since all use of marijuana not falling within a stated exception was made unlawful. *State v. Covens*, 1971-NMCA-141, 83 N.M. 175, 489 P.2d 888 (decided under prior law).

Meaning of "eight ounces". — Weight of eight ounces mentioned in Subsection B(3) of this section means the weight of the plant, or the plant's derivative products, weighed in the form seized, whether that form be the green plant, the dried plant or the various products which may be derived from the plant. *State v. Olive*, 1973-NMCA-131, 85 N.M. 664, 515 P.2d 668, cert. denied, 85 N.M. 639, 515 P.2d 643.

Intent required. — Under 54-5-16, 1953 Comp. (now repealed), an intent to possess anhalonium (peyote) was required for conviction. *State v. Pedro*, 1971-NMCA-145, 83 N.M. 212, 490 P.2d 470 (decided under prior law, statute repealed).

Locus of offense jurisdictional. — Since state in prosecution for unlawful use of heroin failed to establish where defendant used the narcotic, an essential element of the offense charged, this jurisdictional error would be raised sua sponte by the appellate court and defendant's conviction reversed for failure of proof. *State v. Losolla*, 1972-NMCA-085, 84 N.M. 151, 500 P.2d 436.

Possession coupled with knowledge. — The state must prove that defendant had physical or constructive possession, coupled with knowledge of the presence and narcotic character of the substance possessed. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649; *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411; *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471; *State v. Maes*, 1970-NMCA-053, 81 N.M. 550, 469 P.2d 529, cert. denied, *sub nom*. *State v. Felix*, 81 N.M. 588, 470 P.2d 309 (1970).

Possession means care, control and management on the occasion in question. *State v. Mosier*, 1971-NMCA-138, 83 N.M. 213, 490 P.2d 471; *State v. Maes*, 1970-NMCA-053, 81 N.M. 550, 469 P.2d 529, cert. denied, *sub nom*. *State v. Felix*, 81 N.M. 588, 470 P.2d 309 (1970).

Constructive possession defined. — Constructive possession exists when the accused has knowledge of the presence of the narcotic and control over it. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Montoya*, 1973-NMCA-060, 85 N.M. 126, 509 P.2d 893.

Exclusive possession is not required to support a conviction. *State v. Favela*, 1968-NMCA-065, 79 N.M. 490, 444 P.2d 1001.

III. DOUBLE JEOPARDY.

Subsection A of this section defines the unit of prosecution for a person in simultaneous possession of each distinct controlled substance. — Where defendant was a passenger in a vehicle that was the subject of a traffic stop, during which it was revealed that defendant had an outstanding warrant for her arrest, and where, during a search incident to arrest and an inventory search of the vehicle, the officer found a clear bag containing a substance that tested positive for heroin, a bag containing a substance that tested positive for methamphetamine, and a clear glass pipe, and where defendant was charged with two counts of possession of a controlled substance, one for possession of heroin and one for possession of methamphetamine, and where the district court, prior to trial, granted defendant's motion to dismiss the second count of possession of a controlled substance, finding that defendant can only be charged with one count of possession, concluding that § 30-31-23 NMSA 1978 does not define the unit of prosecution and defendant's acts of possession were not sufficiently distinct to support two charges, the district court erred in finding that § 30-31-23 does not define the unit of prosecution, because the plain language of § 30-31-23(A) defines the unit of prosecution for a person in simultaneous possession of each distinct

controlled substance. Defendant's separate charges for the simultaneous possession of two distinct controlled substances did not violate defendant's double jeopardy rights. *State v. Garcia*, 2022-NMCA-051, cert. denied.

Possession of methamphetamine and possession of drug paraphernalia . — The legislature did not intend to punish a defendant for possession of a controlled substance and possession of paraphernalia when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance and where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant’s conviction of possession of drug paraphernalia violated double jeopardy. *State v. Almeida*, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

Possession of a controlled substance and possession of drug paraphernalia. — Where police responded to a report that someone was trying to kick in the door of an apartment and encountered defendant at the scene, apparently agitated and yelling loudly, and where, after placing defendant under arrest for disorderly conduct, the officers found a clear glass pipe containing a white crystalline residue, which later tested positive for methamphetamine, in defendant’s left front pocket, and where defendant claimed that his convictions for possession of a controlled substance and possession of drug paraphernalia based on unitary conduct violate double jeopardy, the fact that defendant’s convictions required proof of distinct elements, knowing possession of methamphetamine versus possession of paraphernalia with the intent to use it, gave rise to the presumption that the legislature intended to punish the offenses separately, and defendant failed to overcome this presumption. *State v. Moncayo*, 2022-NMCA-067, cert. granted.

Lesser included offense. — The separate crimes of possession of methamphetamine and possession of methamphetamine with intent to distribute apply in the alternative when based on a single act of possession. *State v. Quick*, 2009-NMSC-015, 146 N.M. 80, 206 P.3d 985.

Possession of methamphetamine is a lesser included charge of possession with intent to distribute methamphetamine and a conviction of both charges when defendant’s conduct was unitary is a violation of double jeopardy. *State v. Lopez*, 2008-NMCA-002, 143 N.M. 274, 175 P.3d 942, cert. denied, 2008-NMCERT-007, 144 N.M. 593, 189 P.3d 1215.

Possession is lesser offense necessarily included in distribution of marijuana. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

Distribution prosecution barred by conviction of possession. — The possession of marijuana was a lesser offense necessarily included in the greater offense of distribution of marijuana, and since the defendant was convicted of the lesser offense, the principles of double jeopardy barred the subsequent prosecution of the greater offense. *State v. Medina*, 1975-NMCA-033, 87 N.M. 394, 534 P.2d 486.

Retrial for possession barred. — Since two counts were 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 was to disregard the possession count if it found defendant guilty of the latter offense operated as an acquittal on the possession count and prevented retrial of this issue when the verdict on possession with intent to distribute was overturned. *State v. Moreno*, 1961-NMSC-070, 69 N.M. 113, 364 P.2d 594.

No double jeopardy violation. — Convictions for possession of cocaine and tampering with evidence did not violate defendant's double jeopardy rights. *State v. Franco*, 2005-NMSC-013, 137 N.M. 447, 112 P.3d 1104.

IV. EVIDENCE AND PROOF.

Authentication of substance as cocaine by lay testimony. — Where defendant was charged with trafficking and the lesser included offense of possession of cocaine; the state failed to present a laboratory analysis authenticating the substance found in defendant's vehicle as crack cocaine; when arrested, defendant raised the inference that the substance was an illegal narcotic by telling the arresting police officers that defendant was the user and that the substance was for defendant's personal use; three officers testified that the substance field tested for the presence of cocaine; one officer testified that the result of the test was positive; and two officers testified that based on their experience and training, the substance had the appearance of crack cocaine, the officers' opinions, combined with the actions and statements of defendant, provided sufficient evidence to support the admissibility of the crack cocaine into evidence. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Field drug test. — The state has the burden to establish the validity of the scientific principles on which a field drug test is based and its scientific reliability when the state elects to rely on a field test to prove the identity of contraband. The testimony by a law enforcement officer will not, without more, be sufficient to support admission of the results, when the officer cannot explain the scientific principles that the test uses, the percentage of false positives or negatives that the test will produce, or the factors that may produce those false results. The state can avoid admissibility problems altogether by using a competent laboratory to identify the substance at issue. *State v. Morales*, 2002-NMCA-052, 132 N.M. 146, 45 P.3d 406, cert. denied, 132 N.M. 193, 46 P.3d 100.

A. IN GENERAL.

Testimony concerning a forensic laboratory report. — Where the court admitted a forensic laboratory report that a substance was cocaine; the report was admitted into evidence through the testimony of a forensic chemist who did not conduct the tests underlying the report; the witness's testimony was an explanation regarding how the test was performed and the witness's approval of the testing chemist's results; there was nothing in the witness's testimony indicating that the witness relied on the witness's own analysis to arrive at the witness's own conclusions; the only other evidence that the

substance was cocaine was the testimony of a police officer who performed a field test on the substance; and the state failed to prove the scientific reliability of the field test, the admission of the laboratory report and the witness's testimony regarding the testing chemist's opinion was error, the error was not harmless, and the error violated defendant's right of confrontation. *State v. Delgado*, 2010-NMCA-078, 148 N.M. 870, 242 P.3d 437, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611, on remand of 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert granted, 2009-NMCERT-006, 146 N.M. 733, 215 P.3d 42.

Chain of custody. — Where, during a search incident to arrest, the arresting police officer found on defendant a plastic "bindle" containing a white crystalline substance which the officer recognized as methamphetamine; the arresting officer observed another officer perform a presumptive field test on the substance; the arresting officer took the substance into evidence and transferred the substance to an evidence technician who sent the substance to the sate laboratory; an analyst in the drug analysis unit obtained the evidence from the laboratory's evidence custodian; the analyst performed two tests on the evidence and concluded that the substance was methamphetamine; the analyst sealed the evidence so that it would be apparent if any one tried to tamper with or alter it and returned the evidence to the evidence custodian, there was sufficient evidence to support the verdict that the substance seized from defendant was the same substance that was tested by the state laboratory and determined to be methamphetamine. *State v. Rodriguez*, 2009-NMCA-090, 146 N.M. 824, 215 P.3d 762, cert. denied, 2009-NMCERT-007, 147 N.M. 361, 223 P.3d 358.

Purchaser not guilty of solicitation to traffic. — Even though the defendant's actions in negotiating for the purchase of drugs fall within the definition of criminal solicitation, his conduct was necessarily incidental to the crime of trafficking through the sale of a controlled substance and he could not be guilty of solicitation to traffic. *State v. Pinson*, 1995-NMCA-045, 119 N.M. 752, 895 P.2d 274.

Proof of possession of controlled substance may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting the defendant with the crime. *State v. Donaldson*, 1983-NMCA-064, 100 N.M. 111, 666 P.2d 1258, cert. denied, 100 N.M. 53, 665 P.2d 809.

Evidence of possession. — When an accused is not in exclusive possession of the places in which an illegal substance is found, the state is required to prove that the accused knew the substance was there and that the accused exercised control over it. *State v. Morales*, 2002-NMCA-052, 132 N.M. 146, 45 P.3d 406, cert. denied, 132 N.M. 193, 46 P.3d 100.

Direct proof unnecessary. — Proof of possession with knowledge of narcotic character need not be by direct or uncontradicted evidence. *State v. Garcia*, 1966-NMSC-063, 76 N.M. 171, 413 P.2d 210, *overruled on other grounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Trace amount not sufficient to infer knowledge. — The presence of a trace amount of cocaine in a cellophane cigarette wrapper carried in defendant's pocket was not, by itself, sufficient to establish that defendant had knowledge of the substance or that the substance was cocaine. *State v. Reed*, 1998-NMSC-030, 125 N.M. 552, 964 P.2d 113.

Conduct permitting inference of guilt. — Evidence sufficient to support a violation of this section must be such as discloses some conduct, declarations or actions on the part of the accused from which the fact finder may fairly infer and which is sufficient to satisfy it beyond a reasonable doubt of knowledge in the accused of the presence and nature of the narcotics. *Doe v. State*, 1975-NMCA-108, 88 N.M. 347, 540 P.2d 827, cert. denied, 88 N.M. 318, 540 P.2d 248; *State v. Garcia*, 1966-NMSC-063, 76 N.M. 171, 413 P.2d 210, *overruled on other grounds by State v. Gomez*, 1997-NMSC-006, 122 N.M. 777, 932 P.2d 1.

Proving knowing possession. — To show knowing possession of narcotics, the conduct and behavior of the parties, their admissions or contradictory statements and explanations are frequently sufficient; possession and knowledge that object is a narcotic drug can also be proven circumstantially. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

Right to control. — An accused has constructive possession when he maintains control or a right to control the contraband. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

Power to produce or dispose is evidence of control. *State v. Montoya*, 1973-NMCA-060, 85 N.M. 126, 509 P.2d 893.

Insufficiency of positive drug test by itself. — The common law rule in New Mexico requires additional proof of an intentional or knowing prior possession corroborating a positive drug test before a defendant can be charged and convicted of possession of a controlled substance; while a positive drug test might be circumstantial evidence of possession, it is insufficient, standing alone, to convict for that crime. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom*. *State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

No burden on state to negate plant maturity. — In prosecution for possession, the state was not required to expressly prove that substance identified as marijuana was not the mature stalk. *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, 424 P.2d 787, cert. denied, sub nom. Greene v. United States, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Failure to prove plant maturity is fatal. — Since the state's expert witness was unable to say whether the substance he tested was cannabis indica or cannabis sativa L., and could only identify it as mature stalk of some kind of cannabis, possession of which mature stalk did not constitute a violation of the statute under which the state had elected to proceed, defendant's conviction for possession of marijuana would be

reversed. *State v. Benavidez*, 1962-NMSC-137, 71 N.M. 19, 375 P.2d 333 (decided under prior law).

Evidence of predisposition. — In view of evidence that defendant, a heroin addict, had been brought off methadone rapidly when a methadone maintenance program was closed, that he encountered a waiting requirement for entry into a different methadone program, during which time he contacted his former heroin supplier (now an informer) who supplied him with heroin, and that defendant being utterly without funds, the two arranged a marijuana transaction during the course of which defendant was arrested, subsequently being convicted of unlawful possession, the jury could reasonably have believed that the parties pooled their thoughts to plan a criminal enterprise in which the defendant was predisposed to participate. *State v. Fiechter*, 1976-NMSC-006, 89 N.M. 74, 547 P.2d 557.

Entrapment for the jury. — Evidence that defendant had previously been involved in "hauling" marijuana, that he had furnished informer with LSD in the past and that he himself had taken drugs went toward defendant's predisposition to commit the crime and bore on the credibility of his testimony that representations by informer involving thereto and violence were the inducing cause of the crime (possession of LSD); and since there were conflicts on the entrapment issue, the trial court properly refused to rule there was entrapment as a matter of law. *State v. Sena*, 1971-NMCA-044, 82 N.M. 513, 484 P.2d 355.

"Ingestion" not possession. — The mere presence of drugs in the urine or bloodstream does not constitute possession. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom*. *State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

To convict the defendant of possession of cocaine that he had ingested, it is necessary to prove that he voluntarily and knowingly ingested the drug in New Mexico. *State v. Franks*, 1994-NMCA-097, 119 N.M. 174, 889 P.2d 209.

Possession through ingestion. — The defendant's statement that he took cocaine was probative of the offense since the fact that he thought that cocaine was present in his body tended to establish that: (1) cocaine was present in his body, (2) he knew that it was cocaine when he ingested it, and (3) the ingestion was voluntary. *State v. Franks*, 1994-NMCA-097, 119 N.M. 174, 889 P.2d 209.

Evidence sufficient for conviction includes any clearly identifiable amount of controlled substances. *State v. Wood*, 1994-NMCA-060, 117 N.M. 682, 875 P.2d 1113, cert. denied, 117 N.M. 744, 877 P.2d 44.

Evidence not inherently improbable. — Testimony in prosecution for unlawful sale and possession of marijuana was not inherently improbable despite fact that defendant was claimed to have insisted on delivering the cigarettes in question in the restroom where only he and undercover officer were present, yet afterwards supposedly received

the money for the transaction and discussed other possible dealings in a car in the presence of several other persons. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

Prejudicial hearsay. — Testimony by undercover officer that defendant's name had been called to his attention by local officers as a person allegedly dealing in marijuana was clearly hearsay and clearly prejudicial and necessitated reversal of her conviction for possession of marijuana. *State v. Alberts*, 1969-NMCA-064, 80 N.M. 472, 457 P.2d 991.

B. CIRCUMSTANTIAL EVIDENCE.

Inference of possession permissible from exclusive possession. — When one has exclusive possession of a home or apartment in which narcotics are found, it may be inferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

Nonexclusive possession distinguished. — When a person is not in exclusive possession of premises, it may not be inferred that he knew of the presence of the marijuana (or narcotics) or had control over same unless there are some other incriminating circumstances or statements tending to buttress such an inference. *State v. Bidegain*, 1975-NMCA-065, 88 N.M. 384, 540 P.2d 864, *rev'd in part on other grounds*, 1975-NMSC-060, 88 N.M. 466, 541 P.2d 971; *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085; *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

Since defendant's wife resided with him, he was not in exclusive possession of the premises, and an inference of constructive possession could not be drawn against him unless there were incriminating statements or circumstances tending to support the inference. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

Possession of agent. — An accused has constructive possession of narcotics found in the physical possession of his agent or any other person when the defendant has the immediate right to exercise dominion and control over the narcotics. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

Constructive possession shown. — Where police officers found crack cocaine in defendant’s vehicle and powder cocaine in the vehicle of defendant’s friend; and defendant’s friend testified that the powder cocaine belonged to defendant and that the friend had agreed to transport the powder cocaine to defendant’s house and to take the blame if they were caught, the evidence was sufficient to prove that defendant constructively possessed the powder cocaine found in the vehicle of defendant’s friend because defendant knew or believed that the substance was cocaine and defendant

knew where the cocaine was located and exercised control over it. *State v. Godoy*, 2012-NMCA-084, 284 P.3d 410, cert. denied, 2012-NMCERT-007.

Finding of numerous unused tinfoils inside the house occupied by defendant and his wife and fact that on the way to the police station, when defendant's wife remarked that the police got everything that "we had," defendant told his wife to keep her mouth shut, were sufficient to sustain the inference that defendant constructively possessed the heroin that was found outside. *State v. Herrera*, 1977-NMCA-028, 90 N.M. 306, 563 P.2d 100, cert. denied, 90 N.M. 636, 567 P.2d 485.

A showing that heroin was found in the bathroom of the master bedroom usually occupied by defendant and his wife, that defendant was a former heroin addict who for the last three years had been undergoing methadone treatments and according to his own testimony took methadone daily and that the wife claimed to have never seen heroin and other items before and not to know what they were used for, constituted substantial evidence of defendant's constructive knowledge and possession of the heroin. *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649.

Evidence was sufficient to find that defendant constructively possessed an eyeglass case left under patrol car seat by his wife, knowing it contained heroin, where it took defendant three blocks to stop his car for the police, various parts of the fix kit were found in the car trunk and in the eyeglass case, including a syringe with defendant's fingerprint, his wife's purse held squares of tinfoil and there were fresh needle marks on defendant's arm. *State v. Bauske*, 1974-NMCA-078, 86 N.M. 484, 525 P.2d 411.

There was sufficient evidence to show constructive possession of controlled substance with knowledge thereof where defendant was in possession of a motel room for six days before a legal search of that room revealed heroin. *State v. Montoya*, 1973-NMCA-060, 85 N.M. 126, 509 P.2d 893.

Constructive possession of cocaine was shown based on evidence that the defendant owned and had control of the car she was traveling in with her daughter, the daughter had cocaine concealed on her person, the daughter was easily influenced to do wrong, and the defendant insisted that police arrest her instead of her daughter. *State v. Hernandez*, 1997-NMCA-006, 122 N.M. 809, 932 P.2d 499.

Even though defendant did not have exclusive possession of the bedroom where drugs and paraphernalia were discovered, physical evidence and her own incriminating statements rationally supported the necessary inferences to find her guilty of criminal possession. *State v. Phillips*, 2000-NMCA-028, 128 N.M. 777, 999 P.2d 421, cert. denied, 128 N.M. 689, 997 P.2d 821.

C. SUFFICIENCY OF EVIDENCE.

Substantial evidence of possession. — Where the defendant was bent down behind a fence; when police officers approached, the defendant stood up and walked toward a shed; the defendant did not stop when the officers called out to the defendant; the defendant's body movements appeared as if the defendant had disposed of something; the defendant then walked back to the officers; the officers found a bag of cocaine in front of the shed; and when the cocaine was found, the defendant placed the defendant's hands behind the defendant's back and turned around without any request by the officers, there was sufficient evidence that the defendant had consecutive possession of the cocaine. *State v. Delgado*, 2009-NMCA-061, 146 N.M. 402, 210 P.3d 828, cert. granted, 2009-NMCERT-006, 146 N.M. 734, 215 P.3d 43, remanded, 2010-NMCA-078, 148 N.M. 870, 242 P.3d 437, cert. denied, 2010-NMCERT-007, 148 N.M. 610, 241 P.3d 611.

Place of possession. — Defendant's conviction for possession of cocaine warranted reversal since there was insufficient evidence to prove that the drugs were actually possessed and ingested in New Mexico, although the defendant's urine tested positive for cocaine. *State v. McCoy*, 1993-NMCA-064, 116 N.M. 491, 864 P.2d 307, *rev'd in part on other grounds sub nom*. *State v. Hodge*, 1994-NMSC-087, 118 N.M. 410, 882 P.2d 1.

Sufficient evidence. — Where police officers testified that they found a glass pipe containing a white substance in the center console of the vehicle defendant was driving and subsequent forensic testing revealed that the substance was methamphetamine, the circumstantial evidence was sufficient to establish that defendant possessed or constructively possessed the methamphetamine and the pipe and to permit the jury to infer that defendant knew that the substance was methamphetamine and that defendant intended to use the pipe to inhale methamphetamine. *State v. Lopez*, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-010, 147 N.M. 452, 224 P.3d 1257.

A trace amount of a controlled substance is sufficient to support a conviction for possession. — Where police responded to a report that someone was trying to kick in the door of an apartment and encountered defendant at the scene, apparently agitated and yelling loudly, and where, after placing defendant under arrest for disorderly conduct, the officers found a clear glass pipe containing a white crystalline residue, which later tested positive for methamphetamine, in defendant's left front pocket, and where defendant challenged the sufficiency of evidence of a trace amount of a controlled substance found inside a glass pipe to support a conviction for possession of methamphetamine, there was sufficient evidence to support defendant's conviction, because the legislature intended possession of any amount of a controlled substance to violate, § 30-31-23(E) NMSA 1978, and the state's evidence conclusively established that defendant was in possession of a clear glass pipe containing the white crystalline residue that proved to be methamphetamine. Moreover, defendant's possession of a glass pipe in his pocket, with a visible white residue inside the pipe, was sufficient to create a reasonable inference that defendant knew that the residue was a controlled substance. *State v. Moncayo*, 2022-NMCA-067, cert. granted.

Substantial evidence of possession. — Evidence that a voice identified as female defendant's responded to the officers' knock, that thereafter running was heard from the front portion of the trailer to the vicinity of the trailer in which the bathrooms were located, that the toilet was flushed and heroin was recovered therefrom immediately thereafter, and that upon entry the officers found the defendant standing in a location consistent with her having been the person who flushed the toilet, along with evidence that the other occupants of the trailer were infants and young children, two sleeping adults and another adult in the living room, was substantial and supported defendant's conviction for possession of heroin. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

Sufficient evidence of possession of controlled substances. — Where defendant was arrested for driving on a revoked license, and where the arresting officer found on defendant’s person ninety-seven empty small baggies and a straw with a burnt end, items which are commonly used to package methamphetamine, a small plastic bag with a white powdery substance, later identified as methamphetamine, and found in defendant’s vehicle three additional baggies that contained what was identified in a field test as methamphetamine, there was sufficient evidence for the jury to find defendant guilty beyond a reasonable doubt of possession of methamphetamine. *State v. Tidey*, 2018-NMCA-014, cert. denied.

Sufficient evidence of possession of methamphetamine. — Evidence that the arresting officer discovered methamphetamine in a pack of cigarettes removed from defendant’s shirt pocket was sufficient to support defendant’s conviction for possession of controlled substances. *State v. Howl*, 2016-NMCA-084, cert. denied.

Sufficiency of evidence. — Evidence that defendant knowingly transferred a forged prescription was sufficient to sustain a conviction for knowingly possessing the drug involved. *State v. Nation*, 1973-NMCA-087, 85 N.M. 291, 511 P.2d 777.

Appellant's acts of purchasing the cigarettes, receiving actual delivery thereof and then distributing them amply supported the conclusion that he had marijuana in his possession, as such term was defined in the instructions. *State v. Romero*, 1968-NMCA-078, 79 N.M. 522, 445 P.2d 587.

Sufficient evidence of joint dominion and control of drugs and drug paraphernalia. — Where defendant was charged with homicide by vehicle (driving while under the influence of drugs), causing great bodily injury (driving while under the influence of drugs), possession of drug paraphernalia, and possession of marijuana following a car collision in which defendant was the driver and where defendant's passenger, the owner of the vehicle that defendant was driving, was killed and another driver was severely injured, and where investigators discovered marijuana and drug paraphernalia in the vehicle defendant was driving, and where defendant implied that the evidence was equally consistent with his passenger possessing the marijuana or others having deposited the marijuana in the vehicle, there was sufficient evidence to permit a rational jury to conclude beyond a reasonable doubt that defendant possessed

the marijuana based on evidence that the marijuana and drug paraphernalia were in a location subject to the joint dominion and control of defendant and his passenger, and witness testimony that the marijuana leaves and drug paraphernalia were in the vehicle prior to police arriving on the scene. *State v. Martinez*, 2020-NMCA-043, cert. denied.

Evidence of possession insufficient. — Evidence that one defendant was in bed asleep when the officers entered the trailer, that plastic baggie tops were found on top of the commode in the bathroom off the bedroom where he was sleeping and that after his arrest defendant asked another man in the trailer to do him an unidentified favor was insufficient to sustain his conviction for possession of heroin flushed down a toilet by someone in the trailer. *State v. Anaya*, 1976-NMCA-055, 89 N.M. 302, 551 P.2d 992.

Since there was no evidence that female defendant had any control over the keys to the car in which she was riding or to the footlockers in its trunk, or that she had any knowledge whatsoever of the contents of the car trunk, it was held that the evidence relied upon to sustain her conviction was totally insubstantial. *State v. Bidegain*, 1975-NMCA-065, 88 N.M. 384, 540 P.2d 864, *rev'd in part on other grounds*, 1975-NMSC-060, 88 N.M. 466, 541 P.2d 971.

Where the only evidence concerning cocaine was that some was found in a vial in a box on the coffee table of the main room of defendants' house, and there was no testimony that any of the defendants knew of the contents of the vial or of its character, nor evidence that any of the defendants had the power to produce or dispose of the narcotic in question, nor any evidence that the defendants had any common purpose in the cocaine which was found, the trial court erred in finding that there was sufficient evidence to convict the defendants for possession of cocaine. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300, cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Insufficient evidence that substance was synthetic cannabinoid. — Where defendant was arrested and charged with a single count of possession of synthetic cannabinoids, and where defendant claimed that there was insufficient evidence to support his conviction because the state failed to meet its burden of proving that the substance in his possession was a synthetic cannabinoid, there was insufficient evidence to support defendant’s conviction where the state failed to introduce evidence that scientific testing was ever done to determine what chemicals were present in or applied to the substance found in defendant’s possession, and therefore could not prove that the substance contained a chemical that falls either into one of the classes of chemicals listed in a statute or regulation or within the neurochemical definition of synthetic cannabinoid. *State v. Arias*, 2018-NMCA-057.

Ignorance of nature of substance. — Evidence that defendant, an Arapahoe Indian, after treatment for illness by an "Indian doctor," was given "medicine" to carry on his person as "protection," which medicine, unknown to defendant, was anhalonium (or peyote), could not support a conviction for possession of the substance. *State v. Pedro*, 1971-NMCA-145, 83 N.M. 212, 490 P.2d 470.

Knowledge not shown. — A degree of furtiveness on the part of juveniles in smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to infer that the smokers knew the character of the substance they were using. *Doe v. State*, 1975-NMCA-108, 88 N.M. 347, 540 P.2d 827, cert. denied, 88 N.M. 318, 540 P.2d 248.

Testimony of a single witness was sufficient evidence for a conviction of unlawful possession and sale of marijuana. *State v. Soliz*, 1969-NMCA-043, 80 N.M. 297, 454 P.2d 779.

V. INDICTMENT AND INFORMATION.

Information and proof not variant. — Information charging defendant with unlawful possession of "certain narcotic drugs, to-wit, cannabis indica, also known as marijuana" was not at fatal variance with proof of possession of leaves and seeds of "marijuana," despite fact that there was no testimony identifying the substance by true botanical name or referring to its chemical breakdown or grouping. *State v. Romero*, 1964-NMSC-245, 74 N.M. 642, 397 P.2d 26.

Law reviews. — For note and comment, "State v. Urioste: A Prosecutor's Dream and Defender's Nightmare," see 34 N.M. L. Rev. 517 (2004).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 179, 181, 187, 188, 191.

Conviction of possession of illicit drugs found in premises of which defendant was not in exclusive 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.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 A.L.R.3d 225.

Minimum quanity of drug required to support claim that defendant is guilty of criminal "possession" of drug under state law, 4 A.L.R.5th 1.

Sufficiency of random sampling of drug or contraband to establish jurisdictional amount required for conviction, 45 A.L.R.5th 1.

Drug abuse: what constitutes illegal constructive possession under 21 USCS § 841(a)(1), prohibiting possession of a controlled substance with intent to manufacture, distribute, or dispense the same, 87 A.L.R. Fed. 309.

Under what circumstances should total weight of mixture or substance in which detectable amount of controlled substance is incorporated be used in assessing sentence under United States sentencing guideline § 2D1.1 - post-*Chapman* cases, 113 A.L.R. Fed. 91.

28 C.J.S. Drugs and Narcotics § 166 et seq.

30-31-24. Controlled substances; violations of administrative provisions.

A. It is unlawful for any person:

(1) who is subject to Sections 30-31-11 through 30-31-19 NMSA 1978 to intentionally distribute or dispense a controlled substance in violation of Section 30-31-18 NMSA 1978;

(2) who is a registrant, to intentionally manufacture a controlled substance not authorized by his registration, or to intentionally distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Controlled Substances Act; or

(4) to intentionally refuse an entry into any premises for any inspection authorized by the Controlled Substances Act.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-24, enacted by Laws 1972, ch. 84, § 24; 1974, ch. 9, § 5; 1980, ch. 23, § 5.

ANNOTATIONS

Title of act constitutionally adequate. — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the ground that "unlawful activities" are not mentioned in the title of the act. *State v.*

Atencio, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 76, 191, 206.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

28 C.J.S. Drugs and Narcotics § 101 et seq.

30-31-25. Controlled substances; prohibited acts.

A. It is unlawful for any person:

(1) who is a registrant to distribute a controlled substance classified in Schedules [Schedule] I or II, except pursuant to an order form as required by Section 30-31-17 NMSA 1978;

(2) to intentionally use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Controlled Substances Act, or any record required to be kept by that act; or

(5) to intentionally make, distribute or possess any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint or device of another or any likeness of any of the foregoing, upon any drug or container or labeling thereof so as to render the drug a counterfeit substance.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-25, enacted by Laws 1972, ch. 84, § 25; 1974, ch. 9, § 6; 1979, ch. 122, § 1; 1980, ch. 23, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For meaning of "counterfeit substance", *see* 30-31-2 NMSA 1978.

For forgery, *see* 30-16-10 NMSA 1978.

Title of act constitutionally adequate. — Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

Subsection A(3) is not impermissibly vague. — Subsection A(3) provides a person with fair warning of the nature of the proscribed act, and it is therefore not impermissibly vague. *State v. Mirabal*, 1989-NMCA-057, 108 N.M. 749, 779 P.2d 126, cert. denied, 108 N.M. 713, 778 P.2d 911.

Section 30-28-1 NMSA 1978 does not apply to attempts covered by Subsection A(3). — The legislature intended to punish attempts under Subsection A(3) specifically as felonies and consequently, Section 30-28-1 NMSA 1978 does not apply to such attempts covered by Subsection A(3). *State v. Mirabal*, 1989-NMCA-057, 108 N.M. 749, 779 P.2d 126, cert. denied, 108 N.M. 713, 778 P.2d 911.

Application of Subsection A(3) to a physician does not violate due process guarantees because effecting delivery through a prescription not for a legitimate medical purpose is prohibited as distribution or trafficking. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Subsection A(3) not more specific statute than Section 30-31-20 NMSA 1978. — A defendant charged with attempt to traffic cocaine under Section 30-31-20 NMSA 1978 was not entitled to be charged under Subsection A(3) of this section since the elements defined in both offenses are so distinct that the specific-statute doctrine had no application. *State v. Villalobos*, 1995-NMCA-105, 120 N.M. 694, 905 P.2d 732, cert. quashed, 121 N.M. 676, 916 P.2d 1343 (1996).

Proof of possession. — In a prosecution for violation of Subsection A(3), constructive possession requires no more than knowledge of a narcotic and control over it; control, in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981),

overruled on other grounds by State v. Olguin, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Constructive possession. — In addition to proof of defendant's knowledge of the presence and character of the item possessed, the state must show the immediate right to exercise dominion and control over the narcotics to establish constructive possession. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

By circumstantial evidence. — Proof of possession of a controlled substance may be through circumstantial evidence. *State v. Carr*, 1981-NMCA-029, 95 N.M. 755, 626 P.2d 292, cert. denied, 95 N.M. 669, 625 P.2d 1186, and cert. denied, 454 U.S. 853, 102 S. Ct. 298, 70 L. Ed. 2d 145 (1981), *overruled on other grounds by State v. Olguin*, 1994-NMCA-050, 118 N.M. 91, 879 P.2d 92, *aff'd in part*, 1995-NMSC-077, 120 N.M. 740, 906 P.2d 731.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 17, 19, 33, 130, 141, 191, 206.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 A.L.R.3d 288.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

28 C.J.S. Drugs and Narcotics § 117 et seq.

30-31-25.1. Possession, delivery or manufacture of drug paraphernalia prohibited; exceptions.

A. It is unlawful for a person to use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act. The provisions of this subsection do not apply to a person who is in possession of:

(1) hypodermic syringes or needles for the purpose of participation in or administration of the Harm Reduction Act [24-2C-1 to 24-2C-6 NMSA 1978];

(2) supplies or devices obtained pursuant to the Harm Reduction Act in accordance with rules established by the department of health for the harm reduction program; or

(3) supplies or devices used for the testing of controlled substances or controlled substance analogs for dangerous adulterants.

B. It is unlawful for a person to deliver, possess with intent to deliver or manufacture with the intent to deliver drug paraphernalia with knowledge, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act. The provisions of this subsection do not apply to:

(1) department of health employees or their designees while they are directly and immediately engaged in activities related to the harm reduction program authorized by the Harm Reduction Act; or

(2) the sale or distribution of hypodermic syringes and needles by pharmacists licensed pursuant to the Pharmacy Act [Chapter 61, Article 11 NMSA 1978].

C. A person who violates the provisions of Subsection A of this section shall be issued a penalty assessment pursuant to Section 31-19A-1 NMSA 1978 and is subject to a fine of fifty dollars ($50.00). A person who violates the provisions of Subsection B of this section is guilty of a misdemeanor.

D. A person eighteen years of age or over who violates the provisions of Subsection B of this section by delivering drug paraphernalia to a person under eighteen years of age and who is at least three years the person's junior is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1978 Comp., § 30-31-25.1, enacted by Laws 1981, ch. 31, § 2; 1997, ch. 256, § 7; 2001, ch. 189, § 1; 2019, ch. 217, § 2; 2022, ch. 4, § 4.

ANNOTATIONS

The 2022 amendment, effective May 18, 2022, provided that possession of certain harm reduction program supplies or devices is an exception to the prohibition of possession of drug paraphernalia; and in Subsection A, added new paragraph designation "(1)", and added new Paragraphs A(2) and A(3).

The 2019 amendment, effective July 1, 2019, decreased penalties for possession of drug paraphernalia; in Subsection C, after the first occurrence of "violates", deleted "this section with respect to" and added "the provisions of", after "Subsection A of this section", added "shall be issued a penalty assessment pursuant to Section 3 of this 2019 act and", and after "is", deleted "guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred

dollars ($100) or by imprisonment for a definite term less than one year, or both" and added "subject to a fine of fifty dollars ($50.00)".

The 2001 amendment, effective June 15, 2001, in the section heading, deleted "or delivery to a minor" following "manufacturer" and inserted "exceptions"; in Subsection B, inserted the Paragraph (1) designation and added Paragraph B(2).

The 1997 amendment, effective June 20, 1997, added the second sentences in Subsections A and B and, in Subsection C, deleted former paragraph designations at the beginning of the sentences and added "Any person who violates this section with respect to" at the beginning of the second sentence.

Double jeopardy. — The legislature did not intend to punish a defendant for possession of a controlled substance and possession of paraphernalia when the paraphernalia consists of only a container that is storing a personal supply of the charged controlled substance and where the defendant was convicted of possession of methamphetamine and possession of drug paraphernalia based on the possession of a baggie that held the methamphetamine, the defendant's conviction of possession of drug paraphernalia violated double jeopardy. *State v. Almeida*, 2008-NMCA-068, 144 N.M. 235, 185 P.3d 1085.

Separate convictions for possession of drug paraphernalia violated double jeopardy. — Where defendant was convicted of two counts of possession of drug paraphernalia, one based on his possession of over ninety small, plastic baggies and the second based on his possession of a red straw with a burnt end, both of which are commonly used to package methamphetamine, defendant's constitutional right to be free from double jeopardy was violated, because the evidence was seized from the same location and was intended for the same purpose, the packaging of methamphetamine, and there was no intervening act or any other factor that would distinguish defendant's act of possessing separate containers for holding the methamphetamine that was also found in defendant's possession. *State v. Tidey*, 2018-NMCA-014, cert. denied.

Sufficient evidence. — Where police officers testified that they found a glass pipe containing a white substance in the center console of the vehicle defendant was driving and subsequent forensic testing revealed that the substance was methamphetamine, the circumstantial evidence was sufficient to establish that defendant possessed or constructively possessed the methamphetamine and the pipe and to permit the jury to infer that defendant knew that the substance was methamphetamine and that defendant intended to use the pipe to inhale methamphetamine. *State v. Lopez*, 2009-NMCA-127, 147 N.M. 364, 223 P.3d 361, cert. denied, 2009-NMCERT-010, 147 N.M. 452, 224 P.3d 1257.

Sufficient evidence of possession of drug paraphernalia. — Sufficient evidence supported defendant's conviction for possession of drug paraphernalia where a reasonable jury could infer that defendant had knowledge of and control over drug

paraphernalia based on evidence that a glass pipe similar to those used to ingest methamphetamine was found in defendant's vehicle and methamphetamine was found on defendant's person. *State v. Howl*, 2016-NMCA-084, cert. denied.

Trafficking methamphetamine by manufacture and possession of drug paraphernalia. — Where the defendant was convicted of trafficking methamphetamine by manufacture for possession of items that could be used to manufacture methamphetamine and possession of drug paraphernalia for possession of items that could be used to consume methamphetamine and marijuana and where the items used to consume drugs were not necessary to manufacture methamphetamine, the defendant's conduct was not unitary and the defendant's convictions did not violate double jeopardy. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

Vehicle search without consent allowed. — Where police officer could have arrested defendant for possession of drug paraphernalia, the officer, therefore, is allowed to search defendant's vehicle without consent. United States v. Malouff, 114 Fed. Appx. 975 (10th Cir. 2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Validity, under Federal Constitution, of so-called "head shop" ordinances or statutes, prohibiting manufacture and sale of drug use related paraphernalia, 69 A.L.R. Fed. 15.

Validity and construction of Drug Paraphernalia Act (21 USCS § 863), 123 A.L.R. Fed. 637.

30-31-26. Penalties under other laws.

A. Any penalty imposed for violation of the Controlled Substances Act is in addition to any civil or administrative penalty or sanction otherwise provided by law.

B. A municipality may, by ordinance, prohibit distribution or possession of a controlled substance enumerated in Schedules I, II, III or IV but penalty provisions shall be the same as those provided for a similar crime in the Controlled Substances Act.

History: 1953 Comp., § 54-11-26, enacted by Laws 1972, ch. 84, § 26.

30-31-27. Bar to prosecution.

If a violation of the Controlled Substances Act is a violation of a federal law, the law of another state or the ordinance of a municipality, a conviction or acquittal under federal law, the law of another state or the ordinance of a municipality for the same act is a bar to prosecution.

History: 1953 Comp., § 54-11-27, enacted by Laws 1972, ch. 84, § 27.

ANNOTATIONS

Cross references. — For constitutional prohibition against double jeopardy, *see* N.M. Const., art. II, § 15.

30-31-27.1. Overdose prevention; limited immunity.

A. A person who, in good faith, seeks medical assistance for someone experiencing an alcohol- or drug-related overdose shall not be arrested, charged, prosecuted or otherwise penalized, nor shall the property of the person be subject to civil forfeiture, for violating any of the following if the evidence for the alleged violation was obtained as a result of the need for seeking medical assistance:

(1) the provisions of Section 30-31-23 NMSA 1978 or Subsection A of Section 30-31-25.1 NMSA 1978;

(2) a restraining order; or

(3) the conditions of probation or parole.

B. A person who experiences an alcohol- or drug-related overdose and is in need of medical assistance shall not be arrested, charged, prosecuted or otherwise penalized, nor shall the property of the person be subject to civil forfeiture, for violating any of the following if the evidence for the alleged violation was obtained as a result of the overdose and the need for seeking medical assistance:

(1) the provisions of Section 30-31-23 NMSA 1978 or Subsection A of Section 30-31-25.1 NMSA 1978;

(2) a restraining order; or

(3) the conditions of probation or parole.

C. The act of seeking medical assistance for someone who is experiencing an alcohol- or drug-related overdose may be used as a mitigating factor in a criminal prosecution pursuant to the Controlled Substances Act for which immunity is not provided pursuant to this section.

D. For the purposes of this section, "seeking medical assistance" means:

(1) reporting an alcohol- or drug-related overdose or other medical emergency to law enforcement, the 911 system or another emergency dispatch system, a poison control center or a health care provider; or

(2) assisting an individual who is reporting an alcohol- or drug-related overdose or providing care to an individual who is experiencing an alcohol- or drug-related overdose or other medical emergency while awaiting the arrival of a health care provider.

History: Laws 2007, ch. 260, § 1; 2019, ch. 211, § 3.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, expanded limited immunity for those who seek medical assistance for someone experiencing a drug-related overdose to include alcohol overdose, and provided an exemption from civil forfeiture for the property of a person who, in good faith, seeks medical assistance for someone experiencing an alcohol- or drug-related overdose, and provided similar protections for the person who is experiencing an overdose who seeks medical assistance; in Subsection A, after "experiencing", deleted "a" and added "an alcohol- or", after "shall not be", added "arrested", after "prosecuted", added "or otherwise be penalized, nor shall the property of the person be subject to civil forfeiture", and after "for", deleted "possession of a controlled substance" and added "violating any of the following if the evidence for the alleged violation was obtained as a result of the need for seeking medical assistance", in Paragraph A(1), after "Section 30-31-23", added "NMSA 1978 or Subsection A of Section 30-31-25.1", deleted "if the evidence for the charge of possession of a controlled substance was gained as a result of the seeking of medical assistance", and added Paragraphs A(2) and A(3); in Subsection B, after "experiences", deleted "a" and added "an alcohol- or", after "shall not be", added "arrested", after "prosecuted", added "or otherwise penalized, nor shall the property of the person be subject to civil forfeiture", after "for", deleted "possession of a controlled substance pursuant to" and added "violating any of the following if the evidence for the alleged violation was obtained as a result of the overdose and the need for seeking medical assistance", in Paragraph B(1), after "Section 30-31-23", added "NMSA 1978 or Subsection A of Section 30-31-25.1", deleted "if the evidence for the charge of possession of a controlled substance was gained as a result of the overdose and the need for medical assistance", and added Paragraphs B(2) and B(3); in Subsection C, after "experiencing", deleted "a" and added "an alcohol- or", after "Controlled Substances Act", added "for which immunity is not provided pursuant to this section."; and added Subsection D.

30-31-28. Conditional discharge for possession as first offense.

A. If any person who has not previously been convicted of violating the laws of any state or any laws of the United States relating to narcotic drugs, marijuana, hallucinogenic or depressant or stimulant substances, is found guilty of a violation of Section 23 [30-31-23 NMSA 1978], after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place him on probation upon reasonable conditions and for a period, not to exceed one year, as the court may prescribe.

B. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against the person and discharge him from probation before the expiration of the maximum period prescribed from the person's probation.

C. If during the period of his probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt, but a nonpublic record shall be retained by the attorney general solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, the person qualifies under this section. A discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the penalties prescribed under this section for second or subsequent convictions or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

D. Upon the dismissal of a person and discharge of the proceedings against him under this section, a person, if he was not over eighteen years of age at the time of the offense, may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, trial, finding or plea of guilty, and dismissal and discharge pursuant to this section except nonpublic records filed with the attorney general. If the court determines, after hearing, that the person was dismissed and the proceedings against him discharged and that he was not over eighteen years of age at the time of the offense, it shall enter the order. The effect of the order shall be to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person in whose behalf an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

History: 1953 Comp., § 54-11-28, enacted by Laws 1972, ch. 84, § 28.

ANNOTATIONS

Conditional discharge dismissal not "conviction". — A dismissal under the conditional discharge statute, Section 30-31-28 NMSA 1978, is not a "conviction" as contemplated by this section, or for any other purpose. *State v. Fairbanks*, 2004-NMCA-005, 134 N.M. 783, 82 P.3d 954.

Habitual offender statute. — Although the habitual offender statute applies to a prior felony conviction under the Controlled Substances Act, Sections 30-31-1 to 30-31-41 NMSA 1978, it does not apply if there is a conditional discharge under Section 30-31-28 NMSA 1978. *State v. Fairres*, 2003-NMCA-152, 134 N.M. 668, 81 P.3d 611, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Prior conviction, not prior sentence, is dispositive for repeat offender status. — Where defendant was convicted of drug charges in New Mexico; the New Mexico court deferred defendant's sentence for a two-year probationary period; the deferred sentence was a final judgment subject to appeal; and after defendant successfully completed the probation, defendant was entitled to have the New Mexico charges dismissed, the deferred sentence was a prior conviction for purposes of sentence enhancement. *United States v. Meraz*, 998 F.2d 182 (10th Cir. 1993).

30-31-29. Probationary period.

Notwithstanding any other provision of law, the court may place on probation for a period not to exceed one year any person convicted of a violation of the Controlled Substances Act where the maximum length of the term of imprisonment is one year or less if:

A. the judge does not impose a prison sentence; or

B. the judge suspends all of any prison sentence which he imposes.

History: 1953 Comp., § 54-11-28.1, enacted by Laws 1975, ch. 80, § 1.

30-31-30. Powers of enforcement personnel.

Any officer or employee designated by the board may:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without warrant for any offense under the Controlled Substances Act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Controlled Substances Act which may constitute a felony; or

C. make seizures of property pursuant to the Controlled Substances Act.

History: 1953 Comp., § 54-11-29, enacted by Laws 1972, ch. 84, § 29.

ANNOTATIONS

Cross references. — For constitutional guarantee against unreasonable searches and seizures, *see* N.M. Const., art. II, § 10.

For issuance of arrest and search warrants, *see* Rules 5-208 and 5-211 NMRA.

Warrantless arrests in public. — Statutory provisions regarding warrants must be considered in para materia with N.M. Const., art. II, § 10. Subsection B cannot establish conclusively that an arrest based on such authority comports with the constitutional

protection afforded by N.M. Const., art. II, § 10. Warrantless arrests made under the authority of the statute may be presumed reasonable but that presumption may be rebutted under an interpretation of what is constitutional. *Campos v. State*, 1994-NMSC-012, 117 N.M. 155, 870 P.2d 117.

Probable cause plus exigent circumstances. — Warrantless search of defendant's tractor and trailer was justified by probable cause arising from detailed information supplied by informant, along with exigent circumstances attendant in the case of moving vehicles. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199.

Law reviews. — For note, "New Mexico Requires Exigent Circumstances for Warrantless Public Arrests: *Campos v. State*," see 25 N.M.L. Rev. 315 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Odor of narcotics as providing probable cause for warrantless search, 5 A.L.R.4th 681.

30-31-31. Administrative inspections and warrants.

Issuance and execution of administrative inspection warrants shall be as follows:

A. a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections and seizures of property authorized by the Controlled Substances Act. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Controlled Substances Act sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant;

B. a warrant shall issue only upon an affidavit of a designated officer or employee having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant shall:

(1) state the grounds for its issuance and the name of each person whose affidavit has been taken in its support;

(2) be directed to a person authorized by Section 29 [30-31-30 NMSA 1978] or a state police officer to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any; and

(5) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned;

C. a warrant issued pursuant to this section must be served and returned within five days of its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and the applicant for the warrant; and

D. the magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

History: 1953 Comp., § 54-11-30, enacted by Laws 1972, ch. 84, § 30.

ANNOTATIONS

Cross references. — For constitutional guarantee against unreasonable searches and seizures, *see* N.M. Const., art. II, § 10.

For issuance of search warrants generally, *see* Rule 5-211 NMRA.

Probable cause. — Application for a warrant to search defendant's car, which as grounds for its issuance merely claimed that a packet of marijuana had been found in the trunk thereof, did not state probable cause and was constitutionally inadequate, as it gave no clue relating to the basis for the statement. *State v. Lewis*, 1969-NMCA-041, 80 N.M. 274, 454 P.2d 360, *overruled on other grounds by State v. Nemrod*, 1973-NMCA-059, 85 N.M. 118, 509 P.2d 885, *overruled on other grounds by State v. Vigil*, 1974-NMCA-065, 86 N.M. 388, 524 P.2d 1004, cert. denied, 87 N.M. 345, 533 P.2d 578 (S. Ct. 1975), 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Affidavit. — Former law providing for issuance of a search warrant upon affidavit by a legal voter of the state, for the purpose of searching for narcotic drugs, did not require a recital in the affidavit that the affiant was a legal voter. *State v. Chavez*, 1966-NMSC-269, 77 N.M. 274, 421 P.2d 796, denial of motion for post-conviction relief, *aff'd*, 1968-NMCA-096, 79 N.M. 741, 449 P.2d 343 (decided under prior law).

30-31-32. Administrative inspections.

The board may make administrative inspections of controlled premises in accordance with the following provisions:

A. for purposes of this section, "controlled premises" means:

(1) places where persons registered or exempted from registration requirements under the Controlled Substances Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons registered or exempted from registration requirements under the Controlled Substances Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any controlled substance;

B. when authorized by an administrative inspection warrant issued pursuant to Section 30 [30-31-31 NMSA 1978], an officer or employee designated by the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection;

C. when authorized by an administrative inspection warrant, an officer or employee designated by the board may:

(1) inspect and copy records required by the Controlled Substances Act to be kept;

(2) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection E, all other things bearing on violations of the Controlled Substances Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any controlled substance and obtain samples;

D. this section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required;

E. an inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

History: 1953 Comp., § 54-11-31, enacted by Laws 1972, ch. 84, § 31.

ANNOTATIONS

Cross references. — For constitutional guarantee against unreasonable searches and seizures, *see* N.M. Const., art. II, § 10.

For issuance of search warrants, *see* Rule 5-211 NMRA.

30-31-33. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Controlled Substances Act.

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

History: 1953 Comp., § 54-11-32, enacted by Laws 1972, ch. 84, § 32.

ANNOTATIONS

Cross references. — For statutory provisions regarding contempt, *see* 34-1-2 to 34-1-5 NMSA 1978.

For issuance of injunctions, see Rules 1-065 and 1-066 NMRA.

30-31-34. Forfeitures; property subject.

The following are subject to forfeiture pursuant to the provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978]:

A. all raw materials, products and equipment of any kind, including firearms that are used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or controlled substance analog in violation of the Controlled Substances Act;

B. all property that is used or intended for use as a container for property described in Subsection A of this section;

C. all conveyances, including aircraft, vehicles or vessels that are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A of this section;

D. all books, records and research products and materials, including formulas, microfilm, tapes and data that are used or intended for use in violation of the Controlled Substances Act;

E. narcotics paraphernalia or money that is a fruit or instrumentality of the crime;

F. notwithstanding Subsection C of this section and the provisions of the Forfeiture Act:

(1) a conveyance used by a person as a common carrier in the transaction of business as a common carrier shall not be subject to forfeiture pursuant to this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the Controlled Substances Act;

(2) a conveyance shall not be subject to forfeiture pursuant to this section by reason of an act or omission established for the owner to have been committed or omitted without the owner's knowledge or consent;

(3) a conveyance is not subject to forfeiture for a violation of law the penalty for which is a misdemeanor; and

(4) a forfeiture of a conveyance encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party neither had knowledge of nor consented to the act or omission; and

G. all drug paraphernalia as defined by Subsection T of Section 30-31-2 NMSA 1978.

History: 1953 Comp., § 54-11-33, enacted by Laws 1972, ch. 84, § 33; 1975, ch. 231, § 1; 1981, ch. 31, § 3; 1987, ch. 68, § 6; 1989, ch. 196, § 1; 2015, ch. 152, § 17; 2021 (1st S.S.), ch. 4, § 69.

ANNOTATIONS

The 2021 (1st S.S.) amendment, effective June 29, 2021, amended a reference to another section of law; and in Subsection G, after "Subsection", deleted "V" and added "T".

The 2015 amendment, effective July 1, 2015, removed controlled substances from the list of items subject to forfeiture; deleted former Subsection A and added the undesignated introductory phrase "pursuant to the provisions of the Forfeiture Act"; redesignated Subsections B through H as Subsections A through G, respectively; in Subsection A, after "firearms", deleted "which" and added "that"; in Subsection B, after "property", deleted "which" and added "that", and after "Subsection A", deleted "or B"; in Subsection C, after "vessels", deleted "which" and added "that", and after "Subsection A", deleted "or B"; in Subsection D, after "data", deleted "which" and added "that"; in Subsection E, after "money", deleted "which" and added "that"; in the introductory sentence of Subsection F, after "Subsection", deleted "D" and added "C", and after "section", added "and the provisions of the Forfeiture Act"; in Paragraph (1) of Subsection F, at the beginning of the paragraph, deleted "no" and added "a", after "used

by", deleted "any" and added "a", after the second occurrence of "carrier", deleted "is" and added "shall not be", and after "forfeiture", deleted "under" and added "pursuant to"; in Paragraph (2) of Subsection F, at the beginning of the paragraph, deleted "no" and added "a", after "conveyance", deleted "is" and added "shall not be", after "forfeiture", deleted "under" and added "pursuant to", after "reason of", deleted "any" and added "an", and after "omitted without", deleted "his" and added "the owner's"; and in Subsection G, after "Subsection", deleted "W" and added "V".

The 1989 amendment, effective July 1, 1989, inserted "including firearms" in Subsection B.

Forfeiture not unconstitutional taking. — Forfeiture under former Narcotic Drug Act (Section 54-7-1, 1953 Comp. et seq.) of tractor and trailer used in transportation of amphetamines did not constitute the taking of property without just compensation. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199.

Nor excessive fine. — Disproportionate ratio between the value of a tractor and trailer which had been carrying amphetamines and the amount of fine imposed for the crime of possession did not render the forfeiture statute unconstitutional as an excessive fine. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199.

Provisions penal in nature. — The forfeiture provisions of the Controlled Substances Act are penal in nature. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

Section to be strictly construed. — Forfeitures are not favored at law, and statutes are to be construed strictly against forfeiture. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

The fourth amendment exclusionary rule is applicable to forfeiture proceedings. *Albuquerque Police Dep't v. Martinez*, 1995-NMCA-088, 120 N.M. 408, 902 P.2d 563, cert. denied, 120 N.M. 213, 900 P.2d 962.

Forfeiture of pickup truck is civil proceeding. — The forfeiture of a pickup truck under this section, although quasi-criminal and gauged by standards applicable to a criminal proceeding, is a civil proceeding. *State v. Barela*, 1979-NMCA-156, 93 N.M. 700, 604 P.2d 838, cert. denied, 94 N.M. 674, 615 P.2d 991 (1980), *overruled on other grounds by State v. Vigil*, 1974-NMCA-065, 86 N.M. 388, 524 P.2d 1004, cert. denied, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975).

Proof of violation required for forfeiture. — Money seized from defendant's vehicle during a routine traffic stop was not subject to forfeiture in the absence of any evidence that it was seized in connection with the commission of a criminal offense and prohibited by the Controlled Substances Act. *State ex rel. Tucumcari Police Dep't v. $104,999.00 in U.S. Currency,* 2000-NMCA-084, 129 N.M. 552, 10 P.3d 876, cert. denied, 129 N.M. 519, 10 P.3d 843.

Possession must be for sale. — In order for property to be forfeited under this section, possession of a controlled substance must be for the purpose of sale. *State ex rel. Dep't of Pub. Safety v. One 1990 Chevrolet Pickup*, 1993-NMCA-068, 115 N.M. 644, 857 P.2d 44, cert. denied, 115 N.M. 602, 856 P.2d 250.

Transportation need not be for purpose of sale. — A vehicle is subject to forfeiture under Subsection D if used to transport an illegal substance, and the transportation need not be for the purpose of sale. *State v. Stevens*, 1983-NMSC-108, 100 N.M. 577, 673 P.2d 1310.

Nature of burden on owner. — The burden imposed on the owner is the burden of going forward and not the burden of persuasion. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

Shifting the burden. — The owner need only assert that the vehicle was used without his knowledge and consent to shift the burden to the state. *State v. Ozarek*, 1978-NMSC-001, 91 N.M. 275, 573 P.2d 209.

Interest of innocent co-owner exempt. — An innocent co-owner's interest in a truck seized due to illegal use by the guilty co-owner is exempt from forfeiture. *In re Forfeiture of One 1970 Ford Pickup*, 1991-NMCA-124, 113 N.M. 97, 823 P.2d 339.

Misdemeanor offenses excluded. — Subsections D and G(3) should be construed together as providing for forfeiture in those trafficking and distribution cases where the crime involved constitutes a felony, and the purpose of Subsection G(3) is to exclude misdemeanor drug trafficking offenses. *State ex rel. Dep't of Pub. Safety v. One 1990 Chevrolet Pickup*, 1993-NMCA-068, 115 N.M. 644, 857 P.2d 44, cert. denied, 115 N.M. 602, 856 P.2d 250.

Law reviews. — For note, "New Mexico Restricts the Use of Civil Forfeiture: *State v. One 1990 Chevrolet Pickup*," see 24 N.M.L. Rev. 377 (1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Forfeiture of money to state or local authorities based on its association with or proximity to other contraband, 38 A.L.R.4th 496.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities, 38 A.L.R.4th 515.

Forfeitability of property held in marital estate under uniform controlled substances act or similar statute, 84 A.L.R.4th 620.

Real property as subject of forfeiture under uniform controlled substances act or similar statutes, 86 A.L.R.4th 995.

Timeliness of institution of proceedings for forfeiture under Uniform Controlled Substances Act or similar statute, 90 A.L.R.4th 493.

Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Forfeiture of homestead based on criminal activity conducted on premises - state cases, 16 A.L.R.5th 855.

Validity and construction of state statutes criminalizing the act of permitting real property to be used in connection with illegal drug activities, 24 A.L.R.5th 428.

Forfeiture of personal property used in illegal manufacture, processing, or sale of controlled substances under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881), 59 A.L.R. Fed. 765, 109 A.L.R. Fed. 322.

Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189.

Seizure or forfeiture of real property used in illegal possession, manufacture, processing, purchase, or sale of controlled substances under § 511(a)(7) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(a)(7)), 104 A.L.R. Fed. 288.

Who is exempt from forfeiture of drug proceeds under "innocent owner" provision of 21 USCS § 881(a)(6), 109 A.L.R. Fed. 322.

What constitutes establishment of prima facie case for forfeiture of real property traceable to proceeds from sale of controlled substances under § 511(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCA § 881(a)(6)), 146 A.L.R. Fed. 597.

When does forfeiture of currency, bank account, or cash equivalent violate excessive fines clause of Eighth Amendment, 164 A.L.R. Fed. 591.

30-31-35. Forfeiture; procedure.

The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal pursuant to the Controlled Substances Act.

History: 1953 Comp., § 54-11-34, enacted by Laws 1972, ch. 84, § 34; 1973, ch. 211, § 1; 1975, ch. 231, § 2; 1977, ch. 139, § 1; 1980, ch. 7, § 1; 1981, ch. 66, § 1; 2002, ch. 4, § 15; 2015, ch. 152, § 18.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, after "disposal", deleted "under" and added "pursuant to".

Forfeiture of cash. — State police officers who seize cash under the authority of the Controlled Substances Act are required to comply with the requirements of the Forfeiture Act. *Albin v. Bakas*, 2007-NMCA-076, 141 N.M. 742, 160 P.3d 923, cert. denied, 2007-NMCERT-006, 142 N.M. 16, 162 P.3d 171.

Forfeiture cases are purely *in rem* proceedings. *In re Forfeiture of One 1980 Honda Accord*, 1988-NMCA-114, 108 N.M. 274, 771 P.2d 982 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Jurisdiction. — In forfeiture cases, execution on the judgment resulting in the removal of the *res* from the control of the district court deprives the court of its *in rem* jurisdiction. An exception to this rule occurs when the *res* is released accidentally, fraudulently or improperly. *In re Forfeiture of One 1980 Honda Accord*, 1988-NMCA-114, 108 N.M. 274, 771 P.2d 982 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

County, by executing on a district court's judgment of forfeiture of an automobile and transferring the title of the vehicle, removed the *res* from the court's control and ended the court's constructive possession of the vehicle. *In re Forfeiture of One 1980 Honda Accord*, 1988-NMCA-114, 108 N.M. 274, 771 P.2d 982 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

When a state entity initiates a forfeiture proceeding, thereby invoking the jurisdiction of the courts of New Mexico, those courts retain *in personam* jurisdiction until all appeals have been exhausted. *Mitchell v. City of Farmington Police Dep't*, 1991-NMSC-035, 111 N.M. 746, 809 P.2d 1274 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Due process notice requirements. — The forfeiture provisions of the Controlled Substances Act are penal in nature and consequently no preseizure notice or hearing is constitutionally required, the provision for a hearing within 30 days of seizure being sufficient to satisfy due process standards. *In re One Cessna Aircraft*, 1977-NMSC-007, 90 N.M. 40, 559 P.2d 417 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Hearing required to meet due process. — The failure of a city ordinance to provide for a hearing for people who lose alleged drug paraphernalia violates the due process guarantee of the constitution. Providing a hearing within 30 days satisfies the due process requirement. *Weiler v. Carpenter*, 695 F.2d 1348 (10th Cir. 1982) (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Jeopardy can attach in a civil forfeiture proceeding arising under the Controlled Substances Act when the final disposition of the case results in a stipulated dismissal and a loss of a property interest without a judgment of forfeiture. *State v. Tijerino*, 2004-

NMCA-039, 135 N.M. 313, 87 P.3d 1095, cert. denied, 2004-NMCERT-003, 135 N.M. 320, 88 P.3d 261.

Double jeopardy rights protected. — Because civil forfeiture under the Controlled Substances Act is punishment for double-jeopardy purposes under the New Mexico Constitution, all forfeiture complaints and criminal charges for violations of the Controlled Substances Act may both be brought only in a single, bifurcated proceeding. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Double jeopardy. — Where the city's forfeiture complaint was filed on June 4, 2001, the stipulated order of dismissal releasing the vehicle to the credit company was entered on August 21, 2001, and the criminal charges against both defendants were not filed until October 1, 2001, there was never a single bifurcated proceeding and if the city and state had combined these cases in a single bifurcated proceeding, there would be no double jeopardy issue. *State v. Tijerino*, 2004-NMCA-039, 135 N.M. 313, 87 P.3d 1095, cert. denied, 2004-NMCERT-003, 135 N.M. 320, 88 P.3d 261.

State's burden of proof in forfeiture proceeding. — In the forfeiture portion of the trial, the burden of proof is on the state to prove by clear and convincing evidence that the property in question is subject to forfeiture. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Inability to post supersedeas bond may not operate to deny the right to a stay of a forfeiture judgment. *Mitchell v. City of Farmington Police Dep't*, 1991-NMSC-035, 111 N.M. 746, 809 P.2d 1274 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Criminal standards applicable. — Proceeding under former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) to declare the forfeiture of a tractor and trailer found to contain a large quantity of amphetamines, notwithstanding such was not a criminal proceeding, was properly gauged by the same standards applicable in a criminal proceeding. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Fourth Amendment exclusionary rule is applicable to forfeiture proceedings. *Albuquerque Police Dep't v. Martinez*, 1995-NMCA-088, 120 N.M. 408, 902 P.2d 563 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Illegal evidence inadmissible. — If the evidence supporting a forfeiture was obtained by an unconstitutional search and seizure, that evidence would be inadmissible and would necessitate reversal of the judgment of forfeiture. *State v. One 1967 Peterbilt Tractor*, 1973-NMSC-025, 84 N.M. 652, 506 P.2d 1199 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Waiver of hearing. — Since the defendant opted for silence to protect his right against self-incrimination, he waived his right to a timely hearing following seizure. *State ex rel. Albuquerque Police Dep't v. One Black 1983 Chevrolet Van*, 1995-NMCA-082, 120 N.M. 280, 901 P.2d 211 (decided under prior law, *see now* Section 31-27-1 NMSA 1978).

Term "law enforcement agency" used in this section may include a district attorney's office. 1989 Op. Att'y Gen. No. 89-32 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

Disposition of forfeited properties. — Moneys or other properties do not have to revert to the general fund under this provision provided the moneys or other properties are used by law enforcement agencies in the enforcement of the Controlled Substances Act. 1977 Op. Att'y Gen. No. 77-14 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

The state police bureau of narcotics may receive the proceeds of forfeitures of property seized before November 25, 1986, even though not disposed of by order of the district court prior to that date. 1987 Op. Att'y Gen. No. 87-20 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

Statute requires that the proceeds of vehicles sold by a law enforcement agency must revert to the applicable general fund. 1989 Op. Att'y Gen. No. 89-32 (opinion rendered under prior law, *see now* Section 31-27-1 NMSA 1978).

Law reviews. — For note, "Criminal Procedure - Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M.L. Rev. 401 (2001).

For note, "Criminal Procedure – Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M. L. Rev. 401 (2001).

For note and comment, "Complying with Nunez: The Necessary Procedure for Obtaining Forfeiture of Property and Avoiding Double Jeopardy after State v. Esparza," see 34 N.M. L. Rev. 561 (2004).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 191, 206.

Validity and construction of provisions of Uniform Controlled Substances Act providing for forfeiture hearing before law enforcement officer, 84 A.L.R.4th 637.

Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317.

Forfeitability of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 A.L.R.5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 A.L.R.5th 375.

Delay in setting hearing date or in holding hearing as affecting forfeitability under Uniform Controlled Substances Act or similar statute, 6 A.L.R.5th 711.

Forfeiture of personal property used in illegal manufacture, processing, or sale of controlled substances under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881), 59 A.L.R. Fed. 765, 109 A.L.R. Fed. 322.

Delay between seizure of personal property by federal government and institution of proceedings for forfeiture thereof as violative of fifth amendment due process requirements, 69 A.L.R. Fed. 373.

What constitutes establishment of prima facie case for forfeiture of real property traceable to proceeds from sale of controlled substances under § 511(a)(6) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCA § 881(a)(6)), 146 A.L.R. Fed. 597.

28 C.J.S. Drugs and Narcotics § 6 et seq.

30-31-36. Summary forfeiture.

A. Controlled substances listed in Schedule I or controlled substance analogs of substances listed in Schedule I that are possessed, transferred, sold or offered for sale in violation of the Controlled Substances Act are contraband and shall be seized and summarily forfeited to the state.

B. Controlled substances listed in Schedule I or controlled substance analogs of substances listed in Schedule I which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

C. Species of plants from which controlled substances in Schedules I and II or controlled substance analogs of substances listed in Schedules I and II may be derived which have been planted or cultivated in violation of the Controlled Substances Act, or of which the owners or cultivators are unknown or which are wild growths, may be seized and summarily forfeited to the state.

History: 1953 Comp., § 54-11-35, enacted by Laws 1972, ch. 84, § 35; 1987, ch. 68, § 7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317.

Forfeitability of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 A.L.R.5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 A.L.R.5th 375.

Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Delay between seizure of personal property by federal government and institution of proceedings for forfeiture thereof as violative of fifth amendment due process requirements, 69 A.L.R. Fed. 373.

30-31-37. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Controlled Substances Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Controlled Substances Act. The burden of proof of any exemption or exception is upon the person claiming it.

History: 1953 Comp., § 54-11-36, enacted by Laws 1972, ch. 84, § 36.

ANNOTATIONS

State not required to disprove excuses or exemptions. — The state's burden of proving guilt beyond a reasonable doubt does not entail the burden of disproving all excuses, provisos, exceptions and exemptions which might possibly relieve a defendant of criminal liability for the offense with which he is charged. *State v. Everidge*, 1967-NMSC-035, 77 N.M. 505, 424 P.2d 787, cert. denied, sub nom. Greene v. U.S., 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967).

Burden on defendant to negate narcotic character of substance. — The burden of proof is on the defendant, not the state, to prove that the substance identified as heroin was not a narcotic drug as an exemption or exception. *State v. Atencio*, 1973-NMCA-110, 85 N.M. 484, 513 P.2d 1266, cert. denied, 85 N.M. 483, 513 P.2d 1265.

State's burden of proof in forfeiture proceeding. — In the forfeiture portion of the trial, the burden of proof is on the state to prove by clear and convincing evidence that the property in question is subject to forfeiture. *State v. Nunez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 28 C.J.S. Drugs and Narcotics § 148 et seq.

30-31-38. Cooperative duties of board.

A. The board shall cooperate with federal and other state agencies in discharging its responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end it may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) cooperate in training programs concerning controlled substances law enforcement at local and state levels; and

(3) cooperate with the bureau by establishing a centralized unit to accept, catalogue, file and collect statistics and make the information available for federal, state and local law enforcement purposes. It shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under Section 39 [30-31-40 NMSA 1978].

B. Results, information and evidence received from the bureau relating to the regulatory functions of the Controlled Substances Act, including results of inspections conducted by it, may be relied and acted upon by the board in the exercise of its regulatory functions under the Controlled Substances Act.

History: 1953 Comp., § 54-11-37, enacted by Laws 1972, ch. 84, § 37.

30-31-39. Education.

The board shall provide for educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs it may:

A. promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry;

B. assist the regulated industry in contributing to the reduction of misuse and abuse of controlled substances; and

C. assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

History: 1953 Comp., § 54-11-38, enacted by Laws 1972, ch. 84, § 38.

30-31-40. Research; confidentiality.

A. The board shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of the Controlled Substances Act, it may register public agencies, institutions of higher education and private organizations or individuals for the purpose of conducting research, demonstrations or special projects which bear directly on misuse and abuse of controlled substances.

B. The board may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

C. The board may authorize the possession and distribution of controlled substances by persons engaged in research. Such authorization shall contain the conditions and terms of the research to be conducted. Persons who obtain this authorization are exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

D. A practitioner engaged in medical practice or research shall not be required to furnish the name or identity of a patient or research subject to the board, nor may he be compelled in any state or local civil, criminal, administrative, legislative or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

History: 1953 Comp., § 54-11-39, enacted by Laws 1972, ch. 84, § 39.

ANNOTATIONS

Cross references. — For confidentiality of health information involving specific individuals, *see* 14-6-1 NMSA 1978.

30-31-41. Anabolic steroids; possession; distribution; penalties; notice.

A. Except as authorized by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act, Chapter 26, Article 1 NMSA 1978], it is unlawful for any person to intentionally possess anabolic steroids. Any person who violates this subsection is guilty of a misdemeanor.

B. Except as authorized by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act], it is unlawful for any person to intentionally distribute or possess with intent to distribute anabolic steroids. Any person who violates this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as authorized by the New Mexico Drug and Cosmetic Act [New Mexico Drug, Device and Cosmetic Act], it is unlawful for any person eighteen years of age or older to intentionally distribute anabolic steroids to a person under eighteen years of age. Any person who violates this subsection is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. A copy of this act shall be distributed to each licensed athletic trainer by the athletic trainers advisory board and displayed prominently in the athletic locker rooms of all state post-secondary and public schools.

History: Laws 1987, ch. 271, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not a part of the law. Laws 1987, ch. 270, § 1 changed the "New Mexico Drug and Cosmetic Act" to the "New Mexico Drug, Device and Cosmetic Act".

Cross references. — For definition of dangerous drug for purposes of the New Mexico Drug, Device and Cosmetic Act, *see* 26-1-2 NMSA 1978.

ARTICLE 31A
Imitation Controlled Substances

30-31A-1. Short title.

This act [30-31A-1 to 30-31A-15 NMSA 1978] may be cited as the "Imitation Controlled Substances Act".

History: Laws 1983, ch. 148, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

30-31A-2. Definitions.

As used in the Imitation Controlled Substances Act:

A. "board" means the board of pharmacy;

B. "controlled substance" means a substance as defined in Subsection E of Section 30-31-2 NMSA 1978;

C. "distribute" means the sale or possession with the intent to sell of an imitation controlled substance;

D. "imitation controlled substance" means a substance that is not a controlled substance which by dosage unit appearance, including color, shape, size and markings and by representations made would lead a reasonable person to believe that the substance is a controlled substance. The fact finder may consider:

(1) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance or its use or effect;

(2) statements made to the recipient that the substance may be resold for inordinate profit;

(3) whether the substance is packaged in a manner normally used for illicit controlled substances;

(4) evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(5) prior convictions, if any, of the owner or anyone in control of the object, under state or federal law related to controlled substances or fraud; and

(6) whether the physical appearance of the substance is substantially identical to a controlled substance; and

E. "manufacture" means the production, preparation, compounding, processing, encapsulating, packaging or repackaging or labeling or relabeling as an imitation controlled substance.

History: Laws 1983, ch. 148, § 2.

ANNOTATIONS

Admissibility of prior convictions under Section 31-31A-2(D)(5) NMSA 1978. — Any evidence of a prior conviction referred to in Section 31-31A-2(D)(5) NMSA 1978 must also be admissible under Rules 11-403 and 11-404(B) NMRA. *State v. Serna*, 2013-NMSC-033.

Admission of prior convictions under Section 31-31A-2(D)(5) NMSA 1978 was error. — Where defendant was charged with trafficking imitation controlled substances for selling baking soda as cocaine; pursuant to Section 31-31A-2(D)(5) NMSA 1978, the district court allowed testimony about defendant's prior criminal convictions for possession of a controlled substance and credit card fraud; and the evidence of defendant's prior convictions went solely to propensity, painting defendant as a bad

character from the drug world, the convictions were inadmissible. *State v. Serna*, 2013-NMSC-033.

30-31A-3. Duty to administer.

The board shall administer the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 3.

30-31A-4. Manufacture, distribution [or possession] of imitation controlled substance.

It is unlawful for any person to manufacture, distribute or possess with intent to distribute an imitation controlled substance. Any person who violates the provisions of this section is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1983, ch. 148, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Act not unconstitutionally vague or overbroad. — The language of this act clearly prohibits the manufacture, distribution, or possession with the intent to distribute a substance that looks like and is represented as being a controlled substance but is not, evincing a legislative intent to require general criminal intent while restricting from its reach those actions ordinarily deemed to be constitutionally protected. *State v. Castleman*, 1993-NMCA-019, 116 N.M. 467, 863 P.2d 1088, cert. quashed, 115 N.M. 796, 115 N.M. 796, 858 P.2d 1275.

Jury instruction on "transfer" proper. — Trial court did not err in employing the term "transfer" in charging the jury in a prosecution for violating this section, since it is not much broader than the term "sell". *State v. Castleman*, 1993-NMCA-019, 116 N.M. 467, 863 P.2d 1088, cert. quashed, 115 N.M. 795, 115 N.M. 796, 858 P.2d 1275.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

30-31A-5. Sale to a minor.

No person who is eighteen years of age or older shall intentionally sell an imitation controlled substance to a person under the age of eighteen years. Any person who

violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1983, ch. 148, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

30-31A-6. Possession with intent to distribute an imitation controlled substance.

It is unlawful for any person intentionally to possess an imitation controlled substance with the intent to distribute. Any person who violates this section is guilty of a fourth degree felony.

History: Laws 1983, ch. 148, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

30-31A-7. Advertisement.

It is unlawful for any person to place in any newspaper, magazine, handbill or other publication, or to post or distribute in any place visible to the general public, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances. Any person who violates this section is guilty of a misdemeanor.

History: Laws 1983, ch. 148, § 7.

30-31A-8. Defenses.

In any prosecution for unlawful delivery of an imitation controlled substance, it is no defense that the defendant believed the imitation controlled substance to be a controlled substance.

History: Laws 1983, ch. 148, § 8.

30-31A-9. Forfeitures; property subject.

The following are subject to forfeiture:

A. all raw materials, products and equipment of any kind that are used in the manufacturing, compounding or processing of any imitation controlled substance in violation of the Imitation Controlled Substances Act;

B. all property that is used or intended for use as a container for property described in Subsection A of this section; and

C. all books, records and research products and materials, including formulas, microfilm, tapes and data, that are used or intended for use in violation of the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 9; 2015, ch. 152, § 19.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, removed imitation controlled substances from the provisions of this section; deleted former Subsection A, relating to imitation controlled substances, and redesignated the succeeding subsections accordingly; in new Subsection A, after "any kind", deleted "which" and added "that", after "used in", added "the"; in Subsection B, after "property", deleted "which" and added "that", and after "Subsection A", deleted "or B"; and in Subsection C, after "data,", deleted "which" and added "that".

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189.

30-31A-10. Forfeiture; procedure.

The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture and disposal under the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 10; 2002, ch. 4, § 16.

ANNOTATIONS

Cross references. — For Rules of Civil Procedure for the District Courts, *see* Rule 1-001 NMRA et seq.

The 2002 amendment, effective July 1, 2002, substituted the present provisions of the section for the former provisions which detailed forteiture procedures for property seized under the Imitation Controlled Substances Act.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Delay in setting hearing date or in holding hearing as affecting forfeitability under Uniform Controlled Substances Act or similar statute, 6 A.L.R.5th 711.

30-31A-11. Summary forfeiture.

Imitation controlled substances that are possessed, transferred, sold or offered for sale in violation of the Imitation Controlled Substances Act are contraband and shall be seized and summarily forfeited to the state.

History: Laws 1983, ch. 148, § 11.

30-31A-12. Powers of enforcement personnel.

Any officer or employee designated by the board or other law enforcement officer may:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without warrant for any offense under the Imitation Controlled Substances Act committed in his presence or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Imitation Controlled Substances Act which may constitute a felony; or

C. make seizures of property pursuant to the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 12.

30-31A-13. Administrative inspections and warrants.

Magistrate or metropolitan courts may issue administrative inspection warrants upon a showing of probable cause.

History: Laws 1983, ch. 148, § 13.

30-31A-14. Injunctions.

The district courts may exercise jurisdiction to restrain or enjoin violations of the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 14.

30-31A-15. Immunity.

No civil or criminal liability shall be imposed by virtue of the Imitation Controlled Substances Act on any person registered under the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] who manufactures, distributes or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.

History: Laws 1983, ch. 148, § 15.

ARTICLE 31B
Drug Precursors

30-31B-1. Short title.

Chapter 30, Article 31B NMSA 1978 may be cited as the "Drug Precursor Act".

History: Laws 1989, ch. 177, § 1.; 2004, ch. 9, § 1; 2004, ch. 12 § 1.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, substituted "Chapter 30, Article 31B NMSA 1978" for "sections 1 through 18 of this act".

Laws 2004, ch. 12, § 1, effective July 1, 2004, enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 12 § 1. *See* 12-1-8 NMSA 1978.

30-31B-2. Definitions.

As used in the Drug Precursor Act:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or the practitioner's agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. "Agent" does not include a common or contract carrier, public warehouseperson or employee of the carrier or warehouseperson;

C. "board" means the board of pharmacy;

D. "bureau" means the bureau of narcotics and dangerous drugs of the United States department of justice or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or regulations adopted thereto;

F. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or that was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found include, but are not limited to, the following:

(1) phenethylamines;

(2) N-substituted piperidines;

(3) morphinans;

(4) ecgonines;

(5) quinazolinones;

(6) substituted indoles; and

(7) arylcycloalkylamines.

Specifically excluded from the definition of "controlled substance analog" are those substances that are generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, official national formulary or any respective supplement to these publications. "Drug" does not include devices or their components, parts or accessories;

L. "drug precursor" means a substance, material, compound, mixture or preparation listed in Section 30-31B-3 NMSA 1978 or regulations adopted thereto or any of their salts or isomers. "Drug precursor" specifically excludes those substances, materials, compounds, mixtures or preparations that are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance that is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act, unless the board makes the findings required pursuant to Subsection B of Section 30-31B-4 NMSA 1978;

M. "immediate precursor" means a substance that is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit the manufacture of controlled substances;

N. "license" means a license issued by the board to manufacture, possess, transfer or transport a drug precursor;

O. "manufacture" means the production, preparation, compounding, conversion or processing of a drug precursor by extraction from substances of natural origin, independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by a practitioner:

(1) as an incident to the practitioner's administering or dispensing of a controlled substance in the course of professional practice; or

(2) by the practitioner's agent under the practitioner's supervision for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

P. "person" includes an individual, sole proprietorship, partnership, corporation, association, the state or a political subdivision of the state or other legal entity;

Q. "possession" means to actively or constructively exercise dominion over;

R. "practitioner" means a physician, certified advanced practice chiropractic physician, dentist, veterinarian or other person licensed to prescribe and administer drugs that are subject to the Controlled Substances Act;

S. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto; and

T. "transfer" means the sale, possession with intent to sell, barter or giving away of a drug precursor.

History: Laws 1989, ch. 177, § 2; 2004, ch. 9, § 2; 2004, ch. 12, § 2; 2008, ch. 44, § 6.

ANNOTATIONS

Cross references. — For the Federal Food, Drug and Cosmetic Act, *see* 21 U.S.C. § 301 et seq. For Section 505 of that act, *see* 21 U.S.C. § 355.

The 2008 amendment, effective May 14, 2008, added "certified advanced practice chiropractic physician" in Subsection R.

The 2004 amendment, effective July 1, 2004, in Subsection L, added "unless the board makes the findings required pursuant to Subsection B of Section 30-31B-4 NMSA 1978"; and in Subsection T, changed "controlled substance" to "drug precursor".

Pseudoephedrine cold tablets. — The defendant was improperly convicted of possession of drug precursors for possession of pseudoephedrine cold tablets in their original packaging. *State v. Vance*, 2009-NMCA-024, 145 N.M. 706, 204 P.3d 31, cert. denied, 2009-NMCERT-001, 145 N.M. 655, 203 P.3d 870.

30-31B-3. Drug precursors list.

Any substance, material, compound, mixture or preparation of the following substances or any of their salts or isomers are subject to regulation by the board and to the requirements of the Drug Precursor Act:

A. 1-phenylcyclohexylamine;

B. 1-piperidinocyclohexanecarbonitrile;

C. ephedrine;

D. psuedoephedrine;

E. methylamine;

F. methylformamide;

G. phenylacetic acid; and

H. phenylacetone.

History: Laws 1989, ch. 177, § 3.

30-31B-4. Duty to administer.

A. The board shall administer the Drug Precursor Act and by regulation may add substances to the list of drug precursors enumerated in Section 30-31B-3 NMSA 1978. The board shall promulgate regulations pursuant to the procedures of the Uniform Licensing Act [61-1-1 NMSA 1978].

B. In determining whether to add to the list of drug precursors a substance, material, compound, mixture or preparation that is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or that has been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is:

(a) a source of a substance already controlled under the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978 NMSA 1978]; or

(b) subject to being easily converted to an immediate precursor of a substance already controlled under the Controlled Substances Act ;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses that would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor;

(4) whether the substance, material, compound, mixture or preparation is formulated to effectively prevent its conversion into an immediate precursor of a substance already controlled under the Controlled Substances Act; and

(5) any other factors relevant to and consistent with the public health and safety.

C. In determining whether a substance, material, compound, mixture or preparation should be added to the list of drug precursors, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is an immediate precursor of a substance already controlled under the Controlled Substances Act;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses which would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor; and

(4) any other factors relevant to and consistent with the public health and safety.

D. After considering the factors enumerated in Subsection B or C of this section, the board shall make findings and issue regulations listing the substance, material, compound, mixture or preparation as a drug precursor if it finds that the substance, material, compound, mixture or preparation has a significant potential for use in the manufacture of controlled substances.

E. If the board designates a substance, material, compound, mixture or preparation as a drug precursor, then substances, materials, compounds, mixtures or preparations which are precursors of the drug precursor so designated shall not be subject to control solely because they are precursors of a drug precursor.

F. If any substance, material, compound, mixture or preparation is designated as controlled under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Drug Precursor Act after providing for a hearing pursuant to the Uniform Licensing Act.

G. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 to 76-4-39 NMSA 1978].

History: Laws 1989, ch. 177, § 4; 2004, ch. 9, § 3; 2004, ch. 12, § 3.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, designated the first paragraph of this section as Subsection A; added a new Subsection B; and redesignated former Subsections A through E as Subsections C through G.

Laws 2004, ch. 9, § 3, effective July 1, 2004, enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 12, § 3. *See* 12-1-8 NMSA 1978.

30-31B-5. Nomenclature.

The drug precursors listed in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act are included by whatever official, common, usual, chemical or trade name designated.

History: Laws 1989, ch. 177, § 5.

30-31B-6. Regulations.

A. The board may promulgate regulations and charge reasonable fees relating to the licensing and control of the manufacture, possession, transfer and transportation of drug precursors. The fees shall not be more than two hundred fifty dollars ($250) per license for a wholesaler's license, a distributor's license or a manufacturer's license. The fees shall not be more than fifty dollars ($50.00) per license for a retail distributor's license, when the retail distributor has ten or more employees. The fees shall not be more than twenty-five dollars ($25.00) per license for a retail distributor's license, when the retail distributor has fewer than ten employees.

B. Every person who manufactures, possesses, transfers or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer or transportation of any drug precursor shall obtain, annually, a license issued by the board.

C. Persons licensed by the board to manufacture, possess, transfer or transport drug precursors may manufacture, possess, transfer or transport those substances to the extent authorized by their license and in conformity with the other provisions of the Drug Precursor Act.

D. The following persons need not be licensed under the Drug Precursor Act and may lawfully possess drug precursors:

(1) physicians;

(2) an agent of any licensed manufacturer of any drug precursor if he is acting in the usual course of his principal's business or employment;

(3) an employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business;

(4) a student enrolled in a chemistry class for credit; provided, however, that the student's use of the drug precursor is for a bona fide educational purpose and that the chemistry department of the educational institution otherwise possesses all the necessary licenses required by the board;

(5) a consumer who uses a drug precursor for its intended purpose and who does not use the drug precursor to manufacture a substance controlled under the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

(6) a pharmacy, an agent or employee of a pharmacy or a contractor for a pharmacy;

(7) a pharmacist, an agent or employee of a pharmacist or a contractor for a pharmacist; or

(8) an agent or employee of a licensed retail establishment or a contractor for a licensed retail establishment.

E. The board may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

F. The board may inspect the establishment of a licensee or applicant for license in accordance with the board's regulations.

History: Laws 1989, ch. 177, § 6; 2004, ch. 9, § 4; 2004, ch. 12, § 4.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, designated the first paragraph of this section as Subsection A and redesignated former Subsections A through E as Subsections B through F; in Subsection A, provided a new $50.00 fee for a retail distributor's license; and in Subsection D, added new Pargraphs (5) through (8).

Laws 2004, ch. 9, § 4, effective July 1, 2004, enacted identical amendments to this section. The section was set out as amended by Laws 2004, ch. 12, § 4. *See* 12-1-8 NMSA 1978.

30-31B-7. Licenses.

A. The board shall license an applicant to manufacture, possess, transfer or transport drug precursors unless it determines that the issuance of that license would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of drug precursors into other than legitimate medical, scientific or industrial channels;

(2) compliance with applicable state and local law;

(3) any conviction of the applicant under federal or state laws relating to any controlled substance or drug precursor;

(4) past experience in the manufacture, possession, transfer or transportation of drug precursors and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the Drug Precursor Act or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978];

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances or drug precursors as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

B. Licensing under this section does not entitle a licensee to manufacture, possess, transfer or transport drug precursors other than those allowed in the license.

History: Laws 1989, ch. 177, § 7.

30-31B-8. Revocation and suspension of license.

A. A license to manufacture, possess, transfer or transport a drug precursor under Section 7 [30-31B-7 NMSA 1978] of the Drug Precursor Act may be suspended or revoked upon a finding that the registrant has:

(1) furnished false or fraudulent material information in any application filed with the board;

(2) been convicted of a felony under any state or federal law relating to a controlled substance or drug precursor;

(3) had his federal registration to manufacture, distribute or dispense controlled substances or drug precursors suspended or revoked; or

(4) violated any rule or regulation of the board with regard to drug precursors or controlled substances or any provision of the Drug Precursor Act or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978].

B. A hearing to revoke or suspend a license shall be held by a special hearing panel consisting of the board and two additional persons designated by the board to sit on the hearing panel.

C. The special hearing panel may limit revocation or suspension of a license to the particular drug precursor if grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a license, all drug precursors owned or possessed by the licensee at the time of suspension or the effective date of the revocation may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been

concluded, unless a court, upon application, orders the sale or destruction of perishable or dangerous substances and the deposit of the proceeds of any sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell or destroy all drug precursors under seal. The court shall order the sale or destruction of such drug precursors under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking licenses.

G. The standard of proof necessary to revoke or suspend a license under this section shall be a preponderance of the evidence. The rules of evidence are not strictly applicable to a hearing under this section and all evidentiary matters are to be finally determined by the special hearing panel.

History: Laws 1989, ch. 177, § 8.

30-31B-9. Order to show cause.

A. Before denying, suspending or revoking a license or refusing a renewal of the license, the board shall serve upon the applicant or licensee an order to show cause why the license should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of the license, the order shall be served not later than thirty days before the expiration of the license unless the proceedings relate to suspension or revocation of a license. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a license or to refuse renewal of a license shall not abate the existing license which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any license simultaneously with the institution of proceedings to revoke or suspend a registration under Section 30-31-14 NMSA 1978 or where renewal of the license is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

History: Laws 1989, ch. 177, § 9.

30-31B-10. Records of licensees.

Every licensee under the Drug Precursor Act manufacturing, possessing, transferring or transporting a drug precursor shall maintain, on a current basis, a complete and accurate record of each substance manufactured, possessed, transferred or transported by the licensee in accordance with regulations of the board.

History: Laws 1989, ch. 177, § 10.

30-31B-11. Distribution by manufacturers.

A licensed manufacturer or transferer may transfer drug precursors to a licensed manufacturer, licensed possessor or licensed transporter.

History: Laws 1989, ch. 177, § 11.

30-31B-12. Drug precursors; prohibited acts; penalties.

A. It is unlawful for any person:

(1) to transfer drug precursors except to an authorized licensee;

(2) to intentionally use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Drug Precursor Act or any record required to be kept by that act;

(5) who is a licensee to intentionally manufacture a drug precursor not authorized by his license or to intentionally transfer a drug precursor not authorized by his license to another licensee or authorized person;

(6) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Drug Precursor Act;

(7) to intentionally refuse an entry into any premises for any inspection authorized by the Drug Precursor Act; or

(8) to manufacture, possess, transfer or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the board.

B. Any person who violates any provision of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. When a person owns or operates a retail establishment where drug precursors are sold by an employee in violation of the provisions of this section, it is an affirmative defense to a prosecution of that owner or operator if he furnishes documentation that he provided the employee with a training program regarding state and federal laws and regulations regarding drug precursors; provided that, if the owner or operator knew or should have known of the employee's violation, the owner or operator shall also be in violation of the provisions of this section.

D. When drug precursors are sold by an employee of a retail establishment in violation of the provisions of this section, it is an affirmative defense to a prosecution of that employee that he did not receive training from his employer regarding state and federal laws and regulations regarding drug precursors.

History: Laws 1989, ch. 177, § 12; 2004, ch. 9, § 5; 2004, ch. 12, § 5.

ANNOTATIONS

The 2004 amendment, effective July 1, 2004, in Subsection B, increased the penalty from a misdemeanor to a fourth degree felony and deleted the enhancement provisions for second and subsequent offenses; and added new Subsections C and D.

Laws 2004, ch. 9, § 5, effective July 1, 2004, enacted identical amendments to this section. The section was set out as enacted by Laws 2004, ch. 12, § 5. *See* 12-1-8 NMSA 1978.

30-31B-13. Powers of enforcement personnel.

Any law enforcement officer:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without a warrant for any offense under the Drug Precursor Act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Drug Precursor Act which may constitute a felony; and

C. make seizures of property pursuant to the Drug Precursor Act.

History: Laws 1989, ch. 177, § 13.

30-31B-14. Administrative inspection warrants.

A. Issuance and execution of administrative inspection warrants shall be as follows:

(1) a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections and seizures of property authorized by the Drug Precursor Act. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Drug Precursor Act sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant; and

(2) a warrant shall be issued only upon an affidavit of a law enforcement officer or employee of the board having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection and, if appropriate, the type of property to be inspected, if any.

B. The warrant shall:

(1) state the grounds for its issuance and the name of the affiant;

(2) be directed to a person authorized by this section to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any;

(5) allow the sale or destruction of perishable or dangerous substances or equipment and deposit the proceeds of any sale with the court; and

(6) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned.

C. A warrant issued pursuant to this section must be served and returned within five days of its date of issue unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the

inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

D. The magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

History: Laws 1989, ch. 177, § 14.

30-31B-15. Administrative inspections.

A. When authorized by an administrative inspection warrant issued pursuant to the Drug Precursor Act, a law enforcement officer or employee of the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection.

B. When authorized by an administrative inspection warrant, a law enforcement officer or employee of the board may:

(1) inspect and copy records required to be kept by the Drug Precursor Act;

(2) inspect and sample, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection D of this section, all other things bearing on violation of the Drug Precursor Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any drug precursor and obtain samples.

C. This section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required.

D. An inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

E. When perishable or dangerous substances or equipment are seized pursuant to Subsection C of this section, the law enforcement officer or employee of the board may

apply to the district court for an order to sell or destroy said property and deposit the proceeds of any sale with the court.

F. For purposes of this section "controlled premises" means:

(1) places where persons licensed or exempted from license requirements under the Drug Precursor Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons licensed or exempted from license requirements under the Drug Precursor Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any drug precursor.

History: Laws 1989, ch. 177, § 15.

30-31B-16. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Drug Precursor Act.

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

History: Laws 1989, ch. 177, § 16.

30-31B-17. Summary forfeiture.

A. Drug precursors that are manufactured in violation of the Drug Precursor Act are contraband and shall be seized and summarily forfeited to the state.

B. Drug precursors which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

History: Laws 1989, ch. 177, § 17.

30-31B-18. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Drug Precursor Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Drug Precursor Act. The burden of proof of any exception or exemption is upon the person claiming it.

History: Laws 1989, ch. 177, § 18.

ARTICLE 32
Forest Fires

30-32-1. Fires extinguished by officers; responsibility for costs.

A. As used in this section, "forest fire" means a fire burning uncontrolled on lands covered wholly or in part by timber, brush, grass, grain or other inflammable vegetation.

B. A person who willfully or recklessly sets a forest fire or causes a forest fire to be set for which efforts to control or extinguish the fire are exerted by the forestry division of the energy, minerals and natural resources department; an agency under agreement with the energy, minerals and natural resources department; a county or municipality; or any fire protection agency of the United States may be liable for the costs incurred, including expenses for fighting the fire and costs of investigation.

History: Laws 1921, ch. 33, § 4; C.S. 1929, § 35-1409; 1941 Comp., § 14-1804; 1953 Comp., § 40-18-4; Laws 1967, ch. 136, § 1; 2007, ch. 332, § 1.

ANNOTATIONS

Compiler's notes. — Section 68-2-3 NMSA 1978 makes the director of the forestry division of the minerals and natural resources department the "state forester".

Cross references. — For public nuisances, *see* 30-8-1 NMSA 1978.

For offenses of improper handling of fire and negligent arson, *see* 30-17-1 and 30-17-5 NMSA 1978, respectively.

The 2007 amendment, effective June 15, 2007, deleted Subsections B and C and added a new Subsection B.

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

30-32-2. Repealed.

History: Laws 1921, ch. 33, § 5; C.S. 1929, § 35-1410; 1941 Comp., § 41-1805; 1953 Comp., § 40-18-5; Laws 1959, ch. 123, § 1; 1977, ch. 254, § 44; repealed by Laws 2007, ch. 332, § 3.

ANNOTATIONS

Repeals. — Laws 2007, ch. 332, § 3 repealed 30-32-2 NMSA 1978, as enacted by Laws 1921, ch. 33, § 5, relating to appointment of voluntary fire wardens, effective June

15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com.*

30-32-3. Arrest for violations.

All peace officers of the state, including department of game and fish conservation officers, have the power to make arrests on warrant issued by any magistrate of the state for violation of any of the state forest fire laws, including Chapter 68, Article 2 NMSA 1978, rules implementing Chapter 68, Article 2 NMSA 1978 or fire restrictions issued pursuant to such rules, or without warrant for violations of those laws committed in their presence, and shall not be liable to civil action for trespass for acts done in the discharge of their duties.

History: Laws 1921, ch. 33, § 6; C.S. 1929, § 35-1411; 1941 Comp., § 41-1806; 1953 Comp., § 40-18-6; 2007, ch. 332, § 2.

ANNOTATIONS

Cross references. — For issuance of arrest warrants by the magistrate court, *see* Rules 6-204 and 6-206 NMRA.

The 2007 amendment, effective June 15, 2007, eliminated voluntary forest fire wardens; changed "deputy game and fish wardens" to "department of game and fish conservation officers"; and provided that officers have the power to arrest for violation of Chapter 68, Article 2 NMSA 1978, rules implementing Chapter 68, Article 2 NMSA 1978 or fire restrictions issued pursuant to such rules.

30-32-4. Damages to person injured.

If a person sets on fire any woods, marshes or prairies, whether the person's own or not, so as thereby to occasion damage to another person or that person's property, the person shall make satisfaction in double damages to the party injured to be recovered by civil action, unless the person is conducting a prescribed burn pursuant to the Prescribed Burning Act [68-5-1 to 68-5-8 NMSA 1978].

History: Laws 1882, ch. 61, § 7; C.L. 1884, § 2314; C.L. 1897, § 3222; Code 1915, § 1518; C.S. 1929, § 35-1412; 1941 Comp., § 41-1807; 1953 Comp., § 40-18-7; 2021, ch. 13, § 9.

ANNOTATIONS

The 2021 amendment, effective June 18, 2021, provided an exception for prescribed burns pursuant to the Prescribed Burning Act, and made technical amendments; added the section heading "Damages to person injured"; and after "another person", added "or that person's property", and after "civil action", added "unless the person is conducting a prescribed burn pursuant to the Prescribed Burning Act".

Law reviews. — For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

ARTICLE 33
Fraud and False Dealing

30-33-1. Sale of Indian-made articles as genuine.

It is unlawful to barter, trade, sell or offer for sale or trade any article represented as produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian.

History: Laws 1929, ch. 33, § 1; C.S. 1929, § 35-1925; 1941 Comp., § 41-2123; 1953 Comp., § 40-21-24; Laws 1957, ch. 93, § 1; 1991, ch. 90, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "Indian-made" for "American-Indian" in the catchline; substituted "produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian" for "handicrafted by American Indian unless the basic article be handicraft wholly by American Indian labor or workmanship"; and deleted provisions following "workmanship" which read "provided that all such articles purporting to be of silver shall be made of coin silver or sterling silver, and provided further that 'handicraft' means the production of such articles wholly by hand tools with the exception of buffing or polishing the same and with the exception of the findings used upon such article."

30-33-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 90, § 12 repealed 30-33-2 NMSA 1978, as enacted by Laws 1929, ch. 33, § 2, relating to penalty for falsely selling American Indian items as genuine, effective June 14, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com.* For present comparable provisions, *see* 30-33-9 NMSA 1978.

30-33-3. Indian Arts and Crafts Sales Act; short title.

Sections 30-33-1 through 30-33-11 NMSA 1978 may be cited as the "Indian Arts and Crafts Sales Act".

History: 1953 Comp., § 40-21-25.1, enacted by Laws 1973, ch. 163, § 1; 1975, ch. 261, § 1; 1991, ch. 90, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1973, ch. 163, § 1, repealed 40-21-25.1, 1953 Comp., relating to the short title of the Indian Arts and Crafts Sales Act, and enacted a new section.

The 1991 amendment, effective June 14, 1991, substituted "30-33-1 through 30-33-11 NMSA 1978" for "40-21-25.1 through 40-21-25.7 NMSA 1953."

Law reviews. — For note and comment, "Advancing the Arts Community in New Mexico through Moral Rights and Droit de Suite: The International Impacts and Implications of Preemption Analysis," see 36 N.M. L. Rev. 713 (2006).

For note, "Criminal Procedure – Civil Forfeiture and Double Jeopardy: State v. Nunez," see 31 N.M. L. Rev. 401 (2001).

30-33-4. Definitions.

As used in the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978]:

A. "Indian tribe" means:

(1) any tribe, band, nation, Alaska native village or other organized group or community that is eligible for the special programs and services provided by the United States government to Indians because of their status as Indians; or

(2) any tribe that has been formally recognized as an Indian tribe by a state legislature;

B. "Indian" means:

(1) any person who is an enrolled member of an Indian tribe as evidenced by a tribal enrollment card or certified tribal records; or

(2) any person who can meet the minimum qualifications for services offered by the United States government to Indians because of their special status as Indians as evidenced by a certificate of degree of Indian blood card;

C. "authentic Indian arts and crafts" means any product, including traditional or contemporary Indian arts, that:

(1) are Indian handmade; and

(2) are not made by machine;

D. "person" means any individual, firm, association, corporation, partnership or any other legal entity;

E. "made by machine" means the producing or reproducing of a product in mass production by mechanically stamping, blanking, weaving or offset printing;

F. "Indian handmade" means any product in which the entire shaping and forming of the product from raw materials and its finishing and decoration were accomplished by Indian hand labor and manually controlled methods that permit the maker to control and vary the construction, shape, design or finish of each part of each individual product, but does not exclude the use of findings, hand tools and equipment for buffing, polishing, grinding, drilling, sawing or sewing and other processes approved by regulations adopted under the Indian Arts and Crafts Sales Act;

G. "Indian crafted" means any item that is made by an Indian when it is not entirely Indian handmade or is at least in part made by machine, including Indian-assembled and Indian-decorated items and other items consistent with this definition and approved by regulations adopted under the Indian Arts and Crafts Sales Act;

H. "findings" means an ingredient part of the product that adapts the product for wearing or display, including silver beads used in jewelry containing Indian handmade adornments in addition to beads, leather backing, binding material, bolo tie clips, tie bar clips, tie-tac pins, earring pins, earring clips, earring screw backs, cuff link toggles, money clips, pin stems, combs and chains;

I. "product" means the finished tangible arts or crafts;

J. "raw materials" means any material that can be converted by manufacture, processing or a combination of manufacture and processing into a new and useful product, and includes:

(1) "naturally occurring material", which means any material created and produced by nature;

(2) "natural material", which means any material created and produced by nature that is only altered in shape, form, finish or color as long as the color change is the result of finishing or polishing agents used that do not penetrate the surface of the material by more than one millimeter, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act;

(3) "treated material", which means any material created and produced by nature that has been altered by man-made processes that leave the material in its original shape and size after processing, but alter the color, hardness or character of the material, which may be formed, shaped or finished after treating, or as further defined

consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act; and

(4) "reconstructed material", which means any material created and produced in nature that has been altered by man-made processes that change the color, hardness, shape or character of the material, provided that more than fifty percent of the original naturally occurring material is contained in the product after processing, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act but excludes synthetic material; and

K. "synthetic material" means any material that imitates natural materials and is man-made or contains fifty percent or less of the original naturally occurring materials, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act.

History: 1953 Comp., § 40-21-25.2, enacted by Laws 1973, ch. 163, § 2; 1975, ch. 261, § 2; 1977, ch. 334, § 1; 1991, ch. 90, § 3.

ANNOTATIONS

Repeals and reenactments. — Laws 1973, ch. 163, § 2, repealed 40-21-25.2, 1953 Comp., defining various terms, and enacted a new section.

The 1991 amendment, effective June 14, 1991, rewrote this section.

30-33-5. Purpose of act.

The purpose of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978] is to protect the public and the Indian craftsman under the police powers of the state from false representation in the sale, trade, purchase or offering for sale of Indian arts and crafts.

History: 1953 Comp., § 40-21-25.3, enacted by Laws 1959, ch. 133, § 3; 1973, ch. 163, § 3; 1975, ch. 261, § 3; 1977, ch. 334, § 2; 1991, ch. 90, § 4.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, deleted "or of turquoise" at the end of the section.

30-33-6. Inquiry as to producer; duty of inquiry; election to label authentic Indian arts and crafts.

A. It is the duty of every person selling or offering for sale a product that is represented to be authentic Indian arts or crafts to make due inquiry of his suppliers concerning the true nature of the materials, product design and process of manufacture

to determine whether the product may be lawfully represented as authentic Indian arts or crafts.

B. Each person may elect to label or otherwise clearly and conspicuously disclose as authentic Indian arts and crafts all articles that are authentic Indian arts and crafts in accordance with the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978] and regulations adopted pursuant to that act.

C. Consistent with the purposes of the Indian Arts and Crafts Sales Act, regulations adopted under that act may specify designations other than "authentic Indian arts and crafts", including a designation such as "Indian crafted", for authorized labeling as Indian arts and crafts.

History: 1953 Comp., § 40-21-25.4, enacted by Laws 1959, ch. 133, § 4; 1973, ch. 163, § 4; 1975, ch. 261, § 4; 1977, ch. 334, § 3; 1991, ch. 90, § 5.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, added "Duty of inquiry; election to label authentic Indian arts and crafts" in the catchline; deleted former Subsection A, relating to a duty of persons selling Indian arts and crafts to make due inquiry concerning methods used in production and to determine authenticity; designated former Subsection B as Subsection A and rewrote the subsection which read "It is the duty of every person selling or offering for sale natural or unnatural turquoise, or both to make due inquiry of their suppliers concerning the true nature of the turquoise and to determine whether such turquoise is natural, stabilized, treated, reconstituted or imitation"; and added Subsections B and C.

30-33-7. Unlawful acts.

It is unlawful for any person to:

A. sell or offer for sale any products represented to be Indian handmade or authentic Indian arts and crafts unless such products are in fact Indian handmade or authentic Indian arts and crafts;

B. sell or offer for sale any products represented to be Indian crafted unless such products are in fact Indian crafted;

C. represent that any Indian arts and crafts product is made of a material, including natural material, unless it is made of that material;

D. fail to disclose in writing that any Indian arts and crafts product is made of treated material, reconstructed material or synthetic material;

E. solicit or buy for resale as authentic Indian arts and crafts any products that are known in fact not to be authentic; or

F. prepare, disseminate or otherwise engage in any unfair or deceptive trade practice, including any false, misleading or deceptive advertising, or any unconscionable trade practice, regarding Indian arts or crafts. For the purpose of this subsection, "unfair or deceptive trade practice" and "unconscionable trade practice" mean "unfair or deceptive trade practice" and "unconscionable trade practice" as those terms are defined in Section 57-12-2 NMSA 1978.

History: 1953 Comp., § 40-21-25.5, enacted by Laws 1973, ch. 163, § 5; 1975, ch. 261, § 5; 1977, ch. 334, § 4; 1991, ch. 90, § 6.

ANNOTATIONS

Repeals and reenactments. — Laws 1973, ch. 163, § 5, repealed former 40-21-25.5, 1953 Comp., relating to labeling imitation Indian arts and crafts, and enacted a new 40-21-25.5, 1953 Comp.

The 1991 amendment, effective June 14, 1991, rewrote this section.

30-33-8. Enforcement by attorney general or district attorney.

The attorney general or a district attorney with jurisdiction over a matter shall enforce the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978]. The New Mexico office of Indian affairs [Indian affairs department] and an authorized tribal prosecutor may assist the office of the attorney general or the district attorney in determining whether the provisions of the Indian Arts and Crafts Sales Act have been or are being violated. Either the attorney general or a district attorney with jurisdiction over a matter may take action to enforce the provisions of the Indian Arts and Crafts Sales Act.

History: 1953 Comp., § 40-21-25.7, enacted by Laws 1973, ch. 163, § 6; 1977, ch. 334, § 5; 1991, ch. 90, § 7.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 24, § 17 provided that statutory references to the "New Mexico office of Indian affairs" be changed to the "Indian affairs department" pursuant to an executive order issued in accordance with Laws 2003, Chapter 403.

The 1991 amendment, effective June 14, 1991, added "or district attorney" in the catchline; inserted "or a district attorney with jurisdiction over a matter" in the first sentence; rewrote the second sentence which read "The New Mexico commission of Indian affairs shall assist the office of the attorney general in the determining whether

the provisions of the Indian Arts and Crafts Sales Act have been violated"; and added the final sentence.

30-33-9. Violation of act; penalties.

A. In an action brought by the attorney general or a district attorney for a violation under the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978], the district court may order temporary or permanent injunctive relief. The district court shall order restitution and such other relief as may be necessary to redress injury to any person resulting from the violation.

B. In any action brought under this section, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Indian Arts and Crafts Sales Act, the attorney general or district attorney, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty not to exceed five thousand dollars ($5,000) per violation.

C. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued at two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

D. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

E. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

F. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

G. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act where the violation involves property valued in excess of twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40-21-25.8, enacted by Laws 1977, ch. 334, § 6; 1991, ch. 90, § 8; 2010, ch. 35, § 1.

ANNOTATIONS

Cross references. — For issuance of injunctions, *see* Rules 1-065 and 1-066 NMRA.

The 2010 amendment, effective July 1, 2010, in Subsection B, after "a civil penalty not to exceed", deleted "five hundred dollars ($500)" and added "five thousand dollars ($5,000)"; in Subsection C, after "Indian Arts and Crafts Sales Act", deleted "is guilty of a petty misdemeanor when" and added "where"; after "involves property valued at", deleted "less than two thousand five-hundred dollars ($2,500) and shall be punished by a fine of not less that one hundred dollars ($100) per violation per day, up to a maximum fine of five hundred dollars ($500), or imprisonment in the county jail for a definite term not to exceed six months, or both" and added the reminder of the sentence; in Subsection D, after "Indian Arts and Crafts Sales Act", deleted "is guilty of a misdemeanor when" and added "where"; after "involves property valued", deleted "at or"; after "in excess of", deleted "two thousand five-hundred dollars ($2,500) and less than twenty thousand ($20,000) and shall be punished by a fine of not less than one hundred dollars ($100) per violation per day, up to a maximum fine of one thousand dollars ($1,000), or imprisonment in the county jail for not more than one year, or both" and added the reminder of the sentence; in Subsection E, after "Indian Arts and Crafts Sales Act", deleted "is guilty of a fourth degree felony when" and added "where"; after "involves property valued", deleted "at or"; after "in excess of", deleted "twenty thousand dollars ($20,000) and shall be punished by a fine of not less than one hundred dollars ($100) per violation per day, up to a maximum fine of five thousand dollars ($5,000), or up to eighteen months imprisonment in the county jail, or both" and added the reminder of the sentence; and added Subsections F and G.

The 1991 amendment, effective June 14, 1991, substituted "penalties" for "remedies" in the catchline; designated the formerly undesignated provision as Subsection A; in Subsection A, inserted "or a district attorney" in the first sentence, deleted "civil penalties not to exceed five thousand dollars ($5,000) per violation" following "restitution" in the second sentence and made a minor stylistic change; and added Subsections B to E.

30-33-10. Private right of action; damages.

Any person who suffers financial injury or damages by reason of any conduct declared in violation of the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978] may sue in district court. Upon a showing that that act is being violated, the court may award damages and order injunctive relief and shall award the cost of the suit, including reasonable attorneys' fees. Where the court finds that the party charged with violating the Indian Arts and Crafts Sales Act has willfully violated that act, the court may award treble damages to the party complaining of the violation.

History: 1953 Comp., § 40-21-25.9, enacted by Laws 1977, ch. 334, § 7; 1991, ch. 90, § 9.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, rewrote this section which read "Any person who suffers financial injury or damages by reason of any conduct declared in

violation of the Indian Arts and Crafts Sales Act may sue in district court and may recover actual damages sustained and the cost of the suit, including reasonable attorneys' fees."

30-33-11. Administrative regulations.

The attorney general and the New Mexico office of Indian affairs [Indian affairs department] are authorized jointly to promulgate necessary regulations, pursuant to the Administrative Procedures Act [12-8-1 to 12-8-25 NMSA 1978], to further the purpose and implement the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978].

History: 1953 Comp., § 40-21-25.10, enacted by Laws 1977, ch. 334, § 8; 1991, ch. 90, § 10.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2004, ch. 24, § 17 provided that statutory references to the "New Mexico office of Indian affairs" be changed to the "Indian affairs department" pursuant to an executive order issued in accordance with Laws 2003, Chapter 403.

The 1991 amendment, effective June 14, 1991, rewrote this section which read "The attorney general is authorized to promulgate necessary regulations, pursuant to the Administrative Procedures Act, to further the purpose of the Indian Arts and Crafts Sales Act as set forth in Section 40-21-25.3 NMSA 1953."

Severability. — Laws 1991, ch. 90, § 11 provides for the severability of the act if any part or application thereof is held invalid.

30-33-12. Obtaining telecommunications service with intent to defraud; definitions.

For the purposes of Sections 30-33-12 through 30-33-14 NMSA 1978:

A. "credit card" means an identification card or plate issued to a person, firm or corporation by any person, firm or corporation engaged in the furnishing of telecommunications service, which permits the person, firm or corporation to whom the card has been issued to obtain telecommunications service on credit;

B. "credit card number" means the card number appearing in a credit card; and

C. "telecommunication service" means service furnished by a public utility, including a telephone company, by which there is accomplished, or may be accomplished, the sending or receiving of information, data, messages, writing, signs, signals, pictures and sound of all kinds, by aid of wire, cable, radio or other means or apparatus.

History: 1953 Comp., § 40-21-49, enacted by Laws 1963, ch. 49, § 1; 1967, ch. 134, § 1.

30-33-13. Crime to procure or to attempt to procure telecommunications service without paying charge; crime to make, possess, sell, give or transfer certain devices for certain purposes; penalty.

A. It is unlawful for a person, with intent to defraud a person, firm or corporation, to obtain or to attempt to obtain any telecommunications service without paying the lawful charge, in whole or in part, by any of the following means:

(1) charging the service to an existing telephone number or credit card number without the authority of the subscriber or the legitimate holder;

(2) charging the service to a nonexistent, false, fictitious or counterfeit telephone number or credit card number or to a suspended, terminated, expired, canceled or revoked telephone number or credit card number;

(3) rearranging, tampering with or making electrical, acoustical, induction or other connection with any facilities or equipment;

(4) using a code, prearranged scheme or other strategem or device whereby the person in effect sends or receives information; or

(5) using any other contrivance, device or means to avoid payment of the lawful charges, in whole or in part, for the service.

B. This section shall apply when the telecommunications service either originates or terminates, or both, in this state or when charges for the service would have been billable in normal course by the public utility providing the service in this state but for the fact that the service was obtained or attempted to be obtained by one or more of the means set forth in this section.

C. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

D. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

E. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are more than five hundred dollars ($500)

but not more than two thousand five hundred dollars ($2,500) is guilty of fourth degree felony.

F. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained are more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

G. Whoever violates this section when the charges for the telecommunications service obtained or attempted to be obtained exceed twenty thousand dollars ($20,000) is guilty of a second degree felony.

H. It is unlawful for a person under circumstances evidencing an intent to use or employ any instrument, apparatus, equipment or device described in Paragraph (1) of this subsection or to allow the same to be used or employed for the purpose described in Paragraph (1) of this subsection or knowing or having reason to believe that the same is intended to be so used or that the plans and instructions described in Paragraph (2) of this subsection are intended to be used for making or assembling the instrument, apparatus, equipment or device:

(1) to make or possess any instrument, apparatus, equipment or device designed, adapted or that can be used either:

(a) to obtain telecommunications service in violation of this section; or

(b) to conceal or to assist another to conceal from any supplier of telecommunications service or from any lawful authority the existence or place of origin or of destination of any telecommunications service; or

(2) to sell, give or otherwise transfer to another or to offer or advertise for sale any instrument, apparatus, equipment or device described in Paragraph (1) of this subsection or plans or instructions for making or assembling the same.

I. Whoever violates Subsection H of this section is guilty of a misdemeanor, unless the person has previously been convicted of the crime or of an offense under the laws of another state or of the United States that would have been an offense under Subsection H of this section if committed in this state, in which case the person is guilty of a fourth degree felony.

History: 1953 Comp., § 40-21-50, enacted by Laws 1963, ch. 49, § 2; 1967, ch. 134, § 2; 1987, ch. 121, § 11; 2006, ch. 29, § 17.

ANNOTATIONS

Cross references. — For crime of fraud, *see* 30-16-6 NMSA 1978.

The 2006 amendment, effective July 1, 2006, increased the value of the services in Subsection C from $100 to $250; increased the value of the services in Subsection D from more than $100, but not more than $250, and to more than $250, but not more than $500; and increased the value of the services in Subsection E from more than $250 to more than $500.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State civil actions by subscription television business for use, or providing technical means of use, of transmissions by nonsubscribers, 46 A.L.R.4th 811.

Offense of obtaining telephone services by unauthorized use of another's telephone - state cases, 61 A.L.R.4th 1197.

Federal legal problems arising from subscription television or "pay TV" broadcast over the air, 61 A.L.R. Fed. 809.

30-33-14. Venue.

Venue is in the county in this state where the telecommunication service giving rise to the prosecution was solicited or initiated, or attempted to be solicited or initiated, or where the service was received or was attempted to be received, or was billable in the normal course of business.

History: 1953 Comp., § 40-21-51, enacted by Laws 1963, ch. 49, § 3; 1967, ch. 134, § 3.

ARTICLE 33A
Telecommunications Service Theft

30-33A-1. Short title.

This act [30-33A-1 to 30-33A-5 NMSA 1978] may be cited as the "Telecommunications Service Theft Act".

History: Laws 1997, ch. 50, § 1.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 74 Am. Jur. 2d Telecommunications § 184.

Criminal liability for unauthorized interference with or reception of radio or television transmission, 43 A.L.R.4th 991.

30-33A-2. Definitions.

As used in the Telecommunications Service Theft Act:

A. "provider" means a person that offers telecommunications service for lawful compensation; and

B. "telecommunications service" means any audio, video, data or programming offered for a fee or other consideration to facilitate the origination, transmission, emission or reception of signs, signals, data, writings, images, sounds or intelligence of any nature delivered by telephone or telephone service, cable television service, including cellular or other wireless telephones, wire, radio, electromagnetic, photoelectronic or photo-optical equipment, coaxial or fiber optic cable, terrestrial microwave, television broadcast or satellite transmission.

History: Laws 1997, ch. 50, § 2.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

30-33A-3. Illegal service; prohibited acts; penalties.

A. It is unlawful for any person to:

(1) obtain or attempt to obtain telecommunications service by trick, artifice, deception, use of an illegal device or decoder or other fraudulent means without authorization of the provider;

(2) assist or instruct any person to obtain or attempt to obtain any telecommunications service without authorization of the provider;

(3) make or attempt to make or assist any person to make or maintain a telecommunications service connection, whether physical, electrical, mechanical, acoustical or by other means, with any cables, wires, components or other devices used for the distribution of telecommunications service without authorization of the provider; or

(4) make or maintain any modification or alteration to any device that was installed with the authorization of the provider for the purpose of intercepting or receiving any telecommunications service without authorization of the provider.

B. Any person who violates this section is guilty of a misdemeanor upon conviction for a first offense and shall be punished by a fine of up to five hundred dollars ($500); and upon conviction for a second or subsequent offense, is guilty of a misdemeanor and shall be punished by either a fine of not less than five hundred dollars ($500) or more than one thousand dollars ($1,000), by imprisonment for a definite term not to exceed thirty days, or both.

History: Laws 1997, ch. 50, § 3.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

30-33A-4. Illegal devices; prohibited acts; penalties.

A. It is unlawful for any person to:

(1) own or possess any device, including a printed circuit board, designed to receive or permit reception of any telecommunications service, regardless of whether that service is encoded, filtered, scrambled or otherwise made unintelligible, with the intent to distribute such device for the purpose of permitting reception or use of telecommunications service without authorization by the provider;

(2) publish or advertise for sale or lease any kit or plan for a device designed in whole or in part to receive without authorization of the provider any telecommunications service, regardless of whether that service is encoded, filtered, scrambled or otherwise made unintelligible;

(3) advertise for sale or lease any device or printed circuit or kit for a device or printed circuit designed in whole or in part to receive any telecommunications service without authorization of the provider, regardless of whether the service is encoded, filtered, scrambled or otherwise made unintelligible; or

(4) manufacture, import into New Mexico, distribute, sell, lease or offer for sale or lease any device, printed circuit or any plan or kit for a device or for a printed circuit, designed in whole or in part to receive any telecommunications service, regardless of whether the service is encoded, filtered, scrambled or otherwise made unintelligible, that can be used to receive that service without the authorization of the provider.

B. Any person who violates this section is guilty of a misdemeanor upon conviction for a first offense and shall be punished by either a fine of not less than one thousand dollars ($1,000), imprisonment for a definite term of not less than thirty days, or both;

and upon conviction for a second or subsequent offense, is guilty of a fourth degree felony and shall be punished as provided in Section 31-18-15 NMSA 1978.

History: Laws 1997, ch. 50, § 4.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

30-33A-5. Private remedies.

A. A person damaged by a violation of Section 3 or 4 [30-33A-3 or 30-33A-4 NMSA 1978] of the Telecommunications Service Theft Act may be granted an injunction under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of revenue or intent to deceive and take unfair advantage of any person is not required.

B. The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other New Mexico statutes.

History: Laws 1997, ch. 50, § 5.

ANNOTATIONS

Effective dates. — Laws 1997, ch. 50 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, the Telecommunications Service Theft Act is effective June 20, 1997, 90 days after adjournment of the legislature.

Severability. — Laws 1997, ch. 50, § 7 provides for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State civil actions by subscription television business for use, or providing technical means of use, of transmissions by nonsubscribers, 46 A.L.R.4th 811.

ARTICLE 34
Libel and Slander (Transferred.)

30-34-1 to 30-34-6. Transferred.

ANNOTATIONS

Compiler's notes. — Former 30-34-1 to 30-34-6 NMSA 1978, concerning tort actions for libel and slander, have been transferred to 41-7-1 to 41-7-6 NMSA 1978.

ARTICLE 35
Public Utilities

30-35-1. [Failure to relinquish telephone party line for emergency call.]

It is unlawful for any person:

A. wilfully [willfully] to refuse to yield, or wilfully [willfully] to impede, the use of a telephone party line in time of emergency, by which he is not affected and of which he has been apprised, when he has been requested so to yield; or

B. to request another to yield the use of a telephone party line because of an emergency, which in fact does not exist.

History: 1953 Comp., § 40-37-6, enacted by Laws 1963, ch. 320, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

30-35-2. Penalty.

Any person:

A. who fails to yield a telephone party line or impedes its use, and any person who falsely asserts an emergency as basis for a request of another to yield a telephone party line, as provided in the preceding section [30-35-1 NMSA 1978], is liable to the person aggrieved by his act for triple the amount of damages proximately caused by his act;

B. who violates any provision of this act [30-35-1, 30-35-2 NMSA 1978] is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500) nor less than twenty-five dollars ($25.00).

History: 1953 Comp., § 40-37-7, enacted by Laws 1963, ch. 320, § 2.

ARTICLE 36
Worthless Checks

30-36-1. Short title.

This act [30-36-1 to 30-36-9 NMSA 1978] may be cited as the "Worthless Check Act".

History: 1953 Comp., § 40-49-1, enacted by Laws 1963, ch. 315, § 1.

ANNOTATIONS

Relation to general fraud statute. — The general fraud statute (Section 30-16-6 NMSA 1978) and this act prohibit different offenses, and it is inappropriate to view this act as an exception to the fraud statute. *State v. Higgins*, 1988-NMCA-072, 107 N.M. 617, 762 P.2d 904.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and effect of "bad check" statute with respect to check in payment of preexisting debt, 59 A.L.R.2d 1159.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

30-36-2. Definitions.

As used in the Worthless Check Act:

A. "check" means any check, draft or written order for money;

B. "person" means any person, firm or corporation;

C. "draw" means the making, drawing, uttering or delivering a check;

D. "thing of value" includes money, property, services, goods and wares; and lodging;

E. "credit" means an arrangement or understanding with the drawer for the payment of the check.

History: 1953 Comp., § 40-49-2, enacted by Laws 1963, ch. 315, § 2.

30-36-3. Purpose.

It is the purpose of the Worthless Check Act to remedy the evil of giving checks on a bank without first providing funds in or credit with the depository on which they are made or drawn to pay or satisfy the same, which tends to create the circulation of worthless checks on banks, bad banking, check kiting and mischief to trade and commerce.

History: 1953 Comp., § 40-49-3, enacted by Laws 1963, ch. 315, § 3.

ANNOTATIONS

"Issue" and "giving" same. — The term "issue" in Section 30-36-4 NMSA 1978 is used in the same sense as "giving" a check in this section, and "giving" a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

30-36-4. Unlawful to issue.

It is unlawful for a person to issue in exchange for anything of value, with intent to defraud, any check, draft or order for payment of money upon any bank or other depository, knowing at the time of the issuing that the offender has insufficient funds in or credit with the bank or depository for the payment of such check, draft or order in full upon its presentation.

History: 1953 Comp., § 40-49-4, enacted by Laws 1963, ch. 315, § 4.

ANNOTATIONS

Cross references. — For fraud, *see* 30-16-6 NMSA 1978.

For offense of falsely obtaining services or accommodations, *see* 30-16-16 NMSA 1978.

The antecedent or preexisting debt exception does not apply to criminal prosecutions under the Worthless Check Act. *State v. Cruz*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890, *rev'g* 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173.

A violation of the Worthless Check Act does not require a contemporaneous transaction. *State v. Cruz*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890, *rev'g* 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173.

Check issued to pay earned wages. — Where defendant issued payroll checks to pay workers one week after the end of the pay period and the checks were issued with insufficient funds to cover the checks, defendant violated Section 30-36-4 NMSA 1978. *State v. Cruz*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890, *rev'g* 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173.

Checks issued to members of an Indian tribe. — Where defendant issued checks to pay the wages of three members of an Indian tribe for performing work on a construction project that was located on Indian land; the checks were delivered to the payees on Indian land; the checks were signed by defendant outside Indian land; defendant gave the checks to an employee of defendant’s construction company at a meeting place that was located outside Indian land for delivery to the payees; the payees cashed the checks at a store that was located outside Indian land; and defendant’s bank dishonored the checks for insufficient funds, New Mexico had

jurisdiction to prosecute defendant for issuing worthless checks. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

A check issued in payment of wages earned is payment of a pre-existing debt and is not encompassed within the Worthless Check Act. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

Check issued to pay earned wages. — Where defendant issued checks to pay the wages of the payees for performing work on a construction project; the payees were paid every Friday for work they performed during the week ending the previous Friday; and defendant did not receive anything of value in exchange for issuing the checks and the payees performed the work in exchange for a promise to pay, not for the checks themselves, the checks were issued in satisfaction of a debt already owed to the payees by virtue of their work and were not encompassed within the Worthless Check Act. *State v. Cruz*, 2010-NMCA-011, 147 N.M. 753, 228 P.3d 1173, *rev'd*, 2011-NMSC-038, 150 N.M. 548, 263 P.3d 890.

Section not void for vagueness. — This section gives one notice of the prohibited act; it is not void for vagueness. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

"Issue" and "giving" same. — The term "issue" in this section is used in the same sense as "giving" a check in 30-36-3 NMSA 1978, and "giving" a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

"Issue" and "give" mean delivery to holder with passing of interest from one to another. To violate this section, one must issue the check in exchange for value, with the requisite intent and knowledge. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

Timing of delivery of goods/services and issuance of checks. — The fact that the goods and services were delivered before the check was issued did not signify that an exchange did not occur within the meaning of this section. A worthless check is given for something of value if the worthless check is issued as part of a contemporaneous transaction between the parties in which something of value is exchanged for the check, without regard to whether the thing of value is delivered before or after the worthless check is issued. *State v. Platt*, 1992-NMCA-110, 114 N.M. 721, 845 P.2d 815, cert. denied, 114 N.M. 501, 841 P.2d 549.

Section inapplicable to postdated checks. — Where neither evidence nor inference contradicts testimony that a check was postdated, defendant's motion to dismiss the charge as to the check should be sustained as the Worthless Check Act does not apply to postdated checks. *State v. Downing*, 1971-NMCA-122, 83 N.M. 62, 488 P.2d 112.

False pretenses. — Giving a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved, and such representation relates to an existing fact, so that under former law a prosecution for obtaining money by false pretenses could be maintained. *State v. Tanner*, 1917-NMSC-017, 22 N.M. 493, 164 P. 821.

Finding of intent to defraud was supported by evidence where defendant cashed a $20.00 check on a bank in which he had no account, the next day cashed a $75.00 check on another bank with which he had just opened an account and made a $25.00 deposit, and on the following morning before leaving town without checking out of motel cashed a $35.00 check on that bank. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

Intent lacking. — To issue a check in payment of an outstanding account, where credit was not given on the strength of check so issued, was not a violation of the statute, because there was no intent to defraud which is the gist of the offense. *State v. Davis*, 1921-NMSC-003, 26 N.M. 523, 194 P. 882.

Sufficient bank credit. — Conviction for issuance of a fraudulent check was reversed upon evidence showing an arrangement with the bank whereby defendant was to deposit drafts drawn on various commission houses, and the bank was to honor checks drawn by defendant, and that at the time the check was presented, defendant's credit with the bank was sufficient, according to the bank's own records, to cover it. *State v. Thompson*, 1933-NMSC-021, 37 N.M. 229, 20 P.2d 1030.

Compulsion as defense. — Where defendant claimed that an individual who was "bigger and tougher" than he forced him to write and cash a bad check under threat of bodily harm, and that this person was present in the store when he cashed the check, but store employees testified that defendant came into the store alone, defense of compulsion failed. *State v. Lee*, 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265.

Knowledge of motel clerk. — Whether motel clerk knew, had been expressly notified or had reason to believe that defendant did not have sufficient funds on deposit in the bank to insure payment on presentation of the check was for the jury to decide. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

Information sufficient. — Where information charged defendant with issuing worthless checks contrary to this section and 30-36-5B NMSA 1978, reference to the latter section was surplusage, since the information was sufficient without reference to the penalty. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

Malicious prosecution action not maintainable. — One charged with having issued a fraudulent check or draft cannot maintain a malicious prosecution action where he has obtained dismissal of charge by voluntarily paying the claim and costs of prosecution. *Marchbanks v. Young*, 1943-NMSC-024, 47 N.M. 213, 139 P.2d 594.

Court inquiry into defendant's consideration of bankruptcy might constitute reversible error. — In a trial for issuing worthless checks, the court's inquiry into defendant's consideration of bankruptcy might well have detracted from the presumption of innocence to which defendant was entitled, and constituted reversible error, because his answers may have tainted the opinion of the jury in deciding whether or not defendant's disavowals of intent to deceive or knowledge of insufficient funds should be believed in view of his past history as a debtor. *State v. Caputo*, 1980-NMCA-032, 94 N.M. 190, 608 P.2d 166.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 32 Am. Jur. 2d False Pretenses § 65 et seq.

False pretense or confidence game through means of worthless check or draft, 35 A.L.R. 344, 174 A.L.R. 173.

Criminal liability of corporate officer who issues worthless check in corporate name, 68 A.L.R.2d 1269.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

35 C.J.S. False Pretenses § 21.

30-36-5. Penalty.

Any person violating Section 30-36-4 NMSA 1978 shall be punished as follows:

A. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for more than one dollar ($1.00) but less than twenty-five dollars ($25.00), imprisonment in the county jail for a term of not more than thirty days or a fine of not more than one hundred dollars ($100), or both such imprisonment and fine;

B. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for twenty-five dollars ($25.00) or more, imprisonment in the penitentiary for a term of not less than one year nor more than three years or the payment of a fine of not more than one thousand dollars ($1,000) or both such imprisonment and fine.

History: 1953 Comp., § 40-49-5, enacted by Laws 1965, ch. 114, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 1965, ch. 114, § 1, repealed 40-49-5, 1953 Comp., relating to penalties for the writing of bad checks, and enacted a new section.

Totaling provisions unconstitutional. — The provisions of this section, concerning the "totaling" of amounts of worthless checks, are so vague that they offend due process and are void. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

Totaling provisions severable. — While the "totaling" provisions of this section are void, they may be severed from this section, leaving the remaining portion thereof consistent with 30-36-4 NMSA 1978, which makes an offense out of each worthless check issued. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

Frivolous to infer rest of statute unconstitutionally vague. — An inference that because the totaling provision of this section was held unconstitutionally vague, other parts of the Worthless Check Act (30-36-1 to 30-36-9 NMSA 1978) are also unconstitutionally vague was frivolous. *State v. Libero*, 1978-NMCA-055, 91 N.M. 780, 581 P.2d 873, cert. denied, 92 N.M. 180, 585 P.2d 324.

Quashing of information unwarranted. — The trial court correctly held that defendant could not be punished under Subsection B of this section by "totaling" two checks, but erred in quashing the information, since defendant could still be punished for each worthless check that he had issued. *State v. Conners*, 1969-NMCA-096, 80 N.M. 662, 459 P.2d 461.

Since defendant was convicted of issuing four worthless checks, he could have been sentenced for each offense under the portion of this section remaining after severance of the provisions on totaling; therefore, the trial court erred in dismissing the information. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

Reinstatement of charges not double jeopardy. — Dismissal of the information before the entering of a plea because of the unconstitutional vagueness of the "totaling" provision of this section did not place defendant in jeopardy, and, therefore, reinstatement of the information did not subject him to double jeopardy. *State v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462.

Felony degree for violation of Subsection B. — The offense of issuing a worthless check over $25.00 is a "felony" but could not constitute a "fourth degree felony" because the minimum sentence imposed for issuing worthless checks is less than the stated sentence for fourth degree felonies. *State v. Muzio*, 1987-NMCA-006, 105 N.M. 352, 732 P.2d 879.

Sentence not severable. — A sentence of six to eight years for utterance of fraudulent checks by habitual criminal could not be considered a sentence of five years for uttering fraudulent checks since judgment was not severable. *Jordan v. Swope*, 1932-NMSC-015, 36 N.M. 84, 8 P.2d 788.

Totaling provisions vague. — The cumulative provisions in this section relating to penalties are vague, indefinite and uncertain. 1966 Op. Att'y Gen. No. 66-80.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 35 C.J.S. False Pretenses § 56.

30-36-6. Exceptions.

The Worthless Check Act does not apply to:

A. any check where the payee or holder knows or has been expressly notified prior to the drawing of the check or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment on its presentation; or

B. any post-dated check.

History: 1953 Comp., § 40-49-6, enacted by Laws 1963, ch. 315, § 6.

ANNOTATIONS

Cross references. — For effect of postdating a negotiable instrument, *see* 55-3-113 NMSA 1978.

Knowledge of payee as jury question. — Whether motel clerk knew, had been expressly notified or had reason to believe that defendant did not have sufficient funds on deposit in the bank to insure payment on presentation of the check was for the jury to decide. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

Act inapplicable to postdated check. — Where neither evidence nor inference contradicts testimony that a check was postdated, defendant's motion to dismiss the charge as to the check should be sustained as the Worthless Check Act does not apply to postdated checks. *State v. Downing*, 1971-NMCA-122, 83 N.M. 62, 488 P.2d 112.

Check postdated. — Where it was stipulated that the hay sold to defendant was weighed on June 25, and the payee testified that the check was accepted on the date of weighing, while the check was dated June 30, the defendant's motion to dismiss should have been sustained. *State v. Downing*, 1971-NMCA-122, 83 N.M. 62, 488 P.2d 112.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of "bad check" statute with respect to post dated checks, 52 A.L.R.3d 464.

30-36-7. Intent to defraud; how established.

In the prosecution of offenses under the Worthless Check Act, the following rules of evidence shall govern:

A. if the maker or drawer of a check, payment of which is refused by the bank or depository upon which it is drawn because of no account in the name of the maker or drawer in the bank, proof of the fact that the maker or drawer had no account in the

bank or depository upon which the check is drawn shall be prima facie evidence of an intent to defraud and of knowledge of insufficient funds in or credit with the bank or depository with which to pay the draft;

B. if the maker or drawer of a check, payment of which is refused by the bank or depository upon which it is drawn because of insufficient funds or credit in the account of the maker or drawer in the bank or depository, fails, within three business days after notice to him that the check was not honored by the bank or depository, to pay the check in full, together with any protest fees or costs thereon, such failure shall constitute prima facie evidence of a knowledge of the insufficiency of funds in the bank or depository at the time of the making or drawing of the check and of an intent to defraud.

History: 1953 Comp., § 40-49-7, enacted by Laws 1965, ch. 114, § 2; 1979, ch. 8, § 1.

ANNOTATIONS

Cross references. — For evidentiary rule regarding the use of presumptions in criminal cases, *see* Rule 11-302 NMRA.

Repeals and reenactments. — Laws 1965, ch. 114, § 2, repealed 40-49-7, 1953 Comp., relating to establishing intent to defraud, and enacted a new section.

Notice is not condition precedent to maintaining criminal action. — One who had been given a fraudulent check was not required to give notice provided for by former statute before filing his complaint to have the drawer prosecuted. *Marchbanks v. Young*, 1943-NMSC-024, 47 N.M. 213, 139 P.2d 594.

Prima facie presumption inapplicable without notice. — Where although defendant unquestionably had insufficient funds in his account with a bank to cover a $35.00 check, the state failed to prove that defendant had received notice of dishonor at least 10 days (now 3 days) before trial, the state could not rely on the prima facie evidence rule as to intent to defraud set forth in Subsection B of this section. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

Prima facie intent to defraud. — Where the only evidence relative to the dishonor of a $20.00 check was that it was dishonored because defendant had no account in the bank on which it was drawn, there was prima facie intent to defraud under Subsection A. *State v. McKay*, 1969-NMCA-009, 79 N.M. 797, 450 P.2d 435.

Intent to defraud. — Evidence that defendant entered store and after furnishing identification cashed $25.00 check drawn on a Texas bank with which he had no account or credit was prima facie evidence of an intent to defraud under this section. *State v. Lee*, 1967-NMCA-017, 78 N.M. 421, 432 P.2d 265.

Effect of discharge in bankruptcy. — On its face, this act addresses the passing of worthless checks with the intent to defraud, and a defendant's prosecution for violation

of such law is not precluded by filing for or obtaining a discharge in bankruptcy. *State v. Muzio*, 1987-NMCA-006, 105 N.M. 352, 732 P.2d 879.

Purpose of notice. — Under the language of the Worthless Check Act the purpose of notice and of the 10-day period (now 3 business days) is to make it easier for the state, upon prosecution, to prove necessary knowledge and intent; such knowledge and intent can, however, be proved without use of the statutory act if desired. 1965 Op. Att'y Gen. No. 65-197.

Notice is not condition precedent to maintaining criminal action. 1965 Op. Att'y Gen. No. 65-197.

Failure to respond to notice merely creates presumption of knowledge and fraudulent intent if a criminal proceeding is instituted. 1965 Op. Att'y Gen. No. 65-197.

Threat of prosecution not authorized. — The specific language of Section 30-22-6 NMSA 1978, relating to compounding a crime, controls over the more general language of the Worthless Check Act by making it a crime to include in the notice of dishonor a threat to institute criminal proceedings unless payment is made within 10 days (now 3 business days). 1965 Op. Att'y Gen. No. 65-197.

30-36-8. Notice.

Notice as used in the Worthless Check Act shall consist of either notice given to the person entitled thereto in person or notice given to such person in writing. The notice in writing is presumed to have been given when deposited as certified matter in the United States mail, addressed to the person at his address as it appears on the check.

History: 1953 Comp., § 40-49-8, enacted by Laws 1963, ch. 315, § 8; 1979, ch. 8, § 2.

30-36-9. Citizen's complaint; costs.

Where prosecutions are initiated under the Worthless Check Act before any committing magistrate, the party applying for the warrant is liable for costs accruing in the event the case is dismissed at his request or for his failure to prosecute.

History: 1953 Comp., § 40-49-9, enacted by Laws 1963, ch. 315, § 9.

ANNOTATIONS

Law reviews. — For article, "Automatic Stay Provisions of the Bankruptcy Act of 1978," see 13 N.M.L. Rev. 599 (1983).

30-36-10. District attorney; processing fee.

A. A district attorney is authorized to assess a processing fee against any person who is convicted of violating Section 30-36-4 NMSA 1978 and against any person who acknowledges violation of that section but for whom prosecution is waived by the district attorney. The processing fee assessed pursuant to this section shall not exceed:

(1) five dollars ($5.00) if the amount of the check, draft or order is less than twenty-five dollars ($25.00);

(2) ten dollars ($10.00) if the amount of the check, draft or order is twenty-five dollars ($25.00) or more but less than one hundred dollars ($100);

(3) thirty dollars ($30.00) if the amount of the check, draft or order is one hundred dollars ($100) or more but less than three hundred dollars ($300);

(4) fifty dollars ($50.00) if the amount of the check, draft or order is three hundred dollars ($300) or more but less than five hundred dollars ($500); and

(5) seventy-five dollars ($75.00) if the amount of the check, draft or order is five hundred dollars ($500) or more.

B. All processing fees collected by a district attorney pursuant to this section shall be transmitted to the administrative office of the district attorneys for credit to the district attorney fund.

History: Laws 1984, ch. 110, § 4.

ARTICLE 37
Sexually Oriented Material Harmful to Minors

30-37-1. Definitions.

As used in this act:

A. "minor" means any unmarried person who has not reached his eighteenth birthday;

B. "nudity" means the showing of the male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state;

C. "sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast;

D. "sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

E. "sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained;

F. "harmful to minors" means that quality of any description of representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse, when it:

(1) predominantly appeals to the prurient, shameful or morbid interest of minors; and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(3) is utterly without redeeming social importance for minors; and

G. "knowingly" means having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or both, of:

(1) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant;

(2) the age of the minor.

History: 1953 Comp., § 40-50-1, enacted by Laws 1973, ch. 257, § 1.

ANNOTATIONS

Cross references. — For provisions regarding other sexual offenses, *see* 30-9-10 to 30-9-17 NMSA 1978.

Compiler's notes. — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

General/specific rule did not apply. — Where defendant, who was convicted of contributing to the delinquency of a minor when defendant wrote a sexually explicit letter to the victim, claimed that under the general/specific rule, the State was required to charge defendant under the sexually oriented materials statute, Section 30-37-2 NMSA 1978, rather than under Section 30-6-3 NMSA 1978; the general/specific rule states that if one statute deals with a subject in general and comprehensive terms and another statute addresses part of the same subject matter in a more specific manner, the latter controls; the contributing to the delinquency of a minor statute requires that the material encourage delinquency; and the sexually oriented materials statute only requires the

knowing delivery of harmful materials to a minor, the general/specific rule did not apply because the statutory elements of the statutes were not the same and defendant's conviction did not violate the general/specific rule. *State v. Garcia*, 2013-NMCA-005, 294 P.3d 1256, cert. granted, 2012-NMCERT-012.

Validity of separate classifications for minors and adults for purposes of legislative control has been explicitly recognized. 1973 Op. Att'y Gen. No. 73-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297.

Gesture as punishable obscenity, 99 A.L.R.3d 762.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials, 13 A.L.R.5th 567.

30-37-2. Offenses; books; pictures.

It is unlawful for a person to knowingly sell, deliver, distribute, display for sale or provide to a minor, or knowingly to possess with intent to sell, deliver, distribute, display for sale or provide to a minor:

A. any picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body, or any replica, article or device having the appearance of either male or female genitals which depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse and which is harmful to minors; or

B. any book, pamphlet, magazine, printed matter however produced or sound recording which contains any matter enumerated in Subsection A of this section or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

History: 1953 Comp., § 40-50-2, enacted by Laws 1973, ch. 257, § 2.

ANNOTATIONS

Standing to challenge constitutionality. — Trade association, wholesalers and retailers of books and periodicals had standing to challenge the constitutionality of Section 30-37-2 NMSA 1978 even though no district attorney has made a determination under Section 30-37-4 NMSA 1978 that specific material is harmful to minors and the plaintiffs had not received actual or constructive notice of the district attorney's determination. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

Validity and application of statute exempting nonmanagerial, nonfinancially interested employees from obscenity prosecution, 35 A.L.R.4th 1237.

Musical sound recording as punishable obscenity, 30 A.L.R.5th 718.

Constitutionality of state statutes banning distribution of sexual devices, 94 A.L.R.5th 497.

30-37-2.1. Offenses; retail display.

A. It is unlawful for any person, offering for sale in a retail establishment open to the general public any book, magazine or other printed material the cover of which depicts nudity, sado-masochistic [sadomasochistic] abuse, sexual conduct or sexual excitement and which is harmful to minors, to knowingly exhibit that book, magazine or material in that establishment in such a way that it is on open display to, or within the convenient reach of, minors who may frequent the retail establishment. Such books, magazines or printed materials may be displayed behind an opaque covering which conceals the depiction of nudity, sado-masochistic [sadomasochistic] abuse, sexual conduct or sexual excitement, provided that those books, magazines or printed materials are not within the convenient reach of minors who may frequent the retail establishment.

B. It is unlawful for any person, offering for sale in a retail establishment open to the general public any book, magazine or other printed material the content of which exploits, is devoted to or is principally made up of descriptions or depictions of nudity, sado-masochistic [sadomasochistic] abuse, sexual conduct or sexual excitement and which are harmful to minors, to knowingly exhibit that book, magazine or material in that establishment in such a way that it is within the convenient reach of minors who may frequent the retail establishment.

History: Laws 1985, ch. 13, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Standing to challenge constitutionality. — Trade association, wholesalers and retailers of books and periodicals had standing to challenge the constitutionality of Section 30-37-2 NMSA 1978 even though no district attorney has made a determination under Section 30-37-4 NMSA 1978 that specific material is harmful to minors and the

plaintiffs had not received actual or constructive notice of the district attorney's determination. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

30-37-3. Offenses; motion pictures; plays.

It is unlawful for any person knowingly to exhibit to a minor or knowingly to provide to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

History: 1953 Comp., § 40-50-3, enacted by Laws 1973, ch. 257, § 3.

ANNOTATIONS

Lack of essential element in jury instruction resulted in fundamental error. — Where defendant was charged with unlawful exhibition of motion pictures to a minor pursuant to the Sexually Oriented Material Harmful to Minors Act (Act), in which the State was required to prove that defendant knowingly exhibited a motion picture, the exhibition was to a minor, the motion picture depicts, in whole or in part, nudity, sexual conduct or sado-masochistic abuse, and the motion picture is harmful to minors, but where the state failed to include "harmful to minors" as a separate element of the offense and failed to provide to the jury the definitions of "nudity" or "harmful to minors" as defined in the Act, a rational jury could not find that the motion picture was harmful to minors, an essential element of the offense. The district court therefore fundamentally erred in instructing the jury on the charge of unlawful exhibition of motion pictures to a minor. *State v. Luna*, 2018-NMCA-025, cert. denied.

No bar to retrying defendant where there was sufficient evidence of unlawful exhibition of motion pictures to a minor. — Where defendant was tried and convicted on the charge of unlawful exhibition of motion pictures to a minor pursuant to the Sexually Oriented Material Harmful to Minors Act (Act), but where the district court erred in instructing the jury on the charged offense, the state was not barred from retrying defendant on that count, because there was sufficient evidence of the charged offense based on evidence that defendant showed the nine-year-old child a movie that depicted female nudity, material which lay jurors may consider harmful to minors. *State v. Luna*, 2018-NMCA-025, cert. denied.

30-37-3.1. Outdoor theaters; offenses.

A. It is unlawful for the owner or operator of an outdoor motion picture theater to show or exhibit any motion picture which in whole or in part depicts unclothed sexual conduct in an outdoor theater unless the exhibitor can prove that the outdoor screen on which the picture is to be shown cannot be seen by any minor who has not taken extraordinary measures to view the screen or who is not within the area provided for those persons who have been admitted by a ticket or pass.

B. As used in this section, "unclothed sexual conduct" means an act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's unclothed genitals, pubic area or buttocks.

C. The notice provisions of Section 30-37-4 NMSA 1978 shall not apply to this section.

History: Laws 1983, ch. 152, § 2.

30-37-3.2. Child solicitation by electronic communication device.

A. Child solicitation by electronic communication device consists of a person knowingly and intentionally soliciting a child under sixteen years of age, by means of an electronic communication device, to engage in sexual intercourse, sexual contact or in a sexual or obscene performance, or to engage in any other sexual conduct when the perpetrator is at least four years older than the child.

B. Whoever commits child solicitation by electronic communication device is guilty of a:

(1) fourth degree felony if the child is at least thirteen but under sixteen years of age; or

(2) third degree felony if the child is under thirteen years of age.

C. Whoever commits child solicitation by electronic communication device and also appears for, attends or is present at a meeting that the person arranged pursuant to the solicitation is guilty of a:

(1) third degree felony if the child is at least thirteen but under sixteen years of age; or

(2) second degree felony if the child is under thirteen years of age.

D. In a prosecution for child solicitation by electronic communication device, it is not a defense that the intended victim of the defendant was a peace officer posing as a child under sixteen years of age.

E. For purposes of determining jurisdiction, child solicitation by electronic communication device is committed in this state if an electronic communication device transmission either originates or is received in this state.

F. As used in this section, "electronic communication device" means a computer, video recorder, digital camera, fax machine, telephone, cellular telephone, pager, audio equipment or any other device that can produce an electronically generated image, message or signal.

History: Laws 1998, ch. 64, § 1; 2005, ch. 295, § 1; 2007, ch. 68, § 3.

ANNOTATIONS

The 2007 amendment, effective July 1, 2007, defined the crime of child solicitation by electronic communication device; prescribed penalties for child solicitation by electronic communication device; added a new Subsection C to provide penalties for persons who commit child solicitation by electronic communication device and who attends or is present at a meeting that the offender arranged pursuant to the solicitation; and defined "electronic communication device".

The 2005 amendment, effective July 1, 2005, deleted the former provision of Subsection A which defined the crime of dissemination of material that is harmful to a minor by computer; created the crime of child solicitation by computer and designated the crime as a fourth degree felony in Subsection A; deleted former Subsection C which provided defenses to the crime of dissemination of material that is harmful to a minor by computer; deleted former Subsection D which provided that it is not a violation of this section for a person to provide access or connection to or from a facility or system or network not under the person's control; deleted former Subsection E which provided that limitation of former Subsection D does not apply to a conspirator with an entity that creates or disseminates indecent material by computer or advertises the availability of indecent material by computer or apply to a person who provides access or connection to a facility, system or network that disseminates indecent material by computer owned or controlled by the person; added Subsection B to provide that in a prosecution for child solicitation by computer it is not a defense that the victim was a peace officer; and added Subsection C to provide that child solicitation by computer is committed in New Mexico if a computer transmission originates or is received in New Mexico.

Not unconstitutional under the first amendment. — Section 30-37-3.2 NMSA 1978, which prohibits the solicitation of children to engage in sexual conduct, is narrowly tailored to the compelling interest of protecting children from online sexual predators and is not unconstitutional under the first amendment. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

Not unconstitutionally overbroad. — The failure of Section 30-37-3.2 NMSA 1978 to include an "unlawful" element of the crime of child solicitation by computer does not render the statute unconstitutionally overbroad. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

Not unconstitutionally vague as applied. — Where defendant was communicating by computer with a person whom defendant believed to be a twelve-year-old child and defendant requested the "child" to masturbate, Section 30-37-3.2 NMSA 1978 clearly applied to defendant’s conduct and was not unconstitutionally vague. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

Child solicitation by electronic communication device statute is not void for vagueness. — Where defendant was charged with two counts of child solicitation by electronic communication device, and where defendant argued that § 30-37-3.2 NMSA 1978 should be declared void for vagueness because the statute does not provide clear notice of what is prohibited or there a re no clear standards as to what is prohibited and, as such, violates his due process rights, defendant's constitutional rights were not violated because the conduct prohibited by the statute, solicitation of minors through electronic communications, is straightforward such that a person of ordinary intelligence using common sense would understand that § 30-37-3.2 prohibits an individual from using an electronic device to knowingly and intentionally solicit a child under sixteen years of age, to engage in the identified sexual acts, and when the individual is at least four years older than the child. As applied in this case, § 30-37-3.2 provided fair warning that defendant's conduct of sending the undercover officer, whom he believed to be a fourteen-year-old girl, messages with instructions on how to masturbate and making arrangements to meet with the child in order to engage in specific sexual acts, was prohibited. *State v. Julg*, 2021-NMCA-058, cert. denied.

Not unconstitutional under the commerce clause. — Section 30-37-3.2 NMSA 1978 does not violate the commerce clause, because it applies evenhandedly to both in- and out-of-state actors; applies only to communications that originate or are received in New Mexico; addresses behavior relevant to its local purpose of preventing the sexual exploitation of children; and does not impose any burden on legitimate interstate commerce. *State v. Ebert*, 2011-NMCA-098, 150 N.M. 576, 263 P.3d 918.

Injunction against enforcement. — Because plaintiffs, a broad array of internet content providers, were likely to prevail in their challenge to this section on grounds that it violated the first, fifth and fourteenth amendments to the United States constitution, and the commerce clause thereof, they were entitled to a preliminary injunction enjoining its enforcement. *ACLU v. Johnson*, 4 F. Supp. 2d 1029 (D.N.M. 1998), *aff'd*, 194 F.3d 1149 (10th Cir. 1999).

Defense of entrapment rejected. — Under the subjective approach to the defense of entrapment, the focus is on the defendant’s intent or predisposition to commit the crime, with the prosecution bearing the burden of proving to the fact-finder that the defendant was predisposed to commit the crime; where the prosecution proves that the defendant was predisposed to commit the crime and the police merely provided an opportunity to commit a crime that is free of police inducement and overreach, and the defendant avails himself of the opportunity, the subjective entrapment defense must fail. *State v. Schaublin*, 2015-NMCA-024, cert. denied, 2015-NMCERT-002.

Where defendant was convicted of child solicitation by electronic communication device; and where the state presented evidence that the police presented an opportunity, via a "women seeking men" Craigslist posting in which the online profile immediately represented herself as a fifteen-year-old girl, and where defendant availed himself of the opportunity presented by the police when he continued to communicate with the "fifteen-year-old," even after having learned her age, and where defendant introduced sexuality

into the communications and arranged to meet the fifteen-year-old, defendant's willingness to engage in sexually explicit conversations with the online profile, which was not the product of police overreach or improper inducement, was sufficient evidence of defendant's predisposition to commit the crime of child solicitation by electronic device to support the jury's rejection of his subjective entrapment defense. *State v. Schaublin*, 2015-NMCA-024, cert. denied, 2015-NMCERT-002.

Entrapment as a matter of law. — Entrapment as a matter of law exists when there is undisputed testimony which shows conclusively and unmistakably that an otherwise innocent person was induced to commit the act or when the district court determines that as a matter of law the police conduct exceeded the standards of proper investigation. *State v. Mendoza*, 2016-NMCA-002.

Where defendant was convicted of child solicitation by electronic device, evidence that law enforcement posted an ad in an adults-only section of a website and used an age-regressed photo of an adult to accompany the false persona of a fifteen-year-old child, who purportedly placed the ad, was insufficient to support defendant's claim that he was entrapped as a matter of law, when the evidence showed that defendant was made aware at the outset that he was conversing with a fifteen-year-old child, that defendant first introduced the subject of sex in his conversations with the fifteen-year-old child, and where the record was void of any evidence that the police practices exceeded the standards of proper investigation or were unconscionable. *State v. Mendoza*, 2016-NMCA-002.

Notice requirements of § 30-37-4 NMSA 1978 do not apply to child solicitation by electronic communication device. — Where defendant was charged with two counts of child solicitation by electronic communication device, and where, prior to trial, defendant filed a motion to dismiss in which he asserted that the "notice" requirement in § 30-37-4 NMSA 1978 was an essential element of the offense of child solicitation by electronic communication device, and that the state was required, but failed, to make a determination that the acts underlying defendant's charges were harmful to minors and without such a determination, he could not have received actual or constructive notice as required under § 30-37-4, and where the district court denied defendant's motion, finding that the notice requirement in § 30-37-4 does not apply to this section and defendant had constructive notice of the criminality of his actions from the clear language of the child solicitation by electronic communication device statute, the district court did not err in denying defendant's motion to dismiss because an examination of § 30-37-4 reveals that solicitation of minors through electronic communications, as prohibited by this section, are not "matters" or "performances" subject to the notice requirements of § 30-37-4. *State v. Julg*, 2021-NMCA-058, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity of state statutes and administrative regulations regulating internet communications under commerce clause and First Amendment of federal constitution, 98 A.L.R.5th 167.

30-37-3.3. Criminal sexual communication with a child; penalty.

A. Criminal sexual communication with a child consists of a person knowingly and intentionally communicating directly with a specific child under sixteen years of age by sending the child obscene images of the person's intimate parts by means of an electronic communication device when the perpetrator is at least four years older than the child.

B. Whoever commits sexual communication with a child is guilty of a fourth degree felony.

C. As used in this section:

(1) "electronic communication device" means a computer, video recorder, digital camera, fax machine, telephone, pager or any other device that can produce an electronically generated image; and

(2) "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

History: Laws 2007, ch. 67, § 1.

ANNOTATIONS

Effective dates. — Laws 2007, ch. 67, § 2, made the section effective July 1, 2007.

Criminal sexual communication with a child may be committed by delivering the electronic communication device directly to the child. — This section requires a person to knowingly and intelligently communicate directly with a specific child; the element of communicating directly with a child by means of an electronic communication device may occur through a third-party carrier such as social media, internet forums and message boards, online file-sharing services, text message, or email, and it may also occur by delivering the electronic communication device containing the obscene images directly to the child, so where defendant recorded himself nude and masturbating, saved the files to a digital memory card, placed the memory card in a cell phone which he handed directly to the child victim, claiming that there was a surprise for her on the phone, defendant's actions constituted the crime of criminal sexual communication with a child. *State v. Tufts*, 2016-NMSC-020, *rev'g* 2015-NMCA-075, 355 P.3d 32.

Hand-delivery of obscene images not covered by statute. — Where defendant transferred obscene images of his intimate parts onto a digital memory card and then physically placed the memory card in the child-victim's cell phone, and where the obscene images were never transferred through the cell phone network or transmitted electronically, defendant was wrongly charged and convicted of 30-37-3.3 NMSA 1978, because defendant's conduct did not constitute "sending" by means of an electronic communication device. *State v. Tufts*, 2015-NMCA-075, cert. granted, 2015-NMCERT-006.

30-37-4. Notice; prosecution.

A. No prosecution based under this act shall be commenced unless the district attorney of the county in which the offense occurs shall have previously determined that the matter or performance is harmful to minors and the defendant shall have received actual or constructive notice of such determination. Persons shall be presumed to have constructive notice of such determination on the fifth business day following publication of a notice of such determination in a newspaper of general circulation in the county in which the prosecution takes place.

B. Any person adversely affected by such determination may, at any time within thirty days after such notice is given, seek a judicial determination of its correctness. The court shall, unless otherwise agreed by the parties, render judgment not later than two court days following trial. Filing of an action under this section shall stay prosecution until a judicial determination is rendered, but no appeal shall have such effect unless so ordered by the trial court.

C. No criminal action shall be commenced in any other judicial district within this state during the pendency of the civil action authorized by Subsection B of Section 4 [this section] regarding the same matter, exhibition or performance.

History: 1953 Comp., § 40-50-4, enacted by Laws 1973, ch. 257, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Compiler's notes. — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

Constitutionality. — The threat of a determination of harmfulness – apart from the possibility of prosecution - was substantial enough to establish standing, insofar as the case and controversy requirement of Article III of the federal constitution was concerned, for publishers, distributors and sellers of printed materials in their action to challenge the constitutionality of this article. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

Burden of proof. — Once the district attorney determines that certain material is harmful to minors, the statute places upon the distributor or retail establishment marketing such material the burden of establishing that the material is not harmful to minors. *Am. Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

Notice requirements do not apply to child solicitation by electronic communication device. — Where defendant was charged with two counts of child solicitation by electronic communication device, § 30-37-3.2 NMSA 1978, and where,

prior to trial, defendant filed a motion to dismiss in which he asserted that the "notice" requirement in this section was an essential element of the offense of child solicitation by electronic communication device, and that the state was required, but failed, to make a determination that the acts underlying defendant's charges were harmful to minors and without such a determination, he could not have received actual or constructive notice as required under this section, and where the district court denied defendant's motion, finding that the notice requirement in this section does not apply to child solicitation by electronic communication device and defendant had constructive notice of the criminality of his actions from the clear language of the child solicitation by electronic communication device statute, the district court did not err in denying defendant's motion to dismiss because an examination of this section reveals that solicitation of minors through electronic communications, as prohibited by § 30-37-3.2, are not "matters" or "performances" subject to the notice requirements of this section. *State v. Julg*, 2021-NMCA-058, cert. denied.

30-37-5. Exclusions; defenses.

No person shall be guilty of violating the provisions of this act:

A. where such person had reasonable cause to believe that the minor involved had reached his eighteenth birthday, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor had reached his eighteenth birthday; or

B. if the minor was accompanied by his parent or guardian, or the parent or guardian has in writing waived the application of this act either generally or with reference to the particular transaction; or

C. where such person had reasonable cause to believe that the person was the parent or guardian of the minor; or

D. where such person is a bona fide school, museum or public library, or is acting in his capacity as an employee of such organization, or as a retail outlet affiliated with and serving the educational purposes of such organization.

History: 1953 Comp., § 40-50-5, enacted by Laws 1973, ch. 257, § 5.

ANNOTATIONS

Compiler's notes. — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

30-37-6. Offenses by minor.

A. It is unlawful for any minor to falsely represent to any person mentioned in Section 2 or Section 3 [30-37-2 or 30-37-3 NMSA 1978] of this act, or to his agent, that

such minor has reached his eighteenth birthday, with the intent to procure any material set forth in Section 2 of this act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 of this act.

B. It is unlawful for any person to knowingly make a false representation to any person mentioned in Section 2 or Section 3 of this act, or to his agent, that he is the parent or guardian of any minor, or that any minor has reached his eighteenth birthday, with the intent to procure any material set forth in Section 2 of this act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 of this act.

History: 1953 Comp., § 40-50-6, enacted by Laws 1973, ch. 257, § 6.

30-37-7. Penalties.

A. A person violating Section 30-37-2, 30-37-2.1, 30-37-3 or 30-37-3.1 NMSA 1978 is guilty of a misdemeanor.

B. Any person violating the provisions of Section 30-37-6 NMSA 1978 shall be guilty of a petty misdemeanor.

History: 1953 Comp., § 40-50-7, enacted by Laws 1973, ch. 257, § 7; 1983, ch. 152, § 3; 1985, ch. 13, § 2.

ANNOTATIONS

Cross references. — For sentencing for misdemeanors, *see* 31-19-1 NMSA 1978.

30-37-8. Uniform application.

In order to provide for the uniform application of this act to all minors within this state, it is intended that the sole and only regulation of the sale, distribution or provision of any matter described in Section 2 [30-37-2 NMSA 1978], or admission to, or exhibition of, any performance described in Section 3 [30-37-3 NMSA 1978], shall be under this act, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the sale, distribution or provision of any matter described in Section 2, or admission to any performance described in Section 3, including but not limited to criminal offenses, classification of suitable matter or performances for minors, or licenses or taxes respecting the sale, distribution, exhibition or provision of matter regulated under this act. All such laws, ordinances, regulations, taxes or licenses, whether enacted before or after this act, shall be or become void, unenforceable and of no effect upon the effective date of this act.

History: 1953 Comp., § 40-50-8, enacted by Laws 1973, ch. 257, § 8.

ANNOTATIONS

Compiler's notes. — The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

"Effective date of this act". — The phrase "effective date of this act", referred to at the end of this section, means June 15, 1973, the effective date of Laws 1978, Chapter 257.

Preemption by state. — So that there will be uniform application of the state plan regulating sexually oriented material harmful to minors, the state has preempted county and municipal regulation of the field. *Am. Booksellers Ass'n v. Schiff*, 649 F. Supp. 1009 (D.N.M. 1986), *rev'd on other grounds*, 868 F.2d 1199 (10th Cir. 1989).

The state has preempted this field as far as it pertains to minors, and no county or municipality may enact ordinances on this subject matter. 1973 Op. Att'y Gen. No. 73-54.

Sections 30-37-2 and 30-37-3 NMSA 1978 so fully cover the field that it is not conceivable that a county or municipal ordinance could be drafted that would not offend the prohibitions of this section. 1973 Op. Att'y Gen. No. 73-54.

Powers retained by localities. — In enacting Laws 1973, ch. 257, the legislature intended for counties and municipalities to retain any grant of power they have to make ordinances in the obscenity field not inconsistent with the provisions of this section. 1973 Op. Att'y Gen. No. 73-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Motion pictures: exhibition of obscene motion pictures as nuisance, 50 A.L.R.3d 969.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

30-37-9. Legislative findings and purpose.

The legislature finds that children do not have the judgment necessary to protect themselves from harm and that the legislature has the inherent power to control commercial conduct within this state for the protection of minors in a manner that reaches beyond the scope of its authority to protect adults. The legislature also finds that regulation of content at outdoor theaters does not deprive adults from viewing that content at indoor theaters.

History: Laws 1983, ch. 152, § 1.

30-37-10. Offenses; certain tie-in arrangements unlawful.

A. It is unlawful for any person offering for sale, selling or distributing books, magazines or other printed material to require, as a condition for any such sale or delivery, that the purchaser or receiver of the delivery purchase or accept the delivery of

any other book, magazine or other printed matter which contains sexually oriented material harmful to minors as defined in Subsection F of Section 30-37-1 NMSA 1978. Nothing in this subsection prohibits the sale or purchase on a voluntary basis of books, magazines or other printed material containing sexually oriented material.

B. Any person violating the provisions of Subsection A of this section shall be guilty of a misdemeanor.

History: Laws 1985, ch. 134, § 1.

ANNOTATIONS

Cross references. — For sentencing for petty misdemeanors, *see* 31-19-1 NMSA 1978.

ARTICLE 37A
Unauthorized Distribution of Sensitive Images

30-37A-1. Unauthorized distribution of sensitive images; penalties.

A. Unauthorized distribution of sensitive images consists of distributing, publishing or otherwise making available, by an electronic communications device or other means, sensitive images of a person, with or without information identifying that person, without that person's consent:

(1) with the intent to:

(a) harass, humiliate or intimidate that person;

(b) incite another to harass, humiliate or intimidate that person;

(c) cause that person to reasonably fear for that person's own or family members' safety;

(d) cause that person to suffer unwanted physical contact or injury; or

(e) cause that person to suffer substantial emotional distress; and

(2) where the conduct is such that it would cause a reasonable person to suffer substantial emotional distress.

B. For the purpose of this section:

(1) "electronic communications device" means a computer, an internet web site or page, a video recorder, a digital camera, a fax machine, a telephone, a cellular

telephone, a pager or any other device that can produce an electronically generated image, message or signal;

(2) "information service" means a service offering the capability of generating, acquiring, storing, transforming, processing, publishing, retrieving, utilizing or making available information;

(3) "interactive computer service" means any information service, system or access software provider that provides or enables computer access by multiple users;

(4) "intimate act" has the same meaning as "sexual act", as that term is defined in Section 30-9-2 NMSA 1978;

(5) "sensitive images" means images, photographs, videos or other likenesses depicting or simulating an intimate act or depicting any portion of a person's genitals, or of a woman's breast below the top of the areola, that is either uncovered or visible through less-than-fully opaque clothing, which images may reasonably be considered to be private, intimate or inappropriate for distribution or publication without that person's consent; and

(6) "telecommunications provider" has the same meaning as set forth in Section 63-7-23 NMSA 1978.

C. Whoever commits unauthorized distribution of sensitive images is guilty of a misdemeanor. Upon a second or subsequent conviction, the offender is guilty of a fourth degree felony.

D. Nothing in this section shall be construed to impose liability on:

(1) an interactive computer service, an information service or a telecommunications provider for content provided by another person; or

(2) a person who reproduces, distributes, exhibits, publishes, transmits or otherwise disseminates content in furtherance of a legitimate public purpose, including the compilation or dissemination of news by newspapers and licensed broadcasters.

History: Laws 2015, ch. 42, § 1.

ANNOTATIONS

Effective dates. — Laws 2015, ch. 42, § 2 made Laws 2015, ch. 42, § 1 effective July 1, 2015.

ARTICLE 38
Exhibiting Obscene Films Outdoors

30-38-1. Outdoor motion picture theatres; prohibited from showing obscene films.

A. It is unlawful for the owner or operator of an outdoor motion picture theatre to exhibit any obscene film in an outdoor theatre.

B. For purposes of this section, "obscene film" means a film that:

(1) the average person applying contemporary community standards would find that, when considered or taken as a whole, appeals to the prurient interests;

(2) the material depicts or describes sexual conduct in a patently offensive way by representations of ultimate sexual acts, normal or perverted, actual or simulated; masturbation, excretory functions or lewd exhibitions of the genitals of oneself or another; tactile stimulation of the genitals of oneself or another; and

(3) the work when considered or taken as a whole lacks serious literary, artistic, political or scientific value.

C. It is unlawful for any person to violate the provisions of Subsection A of this section. In the event a person violates the provisions of Subsection A of this section any representative of the local government involved may, upon notice to the offending person, seek an injunction in the district court to enjoin the showing of the offending film.

History: 1953 Comp., § 49-5-23, enacted by Laws 1977, ch. 241, § 1.

ANNOTATIONS

Cross references. — For issuance of injunctions, *see* Rules 1-065 and 1-066 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

30-38-2. Applicability.

The provisions of Section 1 [30-38-1 NMSA 1978] of this act shall only be enforced in those political subdivisions that have adopted by ordinance the provisions of Section 1 of this act. Any ordinance that has been adopted by a political subdivision that is in conflict with the provisions of Section 1 of this act shall be void. In the event a county adopts by ordinance the provisions of Section 1 of this act, those provisions shall not be enforceable by the county within the territorial boundaries of any incorporated municipality located in the county.

History: 1953 Comp., § 49-5-24, enacted by Laws 1977, ch. 241, § 2.

ARTICLE 39
False Reporting

30-39-1. False report; penalty.

It is unlawful for any person to intentionally make a report to a law enforcement agency or official, which report he knows to be false at the time of making it, alleging a violation by another person of the provisions of the Criminal Code [30-1-1 NMSA 1978]. Any person violating the provisions of this section is guilty of a misdemeanor.

History: Laws 1979, ch. 145, § 1.

ANNOTATIONS

Intent. — Section 30-39-1 NMSA 1978 refers to a false accusation of another. The purpose for making a false report is immaterial. The act alone is unlawful, and it is a misdemeanor offense. But when a false report is given which not only interrupts or hinders official investigation or activity, but is done with the opprobrious intention of aiding an offender to escape the criminal process, that intentional conduct rises to the magnitude of a felony. *State v. Rogers*, 1980-NMCA-059, 94 N.M. 527, 612 P.2d 1338, cert. denied, 94 N.M. 629, 614 P.2d 546.

Applicability. — By its plain language, this section applies only if a person falsely alleges a criminal violation by someone other than the person making the allegation. The statute does not apply to situations where an individual falsely assumes the responsibility for a criminal offense. *State v. Gardner*, 1991-NMCA-058, 112 N.M. 280, 814 P.2d 458, cert. denied, 112 N.M. 235, 814 P.2d 103.

ARTICLE 40
Public Assistance

30-40-1. Failing to disclose facts or change of circumstances to obtain public assistance.

A. Failing to disclose facts or change of circumstances to obtain public assistance consists of a person knowingly failing to disclose a material fact known to be necessary to determine eligibility for public assistance or knowingly failing to disclose a change in circumstances for the purpose of obtaining or continuing to receive public assistance to which the person is not entitled or in amounts greater than that to which the person is entitled.

B. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is two hundred

fifty dollars ($250) or less in any twelve consecutive months is guilty of a petty misdemeanor.

C. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) in any twelve consecutive months is guilty of a misdemeanor.

D. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) in any twelve consecutive months is guilty of a fourth degree felony.

E. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) in any twelve consecutive months is guilty of a third degree felony.

F. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received exceeds twenty thousand dollars ($20,000) in any twelve consecutive months is guilty of a second degree felony.

History: Laws 1979, ch. 170, § 1; 1987, ch. 121, § 12; 2006, ch. 29, § 18.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increased the value of the assistance in Subsection B from $100 to $250; increased the value of the assistance in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; increased the value of the assistance in Subsection D from more than $250 to more than $500; and provided in Subsections E and F that the value of the assistance is measured in a twelve consecutive month period.

ANNOTATIONS

This section is not unconstitutionally vague. *State v. Fleming*, 2006-NMCA-149, 140 N.M. 797, 149 P.3d 113, cert. denied, 2006-NMCERT-012, 141 N.M. 104, 151 P.3d 65.

The term "public assistance" includes public housing benefits. *State v. Fleming*, 2006-NMCA-149, 140 N.M. 797, 149 P.3d 113, cert. denied, 2006-NMCERT-012, 141 N.M. 104, 151 P.3d 65.

Multiple convictions of fraud violated defendant's double jeopardy rights. — Where defendant was charged with multiple counts of fraud and failure to disclose facts to obtain public assistance, related to her application for and receipt of several forms of

public assistance benefits, including supplemental security income (SSI), social security disability insurance (SSDI), medicaid, and food stamps (SNAP), and where defendant claimed on appeal that her public assistance fraud convictions should be vacated because the conduct supporting those convictions was the same conduct supporting the general fraud convictions, defendant's double jeopardy rights were violated, because defendant's conduct supporting the fraud charges and the public assistance fraud charges was unitary, the general fraud was not complete before the public assistance fraud was committed, the time and space for each overlapped, the quality and nature of the acts were the same, the object and results of the acts were the same, and the mens rea for the general fraud and the public assistance fraud were the same, and, under the state's theory of the case, the public assistance fraud convictions were subsumed within the general fraud convictions. Punishment cannot be had for both fraud and public assistance fraud in this case. *State v. DeLaO*, 2022-NMCA-064, cert. denied.

Mistake of fact instruction not warranted. — Where defendant was charged with multiple counts of fraud and failure to disclose facts to obtain public assistance, related to her application for and receipt of several forms of public assistance benefits, including supplemental security income (SSI), social security disability insurance (SSDI), medicaid, and food stamps (SNAP), and where defendant claimed on appeal that the district court improperly refused to give a mistake of fact instruction based on defendant's theory that she mistakenly believed that by separately reporting her income to the human services department [health care authority department] to satisfy a child support obligation, she satisfied all of her reporting obligations, the district court properly denied defendant's requested instruction, because the general fraud instruction adequately apprised the jury of the intent element of the crime and allowed it to consider defendant's theory of the case. *State v. DeLaO*, 2022-NMCA-064, cert. denied.

30-40-2. Unlawful use of food stamp identification card or medical identification card.

A. Unlawful use of food stamp identification card or medical identification card consists of the use of a food stamp or medical identification card by a person to whom it has not been issued, or who is not an authorized representative of the person to whom it has been issued, for a food stamp allotment.

B. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully

received is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. For the purpose of this section, the value of the medical assistance received is the amount paid by the human services department [health care authority department] for medical services received through use of the medical identification card.

History: Laws 1979, ch. 170, § 2; 1987, ch. 121, § 13; 2006, ch. 29, § 19.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2006 amendment, effective July 1, 2006, increased the value of the stamps or services in Subsection B from $100 to $250; increased the value of the stamps or services in Subsection C from more than $100 but not more than $250 to more than $250 but not more than $500; and increased the value of the stamps or services in Subsection D from more than $250 to more than $500.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Liability of state or federal government for losses associated with distribution of food stamps, 116 A.L.R. Fed. 457.

30-40-3. Misappropriating public assistance.

A. Misappropriating public assistance consists of a public officer or public employee fraudulently misappropriating, attempting to misappropriate or aiding and abetting in the misappropriation of food stamp coupons, WIC checks pertaining to the special supplemental food program for women, infants and children administered by the human services department [health care authority department], food stamp or medical identification cards, public assistance benefits or funds received in exchange for food stamp coupons.

B. Whoever commits misappropriating public assistance when the value of the thing misappropriated is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits misappropriating public assistance when the value of the thing misappropriated exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

G. Whoever commits misappropriating public assistance when the item misappropriated is a food stamp or medical identification card is guilty of a fourth degree felony.

History: Laws 1979, ch. 170, § 3; 1987, ch. 121, § 14; 2006, ch. 29, § 20.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2006 amendment, effective July 1, 2006, increased the value of the thing misappropriated in Subsection B from $100 to $250; increased the value of the thing misappropriated in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; and increased the value of the thing misappropriated in Subsection D from more than $250 to more than $500.

"Public employee" construed. — Defendant, a workfare participant placed with a public agency, was not a "public employee" for purposes of this section. *State v. Dartez*, 1998-NMCA-009, 124 N.M. 455, 952 P.2d 450, cert. denied, 124 N.M. 311, 950 P.2d 284.

30-40-4. Making or permitting a false claim for reimbursement for public assistance services.

A. Making or permitting a false claim for reimbursement of public assistance services consists of knowingly making, causing to be made or permitting to be made a claim for reimbursement for services provided to a recipient of public assistance for services not rendered or making a false material statement or forged signature upon any claim for services, with intent that the claim shall be relied upon for the expenditure of public money.

B. Whoever commits making or permitting a false claim for reimbursement for public assistance services is guilty of a fourth degree felony.

History: Laws 1979, ch. 170, § 4.

ANNOTATIONS

Effect of conviction. — When a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. *Weiss v. New Mexico Bd. of Dentistry*, 1990-NMSC-077, 110 N.M. 574, 798 P.2d 175.

Am. Jur. 2d, A.L.R. and C.J.S. references. — When does statute of limitations begin to run in action under False Claims Act (31 USCS §§ 3729-3733), 139 A.L.R. Fed. 645.

30-40-5. Unlawful seeking [of] payment from public assistance recipients.

A. Unlawful seeking [of] payment from public assistance recipients consists of knowingly seeking payment from recipients or their families for any unpaid portion of a bill for which reimbursement has been or will be received from the human services department [health care authority department] or for claims or services denied by the human services department [health care authority department] because of provider [the provider's] administrative error.

B. Whoever commits unlawful seeking [of] payment from [a] public assistance recipient is guilty of a misdemeanor.

History: Laws 1979, ch. 170, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

30-40-6. Failure to reimburse the human services department [health care authority department] upon receipt of third party payment.

A. Failure to reimburse the human services department [health care authority department] upon receipt of third party payment consists of knowing failure by a medicaid provider to reimburse the human services department [health care authority department] or the department's fiscal agent the amount of payment received from the department for services when the provider receives payment for the same services from a third party.

B. A medicaid provider who commits failure to reimburse the human services department [health care authority department] upon receipt of third party payment when the value of the payment made by the department is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. A medicaid provider who commits failure to reimburse the human services department [health care authority department] upon receipt of third party payment when the value of the payment made by the department is more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. A medicaid provider who commits failure to reimburse the human services department [health care authority department] upon receipt of third party payment when the value of the payment made by the department is more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. A medicaid provider who commits failure to reimburse the human services department [health care authority department] upon receipt of third party payment when the value of the payment made by the department is more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. A medicaid provider who commits failure to reimburse the human services department [health care authority department] upon receipt of third party payment when the value of the payment made by the department exceeds twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: Laws 1979, ch. 170, § 6; 1987, ch 121, § 15; 2006, ch. 29, § 21.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2006 amendment, effective July 1, 2006, increased the value of the payment in Subsection B from $100 to $250; increased the value of the payment in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; and increased the value of the payment in Subsection D from more than $250 to more than $500.

30-40-7. Failure to notify the department of receipt of anything of value from public assistance recipient.

Any employee of the human services department [health care authority department] who knowingly receives anything of value, other than as provided by law, from either a recipient of public assistance or from the family of a public assistance recipient shall notify the department within ten days after such receipt on a form provided by the department. Whoever fails to so notify the department within ten days is guilty of a petty misdemeanor.

History: Laws 1979, ch. 170, § 7.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

ARTICLE 41
Kickback, Bribe or Rebate

30-41-1. Soliciting or receiving illegal kickback.

Whoever knowingly solicits or receives any remuneration in the form of any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind from a person:

A. in return for referring an individual to that person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or

B. in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony.

History: Laws 1979, ch. 384, § 1.

ANNOTATIONS

Cross references. — For civil penalties for kickbacks or bribes, *see* 13-1-198 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Construction and application of § 2C1.1 of United States Sentencing Guidelines (18 USCS APPX § 2C1.1) pertaining to offenses involving public officials offering, giving, soliciting, or receiving bribes, or extortion under color of official right, 144 A.L.R. Fed. 615.

30-41-2. Offering or paying illegal kickback.

Whoever knowingly offers or pays any remuneration in the form of any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person:

A. to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or

B. to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony.

History: Laws 1979, ch. 384, § 2.

ANNOTATIONS

Cross references. — For civil penalties for kickbacks or bribes, *see* 13-1-198 NMSA 1978.

30-41-3. Exceptions.

This act [30-41-1 to 30-41-3 NMSA 1978] shall not apply to:

A. a discount or other reduction in price obtained by a provider of services or other entity if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity; or

B. any amount paid by an employer to an employee who has a bona fide employment relationship with such employer for employment in the provision of covered items or services.

History: Laws 1979, ch. 384, § 3.

ANNOTATIONS

Cross references. — For civil penalties for kickbacks or bribes, *see* 13-1-198 NMSA 1978.

ARTICLE 42
Racketeering

30-42-1. Short title.

This act [30-42-1 to 30-42-6 NMSA 1978] may be cited as the "Racketeering Act".

History: Laws 1980, ch. 40, § 1.

ANNOTATIONS

Law reviews. — For note, "Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: *John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission,"* see 23 N.M.L. Rev. 315 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of Racketeer Influenced and Corrupt Organization Act, 18 U.S.C.A. § 1961 et seq. - supreme court cases, 171 A.L.R. Fed. 1

30-42-2. Purpose.

The purpose of the Racketeering Act is to eliminate the infiltration and illegal acquisition of legitimate economic enterprise by racketeering practices and the use of legal and illegal enterprises to further criminal activities.

History: Laws 1980, ch. 40, § 2.

30-42-3. Definitions.

As used in the Racketeering Act:

A. "racketeering" means any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving any of the following cited offenses:

(1) murder, as provided in Section 30-2-1 NMSA 1978;

(2) robbery, as provided in Section 30-16-2 NMSA 1978;

(3) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(4) forgery, as provided in Section 30-16-10 NMSA 1978;

(5) larceny, as provided in Section 30-16-1 NMSA 1978;

(6) fraud, as provided in Section 30-16-6 NMSA 1978;

(7) embezzlement, as provided in Section 30-16-8 NMSA 1978;

(8) receiving stolen property, as provided in Section 30-16-11 NMSA 1978;

(9) bribery, as provided in Sections 30-24-1 through 30-24-3.1 NMSA 1978;

(10) gambling, as provided in Sections 30-19-3, 30-19-13 and 30-19-15 NMSA 1978;

(11) illegal kickbacks, as provided in Sections 30-41-1 and 30-41-2 NMSA 1978;

(12) extortion, as provided in Section 30-16-9 NMSA 1978;

(13) trafficking in controlled substances, as provided in Section 30-31-20 NMSA 1978;

(14) arson and aggravated arson, as provided in Subsection A of Section 30-17-5 and Section 30-17-6 NMSA 1978;

(15) promoting prostitution, as provided in Section 30-9-4 NMSA 1978;

(16) criminal solicitation, as provided in Section 30-28-3 NMSA 1978;

(17) fraudulent securities practices, as provided in the New Mexico Securities Act of 1986 [New Mexico Uniform Securities Act, Chapter 58, Article 13C NMSA 1978];

(18) loan sharking, as provided in Sections 30-43-1 through 30-43-5 NMSA 1978;

(19) distribution of controlled substances or controlled substance analogues, as provided in Sections 30-31-21 and 30-31-22 NMSA 1978;

(20) a violation of the provisions of Section 30-51-4 NMSA 1978;

(21) unlawful taking of a vehicle or motor vehicle, as provided in Section 30-16D-1 NMSA 1978;

(22) embezzlement of a vehicle or motor vehicle, as provided in Section 30-16D-2 NMSA 1978;

(23) fraudulently obtaining a vehicle or motor vehicle, as provided in Section 30-16D-3 NMSA 1978;

(24) receiving or transferring stolen vehicles or motor vehicles, as provided in Section 30-16D-4 NMSA 1978; and

(25) altering or changing the serial number, engine number, decal or other numbers or marks of a vehicle or motor vehicle, as provided in Section 30-16D-6 NMSA 1978;

B. "person" means an individual or entity capable of holding a legal or beneficial interest in property;

C. "enterprise" means a sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or a group of individuals associated in fact although not a legal entity and includes illicit as well as licit entities; and

D. "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of the incidents occurred after February 28, 1980 and the last incident occurred within five years after the commission of a prior incident of racketeering.

History: Laws 1980, ch. 40, § 3; 1988, ch. 14, § 4; 1998, ch. 113, § 6; 2009, ch. 253, § 7; 2009, ch. 261, § 7.

ANNOTATIONS

Compiler's notes. — Laws 2009, ch. 82, § 703 repealed the New Mexico Securities Act of 1986, referenced in Subsection A(17), effective January 1, 2010.

The 2009 amendment, effective July 1, 2009, in Paragraph (9) of Subsection A, changed "Section 30-24-3 NMSA 1978" to "Section 30-24-3.1 NMSA 1978" and added Paragraphs (21) through (25) of Subsection A.

Laws 2009, ch. 253, § 7 enacted identical amendments to this section. The section was set out as amended by Laws 2009, ch. 261, § 7. *See* 12-1-8 NMSA 1978.

The 1998 amendment, effective July 1, 1998, substituted "that" for "which" in Subsection A; added Paragraph A(20); substituted "means an" for "includes any" near the beginning of Subsection B; substituted "incident" for "which" near the end of Subsection D; and made minor stylistic changes throughout the section.

The 1988 amendment, effective July 1, 1988, substituted "the New Mexico Securities Act of 1986" for "Sections 58-13-39 and 58-13-40 NMSA 1978; and" in Subsection A(17), made a minor stylistic change in Subsection A(18), and added Subsection A(19).

Intent to perform only predicate acts. — The legislature intended the Racketeering Act to have a broad application, so that it covers situations in which a group of individuals associate only to perform predicate criminal acts. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

Intent requirement. — With respect to the intent requirement, the definition of a "pattern of racketeering activity" is hardly a model of clarity. Where the requested finding and the adopted finding both concern only the intent to commit those acts of fraud that could constitute predicate offenses for a pattern of racketeering activity, such intent is not enough to establish a racketeering claim. The intent component of the definition of "pattern of racketeering activity" would be useless if it encompassed nothing more than the intent necessary to commit each of the two incidents of racketeering required by definition. *Naranjo v. Paull*, 1990-NMCA-111, 111 N.M. 165, 803 P.2d 254.

"Enterprise". — An "enterprise" as used in the racketeering statute may exist when there is no association above and beyond the acts which form the pattern of racketeering activity. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354.

The factors to be considered in determining the existence of an enterprise include the identity of the individuals involved, their knowledge of the relevant activities, the amount of planning required to carry out the predicate acts, the frequency of the acts, the time span between each act, and the existence of an identifiable structure within the association or entity. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

Governmental agencies may be considered "enterprises" for the purposes of the Racketeering Act. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

"Association" necessary for "enterprise". — While proof of an association is essential to establishing the elements of an enterprise, the purpose of the association may be as simple as earning money from repeated illegal acts. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

Failure to state two underlying activities. — Complaint alleging racketeering activity was properly dismissed where plaintiffs conceded that dismissed defendants had not committed fraud, and where plaintiffs failed to state two activities underlying their claim as required by Subsection D. *Maxwell v. Wilson*, 1988-NMSC-096, 108 N.M. 65, 766 P.2d 909.

Distinct, independent proof of elements not necessary. — Although the state must prove both the existence of an "enterprise" and a "pattern of racketeering activity," proof of these elements need not be, and often will not be, distinct and independent. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

Effect of acquittal on some predicate charges. — Petit jury verdicts of guilty on each fraud count returned by them against defendants constituted a basis to uphold the racketeering verdicts and provided assurance that the jury found defendants guilty of at least two of the predicate acts of fraud as charged in the indictment. Simply because defendants were acquitted of some charges and others were dismissed does not require the racketeering charges to be set aside where the jury returned guilty verdicts on other predicate counts. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

Law reviews. — For note, "Criminal Procedure — New Mexico Denies Fifth Amendment Protection to Corporations: John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission," see 23 N.M. L. Rev. 315 (1993).

30-42-4. Prohibited activities; penalties.

A. It is unlawful for a person who has received proceeds derived, directly or indirectly, from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use in the acquisition of an interest in, or the establishment or operation of, an enterprise. Whoever violates this subsection is guilty of a second degree felony.

B. It is unlawful for a person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, an interest in or control of an enterprise. Whoever violates this subsection is guilty of a second degree felony.

C. It is unlawful for a person employed by or associated with an enterprise to conduct or participate, directly or indirectly, in the conduct of the enterprise's affairs by engaging in a pattern of racketeering activity. Whoever violates this subsection is guilty of a second degree felony.

D. It is unlawful for a person to conspire to violate the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.

E. Whoever is convicted of a violation of Subsection A, B, C or D of this section in addition to the prescribed penalties shall forfeit to the state of New Mexico:

(1) any interest acquired or maintained in violation of the Racketeering Act; and

(2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over an enterprise that the person has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act.

F. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property described in Subsection E of this section.

History: Laws 1980, ch. 40, § 4; 2002, ch. 4, § 17; 2015, ch. 152, § 20.

ANNOTATIONS

The 2015 amendment, effective July 1, 2015, made technical amendments to the section; in Subsection A, after "unlawful for", deleted "any" and added "a", after "received", deleted "any", after "investment or use", deleted "thereof", after "acquisition of", deleted "any" and added "an", and after "operation of,", deleted "any" and added "an"; in Subsection B, after "unlawful for", deleted "any" and added "a", after "indirectly", deleted "any" and added "an", after "control of", deleted "any" and added "an"; in Subsection C, after "unlawful for", deleted "any" and added "a", after "associated with", deleted "any" and added "an"; in Subsection D, after "unlawful for", deleted "any" and added "a", and after "violate", deleted "any of"; in Subsection E, after "Whoever", deleted "violates" and added "is convicted of a violation of"; and in Paragraph (2) of Subsection E, after "influence over", deleted "any" and added "an", and after "enterprise that", deleted "he" and added "the person".

The 2002 amendment, effective July 1, 2002, deleted former Subsection F, which pertained to jurisdiction of the district court in forfeiture actions; deleted former Subsection G, which contained procedures for the forfeiture of property subject to forfeiture and disposal under the Racketeering Act; and added present Subsection F.

Proof of enterprise. — An enterprise is more than an individual who conducts his own affairs through a pattern of racketeering. The state must prove the existence of an enterprise by establishing a common purpose among the participants, organization and continuity. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

Evidence failed to establish an enterprise. — Where defendant obtained a pool of capital from investors to buy investment properties from the Resolution Trust Corporation; defendant gave each investor a promissory note pursuant to which defendant would repay the principal with interest; the notes were prepared on documents containing either the letterhead of Building for the Future or the letterhead of Henry A. Rivera; the notes were made by Henry A. Rivera Enterprises and signed by Henry A. Rivera; the state alleged that defendant was associated with an undescribed sole proprietorship which on occasion acted in association with undescribed entities identified as "Henry A. Rivera Enterprises" and "Building for the Future" or that the sole proprietor was one of the entities identified as "Henry A. Rivera Enterprises" or "Building for the Future"; and the state provided no evidence to prove the existence of "Henry A. Rivera Enterprises" or "Building for the Future", that they constituted legal entities or a group of individuals associated with a common purpose and constituted ongoing organizations, or that they had employees, the state failed to prove the existence of an enterprise that existed independent of defendant or that defendant was employed or

associated with an enterprise. *State v. Rivera*, 2009-NMCA-132, 147 N.M. 406, 223 P.3d 951, cert. denied, 2009-NMCERT-011, 147 N.M. 463, 225 P.3d 793.

Racketeering Act is not unconstitutionally vague in proscribing clearly enumerated criminal activities which are perpetrated either through legitimate business or illegitimate business activities. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert denied, 104 N.M. 702, 726 P.2d 856, and cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

Crime of racketeering constitutes separate and distinct offense apart from enumerated predicate crimes. Thus, a separately imposed punishment for racketeering, apart from the sentences levied for the predicate offenses, does not constitute double jeopardy. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert denied, 104 N.M. 702, 726 P.2d 856, and cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

Double jeopardy does not foreclose prosecution for predicate offenses following racketeering conviction. — Where defendant was charged with and convicted of racketeering and conspiracy to commit racketeering for conduct spanning from 2007 to 2012 based on at least two of the predicate offenses of first-degree murder, arson, and bribery of a public officer, and where defendant was subsequently charged with the same crimes that served as the predicate offenses in the racketeering case, the district court did not err in denying defendant’s claim that his right to be free from double jeopardy was violated, because the legislature intended for predicate offenses to be separate from substantive racketeering offenses and therefore double jeopardy protections do not present a bar to defendant’s prosecution for the predicate offenses on which his racketeering convictions were based. *State v. Loza*, 2018-NMSC-034.

Inapplicability of 11-404(B) NMRA to charges of racketeering and conspiracy to commit racketeering. — In defendant’s trial for racketeering and conspiracy to commit racketeering, where defendant claimed that the district court improperly admitted evidence of uncharged crimes, wrongs, or other acts in violation of 11-404 NMRA, the district court did not abuse its discretion in admitting the evidence because New Mexico’s racketeering statute defines violations by reference to predicate offenses which are essential components of a racketeering offense and 11-404(B) NMRA is inapplicable to evidence admitted to demonstrate predicate offenses. *State v. Loza*, 2016-NMCA-088, cert. denied.

Joinder of fraud, bribery and racketeering counts. — The trial court did not err in denying defendant's motion to sever counts of fraud and receiving a bribe from other counts where there was no evidence the multiplicity of charges confused the jury, the multiplicity of charges were not cumulative, and the counts were predicate offenses for a racketeering charge. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Engaging in "pattern of racketeering activity" is separate element of offense of racketeering, distinct from the existence of the enterprise and the participation of the

individual therein. *State v. Johnson*, 1986-NMCA-084, 105 N.M. 63, 728 P.2d 473, cert. denied, 104 N.M. 702, 726 P.2d 856, and cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

Jury instructions to prove pattern of racketeering. — To convict a defendant of racketeering under 30-42-4(C) NMSA 1978, the jury must find that the defendant committed at least two predicate acts, and to do so it is necessary that the jury is instructed on the essential elements of the alleged predicate acts upon which racketeering is based. State v. Catt, 2019-NMCA-013, cert. denied.

Where defendant was charged with a pattern of racketeering, involving trafficking in controlled substances, the district court did not err in vacating the racketeering convictions where the jury instructions for those counts were erroneous; the racketeering instruction failed to define the elements of each predicate offense that must be proved at trial, and the conspiracy to commit racketeering instruction omitted any elements pertaining to an enterprise or a pattern of racketeering. State v. Catt, 2019-NMCA-013, cert. denied.

"Proceeds". — "Proceeds," as used in the Racketeering Act, includes nonmonetary proceeds. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354.

Sufficiency of indictment. — Although a corporate defendant may be charged and convicted of the offense of racketeering, it was error to submit the racketeering charge against the corporate defendant to the jury because the corporate defendant was not specifically charged with commission of such crime in the indictment. *State v. Crews*, 1989-NMCA-088, 110 N.M. 723, 799 P.2d 592, cert. denied, 109 N.M. 232, 784 P.2d 419.

Merger with charge of conspiracy to traffic by manufacturer. — In order for the jury to have convicted defendant of conspiracy to racketeer pursuant to the court's instruction, it was also necessary for the state to prove, and the jury to find, that she and another conspired to traffic by manufacture. Thus, the two offenses for which defendant was convicted merged under the facts and circumstances of the case. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

Distinct, independent proof of elements not necessary. — Although the state must prove both the existence of an "enterprise" and a "pattern of racketeering activity," proof of these elements need not be, and often will not be, distinct and independent. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

Evidence held sufficient. — Evidence was sufficient to support conviction for conspiracy to commit racketeering. The record indicates substantial evidence to support the jury's determination that defendant agreed to participate with others in an enterprise

to traffic by manufacture of a controlled substance and also that there was substantial evidence indicating the existence of an "enterprise" as required under the Racketeering Act. *State v. Wynne*, 1988-NMCA-106, 108 N.M. 134, 767 P.2d 373, cert. denied, 108 N.M. 115, 767 P.2d 354.

There was sufficient proof that defendant used the nonmonetary proceeds of his act of receiving stolen property, i.e., the stolen property itself, in his methamphetamine manufacturing business. *State v. Hughes*, 1988-NMCA-108, 108 N.M. 143, 767 P.2d 382, cert. denied, 108 N.M. 115, 767 P.2d 354 (1989).

Evidence that defendant, as executive director of the Insurance Board, committed two acts of felony fraud victimizing the Insurance Authority was sufficient to support his conviction for racketeering. *State v. Armijo*, 1997-NMCA-080, 123 N.M. 690, 944 P.2d 919.

Evidence held insufficient. — Evidence that defendant exchanged drugs for work on his house and that he advised an undercover agent that he (the undercover agent) could make money cutting cocaine he (the undercover agent) bought from defendant was insufficient to prove all the elements of racketeering. *State v. Rael*, 1999-NMCA-068, 127 N.M. 347, 981 P.2d 280, cert. denied, 127 N.M. 390, 981 P.2d 1208.

Failure to state claim of pattern of racketeering activity. — Complaint alleging that lenders and realtors, in concert with home builder, had injured plaintiffs by representing homes as well built and performing only "windshield inspection", failed to state a claim that lenders and realtors had engaged in a pattern of racketeering activity. *Maxwell v. Wilson*, 1988-NMSC-096, 108 N.M. 65, 766 P.2d 909.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Criminal prosecutions under state RICO statutes for engaging in organized criminal activity, 89 A.L.R.5th 629.

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS §§ 1961-1968, 89 A.L.R. Fed. 887.

30-42-5. Enforcement authority.

The attorney general and the district attorneys of New Mexico shall each have authority to enforce the criminal provisions of the Racketeering Act by initiating investigations, assisting grand juries, obtaining indictments, filing informations and complaints and prosecuting criminal cases.

History: Laws 1980, ch. 40, § 5.

30-42-6. Racketeering; civil remedies.

A. A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three times

the actual damages proved and the costs of the suit, including reasonable attorney's fees.

B. The state may file an action on behalf of those persons injured or to prevent, restrain or remedy racketeering as defined by the Racketeering Act.

C. The district court has jurisdiction to prevent, restrain and remedy racketeering as defined in Subsection A of Section 30-42-3 NMSA 1978 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include but are not limited to entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

D. Following a determination of liability, such orders may include but are not limited to:

(1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

(2) imposing reasonable restrictions on the future activities or investments of any person;

(3) ordering dissolution or reorganization of any enterprise;

(4) ordering the payment of three times the damages proved to those persons injured by racketeering; and

(5) ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering incurred by the state to be paid to the general fund of New Mexico.

History: 1978 Comp., § 30-42-6, enacted by Laws 1980, ch. 40, § 6.

ANNOTATIONS

Plaintiff must show actual injury. — To state a claim under this section, plaintiff must allege an actual injury; mere conclusory allegations that a prison warden jeopardized safety of employees and inmates by failing to enforce provisions of a food service contract did not meet the "actual injury" requirement. *Peterson v. Shanks*, 149 F.3d 1140 (10th Cir. 1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Civil action for damages under state Racketeer Influenced and Corrupt Organizations Act (RICO) for losses from racketeering activity, 62 A.L.R.4th 654.

Civil action for damages under 18 USCS § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USCS §§ 1961 et seq.) for injuries sustained by reason of racketeering activity, 70 A.L.R. Fed. 538.

Recovery of damages for personal injuries in civil action for damages under Racketeer Influenced and Corrupt Organizations Act (18 USCS § 1964(c)), 96 A.L.R. Fed. 881.

Liability, under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS §§ 1961-1968), for retaliation against employee for disclosing or refusing to commit wrongful act, 100 A.L.R. Fed. 657.

ARTICLE 43
Loan Sharking

30-43-1. Short title.

This act [30-43-1 to 30-43-5 NMSA 1978] may be cited as the "Loan Sharking Act".

History: Laws 1980, ch. 39, § 1.

30-43-2. Definitions.

As used in the Loan Sharking Act:

A. "creditor" means any person making an extension of credit or any person claiming by, under or through any person making an extension of credit;

B. "debtor" means any person to whom an extension of credit is made or any person who guarantees the repayment of an extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom an extension is made to repay the same;

C. "extortionate extension of credit" means any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal acts other than petty misdemeanors to cause harm to the person, reputation or property of any person;

D. "extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal acts other than petty misdemeanors to cause harm to the person, reputation or property of any person;

E. "to collect an extension of credit" means to induce in any way any person to make repayment of one extension of credit;

F. "to extend credit" means to make or renew any loan or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid and however arising, may or shall be deferred; and

G. "repayment of any extension of credit" means the repayment, satisfaction or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

History: Laws 1980, ch. 39, § 2.

30-43-3. Making extortionate extensions of credit.

A. Any person who makes or conspires or attempts to make an extortionate extension of credit is guilty of a third degree felony.

B. In any prosecution pursuant to this section, if it is shown that all of the following factors were present in connection with the extension of credit, there is prima facie evidence that the extension of credit was extortionate:

(1) the extension of credit was made at a rate of interest in excess of an annual rate of forty-five percent calculated according to the actuarial method of allocating payments on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal;

(2) at the time the extension of credit was made, the debtor reasonably believed either of the following:

(a) one or more extensions of credit by the creditor had been collected by extortionate means or the nonrepayment had been punished by extortionate means; or

(b) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof; and

(3) upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars ($100).

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence of the circumstances described in Paragraph (1) of Subsection B of this section and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may, pursuant to the New Mexico rules of evidence, in its discretion allow evidence to be introduced tending to show the reputation as to collection practices

of the creditor in any community of which the debtor was a member at the time of the extension.

D. Nothing contained in Paragraphs (1) through (3) of Subsection B of this section shall be construed as a requirement for the proof of the existence of an extortionate extension of credit.

History: Laws 1980, ch. 39, § 3.

30-43-4. Financing extortionate extensions of credit.

A person who knowingly advances money or property, whether as a gift, loan or investment, to any person with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced, directly or indirectly, for the purpose of making extortionate extensions of credit is guilty of a third degree felony.

History: Laws 1980, ch. 39, § 4.

30-43-5. Collection of extensions of credit by extortionate means.

A. A person who knowingly participates or conspires or attempts to participate in the use of any extortionate means to collect any extensions of credit or to cause harm to the person, reputation or property of any person for the nonpayment thereof is guilty of a third degree felony.

B. In any prosecution pursuant to this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonpayment resulted in the use of extortionate means.

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence at the time the extension of credit in question was made of the circumstances described in Paragraph (1) of Subsection B of Section 30-43-3 NMSA 1978 and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication shown to have been employed as a means of collection in fact carried an express or implicit threat, the court may, pursuant to the New Mexico rules of evidence, in its discretion, allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

History: Laws 1980, ch. 39, § 5.

ARTICLE 44
Medicaid Fraud

30-44-1. Short title.

Chapter 30, Article 44 NMSA 1978 may be cited as the "Medicaid Fraud Act".

History: Laws 1989, ch. 286, § 1; 1997, ch. 98, § 1.

ANNOTATIONS

Cross references. — For provisions relating to medicaid, *see* 27-2-12 NMSA 1978 et seq.

The 1997 amendment, effective June 20, 1997, substituted "Chapter 30, Article 44 NMSA 1978" for "This act".

30-44-2. Definitions.

As used in the Medicaid Fraud Act:

A. "benefit" means money, treatment, services, goods or anything of value authorized under the program;

B. "claim" means any communication, whether oral, written, electronic or magnetic, that identifies a treatment, good or service as reimbursable under the program;

C. "cost document" means any cost report or similar document that states income or expenses and is used to determine a cost reimbursement based rate of payment for a provider under the program;

D. "covered person" means an individual who is entitled to receive health care benefits from a managed health care plan;

E. "department" means the human services department [health care authority department];

F. "entity" means a person other than an individual and includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof and nonprofit organizations;

G. "great physical harm" means physical harm of a type that causes physical loss of a bodily member or organ or functional loss of a bodily member or organ for a prolonged period of time;

H. "great psychological harm" means psychological harm that causes mental or emotional incapacitation for a prolonged period of time or that causes extreme behavioral change or severe physical symptoms or that requires psychological or psychiatric care;

I. "health care official" means:

(1) an administrator, officer, trustee, fiduciary, custodian, counsel, agent or employee of a managed care health plan;

(2) an officer, counsel, agent or employee of an organization that provides, proposes to or contracts to provide services to a managed health care plan; or

(3) an official, employee or agent of a state or federal agency with regulatory or administrative authority over a managed health care plan;

J. "managed health care plan" means a government-sponsored health benefit plan that requires a covered person to use, or creates incentives, including financial incentives, for a covered person to use health care providers managed, owned, under contract with or employed by a health care insurer or provider service network. A "managed health care plan" includes the health care services offered by a health maintenance organization, preferred provider organization, health care insurer, provider service network, entity or person that contracts to provide or provides goods or services that are reimbursed by or are a required benefit of a state or federally funded health benefit program, or any person or entity who contracts to provide goods or services to the program;

K. "person" includes individuals, corporations, partnerships and other associations;

L. "physical harm" means an injury to the body that causes pain or incapacitation;

M. "program" means the medical assistance program authorized under Title XIX of the federal Social Security Act, 42 U.S.C. 1396, et seq. and implemented under Section 27-2-12 NMSA 1978;

N. "provider" means any person who has applied to participate or who participates in the program as a supplier of treatment, services or goods;

O. "psychological harm" means emotional or psychological damage of such a nature as to cause fear, humiliation or distress or to impair a person's ability to enjoy the normal process of his life;

P. "recipient" means any individual who receives or requests benefits under the program;

Q. "records" means any medical or business documentation, however recorded, relating to the treatment or care of any recipient, to services or goods provided to any recipient or to reimbursement for treatment, services or goods, including any documentation required to be retained by regulations of the program; and

R. "unit" means the medicaid fraud control unit or any other agency with power to investigate or prosecute fraud and abuse of the program.

History: Laws 1989, ch. 286, § 2; 1997, ch. 98, § 2.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 1997 amendment, effective June 20, 1997, added Subsections D, F, I, and J, and redesignated the remaining subsections accordingly; deleted "providers" following "medicaid" in Subsection R; and made stylistic changes throughout the section.

30-44-3. Power to investigate and enforce civil remedies and prosecute criminal actions.

A. The attorney general, the district attorneys, the unit and the department have the power and authority to investigate violations of the Medicaid Fraud Act and bring actions to enforce the civil remedies established in the Medicaid Fraud Act.

B. The attorney general, the district attorneys and those attorneys who are employees of the unit to whom the attorney general or a district attorney has, by appointment made through a joint powers agreement or other agreement for that purpose, delegated criminal prosecutorial responsibility, shall have the power and authority to prosecute persons for the violation of criminal provisions of the Medicaid Fraud Act and for criminal offenses that are not defined in the Medicaid Fraud Act, but that involve or are directly related to the use of medicaid program funds or services provided through medicaid programs.

History: Laws 1989, ch. 286, § 3; 1991, ch. 79, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, rewrote Subsection B which read "The attorney general, the district attorneys and those persons in the unit who have criminal prosecutorial authority under general law have the power and authority to prosecute persons for the violation of criminal provisions of the Medicaid Fraud Act."

30-44-4. Falsification of documents; defined; penalties.

A. Falsification of documents consists of:

(1) knowingly making or causing to be made a misrepresentation of a material fact required to be furnished under the program or knowingly failing or causing the failure to include a material fact required to be furnished under the program in any record required to be retained in connection with the program pursuant to the Medicaid Fraud Act or regulations issued by the department for the administration of the program, or both; or

(2) knowingly submitting or causing to be submitted false or incomplete information for the purpose of receiving benefits or qualifying as a provider.

B. Whoever commits the crime of falsification of documents is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 286, § 4.

30-44-5. Failure to retain records; defined; penalties.

A. Whoever receives payment for treatment, services or goods under the program shall retain all medical and business records relating to:

(1) the treatment or care of any recipient;

(2) services or goods provided to any recipient;

(3) rates paid by the department under the program on behalf of any recipient; and

(4) any records required to be maintained by regulation of the department for administration of the program.

B. Failure to retain records consists of intentionally failing to retain the records specified in Subsection A of this section for a period of at least five years from the date payment was received or knowingly destroying or causing those records to be destroyed within five years from the date payment was received.

C. Whoever commits the crime of failure to retain records:

(1) is guilty of a misdemeanor if the treatment, services or goods for which records were not retained amounts to not more than one thousand dollars ($1,000) and shall be sentenced pursuant to Section 31-19-1 NMSA 1978;

(2) is guilty of a fourth degree felony if the value of the treatment, services or goods for which records were not retained is more than one thousand dollars ($1,000) and shall be sentenced pursuant to the provisions of Section 13-18-15 [31-18-15] NMSA 1978; and

(3) is guilty of a misdemeanor if the records not retained were used in whole or in part to determine a rate of payment under the program and shall be sentenced pursuant to Section 31-19-1 NMSA 1978.

History: Laws 1989, ch. 286, § 5.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler to correct a typographical error, and is not part of the law.

30-44-6. Obstruction of investigation; defined; penalty.

A. Obstruction of investigation consists of:

(1) knowingly providing false information to, or knowingly withholding information from, any person authorized under the Medicaid Fraud Act to investigate violations of that act or to enforce the criminal or civil remedies of that act where that information is material to the investigation or enforcement; or

(2) knowingly altering any document or record required to be retained pursuant to the Medicaid Fraud Act or any regulation issued by the department, or both, when the alteration is intended to mislead an investigation and concerns information material to that investigation.

B. Whoever commits obstruction of investigation is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 286, § 6.

30-44-7. Medicaid fraud; defined; investigation; penalties.

A. Medicaid fraud consists of:

(1) paying, soliciting, offering or receiving:

(a) a kickback or bribe in connection with the furnishing of treatment, services or goods for which payment is or may be made in whole or in part under the program, including an offer or promise to, or a solicitation or acceptance by, a health care official of anything of value with intent to influence a decision or commit a fraud affecting a state or federally funded or mandated managed health care plan;

(b) a rebate of a fee or charge made to a provider for referring a recipient to a provider;

(c) anything of value, intending to retain it and knowing it to be in excess of amounts authorized under the program, as a precondition of providing treatment, care, services or goods or as a requirement for continued provision of treatment, care, services or goods; or

(d) anything of value, intending to retain it and knowing it to be in excess of the rates established under the program for the provision of treatment, services or goods;

(2) providing with intent that a claim be relied upon for the expenditure of public money:

(a) treatment, services or goods that have not been ordered by a treating physician;

(b) treatment that is substantially inadequate when compared to generally recognized standards within the discipline or industry; or

(c) merchandise that has been adulterated, debased or mislabeled or is outdated;

(3) presenting or causing to be presented for allowance or payment with intent that a claim be relied upon for the expenditure of public money any false, fraudulent, excessive, multiple or incomplete claim for furnishing treatment, services or goods; or

(4) executing or conspiring to execute a plan or action to:

(a) defraud a state or federally funded or mandated managed health care plan in connection with the delivery of or payment for health care benefits, including engaging in any intentionally deceptive marketing practice in connection with proposing, offering, selling, soliciting or providing any health care service in a state or federally funded or mandated managed health care plan; or

(b) obtain by means of false or fraudulent representation or promise anything of value in connection with the delivery of or payment for health care benefits that are in whole or in part paid for or reimbursed or subsidized by a state or federally funded or mandated managed health care plan. This includes representations or statements of financial information, enrollment claims, demographic statistics, encounter data, health services available or rendered and the qualifications of persons rendering health care or ancillary services.

B. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud as described in Paragraph (1) or (3) of Subsection A of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud as described in Paragraph (2) or (4) of Subsection A of this section when the value of the benefit, treatment, services or goods improperly provided is:

(1) not more than one hundred dollars ($100) is guilty of a petty misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(2) more than one hundred dollars ($100) but not more than two hundred fifty dollars ($250) is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(3) more than two hundred fifty dollars ($250) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(4) more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) shall be guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(5) more than twenty thousand dollars ($20,000) shall be guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud when the fraud results in physical harm or psychological harm to a recipient is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud when the fraud results in great physical harm or great psychological harm to a recipient is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. Except as otherwise provided for in this section regarding the payment of fines by an entity, whoever commits medicaid fraud when the fraud results in death to a recipient is guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

G. If the person who commits medicaid fraud is an entity rather than an individual, the entity shall be subject to a fine of not more than fifty thousand dollars ($50,000) for

each misdemeanor and not more than two hundred fifty thousand dollars ($250,000) for each felony.

H. The unit shall coordinate with the human services department [health care authority department], department of health and children, youth and families department to develop a joint protocol establishing responsibilities and procedures, including prompt and appropriate referrals and necessary action regarding allegations of program fraud, to ensure prompt investigation of suspected fraud upon the medicaid program by any provider. These departments shall participate in the joint protocol and enter into a memorandum of understanding defining procedures for coordination of investigations of fraud by medicaid providers to eliminate duplication and fragmentation of resources. The memorandum of understanding shall further provide procedures for reporting to the legislative finance committee the results of all investigations every calendar quarter. The unit shall report to the legislative finance committee a detailed disposition of recoveries and distribution of proceeds every calendar quarter.

History: Laws 1989, ch. 286, § 7; 1997, ch. 98, § 3; 2003, ch. 291, § 1.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For the children, youth and families department, *see* 9-2A-1 NMSA 1978 et seq.

For the legislative finance committee, *see* 2-5-1 NMSA 1978.

The 2003 amendment, effective July 1, 2003, added Subsection H.

The 1997 amendment, effective June 20, 1997, in Subsection A, added the language beginning "including an offer or promise to" at the end of Subparagraph (1)(a), added Paragraph (4), and made related stylistic changes throughout the subsection; added "Except as otherwise provided for in this section regarding the payment of fines by an entity" at the beginning of Subsection B; in Subsection C, added "Except as otherwise provided for in this section regarding the payment of fines by an entity" at the beginning of the introductory language, added the language beginning "and shall be sentenced" at the end of Paragraph (1), inserted "dollars" in Paragraph (2), and substituted "Section 31-18-15 NMSA 1978" for "Section 31-19-1 NMSA 1978" in Paragraph (3); added "Except as otherwise provided for in this section regarding the payment of fines by an entity" at the beginning of Subsections D and E; and added Subsections F and G.

Materiality element of Medicaid fraud. — Section 30-44-7(A)(3) imposes a materiality element, which requires that the false or fraudulent certification be integral to the

government's payment decision; regulatory deficiencies that are not material to government payment do not support a cause of action of Medicaid fraud under the Medicaid Fraud Act. *State ex rel. King v. Behavioral Home Care, Inc*., 2015-NMCA-035, cert. granted, 2014-NMCERT-008.

Where Medicaid provider failed to comply with criminal history screening requirements of its caregivers, the state could not allege that the government could withhold payment solely because the unscreened caregivers had disqualifying criminal convictions in their histories, and therefore the fact that the Medicaid provider violated the statutory hiring requirements does not create a violation of a condition of Medicaid payment that supports a Medicaid fraud cause of action under the Medicaid Fraud Act. *State ex rel. King v. Behavioral Home Care, Inc*., 2015-NMCA-035, cert. granted, 2014-NMCERT-008.

Medicaid fraud not a lesser included offense of tampering with public records. — Defendant charged with tampering with public records based on his sale of medicaid cards to undercover agents was not entitled to an instruction on medicaid fraud as a lesser included offense. *State v. Dartez*, 1998-NMCA-009, 124 N.M. 455, 952 P.2d 450, cert. denied, 124 N.M. 311, 950 P.2d 284.

30-44-8. Civil penalties; created; enumerated; presumption; limitation of action.

A. Any person who receives payment for furnishing treatment, services or goods under the program, which payment the person is not entitled to receive by reason of a violation of the Medicaid Fraud Act, shall, in addition to any other penalties or amounts provided by law, be liable for:

(1) payment of interest on the amount of the excess payments at the maximum legal rate in effect on the date the payment was made, for the period from the date payment was made to the date of repayment to the state;

(2) a civil penalty in an amount of up to three times the amount of excess payments;

(3) payment of a civil penalty of up to ten thousand dollars ($10,000) for each false or fraudulent claim submitted or representation made for providing treatment, services or goods; and

(4) payment of legal fees and costs of investigation and enforcement of civil remedies.

B. Interest amounts, legal fees and costs of enforcement of civil remedies assessed under this section shall be remitted to the state treasurer for deposit in the general fund.

C. Any penalties and costs of investigation recovered on behalf of the state shall be remitted to the state treasurer for deposit in the general fund except an amount not to exceed two hundred fifty thousand dollars ($250,000) in fiscal year 2004, one hundred twenty-five thousand dollars ($125,000) in fiscal year 2005 and seventy-five thousand dollars ($75,000) in fiscal year 2006 may be retained by the unit and expended, consistent with federal regulations and state law, for the purpose of carrying out the unit's duties.

D. A criminal action need not be brought against a person as a condition precedent to enforcement of civil liability under the Medicaid Fraud Act.

E. The remedies under this section are separate from and cumulative to any other administrative and civil remedies available under federal or state law or regulation.

F. The department may adopt regulations for the administration of the civil penalties contained in this section.

G. No action under this section shall be brought after the expiration of five years from the date the action accrues.

History: 1989, ch. 286, § 8; 1997, ch. 98, § 4; 2004, ch. 54, § 1.

ANNOTATIONS

The 2004 amendment, effective March 3, 2004, amended Subsection B to delete "Penalties and" and insert "legal fees and costs of enforcement of civil remedies" and amended Subsection C to delete "legal fees" and "and costs of enforcement of civil remedies" and inserted at the end of the Subsection C "except an amount not to exceed two hundred fifty thousand dollars ($250,000) in fiscal year 2004, one hundred twenty-five thousand dollars ($125,000) in fiscal year 2005 and seventy-five thousand dollars ($75,000) in fiscal year 2006 may be retained by the unit and expended, consistent with federal regulations and state law, for the purpose of carrying out the unit's duties.".

The 1997 amendment, effective June 20, 1997, in Paragraph A(3), substituted "up to ten thousand dollars ($10,000)" for "five hundred dollars ($500)" and inserted "or representation made"; and deleted "paid into the health care trust fund established in the Health Care Trust Fund Act if that act is in effect, and if it is not, then those amounts shall be" preceding "remitted" in Subsection B.

ARTICLE 45
Computer Crimes

30-45-1. Short title.

This act [30-45-1 to 30-45-7 NMSA 1978] may be cited as the "Computer Crimes Act".

History: Laws 1989, ch. 215, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Computer fraud, 70 A.L.R.5th 647.

30-45-2. Definitions.

As used in the Computer Crimes Act:

A. "access" means to program, execute programs on, intercept, instruct, communicate with, store data in, retrieve data from or otherwise make use of any computer resources, including data or programs of a computer, computer system, computer network or database;

B. "computer" includes an electronic, magnetic, optical or other high-speed data processing device or system performing logical, arithmetic or storage functions and includes any property, data storage facility or communications facility directly related to or operating in conjunction with such device or system. The term does not include an automated typewriter or typesetter or a single display machine in and of itself, designed and used solely within itself for word processing, or a portable hand-held calculator, or any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended;

C. "computer network" means the interconnection of communication lines and circuits with a computer or a complex consisting of two or more interconnected computers;

D. "computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from a computer system;

E. "computer property" includes a financial instrument, data, databases, computer software, computer programs, documents associated with computer systems and computer programs, or copies, whether tangible or intangible, and data while in transit;

F. "computer service" includes computer time, the use of the computer system, computer network, computer programs or data prepared for computer use, data contained within a computer network and data processing and other functions performed, in whole or in part, by the use of computers, computer systems, computer networks or computer software;

G. "computer software" means a set of computer programs, procedures and associated documentation concerned with the operation and function of a computer system;

H. "computer system" means a set of related or interconnected computer equipment, devices and software;

I. "data" means a representation of information, knowledge, facts, concepts or instructions which are prepared and are intended for use in a computer, computer system or computer network;

J. "database" means any data or other information classified, processed, transmitted, received, retrieved, originated, switched, stored, manifested, measured, detected, recorded, reproduced, handled or utilized by a computer, computer system, computer network or computer software; and

K. "financial instrument" includes any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction, authorization mechanism, marketable security or any other computerized representation thereof.

History: Laws 1989, ch. 215, § 2.

ANNOTATIONS

Accessing of computer. — The use of a telephone network consisting in part of computerized switches to make a long distance call does not constitute "accessing" of a "computer" within the meaning of the computer fraud statute. *State v. Rowell*, 1995-NMSC-079, 121 N.M. 111, 908 P.2d 1379, 70 A.L.R. 5th 819 (1995), *rev'g* 1995-NMCA-029, 119 N.M. 710, 895 P.2d 232.

30-45-3. Computer access with intent to defraud or embezzle.

A person who knowingly and willfully accesses or causes to be accessed a computer, computer system, computer network or any part thereof with the intent to obtain, by means of embezzlement or false or fraudulent pretenses, representations or promises, money, property or anything of value, when the:

A. money, property or other thing has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

B. money, property or other thing has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

C. money, property or other thing has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

D. money, property or other thing has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

E. money, property or other thing has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony.

History: Laws 1989, ch. 215, § 3; 2006, ch. 29, § 22.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increased the value in Subsection A from $100 to $250; increased the value in Subsection B from more than $100, but not more than $250, and to more than $250, but not more than $500; increased the value in Subsection C from more than $250 to more than $500; and deleted the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Subsections B through E.

"Accessing" construed. — The use of a telephone network consisting in part of computerized switches to make a long-distance call does not constitute the "accessing" of a "computer" within the meaning of this article. *State v. Rowell*, 1995-NMSC-079, 121 N.M. 111, 908 P.2d 1379.

Using a computer as a passive conduit not covered by statute. — The Computer Crimes Act, 30-45-1 NMSA 1978 et seq., was intended by the legislature to deter and punish crimes committed through the abuse of computer sophistication and to protect against the introduction of fraudulent data into a computer system, the unauthorized use of computer facilities, the alteration or destruction of computerized information or files, and the stealing of financial information data or other assets, but was not intended to apply to the use of a computer as a passive conduit through which the defendant's criminal activity passed. *State v. Garcia*, 2015-NMCA-094, *rev'd on other grounds*, 2016-NMSC-034.

Insufficient evidence of computer access with intent to defraud. — Where defendant, with the victim's permission, used a computer to access victim's bank accounts and transfer funds to defendant's own bank accounts for personal use, the evidence was insufficient to convict defendant of computer access with intent to defraud because defendant did not introduce fraudulent data into a computer system, use computer facilities without authorization, alter or destroy computerized information or files, nor did she steal financial information, data or other assets, but merely used the computer as a passive conduit to access accounts and transfer funds, just as any banking customer would. *State v. Garcia*, 2015-NMCA-094, *rev'd on other grounds*, 2016-NMSC-034.

Law reviews. — For note, "Criminal Law: Applying the General/Specific Statute Rule in New Mexico - State v. Santillanes," see 32 N.M. L. Rev. 313 (2002).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Computer fraud, 70 A.L.R.5th 647.

30-45-4. Computer abuse.

A person who knowingly, willfully and without authorization, or having obtained authorization, uses the opportunity the authorization provides for purposes to which the authorization does not extend:

A. directly or indirectly alters, changes, damages, disrupts or destroys any computer, computer network, computer property, computer service or computer system, when the:

(1) damage to the computer property or computer service has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

(2) damage to the computer property or computer service has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

(3) damage to the computer property or computer service has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

(4) damage to the computer property or computer service has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

(5) damage to the computer property or computer service has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony; or

B. directly or indirectly introduces or causes to be introduced data that the person knows to be false into a computer, computer system, computer network, computer software, computer program, database or any part thereof with the intent of harming the property or financial interests or rights of another person is guilty of a fourth degree felony.

History: Laws 1989, ch. 215, § 4; 2006, ch. 29, § 23.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, provided that a person who uses the opportunity the authorization provides for purposes to which the authorization does not extend is guilty of computer abuse; increased the damage in Paragraph (1) of

Subsection A from $100 to $250; increased the damage in Paragraph (2) of Subsection A from more than $100, but not more than $250, and to more than $250, but not more than $500; increased the damage in Paragraph (3) of Subsection A from more than $250 to more than $500; deleted the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Paragraph (2) of Subsection A; and deleted the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Paragraphs (3) through (5) of Subsection A and in Subsection B.

30-45-5. Unauthorized computer use.

A person who knowingly, willfully and without authorization, or having obtained authorization, uses the opportunity the authorization provides for purposes to which the authorization does not extend, directly or indirectly accesses, uses, takes, transfers, conceals, obtains, copies or retains possession of any computer, computer network, computer property, computer service, computer system or any part thereof, when the:

A. damage to the computer property or computer service has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

B. damage to the computer property or computer service has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

C. damage to the computer property or computer service has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

D. damage to the computer property or computer service has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

E. damage to the computer property or computer service has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony.

History: Laws 1989, ch. 215, § 5; 2006, ch. 29, § 24.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increased the value in Subsection A from $100 to $250; increased the value in Subsection B from more than $100 but not more than $250 to more than $250 but not more than $500; increased the value in Subsection C from more than $250 to more than $500; deleted the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Subsection B; and deleted the reference to sentencing pursuant Section 31-18-15 NMSA 1978 in Subsections C through E.

30-45-6. Prosecution.

A. Prosecution pursuant to the Computer Crimes Act shall not prevent any prosecutions pursuant to any other provisions of the law where such conduct also constitutes a violation of that other provision.

B. A person found guilty of violating any provision of the Computer Crimes Act shall, in addition to any other punishment, be ordered to make restitution for any financial loss sustained by anyone injured as the direct result of the commission of the crime. Restitution shall be imposed in addition to incarceration, forfeiture or fine, and not in lieu thereof, and may be made a condition of probation. The defendant's present and future ability to make such restitution shall be considered. In an extraordinary case, the court may determine that the interests of those injured and justice would not be served by ordering restitution. In such a case, the court shall make and enter specific written findings on the record substantiating the extraordinary circumstance presented upon which the court determined not to order restitution. In all other cases, the court shall determine the amount and method of restitution.

History: Laws 1989, ch. 215, § 6.

30-45-7. Forfeiture of property.

A. The following are subject to forfeiture:

(1) all computer property, equipment or products of any kind that have been used, manufactured, acquired or distributed in violation of the Computer Crimes Act;

(2) all materials, products and equipment of any kind that are used or intended for use in manufacturing, using, accessing, altering, disrupting, copying, concealing, destroying, transferring, delivering, importing or exporting any computer property or computer service in violation of the Computer Crimes Act;

(3) all books, records and research products and materials involving formulas, microfilm, tapes and data that are used or intended for use in violation of the Computer Crimes Act;

(4) all conveyances, including aircraft, vehicles or vessels, that are used or intended for use to transport or in any manner to facilitate the transportation of property described in this subsection for the purpose of violating the Computer Crimes Act;

(5) all property, real, personal or mixed, that has been used or intended for use, maintained or acquired in violation of the Computer Crimes Act; and

(6) all money or proceeds that constitute an instrumentality or derive from a violation of the Computer Crimes Act.

B. The provisions of the Forfeiture Act [Chapter 31, Article 27 NMSA 1978] apply to the seizure, forfeiture and disposal of property subject to forfeiture pursuant to Subsection A of this section.

History: Laws 1989, ch. 215, § 7; 2002, ch. 4, § 18.

ANNOTATIONS

The 2002 amendment, effective July 1, 2002, in Paragraph A(4), substituted "this section" for "A, B or C of this section"; deleted former Subsections B through H, which contained standards and procedures for the forfeiture of property subject to forfeiture and disposal under the Computer Crimes Act; and added present Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Forfeiture of homestead based on criminal activity conducted on premises - state cases, 16 A.L.R.5th 855.

ARTICLE 46
Ticket Scalping

30-46-1. Ticket scalping.

A. Ticket scalping consists of selling, offering for sale or attempting to sell any ticket, privilege, license, admission or pass to any college athletic event at a price greater than the price charged at the place of admission or printed on the ticket.

B. The sale of each ticket, privilege, license, admission or pass in violation of this section shall constitute a separate offense.

C. Nothing in this section shall prohibit charging a fee for services rendered in connection with the sale of a ticket privilege, license, admission or pass to an event if the fee is permitted pursuant to a contract between the ticket seller and the sponsor or promoter of the event.

D. Whoever commits ticket scalping is guilty of a misdemeanor and upon conviction shall be punished by a fine up to five hundred dollars ($500) or by imprisonment for a definite term of less than one year, or both.

History: Laws 1989, ch. 142, § 1.

ARTICLE 47
Resident Abuse and Neglect

30-47-1. Short title.

This act [30-47-1 to 30-47-10 NMSA 1978] may be cited as the "Resident Abuse and Neglect Act".

History: Laws 1990, ch. 55, § 1.

ANNOTATIONS

Constitutional. — The Residents Abuse and Neglect Act is not unconstitutionally vague. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

30-47-2. Purpose.

The purpose of the Resident Abuse and Neglect Act is to provide meaningful deterrents and remedies for the abuse, neglect or exploitation of care facility residents and to provide an effective system for reporting instances of abuse, neglect or exploitation.

History: Laws 1990, ch. 55, § 2.

ANNOTATIONS

Application of the act. — The Residents Abuse and Neglect Act applies to persons who take on the responsibility of continual, steadfast and faithful watch and care of someone who cannot care for himself or herself, and who are grossly negligent in carrying out that responsibility by failing to take any responsible precaution to prevent damage to health. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

30-47-3. Definitions.

As used in the Resident Abuse and Neglect Act:

A. "abuse" means any act or failure to act performed intentionally, knowingly or recklessly that causes or is likely to cause harm to a resident, including:

(1) physical contact that harms or is likely to harm a resident of a care facility;

(2) inappropriate use of a physical restraint, isolation or medication that harms or is likely to harm a resident;

(3) inappropriate use of a physical or chemical restraint, medication or isolation as punishment or in conflict with a physician's order;

(4) medically inappropriate conduct that causes or is likely to cause physical harm to a resident;

(5) medically inappropriate conduct that causes or is likely to cause great psychological harm to a resident; or

(6) an unlawful act, a threat or menacing conduct directed toward a resident that results and might reasonably be expected to result in fear or emotional or mental distress to a resident;

B. "care facility" means a hospital; skilled nursing facility; intermediate care facility; care facility for individuals with developmental or intellectual disabilities; psychiatric facility; rehabilitation facility; kidney disease treatment center; home health agency; ambulatory surgical or outpatient facility; home for the aged or disabled; group home; adult foster care home; private residence that provides personal care, sheltered care or nursing care for one or more persons; a resident's or care provider's home in which personal care, sheltered care or nursing care is provided; adult daycare center; boarding home; adult residential shelter care home; and any other health or resident care related facility or home, but does not include a care facility located at or performing services for any correctional facility;

C. "department" means the human services department [health care authority department] or its successor, contractor, employee or designee;

D. "great psychological harm" means psychological harm that causes mental or emotional incapacitation for a prolonged period of time or that causes extreme behavioral change or severe physical symptoms that require psychological or psychiatric care;

E. "great physical harm" means physical harm of a type that causes physical loss of a bodily member or organ or functional loss of a bodily member or organ for a prolonged period of time;

F. "neglect" means, subject to the resident's right to refuse treatment and subject to the caregiver's right to exercise sound medical discretion, the grossly negligent:

(1) failure to provide any treatment, service, care, medication or item that is necessary to maintain the health or safety of a resident;

(2) failure to take any reasonable precaution that is necessary to prevent damage to the health or safety of a resident; or

(3) failure to carry out a duty to supervise properly or control the provision of any treatment, care, good, service or medication necessary to maintain the health or safety of a resident;

G. "person" means any individual, corporation, partnership, unincorporated association or other governmental or business entity;

H. "physical harm" means an injury to the body that causes substantial pain or incapacitation; and

I. "resident" means any person who resides in a care facility or who receives treatment from a care facility.

History: Laws 1990, ch. 55, § 3; 2010, ch. 93, § 1; 2023, ch. 113, § 9.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

Cross references. — For criminal records screening for caregivers employed by care providers, *see* 29-17-2 to 29-17-5 NMSA 1978.

The 2023 amendment, effective June 16, 2023, revised the definition of "care facility"; in Subsection B, deleted "the mentally retarded" and added "individuals with developmental or intellectual disabilities".

The 2010 amendment, effective May 19, 2010, in Subsection A(5), at the end of the sentence, added "or"; and in Subsection B, after "nursing care for one or more persons", added "a resident's or care provider's home in which personal care, sheltered care or nursing care is provided".

Standard of negligence. — Criminal negligence is the standard applicable to 30-47-3(F) NMSA 1978 which requires an actual or imputed foreseeability of danger directed toward the victim who might be injured as a result of the defendant's acts and a risk of harm that is substantial and unjustifiable. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

"Care facility". — Evidence was sufficient to prove that defendant, who was legal custodian of eighty-year-old man, housed the man at his mother's residence, and provided other services for him, was acting as a "care facility" for the man and was, therefore, subject to the provisions of this article. *State v. Davis*, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

The Resident Abuse and Neglect Act applies to persons in a private residence setting who take on the responsibility as caregivers to care for severely developmentally disabled and other similarly incapacitated adults, including the aged, who are in need of frequent, if not daily, personal assistance and care to stave off harm. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

Resident of a care facility. — Where the victim, who was a profoundly developmentally disabled adult, resided in defendant's home; defendant was the victim's parent; defendant was not treating or caring for the victim under any contract with a care facility, care provider or other entity; the victim was totally dependent on defendant for the victim's life; and defendant accepted full responsibility for the victim's care, defendant's home was a "care facility" and the victim was a "resident". *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

30-47-4. Abuse of a resident; criminal penalties.

A. Whoever commits abuse of a care facility resident that results in no harm to the resident is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

B. Whoever commits abuse of a resident that results in physical harm or great psychological harm to the resident is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits abuse of a resident that results in great physical harm to the resident is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Whoever commits abuse of a resident that results in the death of the resident is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1990, ch. 55, § 4.

ANNOTATIONS

Complaint stated sufficient facts to support a conviction. — Where the state's complaint alleged that defendant was the attending physician of the decedent who had had a heart attack; the decedent had been receiving the anticoagulant drug Coumadin before the decedent was transferred to defendant's care; defendant increased the decedent's dosage of Coumadin; defendant failed to monitor the effect of the prescribed dosage by daily testing the decedent's blood, failed to consider and monitor the decedent's blood pressure medication, failed to act in response to the decedent's worsening symptoms, failed to order proper care upon discovery of blood in the decedent's stool, ordered a colonoscopy rather than determine whether the symptom was due to the Coumadin, and ordered the colonoscopy on a non-emergent basis despite the fact that the decedent required drastic and urgent treatment; and the decedent died due to blood loss from the excessively prescribed quantity of Coumadin, the state's complaint alleged sufficient facts to support a conviction under 30-47-4 NMSA 1978. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

30-47-5. Neglect of a resident; criminal penalties.

A. Whoever commits neglect of a resident that results in no harm to the resident is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

B. Whoever commits neglect of a resident that results in physical harm or great psychological harm to the resident is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits neglect of a resident that results in great physical harm to the resident is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Whoever commits neglect of a resident that results in the death of the resident is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1990, ch. 55, § 5.

ANNOTATIONS

Standard of negligence is criminal negligence. — Criminal negligence is the standard applicable to 30-47-3(F) NMSA 1978 which requires an actual or imputed foreseeability of danger directed toward the victim who might be injured as a result of the defendant's acts and a risk of harm that is substantial and unjustifiable. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

Complaint stated sufficient facts to support a conviction. — Where the state's complaint alleged that defendant was the attending physician of the decedent who had had a heart attack; the decedent had been receiving the anticoagulant drug Coumadin before the decedent was transferred to defendant's care; defendant increased the decedent's dosage of Coumadin; defendant failed to monitor the effect of the prescribed dosage by daily testing the decedent's blood, failed to consider and monitor the decedent's blood pressure medication, failed to act in response to the decedent's worsening symptoms, failed to order proper care upon discovery of blood in the decedent's stool, ordered a colonoscopy rather than determine whether the symptom was due to the Coumadin, and ordered the colonoscopy on a non-emergent basis despite the fact that the decedent required drastic and urgent treatment; and the decedent died due to blood loss from the excessively prescribe quantity of Coumadin, the state's complaint alleged sufficient facts to support a conviction under 30-47-5 NMSA 1978. *State v. Muraida*, 2014-NMCA-060, cert. denied, 2014-NMCERT-005.

"Care facility". — Evidence was sufficient to prove that defendant, who was legal custodian of eighty-year-old man, housed the man at his mother's residence, and

provided other services for him, was acting as a "care facility" for the man and was, therefore, subject to the provisions of this article. *State v. Davis*, 1998-NMCA-148, 126 N.M. 297, 968 P.2d 808.

The Resident Abuse and Neglect Act applies to persons in a private residence setting who take on the responsibility as caregivers to care for severely developmentally disabled and other similarly incapacitated adults, including the aged, who are in need of frequent, if not daily, personal assistance and care to stave off harm. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

Contract between care facility and an individual caregiver is not required. — For criminal liability for neglect, the Residents Abuse and Neglect Act does not require any contractual, employment or financial arrangement between a care facility, care provider or particular entity, on the one hand, and an individual caregiver who has the hands-on and immediate responsibility of care and of taking responsible precautions necessary to prevent damage to a resident's health or safety. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

Sufficient evidence. — Where the victim resided in defendant's home; defendant was the victim's parent; the victim was a profoundly developmentally disabled adult who was totally dependent on defendant for the victim's life; defendant was not treating or caring for the victim under any contract with a care facility, care provider or other entity; defendant accepted full responsibility for the victim's care; at the time of the victim's death, the home was covered with fecal matter and trash; the victim's death was caused by sepsis which was caused by extensive, server pressure ulcers that covered the victim's body, some of which were so deep as to expose bone and that had become infected due to the filthy conditions in which the victim lived; the ulcers had developed over an extended period of time; and defendant administered over-the-counter medications to the victim and postponed a decision to seek medical care for the victim, there was sufficient evidence to support the jury's findings that defendant's home was a care facility and that defendant was grossly negligent in failing to take reasonable precaution necessary to prevent damage to the victim's health. *State v. Greenwood*, 2012-NMCA-017, 271 P.3d 753, cert. denied, 2012-NMCERT-001.

30-47-6. Exploitation; criminal penalties.

A. Exploitation of a resident's property consists of the act or process, performed intentionally, knowingly or recklessly, of using a resident's property for another person's profit, advantage or benefit without legal entitlement to do so.

B. Whoever commits exploitation of a resident's property when the value of the property exploited is two hundred fifty dollars ($250) or less is guilty of a petty misdemeanor.

C. Whoever commits exploitation of a resident's property when the value of the property exploited is over two hundred fifty dollars ($250) but not more than five hundred dollars ($500) is guilty of a misdemeanor.

D. Whoever commits exploitation of a resident's property when the value of the property exploited is over five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500) is guilty of a fourth degree felony.

E. Whoever commits exploitation of a resident's property when the value of the property exploited is over two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000) is guilty of a third degree felony.

F. Whoever commits exploitation of a resident's property when the value of the property exploited is over twenty thousand dollars ($20,000) is guilty of a second degree felony.

History: Laws 1990, ch. 55, § 6; 2006, ch. 29, § 25.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, increases the value of the property in Subsection B from $100 to $250; increases the value of the property in Subsection C from more than $100, but not more than $250, and to more than $250, but not more than $500; increases the value of the property in Subsection D from more than $250 to more than $500; deletes the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Subsections B and C; and deletes the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Subsections D through F.

30-47-7. Religious practitioners; exception.

No resident who is being treated by a duly accredited religious practitioner shall be considered for that reason alone, abused or neglected.

History: Laws 1990, ch. 55, § 7.

30-47-8. Treatment in compliance with the Uniform Health-Care Decisions Act.

A. Nothing in the Resident Abuse and Neglect Act shall be construed to preclude health care in accordance with the Uniform Health-Care Decisions Act [Chapter 24, Article 7A NMSA 1978], and it shall be an affirmative defense to any charge brought under the Resident Abuse and Neglect Act that the acts complained of were in accordance with the Uniform Health-Care Decisions Act.

B. To establish an affirmative defense under Subsection A of this section, the person shall show substantial compliance with the provisions of the Uniform Health-Care Decisions Act.

History: Laws 1990, ch. 55, § 8; 1997, ch. 168, § 11.

ANNOTATIONS

The 1997 amendment, effective July 1, 1997, substituted "Uniform Health-Care Decisions Act" for "Right to Die Act" in the section heading and throughout the section and substituted "health care" for "withholding or withdrawing treatment" in Subsection A.

30-47-9. Reporting requirements; failure to report; crime created; criminal penalty; discrimination or retaliation for filing a report prohibited.

A. Any person paid in whole or part for providing to a resident any treatment, care, good, service or medication who has reasonable cause to believe that the resident has been abused, neglected or exploited shall report the abuse, neglect or exploitation in accordance with the provisions of Section 27-7-30 NMSA 1978.

B. Any person required to make a report pursuant to Subsection A of this section who fails to do so is guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection A of Section 31-19-1 NMSA 1978.

C. In addition to those persons required to report pursuant to Subsection A of this section, any other person shall make a report if the person has reasonable cause to believe that a patient or resident of a facility has been abused, neglected or exploited.

D. Any person making a report pursuant to Subsection C of this section shall not be liable in any civil or criminal action based on the report if it was made in good faith.

E. No facility shall, without just cause, discharge or in any manner discriminate or retaliate against any person who in good faith makes a report required or permitted by the Resident Abuse and Neglect Act, or testifies, or is about to testify, in any proceeding about the abuse, neglect or exploitation of a resident in that facility. For the purposes of this section, "retaliate" includes transferring to another facility, without just cause, over the objection of the resident or the resident's guardian, any resident who has reported an incident pursuant to this section.

History: Laws 1990, ch. 55, § 9.

30-47-10. Regulatory authority.

The department shall issue rules and regulations as necessary to implement the reporting provisions of the Resident Abuse and Neglect Act.

History: Laws 1990, ch. 55, § 10.

ANNOTATIONS

Severability. — Laws 1990, ch. 55, § 11 provides for the severability of the Resident Abuse and Neglect Act if any part or application thereof is held invalid.

ARTICLE 48
Smokeless Tobacco Products (Repealed.)

30-48-1. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-1 NMSA 1978, as enacted by Laws 1991, ch. 210, § 1, relating to sale of smokeless tobacco products, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

30-48-2. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-2 NMSA 1978, as enacted by Laws 1991, ch. 210, § 2, relating to purchase of smokeless tobacco products, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

30-48-3. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-3 NMSA 1978, as enacted by Laws 1991, ch. 210, § 3, relating to point of sale signs, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

30-48-4. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-4 NMSA 1978, as enacted by Laws 1991, ch. 210, § 4, relating to proof of age, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

30-48-5. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-5 NMSA 1978, as enacted by Laws 1991, ch. 210, §5, relating to vending machines, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

30-48-6. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-6 NMSA 1978, as enacted by Laws 1991, ch. 210, § 6, relating to local governments, tobacco sales regulations, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

30-48-7. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 244, § 13 repealed 30-48-7 NMSA 1978, as enacted by Laws 1991, ch. 210, § 7, relating to penalties, effective July 1, 1993. For present comparable provisions, *see* 30-49-1 NMSA 1978 et seq.

ARTICLE 49
Tobacco Products, E-Cigarettes and Nicotine Liquid Containers (Repealed)

30-49-1. Repealed.

History: Laws 1993, ch. 244, § 1; 2015, ch. 98, § 1; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-1 NMSA 1978, relating to the short title of the Tobacco Products, E-Cigarette and Nicotine Liquid Container Act, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-2. Repealed.

History: Laws 1993, ch. 244, § 2; 2015, ch. 98, § 2; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-2 NMSA 1978, relating to definitions, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-3. Repealed.

History: Laws 1993, ch. 244, § 3; 2015, ch. 98, § 3; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-3 NMSA 1978, relating to tobacco products, e-cigarettes and nicotine liquid containers, prohibited sales, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-4. Repealed.

History: Laws 1993, ch. 244, § 4; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-4 NMSA 1978, relating to documentary evidence of age and identity, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-5. Repealed.

History: Laws 1993, ch. 244, § 5; 2015, ch. 98, § 4; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-5 NMSA 1978, relating to refusal to sell tobacco products, e-cigarettes or nicotine liquid containers to person unable to produce identity card, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-6. Repealed.

History: Laws 1993, ch. 244, § 6; 2015, ch. 98, § 5; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-6 NMSA 1978, relating to presenting false evidence of age or identity, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-7. Repealed.

History: Laws 1993, ch. 244, § 7; 2003, ch. 364, § 1; 2015, ch. 98, § 6; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-7 NMSA 1978, relating to vending machines, restrictions on sales of tobacco products, e-cigarettes and nicotine liquid containers, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-8. Repealed.

History: Laws 1993, ch. 244, § 8; 2015, ch. 98, § 7; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-8 NMSA 1978, relating to distribution of tobacco products, e-cigarettes or nicotine liquid containers as free samples prohibited, exception, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-9. Repealed.

History: Laws 1993, ch. 244, § 9; 2015, ch. 98, § 8; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-9 NMSA 1978, relating to signs, point of sale, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-10. Repealed.

History: Laws 1993, ch. 244, § 10; 2015, ch. 98, § 9; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-10 NMSA 1978, relating to monitored compliance, inspections, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-11. Repealed.

History: Laws 1993, ch. 244, § 11; 2015, ch. 98, § 10; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-11 NMSA 1978, relating to preemption, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-12. Repealed.

History: Laws 1993, ch. 244, § 12; 2015, ch. 98, § 11; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-12 NMSA 1978, relating to penalty, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

30-49-13. Repealed.

History: Laws 2015, ch. 98, § 12; repealed by Laws 2020, ch. 46, § 26.

ANNOTATIONS

Repeals. — Laws 2020, ch. 46, § 26 repealed 30-49-13 NMSA 1978, relating to applicability, effective January 1, 2021. For provisions of the former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

ARTICLE 50
Fraudulent Telemarketing

30-50-1. Short title.

This act [30-50-1 to 30-50-4 NMSA 1978] may be cited as the "Fraudulent Telemarketing Act".

History: Laws 1995, ch. 37, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 A.L.R.5th 619.

30-50-2. Purpose.

The purpose of the Fraudulent Telemarketing Act is to protect consumers from fraudulent telemarketing.

History: Laws 1995, ch. 37, § 2.

30-50-3. Definitions.

As used in the Fraudulent Telemarketing Act:

A. "telemarketing" means:

(1) being employed by or associating with any company, organization, sole proprietorship or economic venture that uses the telephone on a regular basis as a primary instrument to obtain money from the people to whom information is transmitted by telephone communication; or

(2) representing oneself to a person from whom money is requested as being associated with any company, organization, sole proprietorship or economic venture that can be reasonably understood as using the telephone on a regular basis as a primary instrument to obtain money from the people to whom information is transmitted by telephone communication; and

B. "telephone communication" means any communication by words, fax, computer modem, video or other type of transmission that is carried in whole or in part through the local, long distance or cellular telephone network.

History: Laws 1995, ch. 37, § 3.

30-50-4. Fraudulent telemarketing; penalties.

A person who knowingly and willfully engages in telemarketing to or from a telephone located in New Mexico with the intent to embezzle or to obtain money, property or any thing of value by fraudulent pretenses, representations or promises in the course of a telephone communication, when the:

A. money, property or thing has a value of two hundred fifty dollars ($250) or less, is guilty of a petty misdemeanor;

B. money, property or thing has a value of more than two hundred fifty dollars ($250) but not more than five hundred dollars ($500), is guilty of a misdemeanor;

C. money, property or thing has a value of more than five hundred dollars ($500) but not more than two thousand five hundred dollars ($2,500), is guilty of a fourth degree felony;

D. money, property or thing has a value of more than two thousand five hundred dollars ($2,500) but not more than twenty thousand dollars ($20,000), is guilty of a third degree felony; or

E. money, property or thing has a value of more than twenty thousand dollars ($20,000), is guilty of a second degree felony.

History: Laws 1995, ch. 37, § 4; 2006, ch. 29, § 26.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, in Subsection A, changed the value from less than $250 to $250 or less and changed the crime from a misdemeanor to a petty misdemeanor; in Subsection B, changed the damage from $250 or more, but not more than $2,500, and to more than $250, but not more than $500 and changed the crime from a fourth degree felony to a misdemeanor; added Subsection C to provide that if the value is more than $500, but less than $2,500, the crime is a fourth degree felony; provided in Subsection D (formerly Subsection C) that the value is more than $2,500, but not more than $20,000; deleted the reference to sentencing pursuant to Section 31-19-1 NMSA 1978 in Subsection A; and deleted the reference to sentencing pursuant to Section 31-18-15 NMSA 1978 in Subsections B, D (formerly Subsection C) and E (formerly Subsection D).

ARTICLE 51
Money Laundering

30-51-1. Short title.

Sections 1 through 5 [30-51-1 to 30-51-5 NMSA 1978] of this act may be cited as the "Money Laundering Act".

History: Laws 1998, ch. 113, § 1.

ANNOTATIONS

Effective dates. — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

30-51-2. Definitions.

As used in the Money Laundering Act:

A. "financial institution" means:

(1) a bank, credit union, trust company or thrift institution or an agency or branch thereof;

(2) a broker or dealer in securities or commodities;

(3) an investment banker;

(4) an investment company;

(5) an issuer, redeemer or cashier of traveler's checks, checks, money orders or similar instruments;

(6) an operator of a credit card system;

(7) an insurance company;

(8) a dealer in precious metals, stones or jewels;

(9) a pawnbroker;

(10) a loan or finance company;

(11) a travel agency;

(12) a licensed sender of money;

(13) a telegraph company;

(14) a business engaged in vehicle sales, including automobile, airplane and boat sales;

(15) a currency exchange;

(16) a person involved in real estate closings and settlements; or

(17) an agency or authority of a state or local government carrying out a duty or power of a business described in this subsection;

B. "financial transaction" means a purchase, sale, loan, pledge, gift, transfer, delivery or other disposition of any monetary instrument or the movement of funds by wire or other means;

C. "monetary instrument" means coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, investment securities in bearer form or in such other form that title passes upon delivery of the security and negotiable instruments in bearer form or in such other form that title passes upon delivery of the instrument;

D. "person" means an individual, corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture, unincorporated organization or group or other entity;

E. "proceeds" means property that is acquired, delivered, produced or realized, whether directly or indirectly, by an act or omission;

F. "property" means anything of value, including real, personal, tangible or intangible property; and

G. "specified unlawful activity" means an act or omission, including any initiatory, preparatory or completed offense or omission, committed for financial gain that is punishable as a felony under the laws of New Mexico or, if the act occurred outside New Mexico, would be punishable as a felony under the laws of the state in which it occurred and under the laws of New Mexico.

History: Laws 1998, ch. 113, § 2.

ANNOTATIONS

Effective dates. — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

30-51-3. Reports filed with the department of public safety; criminal penalties.

A. A financial institution in New Mexico that is required to file a report regarding a financial transaction under the provisions of the federal Currency and Foreign Transactions Reporting Act and the regulations promulgated pursuant to that act shall file a duplicate of that report with the department of public safety; provided, a financial

institution that makes a timely filing with an appropriate federal agency shall be deemed to have satisfied the reporting requirements of this subsection.

B. A person engaged in a trade or business in New Mexico who, in the course of the trade or business, receives more than ten thousand dollars ($10,000) in cash in one financial transaction or two or more related financial transactions, and is required to file a report under the provisions of 26 U.S.C. Section 6050I and regulations promulgated pursuant to that section, shall file a duplicate of that report with the department of public safety; provided, a person who makes a timely filing with an appropriate federal agency shall be deemed to have satisfied the reporting requirements of this subsection.

C. A financial institution, a person engaged in a trade or business or an officer, employee or agent of either who files or keeps a record pursuant to the provisions of this section or who communicates or discloses information or records pursuant to the provisions of this section shall not be liable to its customer or to any person for any loss or damage caused in whole or in part by the making, filing or governmental use of the report or information contained in the report.

D. Any person who releases information received pursuant to the provisions of this section, except in the proper discharge of his official duties, is guilty of a misdemeanor.

E. A person who knowingly:

(1) fails to file a report with the department of public safety required pursuant to the provisions of this section is subject to a fine of not more than ten percent of the value of the financial transaction required to be reported or five thousand dollars ($5,000), whichever is greater; or

(2) provides any false or inaccurate information or knowingly conceals any material fact in a report required pursuant to Subsections A and B of this section is guilty of a fourth degree felony.

F. Notwithstanding any other provision of law, a violation of this section constitutes a separate, punishable offense for each transaction or exemption.

G. Any report, record, information, analysis or request obtained by the department of public safety or other agency pursuant to the provisions of this section is not a public record as defined in Section 14-3-2 NMSA 1978 and is not subject to disclosure pursuant to the provisions of Section 14-2-1 NMSA 1978.

H. A financial institution or person required to file a report pursuant to the provisions of Subsection A or B of this section shall, at the request of the department of public safety, provide the department with access to a copy of the report during the period of time that the financial institution or person is required to maintain the report.

History: Laws 1998, ch. 113, § 3.

ANNOTATIONS

Effective dates. — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

Compiler's notes. — The federal Currency and Foreign Transactions Reporting Act, referred in Subsection A, was repealed in the general revision of Title 31 USC. Similar provisions now appear as 31 USC § 5311 et seq.

30-51-4. Prohibited activity; criminal penalties; civil penalties.

A. It is unlawful for a person who knows that the property involved in a financial transaction is, or was represented to be, the proceeds of a specified unlawful activity to:

(1) conduct, structure, engage in or participate in a financial transaction that involves the property, knowing that the financial transaction is designed in whole or in part to conceal or disguise the nature, location, source, ownership or control of the property or to avoid a transaction reporting requirement under state or federal law;

(2) conduct, structure, engage in or participate in a financial transaction that involves the property for the purpose of committing or furthering the commission of any other specified unlawful activity;

(3) transport the property with the intent to further a specified unlawful activity, knowing that the transport is designed, in whole or in part, to conceal or disguise the nature, location, source, ownership or control of the monetary instrument or to avoid a transaction reporting requirement under state or federal law; or

(4) make the property available to another person by means of a financial transaction or by transporting the property, when he knows that the property is intended for use by the other person to commit or further the commission of a specified unlawful activity.

B. A person who violates any provision of Subsection A of this section is guilty of a:

(1) second degree felony if the illegal financial transaction involves more than one hundred thousand dollars ($100,000);

(2) third degree felony if the illegal financial transaction involves over fifty thousand dollars ($50,000) but not more than one hundred thousand dollars ($100,000);

(3) fourth degree felony if the illegal financial transaction involves over ten thousand dollars ($10,000) but not more than fifty thousand dollars ($50,000); or

(4) misdemeanor if the illegal financial transaction involves ten thousand dollars ($10,000) or less.

C. In addition to any criminal penalty, a person who violates any provision of Subsection A of this section is subject to a civil penalty of three times the value of the property involved in the transaction.

D. Nothing contained in the Money Laundering Act precludes civil or criminal remedies provided by the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978] or the Controlled Substances Act [Chapter 30, Article 31 NMSA 1978] or by any other New Mexico law. Those remedies are in addition to and not in lieu of remedies provided in the Money Laundering Act.

History: Laws 1998, ch. 113, § 4.

ANNOTATIONS

Effective dates. — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

30-51-5. Attorney fees; exception.

No provision of the Money Laundering Act shall apply to a financial transaction involving the bona fide fees an attorney accepts for representing a client in a criminal investigation or a proceeding arising from a criminal investigation.

History: Laws 1998, ch. 113, § 5.

ANNOTATIONS

Effective dates. — Laws 1998, ch. 113, § 8, makes the Money Laundering Act effective on July 1, 1998.

ARTICLE 52
Human Trafficking

30-52-1. Human trafficking.

A. Human trafficking consists of a person knowingly:

(1) recruiting, soliciting, enticing, transporting or obtaining by any means another person with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity;

(2) recruiting, soliciting, enticing, transporting or obtaining by any means a person under the age of eighteen years with the intent or knowledge that the person will be caused to engage in commercial sexual activity; or

(3) benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity.

B. The attorney general and the district attorney in the county of jurisdiction have concurrent jurisdiction to enforce the provisions of this section.

C. Whoever commits human trafficking is guilty of a third degree felony; except if the victim is under the age of:

(1) sixteen, the person is guilty of a second degree felony; or

(2) thirteen, the person is guilty of a first degree felony.

D. Prosecution pursuant to this section shall not prevent prosecution pursuant to any other provision of the law when the conduct also constitutes a violation of that other provision.

E. In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking.

F. A person convicted of human trafficking shall, in addition to any other punishment, be ordered to make restitution to the victim for the gross income or value of the victim's labor or services and any other actual damages in accordance with Section 31-17-1 NMSA 1978.

G. As used in this section:

(1) "coercion" means:

(a) causing or threatening to cause harm to any person;

(b) using or threatening to use physical force against any person;

(c) abusing or threatening to abuse the law or legal process;

(d) threatening to report the immigration status of any person to governmental authorities; or

(e) knowingly destroying, concealing, removing, confiscating or retaining any actual or purported government document of any person; and

(2) "commercial sexual activity" means any sexual act or sexually explicit exhibition for which anything of value is given, promised to or received by any person.

History: Laws 2008, ch. 17, § 1.

ANNOTATIONS

Effective dates. — Laws 2008, ch. 17, § 4 made this section effective July 1, 2008.

Knowledge of victim's age is not an element of human trafficking. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, and where defendant argued that to convict him, a jury must find that he knew the victim was under the age of eighteen when the acts giving rise to the human trafficking conviction occurred, the state was not required to prove the defendant knew the victim's age as an element of the offense of human trafficking, because common usage and generally accepted principles of grammar, as well as the structure and language of the statute, indicate the legislature intended that a jury determine whether "recruiting, soliciting, enticing, transporting, or obtaining" was done knowingly rather than whether the defendant knew the age of the person being recruited, solicited, enticed, transported, or obtained. *State v. Jackson*, 2018-NMCA-066, cert. denied.

Knowledge of the victim's age is not an element of the offense of human trafficking of a minor. — Where defendant was convicted of human trafficking of a person under the age of eighteen years, and where the relevant jury instruction did not require the jury to find, as an element of the offense, that defendant knew the victim was under the age of eighteen years, there was no instructional error because "knowingly", in Subsection A of this section describes the action of recruiting, soliciting, enticing, transporting or obtaining, not the age requirement. The state was not required to prove that defendant knew the victim's age as an element of the offense. *State v. Carson*, 2020-NMCA-015, cert. denied.

Sufficient evidence to support human trafficking conviction. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for human trafficking was supported by substantial evidence where the evidence presented at trial established that defendant created an advertisement for the victim on a website commonly used to advertise prostitution services, that defendant took the victim to a gas station and dropped her off there intending for her to exchange sex for money, and that the victim was seventeen years old at the time. *State v. Jackson*, 2018-NMCA-066, cert. denied.

Sufficient evidence of conspiracy to commit human trafficking. — Where defendant was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to the delinquency of a minor, and conspiracy, defendant's conviction for conspiracy to commit human trafficking was supported by substantial evidence where the evidence presented at trial established that defendant instructed his co-conspirator to create an advertisement for the victim on a website commonly used to advertise prostitution services and that the co-conspirator agreed to do. *State v. Jackson*, 2018-NMCA-066, cert. denied.

30-52-1.1. Human trafficking; civil remedy for human trafficking victims.

A. A human trafficking victim may bring a civil action in any court of competent jurisdiction against an alleged human trafficker for actual damages, compensatory damages, punitive damages, injunctive relief or any other appropriate relief. Where the court finds that a defendant's actions were willful and malicious, the court may award treble damages to the plaintiff. A prevailing plaintiff is also entitled to recover reasonable attorney fees and costs.

B. A civil action pursuant to this section shall be forever barred unless the action is filed within ten years from the date on which:

(1) the defendant's human trafficking actions occurred; or

(2) the victim attains eighteen years of age if the victim was a minor when the defendant's actions occurred.

History: Laws 2013, ch. 200, § 1.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 200, § 5 made Laws 2013, ch. 200, § 1 effective July 1, 2013.

30-52-1.2. Sealing of records of human trafficking victims.

A. On petition to the district court, a person who is a victim of human trafficking who has been charged with crimes arising out of the actions of someone charged with human trafficking may have all legal and law enforcement records of the charges and convictions in the person's case sealed. The court may issue an order sealing records and files if the court finds:

(1) the petitioner is a victim of human trafficking;

(2) the charge or conviction is for a non-homicide crime; and

(3) the petitioner's involvement in the offense was due to duress, coercion, use of force, threat to or fraud committed against the petitioner by a person who has committed human trafficking involving the petitioner.

B. Reasonable notice of the petition shall be given to the district attorney or prosecutor who filed the original case and to the law enforcement agency that has custody of the law enforcement files and records for the case.

C. Upon the entry of the sealing order, the proceedings in the case shall be treated as if they never occurred and all index references shall be deleted. The court, law enforcement agencies and the petitioner shall respond to an inquiry that no record exists with respect to the petitioner for the referenced case. Copies of the sealed order shall be sent by the court to the district attorney or prosecutor who filed the original case, and each law enforcement agency shall be named in the order.

D. Inspection of files and records or release of information in the records included in the sealing order may be permitted by the court only upon subsequent order of the court on a showing of good cause after notice to all parties to the original petition.

History: Laws 2013, ch. 200, § 2.

ANNOTATIONS

Effective dates. — Laws 2013, ch. 200, § 5 made Laws 2013, ch. 200, § 2 effective July 1, 2013.

30-52-2. Human trafficking; benefits and services for human trafficking victims.

A. Human trafficking victims found in the state shall be eligible for benefits and services from the state until the victim qualifies for benefits and services authorized by the federal Victims of Trafficking and Violence Protection Act of 2000; provided that the victim cooperates in the investigation or prosecution of the person charged with the crime of human trafficking. Benefits and services shall be provided to eligible human trafficking victims as quickly as can reasonably be arranged regardless of immigration status and shall include, when appropriate to a particular case:

(1) case management;

(2) emergency temporary housing;

(3) health care;

(4) mental health counseling;

(5) drug addiction screening and treatment;

(6) language interpretation, translation services and English language instruction;

(7) job training, job placement assistance and post-employment services for job retention;

(8) child care;

(9) advocacy services;

(10) state-funded cash assistance;

(11) food assistance;

(12) services to assist the victim and the victim's family members; and

(13) other general assistance services and benefits as determined by the children, youth and families department or the human services department [health care authority department].

B. A human trafficking victim advocate shall be provided immediately upon identification by law enforcement of a human trafficking victim.

C. Before providing benefits and services pursuant to Subsection A of this section, law enforcement shall certify to the human services department [health care authority department] and the children, youth and families department that a person is:

(1) a victim of human trafficking; and

(2) cooperating in the investigation or prosecution of the person charged with the crime of human trafficking.

D. A victim's ability to cooperate shall be determined by the court, if that issue is raised by a human trafficking victim advocate. The victim is not required to cooperate if the court determines that the victim is unable to cooperate due to physical or psychological trauma. Benefits and services shall continue unless the court rejects the victim's claim regarding inability to cooperate. A victim who is younger than eighteen years of age is eligible for benefits and services without a finding by the court. Any court proceeding regarding the victim's ability to cooperate shall be held in camera. The human trafficking victim advocate shall be allowed to attend the proceeding. The record of any such proceeding shall be sealed.

E. The attorney general shall coordinate plans developed by state and local law enforcement agencies to provide a human trafficking victim or the victim's family members protection from retaliatory action immediately upon identifying the presence in the state of a victim who offers state or local law enforcement agencies information regarding a perpetrator of human trafficking.

F. The prosecuting authority shall take all reasonable steps within its authority to provide a human trafficking victim with:

(1) all necessary documentation required pursuant to federal law for an adjustment of immigration status that applies to that victim; and

(2) assistance in accessing civil legal services providers who are able to petition for adjustment of immigration status on behalf of the victim.

G. As used in this section:

(1) "human trafficking victim" means a person subjected to human trafficking; and

(2) "human trafficking victim advocate" means a person provided by a state or nonprofit agency with experience in providing services for victims of crime.

History: Laws 2008, ch. 17, § 2; 2013, ch. 200, § 3.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2023, ch. 205, § 16 provided that references to the human services department shall be deemed to be references to the health care authority department.

The 2013 amendment, effective July 1, 2013, provided additional services and benefits for human trafficking victims; in Subsection A, in the second sentence of the introductory paragraph, after "trafficking victims", added "as quickly as can reasonably be arranged", after "immigration status and", deleted "may" and added "shall", and after "shall include", added "when appropriate to a particular case"; added Paragraphs (8) through (11) of Subsection A; in Paragraph (13) of Subsection A, after "families department" added "or the human services department"; added Subsections B through F; in Paragraph (1) of Subsection G, after "human trafficking", deleted "by a person charged in New Mexico with the crime of human trafficking"; and added Paragraph (2) of Subsection G.

30-52-2.1. Posting information about the national human trafficking resource center hotline.

A. An employer subject to the Minimum Wage Act [50-4-19 to 50-4-30 NMSA 1978], a person licensed pursuant to Sections 60-6A-2 through 60-6A-5 NMSA 1978, a health facility licensed pursuant to the Public Health Act [Chapter 24, Article 1 NMSA 1978] and a state or local government agency that manages a transportation facility, including a highway rest area, shall post a sign containing the following notice in English and in Spanish and in any other written language where ten percent or more of the workers or users of a covered facility speak that language:

"NOTICE ON HUMAN TRAFFICKING: OBTAINING FORCED LABOR OR SERVICES IS A CRIME UNDER NEW MEXICO AND FEDERAL LAW. IF YOU OR SOMEONE YOU KNOW IS A VICTIM OF THIS CRIME, CONTACT THE FOLLOWING: IN NEW MEXICO, CALL OR TEXT 505-GET-FREE (505-438-3733); OR CALL THE

NATIONAL HUMAN TRAFFICKING RESOURCE CENTER HOTLINE TOLL-FREE AT 1-888-373-7888 FOR HELP. YOU MAY ALSO SEND THE TEXT "HELP" OR "INFO" TO BEFREE ("233733"). YOU MAY REMAIN ANONYMOUS, AND YOUR CALL OR TEXT IS CONFIDENTIAL.".

B. The sign shall be at least eight and one-half inches high and eleven inches wide. It shall be displayed in a conspicuous manner in the employer's business facility, in the licensees' licensed facilities or in the transportation facility clearly visible to the public and employees of the employer or licensees. The English language and Spanish language portions and any other written language portions of the sign shall be equal in size.

C. The director of the labor relations division of the workforce solutions department shall provide employers under the Minimum Wage Act with information about the notice required by this section and shall provide a version of the notice on its public access internet web site for employers to download or print.

D. The regulation and licensing department; the children, youth and families department; and the department of health shall each provide their respective licensees with information about the notice required by this section and shall provide a version of the notice on their respective public access internet web sites for licensees to download or print.

E. When necessary, a department shall update the relevant telephone and texting numbers provided in the version of the notice posted on its public access internet web site.

History: Laws 2014, ch. 75, § 1.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 75, § 2 made Laws 2014, ch. 75, § 1 effective July 1, 2014.

30-52-3. Terminated.

History: Laws 2008, ch. 17, § 3.

ANNOTATIONS

Compiler’s notes. — Pursuant to Subsection F of Section 30-52-3 NMSA 1978, the task force to combat human trafficking, enacted by Laws 2008, ch. 17, § 3, was terminated on July 1, 2016. For provisions of former section, *see* the 2015 NMSA 1978 on *NMOneSource.com*.

ARTICLE 53
Disruption of Communication and Utility Services

30-53-1. Creation of a safety hazard or disruption of communications and utilities services by theft or intentional damage.

A. Any person who by the theft of, or by intentionally damaging, communications or public utility equipment, whether customer - or utility-owned, creates a public safety hazard or causes a disruption of communications services or public utility services to ten or more households, customers or subscribers or causes monetary damage equal to or greater than one thousand dollars ($1,000) in value of equipment shall be guilty of a:

(1) misdemeanor for a first and second offense, punishable pursuant to Section 31-19-1 NMSA 1978; or

(2) fourth degree felony for third and subsequent offenses, punishable pursuant to Section 31-18-15 NMSA 1978.

B. As used in this section, "equipment" means utility system materials, including communications towers and associated material, telephone lines, railroad and other industrial safety communication devices or systems, electric towers, electric transformers, metering equipment, electric grounding wires and electric and natural gas transmission and distribution facilities.

History: Laws 2014, ch. 30, § 1.

ANNOTATIONS

Effective dates. — Laws 2014, ch. 30 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 21, 2014, 90 days after the adjournment of the legislature.