

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2020-018**

March 3, 2020

The Uniform Jury Instructions – Criminal Committee has recommended amendments to UJI 14-140, 14-1630, 14-1632, 14-1633, 14-1642, 14-1697, 14-2204, 14-2205, 14-2206, 14-2207, 14-2209, 14-2240, 14-2801, 14-2810, 14-2817, 14-2820, 14-2821, 14-5170, 14-5173, and 14-5174 NMRA for the Supreme Court’s consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court’s web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

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Your comments must be received by the Clerk on or before April 2, 2020, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

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

~~In New Mexico, the elements of the crime of _____ are as follows:

(summarize elements of offense)².~~

USE NOTES

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

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

Elements of uncharged crimes.

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

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

USE NOTE

This instruction must be used with every crime that incorporates another crime by reference—either by requiring the “intent to commit” another crime or by describing an act done with the purpose of committing another crime—unless the referenced crime is separately charged and instructed. This instruction may omit the element specifying jurisdiction and date of offense or any other elements not relevant to consideration of the charged offense and whose inclusion would cause juror confusion. The phrasing of this instruction may be adapted to account for the particular context in which it is used.

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

UJI 14-1630. Burglary; essential elements.

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

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization; [the least intrusion constitutes an entry];³
2. The defendant entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____]⁴ (*name of felony*) when inside;
3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.
2. If the charge is burglary of a dwelling house, UJI 14-1631 NMRA should be given.
3. Use bracketed phrase if entry is in issue.

4. ~~[It is not necessary to instruct on the elements of the theft.]~~ If intent to commit a theft is alleged, the essential elements of larceny as determined in UJI 14-1601 NMRA must be given if not separately instructed. If intent to commit a felony is alleged, the essential elements of the felony must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.
[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See Section 30-16-3 NMSA 1978. The crime of burglary is complete at the time the person makes the unauthorized entry into the structure with intent to commit a theft or felony. *State v. Gutierrez*, 82 N.M. 578, 484 P.2d 1288 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971). Consequently, the intention to carry out the theft or felony is sufficient and the act itself need not be carried out. See also *State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

Under the general rule, the least intrusion is sufficient to show entry. See *State v. Grubaugh*, 54 N.M. 272, 221 P.2d 1055 (1950) (Sadler, J., dissenting). See also *State v. Piques*, 310 S.W.2d 942 (Mo. 1958); *People v. Massey*, 196 Cal. App. 2d 230, 16 Cal. Rptr. 402 (1961).

Criminal trespass, Section 30-14-1 NMSA 1978, may be a lesser included offense to burglary. Possession of burglary tools is not a necessarily included offense to burglary. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969). See also commentary to UJI 14-6002.

A single premise may be comprised of more than one structure, and entry into each structure constitutes an act of burglary. See *State v. Ortega*, 86 N.M. 350, 524 P.2d 522 (Ct. App. 1974).

14-1632. Aggravated burglary; essential elements.

For you to find the defendant guilty of aggravated burglary [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant entered a [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] without authorization;
2. The defendant entered the [vehicle] [watercraft] [aircraft] [dwelling] [or] [other structure] with the intent to commit [a theft] [or] [_____]² (*name of felony*) once inside;
3. The defendant
[was armed with a _____³];⁴
[became armed with a _____³ after entering;]
[touched or applied force to _____ (*name of victim*) in a rude or angry manner while entering or leaving, or while inside;]
4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

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

2. ~~[It is not necessary to instruct on the elements of a theft.]~~ If intent to commit a theft is alleged, the essential elements of larceny as determined in UJI 14-1601 NMRA must be given if not separately instructed. If intent to commit a felony other than theft is alleged, the essential elements of the felony must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Insert the name of the weapon when the instrument is a deadly weapon as defined in Section 30-1-12(B) NMSA 1978, or use the phrase “an instrument or object which, when used as a weapon, could cause death or very serious injury”.

4. Use the applicable bracketed phrase.
[As amended, effective August 1, 2001; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See commentary to UJI 14-1621 for explanation of the deadly weapon provision. Carrying a deadly weapon is not a lesser included offense to aggravated burglary. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

The elements of a statutory battery are included in this instruction as one of the “aggravating” circumstances. See Section 30-3-4 NMSA 1978. For a case involving the distinctions between aggravated burglary, aggravated battery and robbery, see *State v. Ranne*, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

14-1633. Possession of burglary tools; essential elements.

For you to find the defendant guilty of possession of burglary tools [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession² _____ (*name of tools or devices*);
2. _____ (*name of tools or devices*) [is] [are] designed for or commonly used in the commission of a burglary;
3. The defendant intended that the _____ (*tools or devices*) be used for the purpose of committing a burglary;
4. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.
2. See UJI 14-130 NMRA for definition of “possession,” if the question of possession is in issue.
3. The jury should be instructed on the elements of burglary following this instruction. See UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See NMSA 1978, § 30-16-5. No New Mexico appellate decision defines burglary tools. See *generally* Annot., 33 A.L.R.3d 798 (1970).

Possession of burglary tools is a separate offense from the crime of burglary. A defendant does not need to be convicted of the crime of burglary in order to be held liable for possession of burglary tools. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, *overruled on other grounds* by *State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110.

An individual can be “exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary.” *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983. The statute is therefore not void for vagueness. *Id.*

Whether an item is commonly used for burglaries is a factual determination for a jury. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882.

Constructive possession is sufficient for conviction of possession of burglary tools. *State v. Langdon*, 1942-NMSC-034, 46 N.M. 277, 127 P.2d 875; *see also, State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767 (burglary tools do not have to be on the person of the defendant in order to be possessed).

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017.]

14-1642. Extortion; essential elements.

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

1. _____ (*name of defendant*) threatened
[to injure the person or property of _____ (*name of victim*) or another]²
[to accuse _____ (*name of victim*) or another of a crime]
[to expose or imply the existence of a deformity or disgrace of _____ (*name of victim*) or another]
[to expose any secret of _____ (*name of victim*) or another]
[to kidnap _____ (*name of victim*) or another]³,
intending to wrongfully⁴
[obtain anything of value from _____ (*name of victim*)]⁵
[compel _____ (*name of victim*) to do something _____ (*name of victim*) would not have done]
[compel _____ (*name of victim*) to refrain from doing something _____ (*name of victim*) would have done];
2. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.
2. Use applicable threatening acts.

3. ~~[Use the applicable element.]~~ If a threatened kidnapping is alleged, the essential elements of kidnapping as determined in UJI 14-403A NMRA must be given if not separately instructed. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. If there is a specific issue of wrongfulness of an act, a specific definition may need to be prepared. ~~[See for example UJI Criminal 14-937, defining “unlawful” for purposes of criminal sexual contact of a minor.]~~

5. Use the applicable element.

[UJI Criminal 16.32; UJI 14-1642 SCRA 1986; UJI 14-1642 NMRA; as amended, effective July 1, 1998; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — This instruction has been amended to add the term “wrongfully” because of the line of cases such as *State v. Osborne*, 111 N.M. 654, 808 P.2d 624 (1991) and *State v. Parish*, 118 N.M. 39, 42, 878 P.2d 988, 991 (1994).

14-1697. Receipt of property obtained by fraudulent use of credit card; essential elements.

For you to find the defendant guilty of receiving property obtained by fraudulent use of a credit card [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant received _____ (*describe money, goods or services received*);

2. This property was obtained by another’s fraudulent use of a credit card^[2];

3. The defendant knew or had reason to believe that:^[4]

[the credit card was obtained in violation of law and then used;] or

[the credit card was invalid, expired or had been revoked, and was used with the

intent to deceive or cheat;] or

[the credit card was used with the intent to deceive or cheat by a person

misrepresenting that he was the cardholder, or was authorized by the cardholder to use the credit card;] or

[the credit card was used without the cardholder’s consent by a person with the intent to deceive or cheat;]

4. These goods or services had a [value]^[3] [value over \$300.00];

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

_____, _____.

USE NOTES

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

~~[2. — If the jury requests a definition of “credit card,” the statutory definition set forth in Section 30-16-25 NMSA 1978 is to be given.]~~

~~[3.]~~² Use applicable alternative.

~~[4. Use only the applicable bracketed phrase or phrases set forth in Element 3. If there is an issue as to the underlying elements of one of the crimes set forth in Element 3 of this instruction, then upon request, the court shall give the applicable essential elements instruction modified in the manner illustrated by UJI 14-140.]~~

Committee commentary. — For general information on credit card crimes, *see* committee commentary to UJI 14-1680.

Section 30-16-36 NMSA 1978 is similar to our receiving stolen property statute, Section 30-16-11 NMSA 1978. Here though, the property was not technically stolen, but was obtained by another’s fraudulent use of a credit card. The knowledge requirement is the same: the defendant “knows or has reason to believe” the money, goods or services were obtained in violation of law.

For a discussion on the aggregation of amounts provided for in this section, *see* committee commentary to UJI 14-1689.

The committee is of the opinion that one or more of the alternatives set forth in Element 3 may be given. *See* UJI 14-1686.

14-2204. Aggravated assault on a peace officer; attempted battery with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____¹ [as charged in Count _____]², the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (name of peace officer) by _____³;

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.⁴

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

3. The defendant also intended to commit the crime of _____¹;

4. At the time, _____ (name of peace officer) was a peace officer and was performing duties of a peace officer⁵;

5. The defendant knew _____ (name of peace officer) was a peace officer;

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

USE NOTES

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

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

3. Use ordinary language to describe the touching or application of force.

4. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

5. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which

defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer's duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.03 NMSA 1978; UJI 14-2204 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* NMSA 1978, § 30-22-22(A)(3) (1971). This crime includes the elements of an aggravated assault with intent to commit a felony. *See* commentary to UJI 14-308, 14-309, and 14-310 NMRA. *See also* commentary to UJI 14-2201, 14-2202, and 14-2203 NMRA.

This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M.142, 207 P.3d 1119.

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

14-2205. Aggravated assault on a peace officer; threat or menacing conduct with intent to commit a felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____¹ [as charged in Count _____]², the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);
2. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer;
3. The defendant knew _____ (*name of peace officer*) was a peace officer;
4. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner³;
5. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;
6. The defendant intended to commit the crime of _____¹;
7. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the name of the felony or felonies in the disjunctive. The essential elements of each felony must also be given immediately following this instruction. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.
2. Insert the count number if more than one count is charged.

3. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

4. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.04 NMSA 1978; UJI 14-2205 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

14-2206. Aggravated assault on a peace officer; attempted battery or threat or menacing conduct with intent to commit a felony; essential elements.¹

For you to find the defendant guilty of aggravated assault on a peace officer with intent to commit _____² [as charged in Count _____]³, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (name of peace officer) by _____⁴;

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.⁵

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

OR

1. The defendant _____ (describe unlawful act, threat or menacing conduct);

2. The defendant’s conduct caused _____ (name of peace officer) to believe the defendant was about to intrude on _____’s (name of peace officer) bodily integrity or personal safety by touching or applying force to _____ (name of peace officer) in a rude, insolent or angry manner⁵;

3. A reasonable person in the same circumstances as _____ (name of peace officer) would have had the same belief;

AND

4. The defendant also intended to commit the crime of _____²;

5. At the time, _____ (name of peace officer) was a peace officer and was performing duties of a peace officer⁶;

6. The defendant knew _____ (*name of peace officer*) was a peace officer.

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

USE NOTES

1. This instruction combines the essential elements in UJI 14-2204 and UJI 14-2205 NMRA.

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

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

4. Use ordinary language to describe the touching or application of force.

5. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

6. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.05 NMSA 1978; UJI 14-2206 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* committee commentary for UJI 14-2204 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

14-2207. Aggravated assault on a peace officer; attempted battery with intent to commit a violent felony; essential elements.

For you to find the defendant guilty of aggravated assault on a peace officer with intent to [kill] [or]¹ [commit _____²] [as charged in Count _____][¹]³, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____ (*name of peace officer*) by _____⁴;

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner.⁵

2. The defendant began to do an act which constituted a substantial part of the battery but failed to commit the battery;
3. The defendant also intended to [kill] [or]¹ [commit _____²] on _____ (*name of peace officer*);
4. At the time, _____ (*name of peace officer*) was a peace officer and was performing duties of a peace officer⁶;
5. The defendant knew _____ (*name of peace officer*) was a peace officer;
6. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Use only the applicable bracketed alternatives.
2. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.
3. Insert the count number if more than one count is charged.
4. Use ordinary language to describe the touching or application of force.
5. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.
6. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.
[Adopted, effective October 1, 1976; UJI Criminal Rule 22.06 NMSA 1978; UJI 14-2207 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* NMSA 1978, § 30-22-23(A) (1971). *Compare* UJI 14-311 NMRA, UJI 14-312 NMRA, UJI 14-313 NMRA and commentary. *See also* commentary to UJI 14-2201 NMRA, UJI 14-2202 NMRA, and UJI 14-2203 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

14-2209. Aggravated assault on a peace officer; attempted battery; threat or menacing conduct with intent to commit a violent felony; essential elements.¹

For you to find the defendant guilty of aggravated assault on a peace officer with intent to [kill] [or]² [commit _____³] [as charged in Count _____]⁴, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended to commit the crime of battery against _____
(*name of peace officer*) by _____⁵;

A battery consists of intentionally touching or applying force in a rude, insolent, or angry manner⁶.

2. The defendant began to do an act which constituted a substantial part of the battery but failed to complete the battery;

OR

1. The defendant _____ (*describe unlawful act, threat or menacing conduct*);

2. The defendant's conduct caused _____ (*name of peace officer*) to believe the defendant was about to intrude on _____'s (*name of peace officer*) bodily integrity or personal safety by touching or applying force to _____ (*name of peace officer*) in a rude, insolent or angry manner⁶;

3. A reasonable person in the same circumstances as _____ (*name of peace officer*) would have had the same belief;

AND

4. The defendant also intended to [kill] [or]² [commit _____³] on _____ (*name of peace officer*);

5. At the time, _____ (*name of peace officer*) was a peace officer and was performing the duties of a peace officer⁷;

6. The defendant knew _____ (*name of peace officer*) was a peace officer;

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

USE NOTES

1. This instruction combines the essential elements set forth in UJI 14-2207 and 14-2208 NMRA.

2. Use only the applicable bracketed alternatives.

3. Insert the name of the felony or felonies in the disjunctive. This instruction is to be used for assault with intent to kill or to commit a violent felony, *i.e.*, mayhem, criminal sexual penetration, robbery or burglary. The essential elements of the felony or felonies must also be given immediately following this instruction. For mayhem, *see* UJI 14-314 NMRA. For criminal sexual penetration in the first, second or third degree, *see* UJI 14-941 to 14-961 NMRA. For robbery, *see* UJI 14-1620 NMRA. For burglary, *see* UJI 14-1630 NMRA. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

5. Use ordinary language to describe the touching or application of force.

6. If the “unlawfulness” of the act is in issue, add unlawfulness as an element as provided by Use Note 1 of UJI 14-132 NMRA. In addition, UJI 14-132 NMRA is given. If the issue of “lawfulness” involves self-defense or defense of another, *see* UJI 14-5181 to UJI 14-5184 NMRA.

7. “Peace officer” is defined in Subsection C of Section 30-1-12 NMSA 1978. If there is an issue as to whether or not the victim was a peace officer, give UJI 14-2216 NMRA, which defines “peace officer.” If there is an issue as to whether the officer was within the lawful discharge of the officer’s duties, an instruction may need to be drafted. The mistake of fact referred to in prior UJI 14-2216 NMRA has been incorporated into this instruction as an element. If some other mistake of fact is raised as a defense, *see* UJI 14-5120 NMRA.

[Adopted, effective October 1, 1976; UJI Criminal Rule 22.08 NMSA 1978; UJI 14-2209 SCRA; as amended, effective January 15, 1998; as amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. 16-8300-008, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* committee commentary for UJI 14-2207 NMRA. This instruction was amended in 2010 to be consistent with *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119.

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

14-2240. Harboring a felon; essential elements.

For you to find the defendant guilty of harboring a felon [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. _____ (*name of defendant*) was a not a husband or wife, parent or grandparent, child or grandchild, or brother or sister, by consanguinity or affinity, of _____ (*name of felon*);²

2. _____ (*name of felon*) committed the crime of _____³;

3. _____ (*name of defendant*) knew that _____ (*name of felon*) had committed the crime of _____³;

4. The defendant [concealed]⁴ [gave aid to] _____ (*name of felon*), with the intent that _____ (*name of felon*) [escape]⁴ [avoid arrest, trial, conviction or punishment] for the crime of _____³;

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

USE NOTES

1. Insert the count number if more than one count is charged.
2. This bracketed element should only be given if there is a factual issue as to the defendant’s relationship to the felon. *See* NMSA 1978, § 30-22-4 (1963) (exempting certain relatives from criminal liability for harboring or aiding a felon).

3. Identify the felony committed. If the jury has not already been given the instruction pertaining to the felony committed, the essential elements of applicable offense must be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. Use only the applicable bracketed elements established by the evidence.
[As amended by Supreme Court Order No. 14-8300-005, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See NMSA 1978, § 30-22-4 (1963). “[Section 30-22-4] requires that the state prove that a specific felony has been committed, whether or not the perpetrator has been arrested, prosecuted, or tried.” *State v. Gardner*, 1991-NMCA-058, ¶ 14, 112 N.M. 280, 814 P.2d 458. Therefore, “in a prosecution for harboring a felon, the State may even be required to conduct a trial-within-a trial in order to establish that the person harbored was a felon.” *State v. Maes*, 2003-NMCA-054, ¶ 6, 133 N.M. 536, 65 P.3d 584 (citing *Gardner*, 1991-NMCA-058). A conviction under this statute was upheld by the supreme court upon evidence that the defendant had witnessed the crime and then allowed the perpetrator to hide in her home. See *State v. Lucero*, 1975-NMSC-061, 88 N.M. 441, 541 P.2d 430.

Section 30-22-4 provides that certain relatives, either by consanguinity or affinity, may harbor or aid a felon with impunity. The supreme court has held that the enumeration of certain persons does not deny a person who is only “living” with another person the equal protection of the law. See *Lucero*, 1975-NMSC-061, ¶ 19.

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

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

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

1. The defendant intended to commit the crime of _____¹;
2. The defendant began to do an act which constituted a substantial part of the _____¹ but failed to commit the _____¹;
3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

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

2. Insert the count number if more than one count is charged.
[As amended by Supreme Court Order No. 10-8300-039, effective December 31, 2010; as amended by Supreme Court Order No. _____, effective _____.]

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

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

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

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

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

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

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

14-2810. Conspiracy; single or multiple objectives; essential elements.

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

1. The defendant and another person by words or acts agreed together to commit _____¹; [or _____ [or _____]]²;
- [2. That other person was not a state or federal agent acting in the agent's official capacity at the time;]⁴
- [3. The conspiracy alleged in this Count must be separate, distinct, and not a continuation of Count ____;]⁵
4. The defendant and the other person intended to commit _____¹ [or _____ [or _____]]²;
5. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. For a conspiracy with a single objective, insert the name of the felony. Unless the court has instructed on the essential elements of the named felony, give the essential elements of the named felony, other than venue, immediately after this instruction.

2. For a conspiracy to commit multiple felonies, insert the names of the felonies in the alternative. Unless the court has instructed on the essential elements of the named felonies, give the essential elements of the named felonies, other than venue, immediately after this instruction.

To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. Where the state charges multiple objectives, the jury must unanimously agree about which of the named felonies, if any, was the object of the conspiracy and the unanimity and special verdict instructions, UJI 14-2810A NMRA and UJI 14-6019B NMRA, must be given.

3. Insert the count number if more than one count is charged.
4. Insert bracketed language if the co-conspirator's status as a governmental agent is an issue.
5. Insert bracketed language if multiple conspiracy counts are charged and identify all other conspiracy counts. UJI 14-2810B NMRA must also be given.

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

Committee commentary. — See NMSA 1978, § 30-28-2.

This instruction sets forth the essential elements of the crime of conspiracy. The offense is complete when the defendant combines with another for felonious purpose. In New Mexico, as at common law, no overt act in furtherance of the conspiracy need be proved. 4 *Wharton's Criminal Law* § 681 (15th ed. 2014); Perkins, *Criminal Law* 616 (2d ed. 1969); see *State v. Gallegos*, 2011-NMSC-027, ¶ 45, 149 N.M. 704, 254 P.3d 655 (citing *State v. Lopez*, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 (no overt act required) and *State v. Villalobos*, 1995-NMCA-105, ¶ 11, 120 N.M. 694, 905 P.2d 732 (“conspiracy is complete when the agreement is reached”)).

Because Section 30-28-2 links the penalty for conspiracy to the penalty for the felony object(s) of the conspiracy, when the State charges multiple objectives that would result in differing penalties, the general verdict form, UJI 14-6014 NMRA, is not sufficient. Instead, UJI 14-2810A NMRA and a special verdict, UJI 14-6019B, should be used to ensure jury unanimity beyond a reasonable doubt regarding *which* felonies, if any, the defendant agreed to commit. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (facts—other than prior convictions—that increase statutory maximum possible sentence must be found by the jury beyond a reasonable doubt); *Gallegos*, 2011-NMSC-027, ¶ 53 (conspiracy statute amended in 1979 to provide punishment calibrated at the level of the highest crime to be committed.)

New Mexico law appears to accept that a defendant cannot be found guilty of conspiracy where the agreement is solely with an agent of the State, such as an undercover officer, an informant, or a person who is a de facto agent, despite ostensible private status (*e.g.* parcel service deliverer who routinely is rewarded for opening suspicious packages for law enforcement purposes). See *Villalobos*, 1995-NMCA-105, ¶¶ 20-27 (assuming without deciding that New Mexico law follows *United States v. Barboa*, 777 F.2d 1420, 1422 (10th Cir. 1985), which held that a defendant cannot be convicted of conspiring with only government agents or informers and supported defendant's tendered instruction that he could not be convicted of conspiracy with government agents); see also *State v. Dressel*, 1973-NMCA-113, ¶ 3, 85 N.M. 450, 513 P.2d 187 (“It takes at least two persons to effect a conspiracy. The essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means.” (internal citations omitted)). Where there is some evidence to support a defendant's theory that the only other alleged co-conspirator was a de jure or de facto state agent, the additional phrase in element 2 should be included. See *Villalobos*, 1995-NMCA-105, ¶¶ 20-27; see also *State v. Privett*, 1986-NMSC-025, ¶ 20, 104 N.M. 79, 717 P.2d 55 (defendant's requested instruction on

intoxication requires “some evidence”; the court does not weigh that evidence but merely determines whether it exists).

The agreement need not be verbal but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme. The agreement may be established by circumstantial evidence. *State v. Deaton*, 1964-NMSC-062, ¶ 5, 74 N.M. 87, 390 P.2d 966; *State v. Sellers*, 1994-NMCA-053, ¶ 17, 117 N.M. 644, 875 P.2d 400.

A defendant may be charged with conspiracy to commit a single felony or multiple felonies. However, a single *agreement* to commit two felonies constitutes only a single conspiracy. *State v. Ross*, 1974-NMCA-028, ¶ 17, 86 N.M. 212, 521 P.2d 1161 (“Whether the object of a single *agreement* is to commit one or many crimes, it is in either case the agreement which constitutes the conspiracy which the statute punishes.” (emphasis added) (quoting *Braverman v. United States*, 317 U.S. 49, 54 (1942))); *see also Gallegos*, 2011-NMSC-027, ¶ 38 (accepting *Braverman* that the number of prosecutable conspiracies is based on the number of agreements), ¶ 49 (cautioning against conflating the existence of multiple objectives in a single conspiracy with multiple conspiracies). If the single conspiracy is alleged to be for the purpose of committing more than one felony, the essential elements of each felony must be given.

There is a “rebuttable presumption” that despite the commission of multiple crimes, there is only one, overarching, conspiratorial agreement and thus only one count of conspiracy. *Gallegos*, 2011-NMSC-027, ¶ 55. Nevertheless, distinct from a single conspiracy count alleging multiple objectives, a defendant may be charged with more than one count of conspiracy, with each count alleging a separate agreement to commit one or more felonies. Where the defendant is charged with more than one conspiracy, UJI 14-2810B NMRA must be given.

In a multi-defendant trial, evidence may be admitted regarding only one or fewer than all of the defendants. Where certain evidence—such as co-conspirators’ statements—is admitted as to only a particular defendant, an appropriate limiting instruction should be given. *See* UJIs 14-5007, 14-5008 NMRA.

Although the gist of the offense is the combination between two or more persons, conviction of all the conspirators is not required. *State v. Verdugo*, 1969-NMSC-008, ¶ 9, 79 N.M. 765, 449 P.2d 781.

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

14-2817. Criminal solicitation; essential elements.

For you to find the defendant guilty of criminal solicitation [as charged in Count _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intended that another person commit _____ (*name of felony*)²;
2. The defendant [solicited]³ [commanded] [requested] [induced] [employed] the other person to commit the crime;
3. This happened in New Mexico on or about the _____ day of _____, _____.

USE NOTES

1. Insert the count number if more than one count is charged.
2. Give the essential elements of the felony, if not covered by other instructions. [*See* UJI 14-140 for example of how essential elements instructions are to be modified when not given as separate offense.] To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

3. Use applicable alternative.

Committee commentary. — Section 30-28-3 NMSA 1978 sets out not only the essential elements of the crime of criminal solicitation, but also what is and is not a defense. To be guilty of solicitation the crime intended to be committed must be a felony. New Mexico law makes no provision for soliciting someone to commit a lesser offense than a felony. The same is true for the crimes of attempt and conspiracy. The underlying crime must be punishable as a felony.

There is much confusion over the distinctions between solicitation, attempt and conspiracy. Under the Model Penal Code a solicitation may be “a substantial step in a course of conduct planned to culminate in [the] commission of the crime” for the purpose of proving an attempt. Model Penal Code § 5.01(1)(c) and (2)(g) (1962). There is some disagreement with this view, however. The Memorandum to Virginia Model Jury Instructions - Criminal, Attempts and Solicitations No. 6, states, “[s]olicitation *does not* amount to a direct act towards the commission of the crime. . . . Where the inciting to crime does proceed to the point of some overt act in the commission of the offense, it becomes an attempt. . . .” (Citing *Wiseman v. Commonwealth*, 143 Va. 631, 130 S.E. 249 (1925).) (Emphasis added.) It is unclear which view prevails in New Mexico due to the lack of case law on solicitation, but the committee was of the opinion that mere solicitation is not enough of an overt act to constitute an attempt. As stated by Perkins, “[t]he usual statement is to the effect that, although a few cases have held otherwise, a solicitation is not an attempt. . . .” R. Perkins, *Perkins on Criminal Law*, p. 585 (2d ed. 1969). A more definite distinction can be drawn when the solicitor does not merely solicit another to commit the crime, but plans to actually assist in the commission of the crime. In these instances there is a specific intent to commit the crime, which may rise to the level of attempt. To prove solicitation, one must only show the solicitor intended someone else to commit the crime.

The solicitation of another to commit a crime is an attempt to commit that crime if, but only if, it takes the form of urging the other to join with the solicitor in perpetrating that offense, - not at some future time or distant place, but here and now, and the crime is such that it cannot be committed by one without the cooperation or submission of another, such as bribery or buggery. Where such cooperation or submission is an essential feature of the crime itself, the request for it now is a step in the direction of the offense.

Id. at 586-7.

To be guilty of solicitation, the crime need not be committed. It must only be proven that the defendant intended that the other person commit the crime.

14-2820. Aiding or abetting; accessory to crime of attempt.¹

The defendant may be found guilty of an attempt even though the defendant did not do the acts constituting the attempt, if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant intended that another person commit the crime;
2. Another person attempted to commit the crime; and
3. The defendant helped, encouraged, or caused the attempt to commit the crime. [This instruction does not apply to the charge of felony murder.]²

USE NOTES

1. For use if the evidence supports liability of the defendant as an aider or abettor for any crime of attempt. This instruction should not be used for felony murder. The essential elements of the attempt or attempts must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury.

[As amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See Section 30-1-13 NMSA 1978.

See commentary to UJI 14-2822.

This instruction sets out the theory of liability as an aider or abettor for crimes of attempt to commit a felony. It may be used if the defendant is charged as a principal, as an aider and abettor, or as both.

This instruction does not define “attempt,” and therefore it is necessary that UJI 14-2801, the essential elements of attempt, be given along with this instruction on aiding and abetting. Further, since UJI 14-2801 is incomplete without the essential elements of the felony that was attempted, those essential elements must also be given to make this instruction complete. Therefore, when this instruction is given, UJI 14-2801 should also be given, and the essential elements of the felony attempted should be given in some form.

14-2821. Aiding or abetting accessory to felony murder.¹

The defendant _____ (*name of defendant*) may be found guilty of felony murder [as charged in Count _____]², even though the defendant did not commit the murder if the state proves to your satisfaction beyond a reasonable doubt each of the following elements:

1. The defendant _____ (*name of defendant*) intended that another person commit the felony of _____ (*name of felony*);

2. Another person committed [or] [attempted]³ the felony of _____ [under circumstances or in a manner dangerous to human life]³;

3. The defendant _____ (*name of defendant*) helped, encouraged, or caused the felony of _____ (*name of felony*) to be committed [or attempted];⁴

4. During the [commission] [attempted commission] of the felony _____ (*name of deceased*) was killed;

5. The defendant _____ (*name of defendant*) helped, encouraged, or caused⁵ the killing to be committed;

6. The defendant _____ (*name of defendant*) intended the killing to occur or knew that the defendant was helping to create a strong probability of death or great bodily harm; and

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

USE NOTES

1. For use if the evidence supports liability as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for felony murder.

2. Insert the count number to which this instruction is applicable if more than one count is submitted to the jury on any theory.

3. Use applicable alternatives.

4. The essential elements of this felony or these felonies must also be given unless they are otherwise covered by the instructions. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

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

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 17-8300-012, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See Sections 30-1-13 and 30-2-1A(2) NMSA 1978.

This instruction sets out the theory of liability as an aider or abettor for a felony murder. A separate instruction was appropriate because the requisite intent in felony murder is different from that in other crimes. See committee commentary to UJI 14-202 (felony murder).

See also the committee commentary to UJI 14-2822.

This instruction is considerably different from UJI 14-2822, because under that instruction the defendant must have intended the crime that was committed, and in this instruction on felony murder, the defendant need only intend that the underlying felony be committed. *State v. Smelcer*, 30 N.M. 122, 125, 228 P. 183 (1924). See also Perkins, Criminal Law 37-44 (2d ed. 1969). In order to make that distinction, the committee merged into this instruction the essential elements of felony murder from UJI 14-202.

14-5170. Justifiable homicide; defense of habitation.¹

An issue you must consider in this case is whether the defendant killed _____ (*name of victim*) while attempting to prevent a _____² in the defendant's _____³.

A killing in defense of _____³ is justified if:

1. The _____³ was being used as the defendant's dwelling; and

2. It appeared to the defendant that the commission of _____² was immediately at hand and that it was necessary to kill the intruder to prevent the commission of _____²; and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the state to prove beyond a reasonable doubt that the defendant did not kill in defense of _____³. If you have a reasonable doubt as to whether the defendant killed in defense of _____³, you must find the defendant not guilty.

USE NOTES

1. If this instruction is given, add to the essential elements instruction for the offense charged, “The defendant did not kill in defense of _____.”³

2. Describe the violent felony being committed or attempted. The essential elements of the violent felony being committed or attempted must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words “the defendant” in UJI 14-140 NMRA.

3. Identify the place where the killing occurred.
[As amended, effective October 1, 1985; January 1, 1997; December 31, 2019; as amended by Supreme Court Order No. [19-8300-016] _____, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — NMSA 1978, Section 30-2-7(A) (1963) provides that a homicide is justifiable when committed in the necessary defense of property. Although this statute has been a part of New Mexico law since 1907, the New Mexico appellate courts have never interpreted the statute broadly. *See also* commentary to UJI 14-5171 NMRA. The New Mexico courts have consistently held, not always referring to the statute, that one cannot defend his property, other than his habitation, from a mere trespass to the extent of killing the aggressor. *State v. Couch*, 1946-NMSC-047, ¶ 30, 52 N.M. 127, 193 P.2d 405 (“The . . . rule limiting the amount of force which may be lawfully used in defense of other property does not apply in defense of habitation.”); *State v. Martinez*, 1929-NMSC-040, ¶ 9, 34 N.M. 112, 278 P. 210 (explaining that “[e]ven if deceased was a trespasser [on the defendant’s land], taking his life for that reason was not justifiable”); *State v. McCracken*, 1917-NMSC-029, ¶ 8, 22 N.M. 588, 166 P. 1174 (addressing trespass on open lands and holding that the defendant did not have the right to use deadly force “to enable him to enter upon the land and construct his fence,” even if he did legally possess the land). *See generally*, Annot., 25 A.L.R. 508, 525 (1923).

The “pure” defense of property, i.e., not including a defense against force and violence, is always limited to reasonable force under the circumstances. *See, e.g., State v. Waggoner*, 1946-NMSC-001, 49 N.M. 399, 165 P.2d 122; *Brown v. Martinez*, 1961-NMSC-040, 68 N.M. 271, 361 P.2d 152. In *Brown*, the Court held that resort to the use of a firearm to prevent a mere trespass or an unlawful act not amounting to a felony was unreasonable as a matter of law.

In defense of habitation, although the defendant is limited by the elements of imminent threat, apparent necessity and reasonableness, he does not have to fear for the life of himself or others or necessarily believe that great bodily harm will come to himself or others. An apparent necessity to kill to prevent a violent felony is required. *Couch*, 1946-NMSC-014; *see also State v. Boyett*, 2008-NMSC-030, ¶ 21, 144 N.M. 184, 185 P.3d 355 (requiring felony, in defense of habitation context, to be a violent felony); *State v. Cardenas*, 2016-NMCA-042, ¶ 6, 380 P.3d 866 (same); *State v. Baxendale*, 2016-NMCA-048, ¶ 15, 370 P.3d 813 (same); Perkins, *Criminal Law* 1024 (2d ed. 1969). This instruction requires a determination of what constitutes a habitation, if the structure is not obviously a home or apartment, under the particular facts of the case. *See generally*, Annot., 25 A.L.R. 508, 521 (1923). *See also* commentary to UJI 14-1631.

If the property being defended is not the defendant's habitation, he may kill the intruder only if the interference with the property is accompanied by a threat of death or great bodily harm. See LaFave & Scott, Criminal Law 399 (1972). In such a case, UJI 14-5171 (Justifiable homicide; self-defense) must be given.

[As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019.]

14-5173. Justifiable homicide; public officer or employee.¹

An issue you must consider in this case is whether the killing of _____ (*name of victim*) was justifiable homicide by a public officer or employee.

The killing was justifiable homicide by a public officer or public employee if:

1. At the time of the killing, _____ (*name of defendant*) was a public officer or employee; and

2. The killing was committed while _____ (*name of defendant*) was performing the defendant's duties as a public officer or employee;

3. The killing was committed while²

[overcoming the actual resistance of _____ (*name of victim*) to the execution of _____³]

[overcoming the actual resistance of _____ (*name of victim*) to the discharge of _____⁴]

[retaking [_____ (*name of victim*)] [a person], who committed _____⁵ and who had [been rescued]⁶ [escaped]]

[arresting _____ (*name of victim*) [a person], who committed _____⁵ and was fleeing from justice]

[attempting to prevent the escape from _____⁷ by

[_____ (*name of victim*)] [a person] who committed _____⁵]; and

4. A reasonable person in the same circumstances as _____ (*name of defendant*) would have reasonably believed that _____ (*name of victim*) posed a threat of death or great bodily harm to _____ (*name of defendant*) or another person. The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE NOTES

1. For use when the defense is based on Section 30-2-6 NMSA 1978. If this instruction is given, add to the essential elements instruction for the offense charged, "The killing was not justifiable homicide by a public officer or employee."

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.

5. Insert the name of the felony. The essential elements of the felony must also be given. To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

However, in this context, substitute the name of the victim in place of the words “the defendant” in UJI 14-140 NMRA.

6. Use only the applicable parenthetical alternative.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Although the Section 30-2-6 NMSA 1978 requires that the defendant “necessarily committed” the killing, “necessarily” is defined as “probable cause” to believe. The committee has used the definition of “probable cause,” “reasonable person in the same circumstances as the defendant” in this instruction for purposes of clarity.

14-5174. Justifiable homicide; aiding public official.¹

An issue you must consider in this case is whether the killing of _____ (*name of victim*) was justifiable homicide by a person aiding a public officer or public employee if:

1. At the time of the killing, _____ (*name of defendant*) was acting at the command and in the aid or assistance of a public officer or employee;

2. The killing was committed while²

[overcoming the actual resistance of _____ (*victim*) to the execution of _____³]

[overcoming the actual resistance of _____ (*victim*) to the discharge of _____⁴]

[retaking [_____ (*name of victim*)] [a person], who committed _____⁶ and who had [been rescued]⁵ [escaped]]

[arresting [_____ (*name of victim*)] [a person] who committed _____⁶ and was fleeing from justice]

[attempting to prevent the escape from _____⁷ of [_____ (*name of victim*)] [a person], who committed _____⁶]; and

3. A reasonable person in the same circumstances as _____ (*name of defendant*) would have reasonably believed that _____ (*name of victim*) posed a threat of death or great bodily harm to _____ (*name of public officer or public employee*) or another person.

The burden is on the state to prove beyond a reasonable doubt that the killing was not justifiable. If you have a reasonable doubt as to whether the killing was justifiable, you must find the defendant not guilty.

USE NOTES

1. For use when the defense is based on Section 30-2-6 NMSA 1978. If this instruction is given, add to the essential elements instruction for the offense charged, “The killing was not justifiable homicide by a person aiding a public officer or employee.”

2. Use only the applicable bracketed phrase.

3. Insert description of legal process being executed.

4. Insert description of legal duty.
5. Use only applicable parenthetical alternative.
6. Insert name of felony. The essential elements of the felony must also be given. To

instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used. However, in this context, substitute the name of the victim in place of the words “the defendant” in UJI 14-140 NMRA.

7. Describe circumstances and place of lawful custody or confinement.

[As amended, effective October 1, 1985; January 1, 1997; April 15, 2003; as amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The elements of this instruction are similar to the instruction for a killing by the public officer. *See* commentary to UJI 14-5173. As a matter of law, the person who aids a public officer stands in the same position as the officer and has no more rights than the officer. *State v. Gabaldon*, 43 N.M. 525, 533, 96 P.2d 293 (1939). For example, the person fleeing must actually be a felon. The defendant is not entitled to kill a misdemeanant even if under the circumstances the latter appears to be a felon. *State v. Gabaldon, supra*. In this respect, this defense is unlike the defense of another, where the defendant may act on an appearance of danger to another. *See* commentary to UJI 14-5172. For the reasons for omitting the defense of “acting in obedience to a judgment of the court,” *see* commentary to UJI 14-5173.

Section 30-2-7C NMSA 1978 contains a justifiable homicide provision for one who, on his own initiative, kills a fleeing felon or kills to suppress a riot or to keep and preserve the peace. The committee was of the opinion that, not only was the defense rarely available, it had an uncertain common-law basis. *See generally* Perkins, *Criminal Law* 989 (2d ed. 1969). The committee further believed that the public policy behind the statute should be the subject of legislative review. For these reasons, no instruction interpreting the statute was included. A special instruction must be drafted under the guidelines of the General Use Note in the event that the evidence justifies giving an instruction based on the statute.

Proposal 2020-018

Please accept this as my comment regarding Proposal 2020-018. Comments are my own, and do not reflect those of my employer.

14-1630 – I'm not sure we need to instruct the jury if we're going to use the term of theft, as I think that word is common enough for the average juror to understand. That said, I understand why we would. If we're going to do that, though, then I think it is confusing to call it theft in the instruction, and then to do the instruction for Larceny (which isn't the same word as theft). Either the UJI should change the instruction to say intent to commit larceny, or it should be called theft in the explanatory instruction, or there should be a separate definition (either in a separate instruction or as part of 1630) defining theft. My preference is to just define theft.

14-1632 – same as 1630. Which makes me feel like it makes sense to have another definitional instruction for theft, rather than as part of the underlying instruction. There is space to make one at, for instance, -1634. The definition can be essentially larceny, but call it theft to match the statute and instruction.

14-1697 – I'm not sure why this is included in these instructions. It doesn't have anything about uncharged offenses. And I don't know why we wouldn't want to let the judge be able to define credit card. I would think that we would at least have a use note allowing the judge to do that definition.

14-2820 – The attempt instruction already says that uncharged offenses have to have 14-140. I don't know how this instruction would ever be given without giving the regular attempt instruction. Thus, adding 140 in here is unnecessary and confusing.

14-2821 – Same as 2820. This instruction is only going to be given if 202 is also given, which already has to define the felony(s) that are being used for the underlying offenses. Frankly, it feels like 2821 is needlessly complicated if 202 is already being instructed – maybe that's worth looking at by the committee.... Is there a circumstance in which what felony the aider/abettor is helping with is a different felony than what is being used by the perpetrator? If so, then I guess this instruction makes sense. But I can't think of such a situation....

That leads to another question – why is 14-140 not being used for 14-202? Or, for that matter, 308-13? Also 358-63 and 379-83? We're

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but not regular ones or HHM or specially protected workers? That seems illogical to me.

Thanks for the committee's hard work. I really do know how hard it can be.

Jonathan L. Ibarra
Assistant Public Defender