MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated November 21, 2014

Introduction

The Committee intends to keep COLJI-Crim. (2014) current by periodically publishing new editions or supplements. During the periods between these formal publications, the Committee Reporter will maintain a "Reporter's Online Update" by posting these online summaries of developments in the law related to criminal jury instructions based on legislative changes and decisions of the United States Supreme Court, the Colorado Supreme Court, and the Colorado Court of Appeals.

Although the Committee expects that the Reporter's Online Update will be a valuable research tool, the Committee emphasizes that it will be an informal publication that is not subject to review by the Committee. Thus, users should not assume that the Committee will make modifications based on information that appears in the Reporter's Online Update.

The Reporter's summaries are purely descriptive; they do not include recommendations for how (or whether) to draft jury instructions based on the authorities that are summarized. Although each summary appears beneath a caption that corresponds to the most relevant model instruction(s), irrespective of whether the summarized authority refers to the model instruction(s), the use of this organizational structure here should not be construed as an indication that the Committee intends to modify an instruction, or a Comment.

In addition to these interim summaries of developments in the law related to criminal jury instructions, the Reporter's Online Update will include notations documenting any errors that the Reporter learns of subsequent to publication. Accordingly, the Committee encourages users to alert the Reporter of errors at: mcjic@judicial.state.co.us. However, here again, users should not assume that the Committee will make modifications based on recommended corrections that appear in the Reporter's Online Update.

I. Reporter's Recommended Corrections

** On page 87, under the heading "Citation," in the example of how to cite to comments, the date should be enclosed within two parentheses, as shown here with the missing parenthesis highlighted:

> Individual comments should be cited as:
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> COLJI-Crim. ___:___, Comment ___ (2014).

** On page 678, Instruction H:12, there should be a blank line between the first and second paragraphs describing the burden of proof.

** On page 806, Instruction H:76, the first paragraph describing the prosecution's burden of proof should be modified as follows: "In order to meet this burden of proof, the prosecution must disprove, beyond a reasonable doubt, ~~all~~ at least one of the above numbered conditions." In addition, in the final two paragraphs, the offense should be described as "driving with excessive alcohol content" (instead of "driving a motor vehicle or vehicle with a B.A.C. of 0.08 or more at the time of driving, or within two hours thereafter") to be consistent with Instruction 42:13.

** On page 1048, Instruction 3-4:42.INT(sexual assault on a child by one in a position of trust - interrogatory (pattern)), the second Comment should include a citation to Instruction F:262(defining "pattern of sexual abuse"). With this revision, the Comment will be identical to the corollary Comment for Instruction 3-4:36.INT(sexual assault on a child - interrogatory (pattern)):

> 2. *See* Instruction F:262(defining "pattern of sexual abuse"); *see, e.g.*, Instruction E:28(special verdict form).

** On page 1104, Instruction 3-6:03(stalking (serious emotional distress)), the third and fourth elements should be combined (and the subsequent elements should be renumbered) so that the third element reads as follows:

> 3. knowingly, repeatedly followed, approached, contacted, placed under surveillance, or made any form of

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communication with another person, either
directly, or indirectly through a third person,
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This corrected format is what the Committee actually approved based on *People v. Cross*, 127 P.3d 71, 77-78 (Colo. 2006) ("The legislature obviously thought it possible, if not likely, that a stalker could and would lose consciousness of the offensive nature of his untoward devoted attention towards the victim. The General Assembly therefore intended that the statute's mens rea 'knowingly' would not apply to require that a perpetrator be aware that his or her acts would cause a reasonable person to suffer serious emotional distress."). However, due to an oversight by the Reporter, the third and fourth elements were not consolidated in the final publication.

II. New Legislation

Initially, this section will be blank because COLJI-Crim. (2014) will be current on the date of publication.

III. Amendments to the Colorado Rules of Criminal Procedure and the Colorado Rules of Evidence

Initially, this section will be blank because COLJI-Crim. (2014) will be current on the date of publication.

IV. Decisions of the United States Supreme Court

Initially, this section will be blank because COLJI-Crim. (2014) will be current on the date of publication.

V. Decisions of the Colorado Supreme Court

Initially, this section will be blank because COLJI-Crim. (2014) will be current on the date of publication.

VI. Final Decisions of the Colorado Court of Appeals

6-4:01 CHILD ABUSE (KNOWINGLY OR RECKLESSLY)

People v. Becker, ___ P.3d ___, ___, 2014 COA 36 (12CA0784, March 27, 2014)("a prior child abuse conviction, as specified in section 18-6-401(7)(e), C.R.S. 2013, serves as a sentence enhancer — and not as an element — of the child abuse crimes set forth in sections 18-6-401(1)(a)(7)(b)(I)-(II), C.R.S. 2013"). Note: Although the mandate issued on July 25, 2014, a citation to this decision was not included in COLJI-Crim. (2014), because, on the date of publication (September 3, 2014), Westlaw® still indicated (erroneously) that the opinion was not yet final.

7-4:11 PATRONIZING A PROSTITUTED CHILD (ACT)

People v. Houser, ___ P.3d ___, 2013 WL 363313, 2013 COA 11 (09CA2147, Jan. 31, 2013; mandate issued Sept. 8, 2014)(holding, as a matter of first impression, that a reasonable belief that a child was at least eighteen years old is not defense to charge of patronizing a prostituted child).

VII. Non-final Decisions of the Colorado Court of Appeals

E:18 SUPPLEMENTAL INSTRUCTION — WHEN JURORS FAIL TO AGREE

People v. Payne, 2014 COA 81, ¶ 18 (10CA0173, July 3, 2014)("We agree with the federal authority cited herein, and conclude that a defendant has a right to be present when a modified *Allen* instruction is read to the jury because of the psychological influence his absence or presence may have on the jury.").

F:10 (DEFINING "AFTER DELIBERATION") & 3-1:01 MURDER IN THE FIRST DEGREE (AFTER DELIBERATION)

Martinez v. People, Colo. No. 12SC803 (Mar. 18, 2013)(granting certiorari to review the unpublished decision in No. 09CA0572)(Issue subject to review: "Whether the trial court committed reversible, constitutional error by giving the jury a legally erroneous instruction on the time interval for deliberation,

thereby lessening the prosecution's burden of proving deliberation necessary for first-degree murder.").

F:81(DEFINING "CUNNILINGUS");
F:343(DEFINING "SEXUAL PENETRATION")

People v. Morales, 2014 COA 129, ¶¶ 37-44 (11CA1132, Oct. 9, 2014)(trial court did not commit plain error by using the definition of "cunnilingus" from the prostitution statute, section 18-7-201(2)(b), C.R.S . 2014, to define "sexual penetration" for purposes of sexual assault: (1) the definition in the prostitution statute is practically identical to the dictionary definition; (2) both COLJI-Crim. F(238)(2008) and COLJI-Crim. F:343 (2014) reference the definition of "cunnilingus" in the prostitution statute for purposes of defining "sexual penetration"; and (3) the definition of "sexual penetration" can be read as requiring some degree of penetration, "however slight," even if the act at issue is cunnilingus).

F:337 (DEFINING "SEXUAL CONTACT")

People v. Lovato, 2014 COA 113, ¶¶ 26, 32 (11CA1227, Sept. 11, 2014)("[W]e conclude that 'sexual' modifies 'abuse' in the definition of 'sexual contact' contained in section 18-3-401(4). . . . Even in deciding that the term 'abuse' in section 18-3-401(4) means 'sexual abuse,' and accepting that 'abuse' means pain, injury, or discomfort, we nonetheless discern no statutory requirement of a 'sexual motivation' on the part of a perpetrator under this definition.").

G1:06 COMPLICITY
(INTENTIONALLY, DELIBERATELY,
WILLFULLY, OR KNOWINGLY)

People v. Childress, 2012 COA 116 (08CA2329, July 19, 2012)(a person cannot be held criminally liable as a complicitor for a strict liability crime). Petition for certiorari granted, 12SC820, June 24, 2013: "Whether the court of appeals erred in holding "as a matter of first impression in Colorado, that complicitor liability does not apply to the strict liability crime of vehicular assault (DUI) because the crime does not require a culpable mental state." Opening Brief filed August 19, 2014.

H:11 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)
H:12 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

People v. Castillo, 2014 COA 140, ¶ 30 (Colo. App. No. 10CA1477, Oct. 23, 2014)("[W]e agree with the rationale of [*People v. Manzanares*, 942 P.2d 1235, 1241 (Colo. App. 1996)] and hold that unless a defendant demonstrates the required level of prejudice under a harmless error or plain error standard, the giving of an unsupported instruction on a self-defense exception does not necessarily warrant reversal. To the extent that [*People v. Silva*, 987 P.2d 909, 914 (Colo. App. 1999)] and [*People v. Beasley*, 778 P.2d 304, 305-06 (Colo. App. 1989)] are inconsistent with this holding, we decline to follow them."). *See also*, *id*. at ¶ 42, n.3 ("The latest version of the Colorado pattern criminal jury instructions, which was not available at the time of the trial in this case, more explicitly instructs the jury that the jury's determinations regarding the exceptions to self-defense must be made beyond a reasonable doubt by including language that the prosecution must disprove beyond a reasonable doubt that the defendant did not provoke the use of unlawful physical force by the other person and the defendant was not the initial aggressor. COLJI-Crim. H:11, H:12 (2014).").

H:15 USE OF PHYSICAL FORCE, INCLUDING DEADLY PHYSICAL FORCE (INTRUDER INTO A DWELLING))

People v. Lane, 2014 COA 48 (09CA1351, April 24, 2014)("[W]e conclude that [*Smith v. United States*, 568 U.S. ___, 133 S. Ct. 714 (2013)(when a defense excuses conduct that would otherwise be punishable but does not controvert any of the elements of the offense itself, the prosecution has no constitutional duty to overcome the defense by proof beyond a reasonable doubt)] did not overrule [*People v. Pickering*, 276 P.3d 553 (Colo. 2011)(When a defendant presents evidence that raises the issue of an affirmative defense, the affirmative defense effectively becomes an additional element, and the trial court must instruct the jury that the prosecution bears the burden of proving beyond a reasonable doubt that the affirmative defense is inapplicable; when a defendant presents evidence that raises the issue of an elemental traverse, however, no such instruction is required; self-defense is an affirmative defense to second degree murder, but it is a traverse to crimes requiring recklessness, criminal negligence, or extreme indifference, such as reckless manslaughter)], and, thus, the trial court did not err in relying on *Pickering* to instruct the jury that self-defense was not an affirmative defense to the lesser-included charges of manslaughter and criminally negligent homicide.").

H:68 MEDICAL MARIJUANA

People v. Fioco, 2014 COA 22, ¶¶ 13-24 (12CA1529, March 13, 2014)(holding, as a matter of first impression, that the medical marijuana affirmative defense

did not apply to a defendant who obtained a physician's assessment and certification of medical necessity after he committed offense).

3-1:02 MURDER IN THE FIRST DEGREE (FELONY MURDER))

People v. Doubleday, 2012 COA 141, ¶29-¶30 (08CA2433, Aug. 30, 2012)("Here, the completed special interrogatory shows that the jurors found defendant not guilty of attempted aggravated robbery because the prosecution failed to disprove one of the elements of duress and not because the prosecution failed to prove one of the elements of the offense. Thus, the jurors clearly believed that defendant attempted to commit aggravated robbery, but that he was not legally liable for the offense because he was under duress at the time. Therefore, because the record shows that the prosecution proved that defendant attempted to commit aggravated robbery as well as the other elements of felony murder, we will not disturb the jury's verdict convicting defendant for felony murder.")(citations omitted). (Petition for certiorari granted October 7, 2013: "Whether a defendant can be convicted of felony murder when he is acquitted of an essential element of felony murder, namely, the underlying offense. Whether, even assuming arguendo that a felony murder conviction can be upheld where the defendant is acquitted of the predicate offense due to the existence of an affirmative defense, the court of appeals erred by (1) considering the jury's response to the special interrogatory, which was prohibited by CRE 606(b), and (2) to the extent the response could be considered, concluding that it established the jurors unanimously believed the prosecution only failed to disprove duress. Whether duress is a defense to felony murder for purposes of section 18–1–708, C.R.S.").

3-1:13 VEHICULAR HOMICIDE (UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS)

People v. Medrano-Bustamante, 2013 COA 139, ¶ 12 (10CA0791, Dec. 5, 2013)(DUI is not a lesser-included offense of either vehicular homicide-DUI or vehicular assault-DUI; "To be found guilty of DUI, a person must drive a motor vehicle or vehicle as those terms are defined by the Uniform Motor Vehicle Law, and to be found guilty of vehicular assault or homicide, a person must drive or operate a motor vehicle as that term is defined in the criminal code.") (2014SC3, petition for certiorari pending as of Sept. 11, 2014).

3-2:27 VEHICULAR ASSAULT (UNDER THE INFLUENCE)

People v. Smoots, 2013 COA 152, ¶ 7 (11CA2381, Nov. 21, 2013)(trial court did not err by instructing the jury that "[f]or the purposes of the strict liability crime of Vehicular Assault, 'proximate cause' is established by the voluntary act of driving under the influence of alcohol")(Certiorari granted, No. 14SC7, June 30, 2014: "[REFRAMED] Whether a double jeopardy claim can be raised for the first time on direct appeal. Whether driving under the influence is a lesser included offense of vehicular assault-driving under the influence, requiring merger.").

3-4:02 SEXUAL ASSAULT (INCAPABLE OF APPRAISING THE NATURE OF CONDUCT)

People v. Bertrand, 2014 COA 142, ¶¶ 17-21 (Colo. App. No. 12CA0709, Oct. 23, 2014)(noting that COLJI-Crim. (2014) does not include an instruction quoting from *Platt v. People*, 201 P.3d 545, 548 (Colo. 2009), and holding that the trial court committed reversible error by misquoting from that opinion).

3-4:40 SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST

People v. Heywood, 2014 COA 99, ¶ 28 (11CA2165, Aug. 14, 2014)(section 18-3-405.4(1)(b) "prohibits an actor from actively and affirmatively importuning, inviting, or enticing a person to view the actor's intimate parts, *while the actor knows or believes* that the person is less than fifteen years old and at least four years younger than the actor")(emphasis added).

5-9:01 IDENTITY THEFT (USE)

People v. Perez, 2013 COA 65, ¶ 21 (10CA0587, May 9, 2013)("we hold that, to convict a defendant of identity theft under section 18–5–902(1)(a), the prosecution must prove that the defendant knew the personal identifying information, financial identifying information, or financial device he or she used was, in fact, the information or device of another"). (Certiorari granted, 13SC465, Dec. 23, 2013: "Whether the court of appeals erred in concluding Colorado's identity theft statute, section 18–5–902, C.R.S. (2012), requires proof that the offender knew the information he exploited belonged to a real person, and if so, whether no rational juror could reasonably infer that an offender knew the social security number he used over a five-year period belonged to a real person.").

6-4:01 CHILD ABUSE
(KNOWINGLY OR RECKLESSLY)

People v. Friend, 2014 COA 123, ¶¶ 63-64 (09CA2536, Sept. 25, 2014)(holding, in a case where the defendant was charged with five counts of child abuse under subsections (1)(a), (7)(a)(I), and (7)(a)(III) of section 18-6-401, that because "[t]he child abuse statute at issue here is structured to set forth a disjunctive series of acts in an extended single sentence, without any attempt to differentiate them by name or an organizational device," "the child abuse statute is similar to the one interpreted in [*People v. Abiodun*, 111 P.3d 462 (Colo. 2005) where] the court held that a series of acts, with reference to the same controlled substance and governed by a common mens rea, that included acts that were not mutually exclusive but rather overlapping, constituted different ways of committing a single offense").

6-4:19 SEXUAL EXPLOITATION OF A CHILD
(POSSESSION OR CONTROL)

People v. Marsh, 2011 WL 6425492 (08CA1884, Dec. 22, 2011). Petition for certiorari granted, 12SC102, Jan. 23, 2013: "Whether images automatically stored by a computer in its Internet cache are sufficient, without additional evidence of a defendant's awareness of the cache or evidence of a defendant's affirmative conduct such as downloading or saving such images, to establish 'knowing possession' under section 18–6–403, C.R.S. (2012)."

6-8:01.INT INTERROGATORY – TRIGGERING MISDEMEANOR OFFENSE OF DOMESTIC VIOLENCE
(HABITUAL DOMESTIC VIOLENCE OFFENDER)

People v. Jaso, 2014 COA 131, ¶ 23 (12CA1072, Oct. 9, 2014)("in a case where the prosecution seeks to increase a defendant's misdemeanor to a felony pursuant to the [Habitual Domestic Violence Offender] statute and the jury's verdict does not reflect a finding of domestic violence, the defendant is entitled to have that question submitted to the jury").

9-1:23 INTERFERENCE AT A PUBLIC BUILDING (IMPEDING)

People v,. Moore, 2013 COA 86, ¶ 13 (11CA2338, June 6, 2013)("we interpret the phrase 'public official or employee' in section 18-9-110(2) to apply only to a victim who is either an official or an employee of a public entity. Contrary to the trial court's reading, the adjective 'public' modifies both 'official[']and [']employee.'"). Petition for certiorari granted, 13SC649, March 24, 2014: "Whether the court of appeals erred in holding that a security guard who operated the x-ray machine at the Denver City and County Building was not a public employee under the statute prohibiting impeding a public official or employee in a public building, section 18–9–110(2), C.R.S. (2013)."

18:43.INT ANY FELONY CONTROLLED SUBSTANCE CONVICTION UNDER PART 4 – INTERROGATORY (DEADLY WEAPON OR FIREARM)

People v. Cisneros, 2014 COA 49, ¶ 51 (Colo. App. April 24, 2014)(trial court did not abuse its discretion by refusing defendant's tendered instruction concerning the constitutional right to bear arms; even if the use of the gun for self-defense would ordinarily be constitutionally protected, the simultaneous use of the gun to protect drugs is punishable through an enhanced sentence for drug possession with the intent to distribute). [Note: This case was decided before the 2010 recodification, at a time when the relevant provision was located in section 18-18-407(1)(f).]

42:05 DRIVING AFTER REVOCATION PROHIBITED
42:09 DRIVING UNDER THE INFLUENCE

People v. Valdez, 2014 COA 125, ¶ 23 n.1 (11CA1659, Sept. 25, 2014)("[T]he instruction set forth in [*People v. VanMatre*, 190 P.3d 770, 772 (Colo. App. 2008)] involves an element-negating traverse because, if a defendant establishes that a 'vehicle may not have been reasonably capable of being operable,' such evidence would necessarily negate the required elements of 'driving' and 'operating' a vehicle." "Although the newly promulgated criminal jury instructions for DUI and DARP cite to *VanMatre* in the comments, those comments do not address whether the *VanMatre* instruction is an element-negati[ng] traverse. [*See* COLJI-Crim. 42:05, Comment 4 (2014) (DARP); COLJI-Crim. 42:09, Comment 3 (2014)(DUI)].").