MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated August 28, 2015

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 pages 38 and 872 (in the main table of contents and in the table of contents for Chapter 3-2), the entries for Instruction 3-2:29.SP should refer to the offense of "VEHICULAR ASSAULT," and not to the offense of "VEHICULAR HOMICIDE."

** On pages 38, 872, and 928, the headers for Instruction 3-2:31 (interrogatory for menacing) should have the suffix ".INT" appended to the instruction number.

** On pages 41, 974, and 1,032, the headers for Instruction 3-4:32 (special instruction for sexual assault on a child) should have the suffix ".SP" appended to the instruction number.

** On pages 61, 1,699, and 1,711, the headers for Instruction 9-1:08 (special instruction for inciting or engaging in a riot) should have the suffix ".SP" appended to the instruction number.

** 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:
>
> COLJI-Crim. ___:___, Comment ___ (2014).

** On page 348, Instruction F:141 (defining "falsely complete" (forgery and impersonation offenses)), the third line of the definition should be corrected to comport with the statutory definition in section 18-5-101(3)(a), C.R.S. 2014. As modified, this portion of the definition should read as follows: "by adding, ~~or~~ inserting, or changing matter without the authority".

** On page 408, Instruction F:201, there should be a blank line before the first numbered Comment.

** On page 463, Instruction F:255 (defining "order"), the definition with brackets should be replaced, in its entirety, with the following unbracketed definition, which mirrors the language and structure of section 18-18-102(23), C.R.S. 2014.

> "Order" means a prescription order which is any order, other than a chart order, authorizing the dispensing of drugs or devices that is written, mechanically produced, computer generated, transmitted electronically or by facsimile, or produced by other means of communication by a practitioner and that includes the name or identification of the patient, the date, the symptom or purpose for which the drug is being prescribed, if included by the practitioner at the patient's authorization, and sufficient information for compounding, dispensing, and labeling; or a chart order which is an order for inpatient drugs or medications to be dispensed by a pharmacist, or pharmacy intern under the direct supervision of a pharmacist, which is to be administered by an authorized person only during the patient's stay in a hospital facility. It shall contain the name of the patient and of the medicine ordered and such directions as the practitioner may prescribe concerning strength, dosage, frequency, and route of administration.

** 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 694, the citation to *People v. Oslund*, 292 P.3d 1025, 1029, 2012 COA 62, ¶23-¶26 (2012), should be corrected to replace the "P.2d" with "P.3d" (as shown here).

** On page 734, Instruction H:38, in the final sentence, the "s" in "charges" should be enclosed within brackets.

** On page 737, Instruction H:39, in the final sentence, there should be an "s" enclosed within brackets at the end of the word "charge."

** On page 739, Instruction H:40, in the final sentence, there should be an "s" enclosed within brackets at the end of the word "charge."

** On page 743, Instruction H:42, in the final sentence, there should be an "s" enclosed within brackets at the end of the word "charge."

** 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 850, the highlighted words and punctuation should be deleted from the sixth Comment to Instruction 3-1:04(murder in the first degree (extreme indifference)): "'Universal malice' is not defined by statute~~; the above definition was developed through case law~~. *See Candelaria v. People*, 148 P.3d at 181; *People v. Jefferson*, 748 P.2d 1223, 1228 (Colo. 1988); *Longinotti v. People*, 46 Colo. 173, 181, 102 P. 165, 168 (1909).

** On page 865, Instruction 3-1:13 vehicular homicide (under the influence of alcohol and/or drugs), Comment 3, the following sentence should be revised as indicated: First, although sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) apply only to motor vehicles, the definitions of "driving under the influence" in sections 18-3-106(1)(b)(IV) and 18-3-205(1)(b)(IV) speak in terms of driving "a vehicle," with no references to motorization.

** On page 923, Instruction 3-2:27 (vehicular assault (under the influence)), Comment 3, the following sentence should be revised as indicated: First, although sections 18-3-106(1)(b)(I) and 18-3-205(1)(b)(I) apply only to motor vehicles, the definitions of "driving under the influence" in sections 18-3-106(1)(b)(IV) and 18-3-205(1)(b)(IV) speak in terms of driving "a vehicle," with no references to motorization.

** 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 communication with another person, either directly, or indirectly through a third person,

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.

** On page 1124, Instruction 4-2:01 (first degree burglary), the seventh element should include the highlighted words: "to commit therein the crime[s] of [insert name(s) of offense(s)] against another person or property, and"

** On page 1231, Instruction 4-4:39 (altering or removing a vehicle identification number (with intent)), Comment 3, and on page 1233, Instruction 4-4:40 (altering or removing a vehicle identification number (with knowledge)), Comment 3, the citation to section 18-4-420(3)(a)(I), C.R.S. 2014, should be replaced with a citation to section § 18-4-420(3)(b), C.R.S. 2014.

** On page 1292, Instruction 4-5:33 (criminal operation of a device in a motion picture theater), Comment 3, the citation to section 18-4-601(4), C.R.S. 2014, should be replaced with a citation to section 18-4-516(4).

** On page 1420, Instruction , the citation to section 18-6-401(b)(III), C.R.S. 2014, should be corrected to section 18-6-401(1)(b)(III), C.R.S. 2014.

II. New Legislation[1]

As legislation is enacted in 2015, entries will be added here noting the Reporter's recommendations for changes that the Committee should make to the model jury instructions and comments that were published in COLJI-Crim. (2014). However, entries will not be included here for legislation relating to other parts of the criminal and traffic codes (i.e., parts of those codes for which model instructions were not included in COLJI-Crim. (2014)). Further, although the Reporter is working with the Committee to incorporate these changes into the next edition of COLJI-Crim., new instructions under review by the Committee will not be posted here.

F:77 CREDIBLE THREAT (STALKING; RETALIATION AGAINST A JUDGE; RETALIATION AGAINST A PROSECUTOR)

The Committee should revise the caption and first Comment to reflect the enactment of section 18-8-616(1), C.R.S. 2015 (retaliation against a prosecutor). *See* HB 15-1229.

F:118 EMERGENCY MEDICAL CARE PROVIDER

The Committee should change the statutory citation in Comment 1 to reflect a legislative reorganization. *See* SB 15-126.

F:119 EMERGENCY MEDICAL SERVICE PROVIDER (ASSAULTS)

The Committee should change the subsection number of the citation to 18-3-201 that appears in Comment 1 to reflect a legislative reorganization. *See* SB 15-126.

F:181.5 INHERENTLY HAZARDOUS SUBSTANCE

The Committee should add an instruction to define this term. *See* HB 15-1305.

[1] HB 15-1043 modified the penalties for driving under the influence ("DUI") and driving while impaired ("DWAI"), classifying these crimes as class 4 felonies if the violation occurs after three or more prior convictions of similar offenses. But because these modifications only affect a defendant's sentence—and because the trial judge will make this sentencing determination without issuing an interrogatory to the jury—the Committee need not modify its existing instructions to account for HB 15-1043.

F:228 MENTALLY IMPAIRED

The Committee should modify this instruction to reflect the legislative correction of an obsolete internal reference (which the Committee had noted in COLJI-Crim. Instruction F:228, Comment 1 (2014)). *See* SB 15-264.

F:291.5 PROSECUTOR

The Committee should add an instruction defining this term to reflect the enactment of section 18-8-616(1), C.R.S. 2015 (retaliation against a prosecutor). *See* HB 15-1229.

F:341 SEXUALLY EXPLOITATIVE MATERIAL

The Committee should modify this instruction to reflect a legislative amendment by replacing the words "video tape" with "recording or broadcast of moving visual images." *See* HB 15-1341.

F:389 VIDEO OR +RECORDING BROADCAST

The Committee should replace the words "video tape" with the words "recording broadcast" to reflect a legislative amendment. *See* HB 15-1341. In addition, to make clear that "motion picture" is defined in a separate instruction (even though the term is codified in the same statutory subsection), the Committee should add a citation to Instruction F:234 in the second Comment.

3-2:10 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER – BODILY INJURY)

The Committee should add the words "emergency medical care provider" to the fourth element. *See* SB 15-067.

3-2:10.5 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER – SERIOUS BODILY INJURY)

The Committee should add an instruction defining this offense. *See* HB 15-1303.

3-2:16.5 ASSAULT IN THE SECOND DEGREE (BODILY FLUIDS OR HAZARDOUS MATERIAL; EMERGENCY RESPONDERS ENGAGED IN DUTIES)

The Committee should add an instruction defining this offense. *See* SB 15-067.

3-2:22 ASSAULT IN THE THIRD DEGREE (EMERGENCY RESPONDERS COMING INTO CONTACT WITH BODILY FLUIDS OR HAZARDOUS MATERIAL)

The Committee should delete the words "infect, injure, "harm" from the fourth element. *See* SB 15-1067.

7-2:01 PROSTITUTION

The Committee should add the following Comment: "Section 18-7-201.3(1), C.R.S. 2015, establishes an affirmative defense where the offense 'was committed as a direct result of being a victim of human trafficking.'" *See* SB 15-030.

8-6:17 RETALIATION AGAINST A PROSECUTOR

The Committee should add an instruction defining this offense. *See* HB 15-1229.

9-1:36 HARASSMENT (COMMUNICATION)

The Committee should modify the fifth and sixth elements to reflect legislative amendments. *See* HB 15-1072.

18:01 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE and 18:88 POSSESSION OF DRUG PARAPHERNALIA

The Committee should add Comments added to both instructions noting that section 18-18-428(1)(b), C.R.S. 2015, now establishes an exemption from criminal liability for "any minuscule, residual controlled substance that may be present in a used hypodermic needle or syringe" if the location of the needle or syringe is disclosed in specified circumstances. *See* SB 15-116.

18:37 UNAUTHORIZED RELEASE OF CONFIDENTIAL INFORMATION PROVIDED TO OR BY THE MEDICAL MARIJUANA REGISTRY

The Committee should add the words "or primary caregiver registry" to the fourth element. *See* SB 15-014.

18:39.5 MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE

The Committee should add an instruction defining this offense. *See* HB 15-1305.

18:39.7 ALLOWING MANUFACTURE OF MARIJUANA CONCENTRATE USING AN INHERENTLY HAZARDOUS SUBSTANCE

The Committee should add an instruction defining this offense. *See* HB 15-1305.

42:06 AGGRAVATED DRIVING AFTER REVOCATION PROHIBITED

The Committee should modify the bracketed statutory citation in the seventh element. *See* HB 15-1043.

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

F:77 and F:78 (DEFINING "CREDIBLE THREAT")

See generally Elonis v. United States, 135 S. Ct. 2001 (2015) ("The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. . . . There is no dispute that the mental state requirement in [§ 18 U.S.C.] 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.").

V. Decisions of the Colorado Supreme Court[2]

C:05 EVIDENCE ADMISSIBLE FOR PARTICULAR PURPOSE ONLY

Perez v. People, 2015 CO 45, ¶ 31, __ P.3d __ (holding that the trial court's improper admission of prejudicial 404(b) evidence as to one count necessarily tainted the jury's determination of the remaining two counts because "(1) all three counts for which [the defendant] was convicted include a similar element regarding sexual conduct, and (2) the prosecutor's statements and arguments repeatedly urged the jury to consider the 404(b) evidence beyond its limited scope and implied that it was relevant to all counts").

D:08 JUDICIAL NOTICE

Doyle v. People, 2015 CO 10, ¶15, 343 P.3d 961, 966.

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[2] THE COLORADO SUPREME COURT HAS GRANTED CERTIORARI IN THE FOLLOWING CASES:

Roberts v. People, 14SC517 (March 2, 2015) (granting certiorari to review a district court decision affirming a county court conviction) (Issue [reframed]: "Whether a defendant may assert self-defense as an affirmative defense to the specific intent crime of harassment under section 18-9-111(1)(a), C.R.S. (2014).").

People v. Molina , 14SC498 (April 20, 2015) (Issues: (1) "Whether the court of appeals erred in concluding Colorado's identity theft statute, section 18-5-902, C.R.S. (2014), requires proof that the offender knew the information she exploited belonged to a real person, and if so, whether no rational juror could reasonably infer that an offender knew the last name and associated Social Security number she used to obtain employment and an apartment lease belonged to a real person"; (2) "Whether, in connection with the use of false identification documents, obtaining employment requiring work for pay or an apartment requiring payment for residence constitutes a "thing of value" under section 18-5-902, C.R.S."; and (3) "Whether defendant's constitutional right to due process was violated and reversible error occurred when the trial court did not provide the jury with the proper definition of "thing of value" as contemplated by section 18–5–902, C.R.S.").

People v. Opana, 14SC820 (Aug. 3, 2015) (Issues: (1) "Whether the court of appeals erred in determining that, even though the victim died, the ordinary physical force instruction was appropriate"; (2) "Whether the court of appeals erred in determining that the trial court's decision constituted plain error.").

People v. Rock, 14SC699 (Aug. 24, 2015) (Issues: (1) "Whether the failure to instruct on a requested lesser-included offense is harmless, where guilty verdicts on both the greater offense and another offense establish that there is no reasonable probability that any error contributed to the defendant's convictions"; (2) "Whether the failure to instruct on a requested lesser-included offense can require reversal of any conviction other than the greater offense"; (3) "Whether second-degree trespass is a lesser-included offense of second-degree burglary.").

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

Martinez v. People, 2015 CO 16, ¶ 11, 344 P.3d 862, 867 ("The trial court in this case erroneously instructed the jury that 'after deliberation' means an interval of time 'sufficient for one thought to follow another.' The prosecution culled this language from an 1895 case, *Van Houten v. People*, that considered how quickly premeditation can occur in the first-degree murder context. 22 Colo. 53, 43 P. 137, 142 (1895). More recently, however, this court has rejected the *Van Houten* language as inconsistent with the element of deliberation that the current first-degree murder statute requires. *People v. Sneed*, 183 Colo. 96, 514 P.2d 776, 778 (1973).").

VI. Final Decisions of the Colorado Court of Appeals

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

People v. Morales, 2014 COA 129, ¶¶ 37–44, __ P.3d __ (holding that the 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 because: (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).

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

People v. Lane, 2014 COA 48, ¶ 19, 343 P.3d 1019, 1024 (concluding that *Smith v. United States*, 133 S. Ct. 714 (2013) (holding that 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) (holding that (1) 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, but that when a defendant presents evidence that raises the issue of an elemental traverse, no such instruction is required; and (2) 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), meaning "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, 342 P.3d 530, 534–36 (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 the offense).

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

People v. Bertrand, 2014 COA 142, ¶¶ 17–21, 342 P.3d 582, 585–86 (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, __ P.3d __ (holding that 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. Campos, 2015 COA 47, ¶ 15 n.3, __ P.3d __ ("[E]ven under the narrower interpretation set forth in [*People v. Beck*, 187 P.3d 1125, 1128–29 (Colo. App. 2008)], employment is a 'thing of value' for purposes of identity theft.").

6-4:12.INT CHILD ABUSE – INTERROGATORY (POSITION OF TRUST)

People v. Becker, 2014 COA 36, ¶ 2, 347 P.3d 1168, 1170 ("[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.").

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

People v. Jaso, 2014 COA 131, ¶ 23, 347 P.3d 1174, 1179 ("[I]n 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.").

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

People v. Houser, 2013 COA 11, ¶¶ 14–27, 337 P.3d 1238, 1244–46 (holding, as a matter of first impression, that a reasonable belief that a child was at least eighteen years old is not a defense to a charge of patronizing a prostituted child).

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

People v. Moore, 2013 COA 86, ¶13, 338 P.3d 348, 350 ("[W]e 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.'").

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

People v. Cisneros, 2014 COA 49, ¶ 51, __ P.3d __ (holding that the trial court did not abuse its discretion by refusing the defendant's tendered instruction concerning the constitutional right to bear arms because, "[e]ven 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).]

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

E:03 PRESUMPTION OF INNOCENCE, BURDEN OF PROOF, AND REASONABLE DOUBT

People v. Boyd, 2015 COA 109, ¶¶ 8, 12, __ P.3d __ (holding that, where the trial court stated during voir dire that "if the District Attorney doesn't prove [defendant is guilty beyond a reasonable doubt], find her not guilty, which, again, doesn't mean she's innocent anymore [sic] than any of us is innocent, in the sense of a newborn baby," the court "should have avoided any comment during voir dire that implied that the presumption of innocence allows guilty defendants to avoid conviction" but that such error was not "egregious or prejudicial" (alterations in original)).

Status: Mandate not issued as of 8/27/15.

E:05 CREDIBILITY OF WITNESSES

People v. Singley, 2015 COA 78, ¶ 37, __ P.3d __ ("The [Colorado] supreme court has consistently held that a trial court does not abuse its discretion by refusing to give jury instructions warning of the unreliability of eyewitness identification testimony so long as it gives the pattern jury instructions on credibility and assessment of evidence." (citing various Colorado Supreme Court cases)).

Status: Petition for rehearing pending as of 8/27/15.

E:11 SERIES OF ACTS IN A SINGLE COUNT

People v. Vigil, 2015 COA 88M, ¶ 44, __ P.3d __ ("Because the prosecution presented a single theory of burglary, the jury was not required to unanimously agree on *which* building was burglarized. Instead, the jury only needed to agree that [the defendant] burglarized a building on the charged date at the charged place.").

Status: Mandate not issued as of 8/27/15.

E:18 SUPPLEMENTAL INSTRUCTION — WHEN JURORS FAIL TO AGREE

People v. Payne, 2014 COA 81, ¶ 18, __ P.3d __ ("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.").

Status: Petition for certiorari pending as of 8/27/15.

F:303 (DEFINING "PUBLIC PLACE")

People v. Naranjo, 2015 COA 56, ¶ 17, __ P.3d __ (for purposes of the definition of a "public place" in section 18-1-901(3)(n), "the method of transportation a person uses on a highway—whether walking, biking, driving, or some other type of transport—does not alter the fact that the person is on a highway, and therefore in a public place").

Status: Petition for certiorari pending as of 8/27/15.

F:337 (DEFINING "SEXUAL CONTACT")

People v. Lovato, 2014 COA 113, ¶¶ 26, 32, __ P.3d __ ("[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.").

Status: Petition for certiorari pending as of 8/27/15.

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

People v. Childress, 2012 COA 116, ¶ 23, __ P.3d __ (holding that a theory of complicity liability cannot apply to the crime of vehicular assault (DUI) because that crime "requires no culpable mental state," and Colorado supreme court case law forbids "applying Colorado's complicity statute 'beyond cases involving crimes of negligence or recklessness'" (quoting *Bogdanov v. People*, 941 P.2d 247, 251 n.9)).

Status: Petition for certiorari granted on the following issue: "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.'" The Colorado Supreme Court heard oral arguments on December 10, 2014.

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

People v. Castillo, 2014 COA 140, ¶ 32, __ P.3d __ ("[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 ¶ 45, 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).").

Status: Petition for certiorari pending as of 8/27/15.

People v. DeGreat, 2015 COA 101, ¶ 15, __ P.3d __ (holding that, where the defendant was charged with attempted murder, first-degree assault, and aggravated robbery, he was entitled to a self-defense instruction on the aggravated robbery charge as well as the other charges because "the robbery was intertwined with the assault" and that, "under these facts, it is illogical to

allow self-defense as an affirmative defense to some of the general intent crimes, but not all of them").

Status: Mandate not issued as of 8/27/15.

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

People v. Doubleday, 2012 COA 141, ¶¶ 29–30, __ P.3d __ ("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)).

Status: Petition for certiorari granted on the following issues: (1) "Whether a defendant can be convicted of felony murder when he is acquitted of an essential element of felony murder, namely, the underlying offense"; (2) 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"; and (3) "Whether duress is a defense to felony murder for purposes of section 18–1–708, C.R.S." Oral arguments not scheduled as of 8/27/15.

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

People v. Medrano-Bustamante, 2013 COA 139, ¶ 14, __ P.3d __ (holding that DUI is not a lesser included offense of either vehicular homicide-DUI or vehicular assault-DUI because "[t]he criminal code's definition of motor vehicle is broader than the Uniform Motor Vehicle Law's definition of motor vehicle," meaning "vehicular assault-DUI and vehicular homicide-DUI can be committed in ways that DUI cannot").

Status: Petition for certiorari granted on the following issue: "Whether DUI is a lesser included offense of vehicular assault-DUI or vehicular homicide-DUI." Oral arguments not scheduled as of 8/27/15.

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

People v. Smoots, 2013 COA 152, ¶ 7, __ P.3d __ (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")

Status: Petition for certiorari granted on the following issues: (1) "Whether a double jeopardy claim can be raised for the first time on direct appeal"; and (2) "Whether driving under the influence is a lesser included offense of vehicular assault-driving under the influence, requiring merger." Oral arguments not scheduled as of 8/27/15.

3-4:25 UNLAWFUL SEXUAL CONTACT (TREATMENT OR EXAMINATION)

People v. McCoy, 2015 COA 76, ¶ 46 __ P.3d __ ("[S]ection 18-3-404(1)(g) is not limited to conduct that occurs within a physician-patient relationship, or to conduct that occurs during medical treatment or a medical examination . . . .").

Status: Petitions for rehearing pending as of 8/27/15.

5-9:01 IDENTITY THEFT (USE)

People v. Perez, 2013 COA 65, ¶ 21, __ P.3d __ ("[W]e 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.").

Status: Petition for certiorari granted on the following issue: "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." Oral arguments set for September 29, 2015.

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

People v. Friend, 2014 COA 123M, ¶¶ 62–63, __ P.3d __ (holding that, because section 18-6-401 "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").

Status: Petition for certiorari pending as of 8/27/15.

People v. Weeks, 2015 COA 77, ¶¶ 79–80, __ P.3d __ ("[W]e conclude that the last phrase 'ultimately results in the death of a child or serious bodily injury to a child' in section 18-6-401(1)(a) applies to only the last enumerated pattern of abuse ('an accumulation of injuries'). The other enumerated patterns of abuse do not require a showing that they resulted in death or serious bodily injury. [Footnote 11: To the extent that this interpretation differs from that in *People v. Friend*, 2014 COA 123M, we decline to follow *Friend*.] Thus, under section 18-6-401(1)(a), the prosecution needed to prove only that defendant engaged in a pattern of conduct resulting in . . . cruel punishment or mistreatment of [the child victim]. To enhance the sentence for the crime, though, the People had to separately prove that one or more acts underlying that pattern resulted in death or injury to the child.").

Status: Mandate not issued as of 8/27/15.

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

People v. Marsh, No. 08CA1884, 2011 WL 6425492, at *6 (Colo. App. Dec. 22, 2011) (holding that "the presence of digital images in an Internet cache can constitute evidence of a prior act of possession").

Status: Petition for certiorari granted as to the following issues: (1) "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)"; (2) Whether the court of appeals erred when it held that the testimony of a child forensic interviewer was lay opinion testimony and therefore was not subject to the admissibility and discovery requirements for expert witnesses." Oral arguments not scheduled as of 8/27/15.

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

People v. Valdez, 2014 COA 125, ¶ 23 & n.1, __ P.3d __ ("[T]he instruction set forth in [*People v. VanMatre*, 190 P.3d 770 (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. [Footnote:] 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 cmt. 3(DUI), 42:05 cmt. 4 (DARP) (2014).").

Status: Petition for certiorari pending as of 8/27/15.