MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated November 7, 2016

Introduction

The Committee intends to keep COLJI-Crim. (2015) 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.

The Committee encourages users to alert the Reporter of any errors at: mcjic@judicial.state.co.us.

I. Decisions of the United States Supreme Court

G2:05 CONSPIRACY

Ocasio v. United States, 136 S. Ct. 1423, 1432 (2016) ("In order to establish the existence of a conspiracy to violate the [federal law prohibiting extortion], the Government has no obligation to demonstrate that each conspirator agreed personally to commit—or was even capable of committing—the substantive offense of . . . extortion. It is sufficient to prove that the conspirators agreed that the underlying crime *be committed* by a member of the conspiracy who was capable of committing it. In other words, each conspirator must have specifically intended that *some conspirator* commit each element of the substantive offense.").

II. Decisions of the Colorado Supreme Court

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

People v. Doubleday, 2016 CO 3, ¶¶ 8, 26, 27, 364 P.3d 193, 195, 197–98 ("[The trial court] instructed the jury that the affirmative defense of duress applied to the charge of attempted aggravated robbery but not to the charge of felony murder. . . . [W]e hold that in order to establish that a defendant has committed or attempted to commit a predicate offense so as to support a felony murder conviction, the prosecution must prove beyond a reasonable doubt all elements of that predicate offense, including the inapplicability of any properly asserted affirmative defense. . . . [Here], we thus conclude that (1) the prosecution did not prove all of the requisite elements of the predicate offense of attempted aggravated robbery; (2) as a result, the prosecution did not establish that Doubleday committed the crime of attempted aggravated robbery, which was an essential element of the felony murder charge; and (3) therefore, Doubleday's felony murder conviction cannot stand.").

Esquivel-Castillo v. People, 2016 CO 7, ¶ 20, 364 P.3d 885, 890 ("Because the felony murder charge in this case effectively tracked the language of the felony murder statute, including the allegation that the defendant committed or attempted to commit 'kidnapping,' such charge was clearly not substantively defective and provided the defendant with adequate notice of the charge against him. As such, instructing the jury, for purposes of the felony murder charge, on all statutory forms of kidnapping did not amount to instructing on an additional or different crime from the one charged and, therefore, did not constitute a constructive amendment.").

3-4:01 SEXUAL ASSAULT (SUBMISSION AGAINST WILL) and 3-4:09 SEXUAL ASSAULT (PHYSICALLY HELPLESS)

Schneider v. People, 2016 CO 70, ¶ 19, __ P.3d __ ("Inflicting sexual penetration upon someone who the actor knows is helpless, which definitionally entails acting with knowledge of an absence of resistance, on the one hand, and causing that person to submit to sexual penetration by means calculated to cause her submission against her will, on the other, clearly involve different conduct. Whether the victim's regaining consciousness is more appropriately characterized as an intervening event, or the defendant's choice to force her to submit, upon her regaining consciousness, as a volitional departure, or perhaps in some other way altogether, these additional factors clearly evidence a change in circumstances from one alternative means of committing sexual assault to another.").

5-9:01 IDENTITY THEFT (USE)

People v. Perez, 2016 CO 12, ¶¶ 14, 22, 367 P.3d 695, 699, 700 ("[T]he plain meaning of our identity-theft statute suggests that 'knowingly' applies to the use of the identifying information of another. . . . [T]he prosecution must prove that an offender knowingly used personal identifying information and knew that the information belonged to another person.").

42:08.SP SPEEDING—SPECIAL INSTRUCTION (SPEED IN EXCESS OF DESIGNATED SPEED LIMIT)

People v. Hoskin, 2016 CO 63, ¶¶ 11, 17, 380 P.3d 130, 134, 136 ("[T]he plain language of the speeding statute creates a mandatory rebuttable presumption. . . . [C]ivil traffic infraction defendants are not entitled to the same due process protections afforded to defendants in criminal proceedings. Rather, due process rights afforded to defendants in criminal proceedings, specifically, as they relate to the burden of proof, are not implicated here").

III. Final Decisions of the Colorado Court of Appeals

E:05 CREDIBILITY OF WITNESSES

People v. Theus-Roberts, 2015 COA 32, ¶¶ 19, 21, 378 P.3d 750, 755–56 ("The Colorado Supreme Court has consistently held that it is not error for a trial court to refuse tendered *Telfaire* instructions when the jury receives a general instruction on the credibility of witnesses. . . . Although Theus–Roberts contends that 'scientific advancements demonstrate the general credibility instruction does not suffice in cases in which eyewitness identification is a

material, disputed issue,' we do not view this case as warranting a departure from controlling Colorado Supreme Court precedent . . . ."); *see also id.* at ¶ 47 (Berger, J., specially concurring) ("[W]hile I recognize that we are bound by the supreme court's prior decisions on this issue, I believe it is important to note how much time has elapsed since the supreme court last visited this subject. The supreme court's earlier cases do not analyze in depth the scientific, judicial, and scholarly work that casts doubt on the reliability of certain eyewitness identifications because much of this body of work did not exist at the time the court addressed this issue.").

People v. Manyik, 2016 COA 42, ¶¶ 62, 71, __ P.3d __ (rejecting the defendant's tendered instruction that the jury "may consider the physical and psychological environment of the interrogation when determining the credibility and accuracy of his statements," holding that "[t]he tendered instruction emphasized only selective evidence that was favorable to [the defendant], and thus it was improper").

E:09 QUESTIONS DURING DELIBERATIONS

People v. Johnson, 2016 COA 15, ¶ 39, __ P.3d __ (finding no error where, when the court gave the jury "unfettered access" to the victim's videotaped interview, "the court ordered that the jury could access the videotape only upon a request to the bailiff . . . and, if such request were made, the jury was required to watch the video all the way through, to avoid emphasis on any one portion of the interview").

E:18 SUPPLEMENTAL INSTRUCTION — WHEN JURORS FAIL TO AGREE

People v. Payne, 2014 COA 81, ¶ 18, 361 P.3d 1040, 1044 ("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:81 (DEFINING "CUNNILINGUS") and F:343 (DEFINING "SEXUAL PENETRATION")

People v. Morales, 2014 COA 129, ¶¶ 37–44, 356 P.3d 972, 981–82 (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).

F:337 (DEFINING "SEXUAL CONTACT")

People v. Lovato, 2014 COA 113, ¶¶ 26, 32, 357 P.3d 212, 221, 223 ("[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.").

G2:05 CONSPIRACY

People v. Lucero, 2016 COA 105, ¶ 8, __ P.3d __ ("[A] mere buyer-seller relationship does not constitute a drug distribution conspiracy . . . . Colorado's general conspiracy law . . . punishes conspirators who have agreed on a common illicit purpose (e.g., to distribute drugs). Such commonality is absent where, as here, the evidence shows that the transferor intended only to distribute the drugs and the transferee intended only to possess them for personal use.").

CHAPTER H: DEFENSES

People v. Marks, 2015 COA 173, ¶¶ 52, 57, 374 P.3d 518, 527–28 (holding that, where the defendant refused a "theory of defense" instruction, the trial court properly rejected his tendered "alternate suspect instruction [because it] merely highlighted the prosecution's duty to establish that it was actually he, and not a third person, who committed the crime with which he was charged").

H:34 INTOXICATION (VOLUNTARY)

People v. Garner, 2015 COA 174, ¶ 72, __ P.3d __ ("[V]oluntary intoxication is not, in and of itself, a defense to first degree murder. It is only 'a partial defense that, under appropriate circumstances, negates the specific intent necessary to carry out certain offenses.'" (quoting *Brown v. People*, 239 P.3d 764, 769 (Colo. 2010)) (emphasis added by court of appeals)).

3-4:26 UNLAWFUL SEXUAL CONTACT (UNDER EIGHTEEN)

People v. Johnson, 2016 COA 15, ¶ 18, __ P.3d __ ("[A] person cannot have unlawful sexual contact while he or she is asleep and unaware of the contact.

. . . [B]ecause [the defendant] was asleep and could not have voluntarily or consciously touched [the victim], he did not have unlawful sexual contact with her.").

3-4:30.INT UNLAWFUL SEXUAL CONTACT—INTERROGATORY (AT-RISK VICTIM)

People v. Nardine, 2016 COA 85, ¶ 26, __ P.3d __ ("[W]e do not discern from the legislative purpose that the at-risk juvenile enhancer necessarily involves a 'knowingly' mens rea as to the victim's at-risk juvenile status.").

3-4:36.INT SEXUAL ASSAULT ON A CHILD—INTERROGATORY (PATTERN)

People v. Johnson, 2016 COA 15, ¶¶ 15, 23, __ P.3d __ ("Because the court provided the required [pattern] instruction, it did not err in allowing the jury to identify an incident of sexual contact other than those listed on the special interrogatory. . . . [But] only one of the two incidents of sexual contact found by the jury was supported by sufficient evidence. And since the pattern of sexual abuse sentence enhancer requires a finding of at least two distinct incidents of sexual contact, there was insufficient evidence to support this conviction.").

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

People v. Heywood, 2014 COA 99, ¶ 28, 357 P.3d 201, 207 (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)).

3-4:46 INTERNET SEXUAL EXPLOITATION OF A CHILD (EXPOSE OR TOUCH)

People v. Helms, 2016 COA 90, ¶¶ 52, 53, __ P.3d __ ("The child exploitation statute does not require that the actor be in Colorado at the time of the criminal communication . . . . [D]efendant did not ask [the supposed 14-year-old girl] to expose or touch her own or another person's intimate parts, an essential element of the offense. A request to send a picture taken previously is not equivalent to such conduct. And asking a child to send a photograph showing such conduct would not constitute an attempt to persuade the child to engage in such conduct 'while communicating' with the actor, another essential element of the offense." (citation omitted)).

5-1:103 FORGERY (LEGAL RIGHT, INTEREST, OBLIGATION, OR STATUS) and 5-1:10 SECOND DEGREE FORGERY

People v. Riley, 2015 COA 152, ¶ 14, 380 P.3d 157, 161 ("By omitting the term 'not' before the phrase 'was purported to be . . . an instrument which does or may . . . affect a legal right, interest, obligation, or status,' the court mistakenly instructed the jury on the elements of felony forgery under section 18-5-102, rather than second degree forgery under section 18-5-104.'" (omissions in original)).

5-9:01 IDENTITY THEFT (USE)

People v. Campos, 2015 COA 47, ¶ 15 n.3, 351 P.3d 553, 556 n.3 ("[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.").

5.5:02 COMPUTER CRIME (DEFRAUD)

People v. Galang, 2016 COA 68, ¶ 38, __ P.3d __ ("We acknowledge that section 18-5.5-102(3)(a) appears to tie the penalties for computer crime to concepts of loss, damage, or value. But in our view, any interpretation of the provision as requiring, as the predicate of a penalty, a showing of actual rather than merely contemplated injury undermines the very purpose of sections 18-5.5-102(1)(a), (b), and (f): to preserve the use of computers for legitimate ends.").

5.5:05 COMPUTER CRIME (ALTERATION OR DAMAGE)

People v. Stotz, 2016 COA 16, ¶ 47, __ P.3d __ ("We conclude that the plain language of section 18-5.5-102(1)(e) prohibits, with sufficient clarity, an employee's knowing deletion of the only electronic copies of thousands of computer documents, when the employee knows that such deletion is not authorized by the employer.").

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

People v. Weeks, 2015 COA 77, ¶¶ 79–80, 369 P.3d 699, 712 ("[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.").

6-8:02 VIOLATION OF A PROTECTION ORDER (PROHIBITED CONDUCT)

People v. Serra, 2015 COA 130, ¶¶ 51, 53, 361 P.3d 1122, 1133 ("We conclude that the term 'contact,' as used in sections 18-8-212 and 18-6-803.5, has a commonly accepted and understood meaning and thus a further clarifying definition was not required to inform the jury of the governing law. . . . The trial court therefore was not required to define 'contact' for the jury, although it had discretion to provide a definitional instruction that properly stated the law. The court's definition of contact as 'includes [a] variety of conduct and is not limited to physical touching,' however, was not a proper definitional instruction because it did not correspond with the plain and ordinary meaning of the term." (alteration in original)).

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Riley, 2015 COA 152, ¶ 29 380 P.3d 157, 164 ("There is no criminal offense in Colorado law of 'influencing a public servant.' It thus would be incorrect to define the term 'attempt' in the attempt to influence a public servant statute as 'engag[ing] in conduct constituting a substantial step toward the commission of the offense' of influencing a public servant. If the term 'attempt' in section 18-8-306 were to be defined by reference to section 18-2-101, the term would have to be defined as 'engag[ing] in conduct constituting a substantial step toward the commission of the offense' of attempt to influence a public servant. This construction makes no sense . . . ." (alteration in original) (citations omitted)).

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

People v. Cisneros, 2014 COA 49, ¶ 51, 356 P.3d 877, 890 (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: The events of this case occurred prior to the 2010

recodification, at a time when the relevant provision was located in section 18-18-407(1)(f).]

42:04.SP DRIVING UNDER RESTRAINT—SPECIAL INSTRUCTION (NOTICE)

People v. Boulden, 2016 COA 109, ¶¶ 16–17 __ P.3d __ ("[T]he only evidence in the record of this case bearing on the driving under restraint charge is (1) the driving record, indicating only that defendant's license had been suspended on September 9, 2013, and not reinstated; and (2) the verification of mailing, showing that a single notice of that suspension had been mailed to his last known address on file. The prosecution presented no evidence that defendant had ever seen or was aware of either document or of the suspension of his license. Accordingly . . . we conclude that no reasonable jury could have found that the prosecution proved the knowledge element of driving under restraint.").

IV. 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: Petition for certiorari granted on the following issue: "Whether the court of appeals erred in holding Amendment 64 applies retroactively." The Colorado Supreme Court heard oral arguments on October 4, 2016.

People v. Waller, 2016 COA 115, ¶¶ 52, 77, __ P.3d __ (holding that, where the trial court's general burden-of-proof instruction told the jury that it "will" find the defendant guilty if the crime was proven beyond a reasonable doubt—rather than "should" find—the instruction did not improperly "abolish[] the jury's power to nullify [or] essentially constitute[] a directed verdict for the State.").

> Status: Petition for certiorari pending as of 11/6/16.

E:05 CREDIBILITY OF WITNESSES

People v. Singley, 2015 COA 78, ¶ 41, __ 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 certiorari pending as of 11/6/16.

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: Petition for certiorari pending as of 11/6/16.

E:20 INSTRUCTION TO DISCHARGED EXTRA JUROR(S)

People v. Riley, 2016 COA 76, ¶ 33, __ P.3d __ ("[T]he presence of other persons, including alternate jurors, in final deliberations is improper.").

Status: Petition for certiorari pending as of 11/6/16.

F:128 (DEFINING "EROTIC NUDITY")

In the Interest of T.B., 2016 COA 151, ¶ 35, __ P.3d __ (rejecting the defendant's contention that the reference to 'persons involved' in the definition of erotic nudity necessarily means the people who are displayed in the photograph," and holding instead that, where the defendant encouraged girls to send him sexually suggestive pictures of themselves, "'the overt sexual gratification was of' the [defendant], who repeatedly asked the girls for the photographs after sending them a picture of his erect penis" (quoting *People v. Batchelor*, 800 P.2d 599, 604 (Colo. 1990))).

Status: Mandate not issued as of 11/6/16.

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 granted on the following issue: "Whether the court of appeals erred in reversing the defendant's menacing convictions because he did not receive an instruction on the lesser non included offense of disorderly conduct." Oral arguments not scheduled as of 11/6/16.

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

People v. Sosa, 2016 COA 93, ¶ 30, __ P.3d __ ("[T]he principles announced in *Bogdanov* [*v. People*, 941 P.2d 247 (Colo.), *amended*, 955 P.2d 997 (Colo. 1997), *disapproved of on other grounds by Griego v. People*, 19 P.3d 1 (Colo. 2001)] and [*People v.*] *Childress*[,2015 CO 65M, 363 P.3d 155,] may not support complicitor liability for the crime of first or second degree murder. While it may have been foreseeable that someone would be killed when the two men started out that night, defendant's liability does not, under *Bogdanov*, depend on the foreseeability of the result. Rather, it must be tied to his own intent and awareness of the circumstances under which his confederate acted. Defendant's position is, apparently, that he was not aware until it was too late that the shooter intended to kill someone other than a person whom defendant wanted to kill. These facts, if true, would not support a conviction of defendant for first or second degree murder under a complicitor theory.").

> Status: Petition for rehearing pending as of 11/6/16.

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 granted on the following issues: (1) "Whether the court of appeals erred in finding that erroneously instructing the jury on the provocation exception to self-defense was harmless error where the exception was unsupported by the evidence and where, in closing, the prosecutor asked the jury to apply the exception by misstating the evidence"; (2) "Whether the court of appeals erred by holding that the trial court did not err by instructing the jury on the initial aggressor exception to self-defense." Oral arguments not scheduled as of 11/6/16.

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: Petition for certiorari granted on the following issue: "Whether the court of appeals erred in concluding that the statutory right to use self-defense can apply to justify the taking of services in a robbery." Oral arguments not scheduled as of 11/6/16.

3-1:04 MURDER IN THE FIRST DEGREE (EXTREME INDIFFERENCE)

People v. Anderson, 2016 COA 47, ¶ 38, __ P.3d __ ("[T]he words 'a person or persons' indicate that the defendant may target a particular person or persons. The statute still requires that the defendant exhibit an attitude of universal malice manifesting an extreme indifference to the value of human life generally, which requires more than one person to be placed at risk by the defendant's conduct.").

> Status: Petition for certiorari pending as of 11/6/16.

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 to be held 11/8/16.

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

People v. Smoots, 2013 COA 152, ¶ 7, __ P.3d __ (holding that the 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 to be held 11/8/16.

3-3:05 SECOND DEGREE KIDNAPPING (SEIZED AND CARRIED)

People v. Bondsteel, 2015 COA 165, ¶ 116, __ P.3d __ ("[I]n response to the jury's question, the trial court properly declined to define "seized and carried" as requiring proof of an increased risk of harm. The division in [*People v. Rogers*, 220 P.3d 931, 936 (Colo. App. 2008)], concluded that defining 'seizing and carrying' as 'any movement, however short in distance' was not plain error. The trial court's definition of 'seized and carried' in Bondsteel's case tracked the *Rogers* language.").

> Status: Petition for certiorari granted on the following issues:
> (1) "Whether a defendant's failure to renew an objection at trial to the prosecution's pretrial motion to join two separately filed cases waives the defendant's ability to challenge the joinder on appeal"; and (2) "Whether the trial court abused its discretion in joining the Motorcycle Case with the Signal Mountain Trail Case for trial." Oral arguments not scheduled as of 11/6/16.

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: Petition for certiorari granted on the following issues: (1) "Whether the court of appeals erred in concluding section 18-3-404(1)(g), C.R.S. (2016), is not limited to conduct that occurs within a physician-patient relationship or during a medical treatment or medical examination"; (2) "Whether the court of appeals' interpretation of section 18-3-404(1)(g) renders the statute unconstitutionally overbroad"; (3) "Whether the court of appeals' interpretation of section 18-3-404(1)(g) renders the statute unconstitutionally vague"; (4) "Whether the court of appeals correctly concluded that sufficiency of the evidence claims are not subject to plain error review"; (5) "Whether the court of appeals erred in concluding that the prosecution presented sufficient evidence to sustain the defendant's two convictions under section 18-3-404(1)(g)." Oral arguments not scheduled as of 11/6/16.

4-4:19 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (RETAINED)

People v. Stellabotte, 2016 COA 106, ¶¶ 25, 32 __ P.3d __ (approving of the trial court's instructions where "knowingly" was set off from the remaining elements, and holding that the court did not abuse its discretion when providing the jury with a dictionary definition of "authorization").

Status: Petition for certiorari pending as of 11/6/16.

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 granted on the following issues: (1) "Whether child abuse causing death as part of a pattern of conduct

under section 18-6-401(1)(a), (7)(a)(I), C.R.S. (2015), merges into first-degree murder child abuse under section 18-3-102(1)(f), C.R.S. (2015), when they are based on identical evidence and the death results solely from accumulated injuries"; (2) "Whether the court of appeals erred when it held that the defendant's double jeopardy claim was not waived and the trial court's failure to sua sponte merge the defendant's child abuse convictions constituted plain error"; (3) "Whether the court of appeals erred when it held that Colorado's child abuse statute, section 18-6-401, C.R.S. (2015), only provides alternative means of committing a single offense of child abuse; and the defendant may only be convicted of a single count of child abuse for numerous acts of torture and abuse that took place at different times over several days." Oral arguments not scheduled as of 11/6/16.

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." The Colorado Supreme Court heard oral arguments on December 8, 2015.

6-4:17 SEXUAL EXPLOITATION OF A CHILD (EXPLICIT SEXUAL CONDUCT FOR SEXUALLY EXPLOITATIVE MATERIAL)

In the Interest of T.B., 2016 COA 151, ¶ 43, __ P.3d __ ("The plain and ordinary meaning of 'sexually exploitative material' does not require depictions of sexual abuse of a child."

Status: Mandate not issued as of 11/6/16.

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Sena, 2016 COA 161, ¶ 12, __ P.3d __ ("The plain language of the statute reveals that a police officer, as an employee of the government, is a public servant.").

Status: Mandate not issued as of 11/6/16.

9-2:01 CRUELTY TO ANIMALS (PROHIBITED ACTS) and 9-2:04 AGGRAVATED CRUELTY TO ANIMALS

People v. Harris, 2016 COA 159, ¶¶ 96, 99, __ P.3d __ (rejecting the defendant's argument that the trial court erred when it failed to define the terms "needlessly killed," "proper protection from weather conditions," "proper drink," "proper food," and "necessary sustenance," and holding instead that "all of the undefined terms are common words the jury was capable of understanding, and there is no indication that the jury was confused by these terms").

Status: Mandate not issued as of 11/6/16.

12-1:01 POSSESSION OF A DANGEROUS WEAPON

People v. Sandoval, 2016 COA 14, ¶ 25, __ P.3d __ ("We conclude that article II, section 13 [of the Colorado Constitution] does not protect an individual's right to possess a short shotgun for self-defense because the state's prohibition of short shotguns is a reasonable exercise of its police power.").

Status: Petition for certiorari pending as of 11/6/16.

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 11/6/16.