MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated January 15, 2020

Introduction

The Committee intends to publish annual updates to the model jury instructions. During the periods between these formal publications, the Committee's Reporter will maintain a "Reporter's Online Update," which will include developments in case law relevant to the instructions. The update may also include substantive changes to instructions that the Committee has formally approved but that have yet to appear in the most recent edition.

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 Colorado Supreme Court

PREFACE

Garcia v. People, 2019 CO 64, ¶¶ 22–23, 445 P.3d 1065, 1069 (holding that simply tracking the model jury instruction in effect at the time does not automatically insulate the given instruction from constituting plain error).

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

Johnson v. People, 2019 CO 17, ¶¶ 4, 18, 436 P.3d 529, 530, 534 (holding that, when the trial court defined the phrase "hesitate to act" in the reasonable doubt instruction as "what it means is that after you evaluate all the evidence and you evaluate whether or not any doubts are reasonable or not . . . you would find Ms. Johnson guilty only if, after hearing all of that evidence, you just can't bring yourself to do it," the instruction was extraneous but did not lower the prosecution's burden of proof because it was nonsensical and because the court otherwise properly instructed the jury on the law).

E:07 TESTIMONY OF DEFENDANT—NOT COMPELLED

Deleon v. People, 2019 CO 85, ¶ 20, 449 P.3d 1135, 1138–39 ("[A] trial court should oblige a request for a no-adverse-inference jury instruction by both orally instructing the jury prior to argument and delivering the instruction in writing to the jury before it retires.").

E:12 MULTIPLE COUNTS, 4-3:01 ROBBERY, and 4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)

People v. Delgado, 2019 CO 82, ¶¶ 27–30, 450 P.3d 703, 707–08 (holding that, because robbery requires a taking "*by the use of force*, threats, or intimidation" whereas theft requires a taking "*by means other than the use of force*, threat, or intimidation," the elements of the two crimes "are mutually exclusive when they are predicated on a single taking," meaning the defendant could not have been guilty of both robbery and theft; directing trial courts to avoid the potential for such inconsistent verdicts by "instruct[ing] the jury that a defendant may not be convicted of multiple crimes when the elements of those crimes are mutually exclusive," meaning that "the court should have instructed the jury that Delgado could be convicted of robbery or theft, but not both").

F:128 (DEFINING "EROTIC NUDITY")

People in Interest of T.B., 2019 CO 53, ¶¶ 46, 52, 445 P.3d 1049, 1059–60 (holding that "whether a photograph displaying the genitals, pubic area, or breasts of a child was 'for the purpose of real or simulated overt sexual gratification or stimulation' under section 18-6-403(2)(d)" depends on "whether the display appears to be intended or designed to elicit a sexual response"; further holding that, when considering whether someone is a "person involved" in creating the nudity, there is "no principled distinction between a defendant who stands in the room with a minor, directing her to pose in erotic positions for nude photographs for the defendant's overt sexual gratification, and a defendant who uses electronic media to solicit or orchestrate such photographs").

F:343 SEXUAL PENETRATION

People v. Lozano-Ruiz, 2018 CO 86, ¶¶ 6–7, 429 P.3d 577, 578 (holding that the trial court's failure to instruct the jury on "sexual penetration" was not plain error because the defendant did not contest that sexual penetration occurred).

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

People v. DeGreat, 2018 CO 83, ¶¶ 30–33, 428 P.3d 541, 546 (holding that, where the defendant was charged with aggravated robbery after leaving a taxi cab without paying and then fighting with the driver, he had presented sufficient evidence to warrant receiving a self-defense instruction).

Ray v. People, 2019 CO 21, ¶¶ 11, 14, 440 P.3d 412, 415–16 (holding that, where the court instructed the jury not to consider the defendant's beliefs in determining whether a reasonable person would have perceived a threat, the instruction did not lower the prosecution's burden of proof).

J:03 COMPLICITY

Butler v. People, 2019 CO 87, ¶¶ 17–18, 450 P.3d 714, 718 (holding that, where the defendant was charged with money laundering under a complicity theory, the prosecution needed to prove that he participated in "the specific acts of money laundering charged" rather than in the "overall operation").

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

People v. Anderson, 2019 CO 34, ¶¶ 15, 22, 442 P.3d 76, 79, 81 (holding that

extreme-indifference murder involves "a killing act objectively demonstrating a willingness to take life indiscriminately," meaning that it is not limited to conduct endangering multiple people).

3-1:09 MANSLAUGHTER (RECKLESS) and 3-2:11 ASSAULT IN THE SECOND DEGREE (RECKLESS)

People v. Griego, 2018 CO 5, ¶ 44, 409 P.3d 338, 345 (rejecting the argument that the crimes of attempted reckless manslaughter or attempted second-degree assault may be committed without an "identifiable person" being placed at risk of harm, and holding instead that the prosecution "must demonstrate that a defendant placed a discernible person in danger of the pertinent harm").

3-2:20 ASSAULT IN THE THIRD DEGREE (KNOWINGLY OR RECKLESSLY) and 3-2:30 MENACING

People v. Margerum, 2019 CO 100, ¶ 20, __ P.3d __ (holding that a person may be convicted of both assault and menacing based on the same conduct).

3-2:30 MENACING

People v. Smith, 2018 CO 33, ¶¶ 4, 7, 35, 416 P.3d 886, 889, 893 (holding that, where the charging document alleged that the defendant menaced his girlfriend but the jury instruction simply required the jury to find that he menaced "another person," any instructional error was not plain).

3-4:10.INT SEXUAL ASSAULT—INTERROGATORY (FORCE OR VIOLENCE)

Garcia v. People, 2019 CO 64, ¶ 38, 445 P.3d 1065, 1071 (agreeing with *People v. Santana-Medrano*, 165 P.3d 804, 807 (Colo. App. 2006), and holding that "the force sentence enhancer doesn't include a mens rea requirement").

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

People v. McCoy, 2019 CO 44, ¶ 48, 442 P.3d 379, 390 (holding that section 18-3-404(1)(g) "cover[s] not only doctors and physician-patient relationships but also others who are, *or hold themselves out to be*, health treatment providers of any kind").

3-4:31 SEXUAL ASSAULT ON A CHILD, 3-4:36.INT SEXUAL ASSAULT ON A CHILD—INTERROGATORY (PATTERN), and 3-4:40 SEXUAL ASSAULT ON A CHILD BY ONE IN A POSITION OF TRUST

Rail v. People, 2019 CO 99, ¶¶ 11–12, 30, __ P.3d __ (holding that, where the jury reached inconsistent verdicts—finding the defendant guilty of sexual assault on a child and stating that the prosecution had proved specific instances of such assault as a pattern of abuse, but further finding on a separate interrogatory that the prosecution had *not* proved those same instances—the inconsistency did not require reversal because "ambiguity was resolved during polling when the jury confirmed both its guilty verdict and its unanimous finding that the State had proved all the alleged incidents of sexual contact beyond a reasonable doubt").

4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)

People v. Rojas, 2019 CO 86M, ¶ 3, 450 P.3d 719, 720 (holding that section 26-2-305(1)(a), C.R.S., which provides that one who steals food stamps "commits the crime of theft," did not create a separate crime, meaning the defendant could be prosecuted under the general theft statute).

5-9:01 IDENTITY THEFT (USE)

Allman v. People, 2019 CO 78, ¶ 20, 451 P.3d 826, 831 (holding that identity theft is not a continuing offense).

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

Friend v. People, 2018 CO 90, ¶¶ 19, 37, 429 P.3d 1191, 1195, 1197 (holding that the child abuse statute "prescribes a single crime of child abuse that can be committed in alternate ways"; further holding that child abuse resulting in death is a lesser included offense of child abuse murder).

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

People in Interest of T.B., 2019 CO 53, ¶ 33, 445 P.3d 1049, 1056 (holding that liability for possessing sexually exploitative material "does not require proof that the material depicts 'an act or acts of sexual abuse of a child'").

8-6:07 JURY-TAMPERING (INFLUENCE)

People v. Iannicelli, 2019 CO 80, ¶¶ 36, 50, 449 P.3d 387, 394, 396 (holding

that the definition of "juror" in section 18-8-601(1), C.R.S., applies to the crime of jury tampering; further holding that the crime "extends only to attempts to communicate with jurors about a specifically identifiable case").

9-1:27 INTERFERENCE AT A PUBLIC BUILDING (DENIED)

People v. Rediger, 2018 CO 32, ¶ 21, 416 P.3d 893, 899 (holding that, for the purposes of section 18-9-110(1), C.R.S., the term "public employee" means "a person who works in the service of a governmental entity under an express or implied contract of hire, under which the governmental entity has the right to control the details of the person's work performance").

II. Final Decisions of the Colorado Court of Appeals

D:06 CONVICTION OF FELONY—WITNESS OR DEFENDANT

People v. Hamilton, 2019 COA 101, ¶¶ 89, 93, 101–07, 452 P.3d 184, 200–02 (holding that, where the court instructed the jury that it may only consider a prior conviction as it relates to the defendant's credibility but *also* instructed the jury that it "should not necessarily presume that because [the defendant] was found guilty by a previous jury that [he] was factually guilty but rather that a previous jury determined that the state proved his guilt beyond a reasonable doubt," the court erred in giving the additional conviction language because that language (1) "made no reference to credibility," (2) "unnecessarily highlighted [the defendant's] prior conviction," (3) failed to ensure that the jury "did not give improper weight to the other acts evidence presented at trial and did not speculate whether [the defendant] had been convicted on a charge for which he had been acquitted," and (4) "was confusing and illogical").

F:186 INTIMATE PARTS

People v. Ramirez, 2018 COA 129, ¶ 23, __ P.3d __ (holding that semen is not part of a person's "external genitalia," meaning it is not an "intimate part" under the statutory definition).

F:242 (DEFINING "NOTICE")

People v. Patton, 2016 COA 187, ¶ 13, 425 P.3d 1152, 1156 ("We conclude that [section 18-5-702(2)] does not require notice only in person or in writing, because the word 'includes' is a word that is meant to extend rather than limit.").

F:277 PHYSICAL EVIDENCE

People v. Rieger, 2019 COA 14, ¶ 13, 436 P.3d 610 (holding that "electronically stored documents or information falls within the ambit of the phrase 'physical evidence'").

G2:05 (CONSPIRACY)

People v. Davis, 2017 COA 40M, ¶¶ 15, 21, __ P.3d __ ("[C]ommitting a number of crimes, or engaging in a number of noncriminal overt acts, does not necessarily mean there is more than one conspiracy. . . . Though the prosecution alleged numerous overt acts in furtherance of the single conspiracy, that did not require unanimous agreement by the jurors as to the precise overt act [the] defendant committed.").

CHAPTER H: DEFENSES

People v. Joosten, 2018 COA 115, ¶¶ 4, 33, 441 P.3d 14, 16, 19 (holding that, where the defendant tendered a theory of the case instruction which argued that he did not commit burglary "because he was invited in or had the privilege to enter the apartment," the trial court erred "when it refused Joosten's tendered instruction, or alternatively, when it failed to work with Joosten's counsel to craft a permissible instruction").

H:08 EXECUTION OF PUBLIC DUTY

People v. Neckel, 2019 COA 69, ¶ 21–23, __ P.3d __ (holding that a "No Trespassing" sign alone did not revoke the public's implicit license to approach the defendant's property, meaning that a process server who so approached was effecting legal process and was thus protected from trespass laws under section 18-1-701).

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

People v. Tardif, 2017 COA 136, ¶¶ 38–41, 433 P.3d 60, 68 (holding that (1) because "none of the elements of conspiracy require the use of physical force," self-defense is not an affirmative defense to conspiracy, and (2) "[b]ecause deadly physical force requires death," the trial court erred when it instructed the jury "on when deadly physical force may be used in self-defense" where the victim did not die).

People v. Wakefield, 2018 COA 37, ¶¶ 20–21, 428 P.3d 639, 645–46 (holding

that, where the defendant testified that he accidentally fired a gun when the victim reached for it and he pulled back in fear, his claim of an accidental shooting was "not so inconsistent with self-defense as to deprive him of the right to have the jury instructed on self-defense"; instead, the jury could have found that the defendant "*either* shot the victim accidentally or that the gun discharged as a result of his holding it in self-defense" (emphasis added)).

People v. Koper, 2018 COA 137, ¶ 18, __ P.3d __ (holding that, where the evidence showed that the defendant acted in self-defense against a third party, he was entitled to a "transferred intent" self-defense instruction as to the victim because the victim "was a bystander incidentally affected by [the] defendant's asserted attempt to defend himself against what he perceived as a threat posed by" the third party).

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

People v. Jones, 2018 COA 112, ¶¶ 34, 39, 434 P.3d 760, 766 (holding that, when the court instructed the jury that the make-my-day defense applies when a person has "made an unlawful entry into the dwelling," the court erred in refusing to modify the phrase "unlawful entry" with the word "knowingly" because "the purpose of the 'knowing' element is to protect the accidental trespasser").

H:16 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PREMISES)

People v. Neckel, 2019 COA 69, ¶ 31, __ P.3d __ (holding that the trial court properly rejected the defendant's tendered "no duty to retreat" instruction because "[t]he concept of defense of premises is at odds with the duty to retreat").

H:34 INTOXICATION (VOLUNTARY) and H:35 INTOXICATION (INVOLUNTARY)

People v. Bryant, 2018 COA 53, ¶¶ 89–91, 428 P.3d 669, 684 (holding that, where the trial court instructed the jury that voluntary intoxication was not a defense to possession of a controlled substance or third-degree assault, the instruction was proper because it "served to *prevent* any confusion for the jury in its determination of whether Bryant possessed the culpable mental state required").

People v. Sabell, 2018 COA 85, ¶¶ 19–20, 452 P.3d 91, 96 (holding that, where the trial court instructed the jury to initially determine whether the defendant's intoxication was self-induced before considering the affirmative defense of

involuntary intoxication, the instruction was erroneous because it did not clarify that the prosecution "bore the burden of disproving involuntary intoxication beyond a reasonable doubt").

H:76 DRIVING WITH EXCESSIVE ALCOHOL CONTENT—SUBSEQUENT CONSUMPTION OF ALCOHOL

People v. Jacobson, 2017 COA 92, ¶¶ 18, 21–22, __ P.3d __ (noting that "the statutory characterization of 'an affirmative defense' is not dispositive," and holding that even though subsequent consumption is defined as an affirmative defense by statute, "an affirmative defense instruction need not be given where the defense is only an element-negating traverse").

J:03 COMPLICITY

People v. Sandoval, 2018 COA 156, ¶¶ 2, 14, __ P.3d __ (holding that *Rosemond v. United States*, 572 U.S. 65, 67 (2014)—which held that for a defendant to be liable as a complicitor of the crime of carrying a firearm during the commission of another crime, he must have "advance knowledge" that a confederate would carry a gun during the crime's commission—does not apply to Colorado's complicity statute).

3-1:07 MURDER IN THE SECOND DEGREE

People v. Archuleta, 2017 COA 9, ¶¶ 40, 45, 411 P.3d 233, 241 (holding that the trial court did not misstate the law when, in defining "cause" in the context of causing another's death, it provided that "a defendant must take his victim as he finds him, and it is no defense that the victim was suffering from preexisting physical ailments, illnesses, injuries, conditions or infirmities").

3-1:08.INT MURDER IN THE SECOND DEGREE—INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION) and 3-2:07.INT ASSAULT IN THE FIRST DEGREE—INTERROGATORY (PROVOKED AND SUDDEN HEAT OF PASSION)

People v. Tardif, 2017 COA 136, ¶¶ 20, 24–25, 433 P.3d 60, 66 (holding that (1) where the defendant testified that he "didn't really process anything" but "just more or less acted" in shooting the victim, the evidence supported giving the heat of passion instruction, and (2) the trial court reversibly erred when it "did not properly instruct the jury on the prosecution's burden to prove the absence of heat of passion provocation beyond a reasonable doubt").

3-2:02 ASSAULT IN THE FIRST DEGREE (PERMANENT DISFIGUREMENT)

People v. Archuleta, 2017 COA 9, ¶¶ 51, 56, 411 P.3d 233, 243 (holding that, where the trial court did not offset the mental state of "with intent," any error was not obvious).

3-2:04 ASSAULT IN THE FIRST DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER)

People v. Denhartog, 2019 COA 23, ¶¶ 24, 28, 452 P.3d 148, 155 (holding that to qualify as "threatening" under the statute, the defendant must have "expressed a purpose or intent to cause injury or harm to the officer or the officer's property," and concluding that where the defendant suddenly reversed his jeep and struck an officer's motorcycle, there was no such intent to harm the officer).

3-2:09 ASSAULT IN THE SECOND DEGREE (BODILY INJURY WITH A DEADLY WEAPON)

People v. Buell, 2017 COA 148, ¶ 36, 442 P.3d 961, 968 (holding that, where the defendant was accused of second-degree assault involving a knife that was four to five inches long, the jury "could not have concluded that the knife was anything other than a deadly weapon," meaning the defendant was not entitled to an instruction on third-degree assault as a lesser included offense).

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

People v. Bondsteel, 2015 COA 165, ¶ 116, 442 P.3d 880, 901 ("[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.").

3-4:31 SEXUAL ASSAULT ON A CHILD

People v. Sparks, 2018 COA 1, ¶ 9, 434 P.3d 713, 717 (holding that the phrase "subjects another" does not mean "causing another to become subservient or subordinate," but instead "encompasses an adult defendant allowing a child to touch the defendant's intimate parts").

3-4:33.INT SEXUAL ASSAULT ON A CHILD—INTERROGATORY (FORCE)

People v. Hodge, 2018 COA 155, ¶¶ 2, 16, __ P.3d __ (holding that a defendant may not raise the defense of consent to the use of force in a charge of sexual assault on a child).

3-6:01, 3-6:02, and 3-6:03 STALKING

People v. Wagner, 2018 COA 68, ¶¶ 20–21, 434 P.3d 731, 737 (holding that, although the defendant's conduct "lasted for several months," his three separate convictions for stalking—under paragraphs (a), (b), and (c) of section 18-3-602(1)—must merge because his "contacts with the victim were related to a common theme" and the People "based all three charges on the same evidence and designated the same approximately five-month period for each charge").

3-6:03 STALKING (SERIOUS EMOTIONAL DISTRESS)

People v. Folsom, 2017 COA 146M, ¶ 55, 431 P.3d 652, 661 ("[I]t is not each individual act of stalking that must cause a reasonable person to suffer emotional distress, but the combined acts of the defendant that would cause such a result.").

4-1:01 FIRST DEGREE ARSON and 4-5:01 CRIMINAL MISCHIEF

People v. Welborne, 2018 COA 127, ¶ 21, __ P.3d __ (holding that criminal mischief is a lesser included offense of first-degree arson).

4-2:01 FIRST DEGREE BURGLARY, 4-2:03 SECOND DEGREE BURGLARY, and 4-5:03 FIRST DEGREE CRIMINAL TRESPASS

People v. Denhartog, 2019 COA 23, ¶¶ 77–79, 452 P.3d 148, 160 (relying on *People v. Garcia*, 940 P.2d 357 (Colo. 1997), to hold that first-degree criminal trespass is not a lesser included offense of second-degree burglary).

People v. Murray, 2018 COA 102, ¶¶ 7, 13, 452 P.3d 101, 104–05 (holding that, where the court instructed the jury that "[i]f a person refuses to leave the dwelling after [an] invitation to enter or remain is withdrawn by one with authority to grant the invitation, that person is thereupon remaining unlawfully after a lawful entry," the instruction accurately stated the law).

4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)

People v. Cohen, 2019 COA 38, ¶ 41, 440 P.3d 1256, 1265 (holding that, where the defendant was an attorney charged with theft for mishandling client funds and the court gave an instruction quoting the ethical rule regarding COLTAF accounts, the instruction was erroneous because it "didn't tell the jurors how to use the instruction and what its limits were").

4-4:09.INT THEFT—INTERROGATORY (IN THE PRESENCE OF AN AT-RISK PERSON)

People v. Lopez, 2018 COA 119, ¶¶ 32, 39–42, __ P.3d __ (holding that the phrase "portion of the offense" as used in the at-risk person interrogatory means "conduct taken in furtherance of the crime that occurs in temporal proximity to an element of the offense and is physically close to the victim"; further holding that because "presence" is an ordinary word, the court did not abuse its discretion when it refused to define the word "presence" in the context of the phrase "in the presence of the victim").

4-4:14 THEFT (MULTIPLE THEFTS; AGGREGATED AND CHARGED IN THE SAME COUNT)

People v. Ramos, 2017 COA 100, ¶¶ 18–20, 417 P.3d 902, 906–07 (citing the Committee's instruction, and concluding that "if the prosecution fails to prove that the defendant committed all 'the thefts so aggregated and charged,' it has not met its burden of proving every element of the 'single offense' created by section 18-4-401(4)(a)").

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

People v. Stellabotte, 2016 COA 106, ¶¶ 25, 32, 421 P.3d 1164, 1171–72 (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").

4-5:01 CRIMINAL MISCHIEF

People v. Coahran, 2019 COA 6, ¶ 27, 436 P.3d 617 (holding that the defendant was entitled to a self-defense instruction "[b]ecause the charged criminal mischief arose out of her use of force upon the [victim] (albeit indirectly)").

5-1:04 FORGERY (PUBLIC RECORD OR INSTRUMENT)

People v. Carian, 2017 COA 106, ¶ 26, 414 P.3d 34, 40 ("[U]nder subsection (1)(d), 'filed or required by law to be filed or legally fileable in or with a public office or public servant' refers to those instruments actually delivered to a public office or public servant pursuant to a legal mandate, such as documents that have a specific legal requirement of delivery to a public officer or with a public office for a specific purpose, like income taxes or license applications.").

6-4:18 SEXUAL EXPLOITATION OF A CHILD (PUBLICATION)

People v. Robles-Sierra, 2018 COA 28, ¶¶ 40, 44–45, 55, __ P.3d __ (holding that (1) because the General Assembly "sought to cut a wide swath" in enacting the statute, the defendant's activity of downloading sexually exploitative material off a peer-to-peer sharing network and making it accessible to others qualified as "publishing" and "distributing"; and (2) the trial court did not plainly err when it defined the terms "offers" pursuant to *People v. Rowe*, 2012 COA 90, ¶ 13, 318 P.3d 57, 60).

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

People in Interest of L.C., 2017 COA 82, ¶ 37, __ P.3d __ ("By using the disjunctive 'or' in section 18-6-803.5(1)(a), the General Assembly intended to describe alternative ways of committing the offense of violation of a protective order. Thus, violation of a protective order does not in every instance require proof that the accused contacted the protected person." (citations omitted)).

7-3:04 PUBLIC INDECENCY (KNOWING EXPOSURE)

People in Interest of D.C., 2019 COA 22, ¶¶ 8–9, 14, 439 P.3d 72, 74–75 (holding that, where the defendant exposed himself in a classroom in the Division of Youth Corrections, the evidence supported a finding that "the conduct may reasonably be expected to be viewed by members of the public" because many members of the community were routinely present in the school; further stating that "we see no reason why DYC teachers, staff, and juvenile residents are not 'members of the public'").

8-2:05 INTRODUCING CONTRABAND IN THE FIRST DEGREE (MAKING WHILE CONFINED) and 8-2:09 POSSESSION OF CONTRABAND IN THE FIRST DEGREE

People v. Jamison, 2018 COA 121, ¶ 49, 436 P.3d 569, 578 (holding that first-degree possession of contraband is a lesser included offense of first-degree

introducing contraband by making).

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Tee, 2018 COA 84, ¶¶ 47–49, 53, 446 P.3d 875, 884–85 (holding that, where the defendant falsely told a police officer that his car had been struck in a hit-and-run, the evidence supported a conviction for attempting to influence a public servant because the officer wrote reports as part of his official functions; but further holding that filing an accident report at a kiosk in the lobby did *not* support such a conviction because the defendant did not know that a technician approved reports from the kiosk and thus could not have intended to influence her actions).

8-7:08 RETALIATION AGAINST A WITNESS OR VICTIM

People v. Johnson, 2017 COA 11, ¶ 30, 446 P.3d 826, 831 ("[W]e conclude that section 18-8-706 applies only to retaliation against witnesses or victims because of their relationship to criminal, and not civil, proceedings.").

8-7:10 TAMPERING WITH A WITNESS OR VICTIM (TESTIMONY)

People v. Brooks, 2017 COA 80, ¶ 14, __ P.3d __ ("[T]he concept of attempt is built into the tampering statute—the crime is completed when a defendant 'intentionally attempts' to tamper with a victim or witness. . . . We conclude that no [crime for attempted tampering] exists because it would be illogical to recognize a crime premised on an attempt to attempt . . . ."), *aff'd on other grounds*, 2019 CO 75M, 448 P.3d 310.

9-1:10 DISORDERLY CONDUCT (COARSE AND OBVIOUSLY OFFENSIVE)

People in Interest of R.C., 2016 COA 166, ¶¶ 3, 18, 411 P.3d 1105, 1110 (The First Amendment bars the prosecution of a middle school student who drew a picture of an ejaculating penis on the mouth of a classmate's photo and then showed the drawing to others. "[T]he doctored photo [did not] tend[] to incite an immediate breach of the peace," as "speech that embarrasses or disgraces another is insufficient to qualify as fighting words. Even vulgar and insulting speech that is likely to arouse animosity or inflame anger, or even to provoke a forceful response from the other person, is not prohibited.").

9-1:54 VEHICULAR ELUDING and 42:14 RECKLESS DRIVING

People v. Dominguez, 2019 COA 78, ¶ 64, __ P.3d __ (recognizing that reckless

driving is a lesser included offense of vehicular eluding).

12-1:05 UNLAWFULLY CARRYING A CONCEALED WEAPON (KNIFE)

People in Interest of L.C., 2017 COA 82, ¶ 26, __ P.3d __ ("[B]y its plain meaning, 'about' necessarily enlarges the area in which a weapon may be concealed, encompassing a space close to, even if not directly on, the person.").

12-1:11 PROHIBITED USE OF A WEAPON (UNDER THE INFLUENCE) and 42:11.SP DRIVING UNDER THE INFLUENCE OR WHILE ABILITY IMPAIRED—SPECIAL INSTRUCTION (BLOOD OR BREATH ALCOHOL LEVEL)

People v. Koper, 2018 COA 137, ¶ 54, __ P.3d __ (holding that, where the defendant was charged with possessing a firearm while under the influence and requested an instruction tracking the statutory presumptions and inferences regarding driving under the influence, the court properly rejected the instruction because the presumptions and inferences are not incorporated into the possession statute).

12-1:16 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER

People v. Van Meter, 2018 COA 13, ¶ 43, 421 P.3d 1222, 1232 (noting that the pattern definition of "possession," *see* Instruction F:281, "mirrors the generally accepted meaning of the term 'possession' and the pattern instruction in the POWPO context").

18:01 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE and 18:57 UNAUTHORIZED POSSESSION OF A PRESCRIBED OR DISPENSED CONTROLLED SUBSTANCE

People v. Gonzales, 2017 COA 62, ¶ 15, 415 P.3d 846, 849 ("[W]e are unpersuaded that section 18-18-413 [(unauthorized possession of a prescribed substance)] is an affirmative defense to section 18-18-403.5 [(unlawful possession of a controlled substance)]. Rather, section 18-18-413 is itself a separate offense, and the exception for 'a person acting at the direction of the legal owner of the controlled substance' is an element the prosecution must disprove when charging someone with a violation of that section.").

42:02 DRIVING UNDER RESTRAINT (GENERAL) and 42:05 DRIVING AFTER REVOCATION PROHIBITED

People v. Wambolt, 2018 COA 88, ¶¶ 49, 63, 431 P.3d 681, 692, 694 (holding that driving under restraint is a lesser included offense of driving after revocation prohibited, and stating that the supreme court's holding in *Zubiate v. People*, 2017 CO 17, 390 P.3d 394, is no longer good law in light of *People v. Rock*, 2017 CO 84, 402 P.3d 472).

42:09 DRIVING UNDER THE INFLUENCE

People v. Gwinn, 2018 COA 130, ¶ 39, 428 P.3d 727, 736 ("[S]imilar to habitual criminal findings, prior DUI convictions constitute sentence enhancers that do not require a jury finding, rather than elements of the crime that do.").

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

DEFENSES

People v. Quezada-Caro, 2019 COA 155, ¶¶ 50–51, __ P.3d __ ("[A] trial court has [no] affirmative obligation to transform *any* tendered instruction into a theory of defense instruction. Rather, court's obligation is limited to either correcting a tendered *theory of defense* instruction or incorporating the substance of a tendered *theory of defense* instruction into the other jury instructions. . . . Quezada-Caro's tendered instruction did not set forth a theory of defense; it explained a term used in an elemental instruction. Because Quezada-Caro did not submit an instruction that set forth a theory of defense, the district court was not required to draft one on counsel's behalf.").

Status: Petition for certiorari pending as of 1/14/20.

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

People v. Flynn, 2019 COA 105, ¶¶ 36–38, 42, 49, __ P.3d __ (holding that, where the court used several hypotheticals to explain the concept of reasonable doubt to the jury, the court's comments did not lower the burden of proof because they were made only once and the court "repeatedly referred back to the appropriate standard definition of reasonable doubt"; nevertheless noting that "such instructions run the risk of confusing the jurors and may even lower the burden of proof or diminish the presumption of innocence").

Status: Petition for certiorari pending as of 1/14/20.

People v. Tibbels, 2019 COA 175, ¶¶ 25, 35, 40, __ P.3d __ (holding that, where the trial court analogized reasonable doubt to a "structurally significant" crack in a house's foundation, the remarks did not lower the prosecution's burden of proof; nevertheless "strongly discourag[ing] trial courts' use of everyday illustrations to explain reasonable doubt").

Status: Petition for certiorari pending as of 1/14/20.

E:11 SERIES OF ACTS IN A SINGLE COUNT

People v. Cooper, 2019 COA 21, ¶ 48, __ P.3d __ (holding that, because the allegations against the defendant "concerned a short timeframe, a single incident, and one victim," it was unlikely that jurors would disagree on which acts the defendant committed, meaning the defendant was not entitled to a unanimity instruction).

Status: Petition for certiorari pending as of 1/14/20.

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: Judgment affirmed on different grounds on 12/16/19; mandate not issued as of 1/14/20.

People v. Wester-Gravelle, 2018 COA 89, ¶ 30, __ P.3d __ (holding that, where the People charged the defendant with forging her supervisor's signature on three different shift charts over a three-week period, her conduct "amounted to multiple transactions that required either an election or a modified unanimity instruction").

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

E:11 SERIES OF ACTS IN A SINGLE COUNT and 6-4:01 CHILD ABUSE (KNOWINGLY OR RECKLESSLY)

People v. Archuleta, 2019 COA 64, ¶¶ 19, 22, __ P.3d __ (holding that, where the prosecution charged the defendant with committing child abuse resulting in death under all three alternative theories—"(1) by causing an injury to the child's life or health; (2) by permitting a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health; or (3) by engaging in a continued pattern of conduct that results in the kind of

mistreatment that ultimately results in death or serious bodily injury"—but did not elect which acts it was relying on, a modified unanimity instruction was required because "any jurors who found her guilty under the first [or second] theory needed to agree on the specific acts she committed that constituted the offense under that theory").

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

E:23 FINAL CONCLUDING INSTRUCTION

People v. Dyer, 2019 COA 161, ¶ 56, __ P.3d __ (holding that, where the prosecution charged the defendant with committing child abuse by engaging in a continuing course of conduct, the court did not need to give a modified unanimity instruction because "the jurors did not need to agree on the acts or omissions constituting the course of conduct").

Status: Mandate not issued as of 1/14/20.

E:23 FINAL CONCLUDING INSTRUCTION and H:11 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

People v. Mosely, 2019 COA 143, ¶¶ 6–8, 19–21, __ P.3d __ (considering a case where, after the court provided a self-defense instruction with both the provocation exception and the initial aggressor exception—along with the standard unanimity instruction—the jury asked whether it needed to "unanimously agree on at least one of the factors, e.g. #1 . . . [or] unanimously agree that individually at least one of the factors 1-4 was disproved," and the trial court responded that "you have to unanimously agree that the prosecution has disproven at least one of the numbered conditions" but that "there is no requirement that you unanimously agree on *which numbered condition* or conditions have been disproven"; holding that "*absent the juror question here*, the unanimity instruction given to the jurors was sufficient to advise them that they had to agree unanimously as to the applicability of either the provocation or initial aggressor exception to self-defense"; but further holding that the trial court's response lowered the prosecution's burden of proof because "some jurors might have concluded that the provocation exception applied, while others concluded that the initial aggressor instruction applied," even though the two exceptions are mutually exclusive; finally stating that "if the prosecution argues the applicability of both exceptions, the trial court *in its discretion* may also provide the jurors with special verdict forms indicating whether they unanimously agree that the prosecution disproved one exception or the other or neither" and "may also give special verdict forms on the first two elements of self-defense" (emphases added)).

Status: Petition for certiorari pending as of 1/14/20.

F:87 DEADLY PHYSICAL FORCE

People v. Ramirez, 2019 COA 16, ¶ 27, __ P.3d __ (holding that the court plainly erred when it instructed the jury on deadly physical force when the victim did not die).

Status: Petition for certiorari pending as of 1/14/20.

F:117 EMERGENCY DRUG OR ALCOHOL OVERDOSE EVENT and H:32 REPORTING AN EMERGENCY DRUG OR ALCOHOL OVERDOSE EVENT

People v. Harrison, 2019 COA 63, ¶¶ 19–22, __ P.3d __ (holding that the statute defines an overdose event *objectively*, meaning that where a Burger King manager discovered the defendant unresponsive and called 911 but did not *subjectively* believe that the defendant was suffering from an overdose, the prosecution had nevertheless failed to disprove that a good-faith report of an overdose had occurred).

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

F:306.5 PUBLIC SERVANT (BRIBERY AND CORRUPT INFLUENCES; ABUSE OF PUBLIC OFFICE) and 8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Knox, 2019 COA 152, ¶ 26, __ P.3d __ (holding that police officers are public servants for purposes of the crime of attempting to influence a public servant).

Status: Mandate not issued as of 1/14/20.

G2:01 CRIMINAL ATTEMPT

People v. Jackson, 2018 COA 79, ¶ 82, __ P.3d __ (holding that, when the defendant drove to the victim's apartment and fired five shots, the evidence did not support two convictions for attempted murder because "the five shots were fired in rapid succession, at the same location, not separated by time or any intervening events, and without a new volitional departure").

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

H:02 EFFECT OF IGNORANCE OR MISTAKE UPON CULPABILITY (MISTAKEN BELIEF OF LAW)

People v. Whisler, 2019 COA 126, ¶ 14, __ P.3d __ (holding that, where the defendant was charged with possession of a weapon by a previous offender and argued that he committed a mistake of law because he had passed background checks when purchasing other weapons, he wasn't entitled to assert the defense because he "present[ed] [no] evidence of an administrative regulation, order, or grant of permission by anyone authorized or empowered to give such permission that would have permitted him to possess firearms").

Status: Petition for certiorari pending as of 1/14/20.

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

People v. Monroe, 2018 COA 110, ¶¶ 13, 25, __ P.3d __ (holding that, where the prosecution "raised the issue of the availability of retreat five separate times during its closing and rebuttal arguments," the court abused its discretion in failing to sustain defense counsel's objection and essentially "permitted the jury to believe that it could consider whether a reasonable person would have retreated, in direct contravention of the instruction that no such duty exists").

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

People v. Galvan, 2019 COA 68, ¶¶ 21, 35, 42, 50–52, __ P.3d __ (stating that the prosecution must present "some evidence" to warrant giving the provocation exception, and holding that the First Amendment did not prohibit the jury from considering the defendant's words as provocation because his words could be construed as inviting the victims to attack him; further holding that the provocation language was not erroneous when it did not specify which victim it applied to; finally holding that the court did not err in refusing to give the defendant's tendered "no duty to retreat" instruction because it gave the model instruction, which already incorporates "without first retreating" language).

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

H:30 DURESS

People v. Leyba, 2019 COA 144, ¶ 52, __ P.3d __ (holding that, where the record was "devoid of any evidence to support a finding that [the defendant's]

fellow gang member[] threatened him," the trial court properly refused to instruct the jury on the affirmative defense of duress).

Status: Petition for certiorari pending as of 1/14/20.

J:03 COMPLICITY

People in Interest of B.D., 2019 COA 57, ¶¶ 38–39, __ P.3d __ (holding that *People v. Childress*, 2015 CO 65M, 363 P.3d 155, applies to the sentence enhancer for theft from an at-risk person, *see* Instruction 4-4:09.INT, meaning that "there must be evidence that the complicitor had an awareness" that the victim was an at-risk person or that such a person was present).

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

People v. Jackson, 2018 COA 79, ¶¶ 67–68, __ P.3d __ (rejecting the defendant's argument that the court should have provided separate complicity instructions for each offense because "the court instructed the jury that each count charged 'a separate and distinct offense' and that 'the evidence and the law applicable to each count had to be considered separately, uninfluenced by [the jury's] decision as to any other count'" (alteration in original)).

Status: Petition for certiorari granted on other grounds. Oral arguments not set as of 1/14/20.

3-1:01 MURDER IN THE FIRST DEGREE (AFTER DELIBERATION)

People v. Jackson, 2018 COA 79, ¶ 83, __ P.3d __ (holding that, where the defendant was convicted of (1) attempted murder after deliberation of one victim, and (2) first-degree murder after deliberation of a different victim, the attempted murder conviction must be vacated under the doctrine of transferred intent).

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

3-2:01 ASSAULT IN THE FIRST DEGREE (DEADLY WEAPON) and 3-2:30 MENACING

People v. Procasky, 2019 COA 181, ¶¶ 14–15, 42, __ P.3d __ (holding that, where an attempted first-degree assault instruction stated that the defendant must have acted "with intent" but did not state that he must have acted "with the specific intent to cause serious bodily injury," the trial court erred, but

reversal was not required; further holding that felony menacing and attempted first-degree assault do not merge).

Status: Petition for rehearing pending as of 1/14/20.

3-2:09 ASSAULT IN THE SECOND DEGREE (BODILY INJURY WITH A DEADLY WEAPON) and 3-2:16.7 ASSAULT IN THE SECOND DEGREE (RESTRICT BREATHING)

People v. Lee, 2019 COA 130, ¶ 2, __ P.3d __ (holding that a defendant alleged to have strangled the victim may not be charged with both second-degree assault—bodily injury with a deadly weapon and second-degree assault—restrict breathing).

Status: Petition for certiorari pending as of 1/14/20.

3-2:11 ASSAULT IN THE SECOND DEGREE (RECKLESS), 3-2:16 ASSAULT IN THE SECOND DEGREE (INTENT TO CAUSE BODILY INJURY; CAUSING SERIOUS BODILY INJURY), and 3-2:21 ASSAULT IN THE THIRD DEGREE (NEGLIGENCE AND DEADLY WEAPON)

People v. Rigsby, 2018 COA 171, ¶¶ 13–14, __ P.3d __ (holding that "separate convictions for both knowing and negligent mental states for the same act cannot be sustained because a defendant cannot consciously act and also fail to perceive a risk simultaneously," meaning the defendant could not be guilty of both second-degree assault—which requires recklessness or intent—and third-degree assault with a deadly weapon—which requires criminal negligence).

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

3-2:32 EXTORTION (UNLAWFUL ACT)

People v. Knox, 2019 COA 152, ¶ 51, __ P.3d __ ("[T]he threat of litigation does not constitute criminal extortion.").

Status: Mandate not issued as of 1/14/20.

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

People v. McEntee, 2019 COA 139, ¶ 24, __ P.3d __ (holding that the phrase "another person" in section 18-3-404(1.5), C.R.S., "is to be viewed from the

perspective of the victim," meaning that the statute "does not require the participation of an additional person beyond the victim and the defendant").

Status: Petition for certiorari pending as of 1/14/20.

4-3:01 ROBBERY, 4-3:03 AGGRAVATED ROBBERY (KILL, MAIM, OR WOUND), and 4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)

People v. Leyba, 2019 COA 144, ¶ 48, __ P.3d __ (holding that, where the defendant was charged with aggravated robbery and "[t]he undisputed evidence showed the use of force during the incident," the trial court correctly refused to instruct the jury on the lesser nonincluded offense of theft).

Status: Petition for certiorari pending as of 1/14/20.

4-4:01 THEFT (INTENT TO PERMANENTLY DEPRIVE)

People v. Halaseh, 2018 COA 111, ¶¶ 14, 20, __ P.3d __ (holding that, where the court instructed the jury that the defendant must have "knowingly obtained or exercised control over anything of value which was the property of *another* person," the court did not err in specifically defining the word "another" (emphasis added)).

Status: Petition for certiorari granted. Oral arguments held on 10/16/19.

4-4:14 THEFT (MULTIPLE THEFTS; AGGREGATED AND CHARGED IN THE SAME COUNT)

People v. Halaseh, 2018 COA 111, ¶ 22, __ P.3d __ (holding that the court erred when it failed to instruct the jury "as to both the prescribed units of prosecution and the proper values required to be found within those units").

Status: Petition for certiorari granted. Oral arguments held on 10/16/19.

5-1:03 FORGERY (LEGAL RIGHT, INTEREST, OBLIGATION, OR STATUS) and 5-1:10 SECOND DEGREE FORGERY

People v. Hoggard, 2017 COA 88, ¶ 32, __ P.3d __ (holding that second-degree forgery is a lesser included offense of felony forgery).

Status: Petition for certiorari granted. Oral arguments held on

10/15/19.

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

People v. Dyer, 2019 COA 161, ¶¶ 51–52, __ P.3d __ (holding that, where medical experts testified that the child was "medically neglected," the defendant was not entitled to an instruction differentiating medical neglect from child abuse).

Status: Mandate not issued as of 1/14/20.

6-4:18 SEXUAL EXPLOITATION OF A CHILD (PUBLICATION) and 6-4:19 SEXUAL EXPLOITATION OF A CHILD (POSSESSION OR CONTROL)

People v. Meils, 2019 COA 180, ¶¶ 43–44, __ P.3d __ (holding that, because section 18-6-403(3) is written in the disjunctive, it prescribes alternative ways of committing the same offense, meaning the defendant could not be convicted of "both creating and possessing sexually exploitative material").

Status: Mandate not issued as of 1/14/20.

6-4:23.INT SEXUAL EXPLOITATION OF A CHILD—INTERROGATORY (QUANTITY)

People v. Bott, 2019 COA 100, ¶¶ 63, 69, __ P.3d __ (holding that, where the defendant possessed a memory card containing 294 images of child pornography, the prohibition against double jeopardy barred him from being convicted for twelve different counts of sexual exploitation of a child because "the unit of prosecution is an act of possession, not an individual image").

Status: Petition for certiorari granted. Oral arguments not set as of 1/14/20.

7-4:01 SOLICITING FOR CHILD PROSTITUTION (ANOTHER) and 7-4:13.SP CHILD PROSTITUTION CRIMES—SPECIAL INSTRUCTION (IGNORANCE OR REASONABLE BELIEF IS NOT A DEFENSE)

People v. Ross, 2019 COA 79, ¶¶ 30, 49, __ P.3d __ (disagreeing with *People v. Emerterio*, 819 P.2d 516 (Colo. App. 1991), *rev'd on other grounds sub nom. People v. San Emerterio*, 839 P.2d 1161 (Colo. 1992), and holding that the phrase "for the purpose of prostitution" equates to the mental state of "intentionally"; further holding that, although it is no defense that the defendant "believed that the prostitute was of legal age," the prosecution must

still prove that the defendant specifically intended to solicit another "for the purpose of child prostitution"

Status: Petition for certiorari pending as of 1/14/20.

8-2:10.INT POSSESSION OF CONTRABAND IN THE FIRST DEGREE—INTERROGATORY (DANGEROUS INSTRUMENT)

People v. Tibbels, 2019 COA 175, ¶¶ 48–51, __ P.3d __ (holding that, where the trial court did not give this interrogatory but did define "contraband" as "a dangerous instrument"—and then defined "dangerous instrument" according to its statutory definition, which is incorporated into the model interrogatory—the defendant's conviction of the sentence enhancer was proper because, "by defining dangerous instrument consistently with the statute, the court ensured that the jury unanimously found that the 'contraband' element was a dangerous instrument, thereby obviating the need for the special interrogatory"; rejecting the defendant's contention that the model instructions require an interrogatory in all cases).

Status: Petition for certiorari pending as of 1/14/20.

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Hoggard, 2017 COA 88, ¶¶ 40, 46, __ P.3d __ (holding that "the mens rea requirement of 'intent' applies to each element of the offense," meaning the trial court erred when it listed "with the intent" after the elements of "attempted to influence a public servant" and "by means of deceit").

Status: Petition for certiorari granted. Oral arguments held on 10/15/19.

8-4:12 EMBEZZLEMENT OF PUBLIC PROPERTY

People v. Berry, 2017 COA 65, ¶ 30, __ P.3d __ (holding that "'public moneys or public property' in section 18-8-407 means (and is limited to) money or property owned by the public (i.e., the state or one of its political subdivisions)").

Status: Petition for certiorari granted. Oral arguments held on 10/17/19.

9-1:36 HARASSMENT (COMMUNICATION)

People in Interest of R.D., 2016 COA 186, ¶¶ 11, 20, __ P.3d __ (holding that the harassment statute was unconstitutional as applied because (1) "[w]hile the language of [the defendant's] Tweets was violent and explicit, the context in which the statements were made mitigated their tone," meaning they were not true threats, and (2) "because [the defendant] was not in close physical proximity to [the recipient] at the time of the incident, his Tweets could not have constituted fighting words").

Status: Petition for certiorari granted. Oral arguments held on 5/7/19.

12-1:07 UNLAWFUL POSSESSION OF A WEAPON ON SCHOOL, COLLEGE, OR UNIVERSITY GROUNDS

People v. Procasky, 2019 COA 181, ¶ 31, __ P.3d __ (holding that, where the defendant pulled into a school parking lot in response to police activating their sirens, he was not acting unlawfully, meaning he could not be found guilty of unlawfully knowingly and unlawfully possessing a weapon on school grounds).

Status: Petition for rehearing pending as of 1/14/20.

42:09 DRIVING UNDER THE INFLUENCE

People v. Quezada-Caro, 2019 COA 155, ¶ 24, __ P.3d __ (agreeing with *People v. Gwinn*, 2018 COA 130, 428 P.3d 727, and holding that "prior DUI convictions are a sentence enhancer rather than an element of felony DUI").

Status: Petition for rehearing pending as of 1/14/20.

42:20 ELUDING OR ATTEMPTING TO ELUDE A POLICE OFFICER

People v. Procasky, 2019 COA 181, ¶ 25, __ P.3d __ (holding that, where police engaged their lights and sirens and the defendant then drove two blocks before pulling over, the evidence was insufficient to convict him of eluding a police officer).

Status: Petition for rehearing pending as of 1/14/20.