

MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated January 19, 2022

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

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

Tibbels v. People, 2022 CO 1, ¶ 3, __ P.3d __ (holding that, where the trial court “equated the concept of reasonable doubt to the doubt that a prospective homebuyer would have upon observing a structurally significant, floor-to-ceiling crack in the home’s foundation,” it was “reasonably likely that the jury understood the court’s statements to allow a conviction on a standard lower than beyond a reasonable doubt,” meaning the court committed structural error).

Pettigrew v. People, 2022 CO 2, ¶¶ 14-17, 46-47, __ P.3d __ (discussing various statements that the trial court made in an effort to explain reasonable doubt – including (1) distinguishing between finding a defendant “innocent” versus “not guilty,” (2) criticizing the model instruction as “a little inadequate,” (3) analogizing the concept to disproving a juror’s birthday, and (4) answering a juror’s question about the lack of certain charges by stating, “Maybe there’s not enough evidence to charge him with that . . . we try people when there’s evidence to support the charges” – and holding that, although the court’s comments were “problematic and, perhaps, ill-advised,” they didn’t lower the prosecution’s burden of proof; nevertheless discouraging trial courts from “using examples and analogies” in an attempt to further define reasonable doubt).

F:114 DWELLING and H:15 USE OF PHYSICAL FORCE, INCLUDING DEADLY PHYSICAL FORCE (INTRUDER INTO A DWELLING)

People v. Rau, 2022 CO 3, ¶¶ 25, 27, __ P.3d __ (holding that the basement of the defendant’s apartment complex was part of his “dwelling” because, similar to the attached garage discussed in *People v. Jiminez*, 651 P.2d 395 (Colo. 1982), it “was part of the building that [he] used for habitation” and its uses (including “control of the water and heat supply and the storage of household items”) were “incidental to and part of the use of [his] residence”; overruling *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1992),

to the extent it held otherwise).

F:125 ENTERPRISE and 17:03 COLORADO ORGANIZED CRIME CONTROL ACT (EMPLOYED BY, OR ASSOCIATED WITH, AN ENTERPRISE)

McDonald v. People, 2021 CO 64, ¶¶ 4, 59, 494 P.3d 1123, 1126, 1134 (holding that, to qualify as an “associated-in-fact enterprise” under COCCA, the enterprise must have “(1) a minimum amount of structure – namely, a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the associates to pursue the enterprise’s purpose – and (2) an ongoing organization of associates, functioning as a continuing unit, that exists separate and apart from the pattern of racketeering activity in which it engages”; further holding that the trial court erred when it instructed the jury on the statutory definition of “enterprise” “without further explaining the structural features necessary for associated-in-fact enterprises”).

F:332 SERIOUS BODILY INJURY

People v. Vigil, 2021 CO 46, ¶ 16, 488 P.3d 1150, 1154 (“[T]he facts of the actual injury control the substantial risk of death determination under section 18-1-901(3)(p), *not* the risk generally associated with the type of conduct or injury in question.”).

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

People v. Mosely, 2021 CO 41, ¶ 19, 488 P.3d 1074, 1080 (“Because a defendant has a right only to a unanimous general verdict and the jury need not unanimously agree on the means by which a particular element of an offense has been established, and because self-defense is treated as an additional element that the prosecution bears the burden of disproving, we conclude that the jury need not unanimously agree on the *means* by which self-defense is disproved. In other words, so long as the jury unanimously agrees that self-defense was disproven beyond a reasonable doubt, it need

not be unanimous as to the specific reason.”); *see also id.* at ¶ 23 n.7 (stating that, because the defendant “was charged with crimes based on a single incident,” he was not entitled to “a special jury instruction requiring unanimity on which of multiple acts occurred”).

3-2:20 ASSAULT IN THE THIRD DEGREE (KNOWINGLY OR RECKLESSLY) and 6.5:03 CRIMINAL NEGLIGENCE RESULTING IN BODILY INJURY TO AN AT-RISK PERSON

Thomas v. People, 2021 CO 84, ¶¶ 49–52, __ P.3d __ (holding that, where the defendant injured an at-risk person through a single act, he couldn’t be convicted of both third-degree assault of an at-risk person and negligently injuring an at-risk person; declining to consider whether negligently injuring an at-risk person is a lesser included offense of third-degree assault).

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

People v. Vidauri, 2021 CO 25, ¶¶ 2, 25, 486 P.3d 239, 240, 244 (adopting the “total payment” approach to a theft of public benefits case, and holding that, because an applicant isn’t entitled to *any* benefits “until she has submitted accurate information demonstrating as much,” *all* of the benefits that a defendant received after submitting false information qualified as being obtained by theft via deception).

8-1:03 RESISTING ARREST (ANY MEANS)

Thomas v. People, 2021 CO 84, ¶ 17, __ P.3d __ (holding that police effected the defendant’s arrest when they handcuffed him because they “applied a level of physical control over him that reasonably ensured that he would not leave,” meaning his subsequent conduct of “going limp” couldn’t be relevant to the charge of resisting arrest but could instead only be considered vis-à-vis potential charges of second-degree assault or escape).

9-1:33 HARASSMENT (PHYSICAL CONTACT)

Pearson v. People, 2022 CO 4, ¶ 1, __ P.3d __ (holding that self-defense can serve as an affirmative defense to harassment “so long as there is some credible evidence to allow a reasonable jury to find that they acted with intent to alarm” (footnote omitted)).

42:09 DRIVING UNDER THE INFLUENCE

Viburg v. People, 2021 CO 81M, ¶ 2, __ P.3d __ (holding that after Viburg’s felony DUI conviction was reversed on appeal – because the jury didn’t find the existence of his prior convictions, as required by *Linnebur v. People*, 2020 CO 79M, 476 P.3d 734 – double jeopardy principles didn’t bar his retrial for felony DUI).

II. Final Decisions of the Colorado Court of Appeals

DEFENSES

People v. Martinez, 2020 COA 141, ¶¶ 83–86, 486 P.3d 412, 427 (considering a case where the defendant tendered a lengthy theory of defense instruction which concluded that “there wasn’t anything about [the victim’s] words or physical demeanor to indicate to [the defendant] that she was not fully aware of what she was saying [or] doing,” and the trial court modified it to simply read that “[i]t is Mr. Martinez’s theory of the case that . . . [the victim] engaged in a consensual sexual relationship with him”; holding that the trial court didn’t err in modifying the tendered instruction because it was argumentative, it wasn’t general or brief, and it merely retained portions of the evidence that were favorable to the defendant; noting that the defendant “was not entitled to a theory of defense instruction that unduly emphasized his trial testimony,” and that the trial court properly “excised the problematic components of [the] tendered instruction” while still providing the substance of his theory of defense).

B:01 INTRODUCTORY REMARKS, JUROR QUALIFICATIONS, AND

JURY SELECTION

People v. Blassingame, 2021 COA 11, ¶¶ 20–22, 26, 488 P.3d 1184, 1189–90 (holding that, where a prospective juror “express[ed] genuine concern about whether her own traumatic experiences would color her ability to evaluate the evidence without favoring the prosecution” and indicated that she “would struggle to follow the instructions and evaluate the competing stories without relying on her preconceived notions about the credibility of sexual assault victims,” the trial court erred in denying defense counsel’s challenge for cause because “[a] prospective juror does not need to unequivocally state her partiality for one side to be deemed unfit to serve on a jury”).

E:01 DUTIES OF JUDGE AND JURY

People v. Scott, 2021 COA 71, ¶¶ 21, 25, 494 P.3d 651, 657–58 (holding that there is no constitutional right to jury nullification, meaning the trial court did not err when it forbade the defendant from testifying “about the history and concept of jury nullification”).

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

People v. Knobee, 2020 COA 7, ¶¶ 18, 38, 490 P.3d 543, 546, 549 (holding that, where the court analogized reasonable doubt to “a standard that we use a lot of times . . . when we do important things in our lives, like buying a home, or choosing doctors,” the court “improperly trivialized the prosecution’s burden of proof”).

E:05 CREDIBILITY OF WITNESSES

People v. McCants, 2021 COA 138, ¶¶ 42, 46, __ P.3d __ (holding that, where the trial court gave this model instruction, it didn’t abuse its discretion in refusing to give the defendant’s tendered instruction that a police officer’s ability to identify a person is no more reliable than a layperson’s).

E:11 SERIES OF ACTS IN A SINGLE COUNT

People v. Abdulla, 2020 COA 109M, ¶¶ 54–55, 486 P.3d 380, 391–92 (considering a case where the court instructed the jury on both the charged offense of sexual assault and the lesser included offense of unlawful sexual contact, but where the unanimity instruction only referenced the charge of sexual assault; holding that, while “[i]t certainly would have been better for the unanimity instruction to have stated explicitly that it applied to both the greater and lesser offense,” the court did not plainly err).

People v. Cooper, 2019 COA 21, ¶ 48, 490 P.3d 420, 428 (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), *rev’d on other grounds*, 2021 CO 69, 496 P.3d 430.

E:14 LESSER-INCLUDED OFFENSES

People v. Abdulla, 2020 COA 109M, ¶¶ 14, 16, 486 P.3d 380, 386 (stating that the court may give a lesser included offense instruction where the lesser offense is “(1) easily ascertainable from the charging instrument, and (2) not so remote in degree from the offense charged that the prosecution’s request appears to be an attempt to salvage a conviction from a case which has proven to be weak,” quoting *People v. Cooke*, 525 P.2d 426, 429 (Colo. 1974), but holding that in addition, there must still be “a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser included offense”).

E:18 SUPPLEMENTAL INSTRUCTION – WHEN JURORS FAIL TO AGREE

People v. Black, 2020 COA 136, ¶¶ 8, 19–22, 24, 27, 32, 490 P.3d 891, 894, 896–98 (considering a case where the deliberating jury submitted a question that read, “What happens if we can’t come to a unanimous decision on only one charge?” and rather than submitting a modified *Allen* instruction,

the court “simply instructed to the jury to ‘please continue with your deliberations at this time’”; stating that, when the jury indicates that it cannot agree, a trial court must first “conduct a threshold inquiry” to determine “the likelihood of progress towards a unanimous verdict if deliberations continue,” and that (1) “[i]f progress is likely, there is no impasse and the trial court can give the jury an unqualified instruction to continue deliberating,” (2) if progress is unlikely, “the court may, in its discretion, give a modified-*Allen* instruction,” and (3) “if progress towards a verdict is not just unlikely but is impossible, even a modified-*Allen* instruction may be impermissibly coercive”; holding that the trial court’s failure to conduct the threshold inquiry in this case constituted reversible error, and in so holding disagreeing with *People v. Munsey*, 232 P.3d 113 (Colo. App. 2009)).

F:337 SEXUAL CONTACT

People v. Abdulla, 2020 COA 109M, ¶ 2, 486 P.3d 380, 384 (holding that “striking a person’s intimate parts with an implement or object, rather than with a part of the actor’s own body, can constitute ‘touching’” under the statutory definition of “sexual contact”).

G2:09 CRIMINAL SOLICITATION

People v. Manzanares, 2020 COA 140M, ¶ 1, 490 P.3d 919, 922 (holding that the unit of prosecution in the solicitation statute “is based on each person solicited, not the number of victims targeted”).

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

People v. Knapp, 2020 COA 107, ¶¶ 23, 25, 487 P.3d 1243, 1251 (“A provocation instruction should be given if (1) self-defense is an issue in the case; (2) the victim made an initial attack on the defendant; and (3) the defendant’s conduct or words were intended to cause the victim to make the attack and provide a pretext for injuring the victim. . . . [T]here is some

uncertainty about what quantum of proof is required to give an instruction on an exception to an affirmative defense like self-defense.”).

People v. Roberts-Bicking, 2021 COA 12, ¶¶ 13–16, 23–27, 41–45, 50, 490 P.3d 1128, 1132–35, 1137, 1139 (considering a case where the defendant requested instructions on both multiple assailants and apparent necessity, and the trial court refused to give those instructions but *did* respond to the jury’s question about “reasonable belief” by instructing the jury that “you are to apply an objective standard based on what a reasonable person in [the defendant’s] situation would have believed or done” and that “you are to consider the totality of the circumstances”; recognizing that, per *Riley v. People*, 266 P.3d 1089 (Colo. 2011), a trial court need not always “specifically provide either a multiple assailant instruction or an apparent necessity instruction,” but stating that *People v. Jones*, 675 P.2d 9 (Colo. 1984), remains good law “to the extent it requires an explicit instruction that the jury must consider the totality of the circumstances”; holding that Instruction H:11 “fails to adequately instruct the jury to consider the totality of the circumstances in a multiple assailant scenario,” but that the trial court’s supplemental instruction “cured any deficiency” because it was virtually identical to the instruction in *Riley*; holding that a trial court need not instruct the jury that the provocation and initial aggressor exceptions are mutually exclusive because “the components of the [two] exceptions are no longer necessarily incompatible,” meaning no special unanimity instruction is required regarding such exceptions).

People v. Snider, 2021 COA 19, ¶¶ 17, 24, 491 P.3d 423, 430–31 (holding that, where the defendant “never admitted to engaging in conduct that could constitute second degree assault,” he was not entitled to a self-defense instruction).

H:30 DURESS

People v. Leyba, 2019 COA 144, ¶ 52, 490 P.3d 483, 495 (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).

H:68 MEDICAL MARIJUANA

People v. Cox, 2021 COA 68, ¶¶ 18–20, 493 P.3d 914, 917 (stating that “a statute that purports to add substantive elements to a defense defined in the constitution cannot trump the constitution,” and approving of the Committee’s decision (explained in Comment 6) not to add conditions found in section 18-18-406(3)(b)(I) to this affirmative defense; applying the same reasoning to conditions found in section 18-18-406(3.5), for which the Committee had not expressed an opinion (see Comment 7)).

CHAPTER 1.3: CRIME OF VIOLENCE SENTENCE ENHANCEMENT INTERROGATORIES

People v. Rodriguez, 2021 COA 38M, ¶ 19, 491 P.3d 547, 552 (holding that section 18-1.3-401(13)(a), C.R.S. – which provides for an increased sentence if the court finds that the victim was pregnant and the defendant knew or reasonably should have known that she was pregnant – requires “the fact of a victim’s pregnancy and the defendant’s knowledge of it” to be found by a jury beyond a reasonable doubt).

People in Interest of N.D.O., 2021 COA 100, ¶¶ 5, 20, 497 P.3d 1070, 1072, 1074 (holding that, where the trial court instructed the jury that the “theory of complicity” didn’t apply to the crime of violence interrogatories in a juvenile adjudication, the court erred because “complicitor liability can support a crime of violence finding in the adult context,” and “[n]either the complicity statute nor the Children’s Code indicates that complicitor liability applies any differently in juvenile delinquency proceedings than it does in adult criminal proceedings” (citing *People v. Swanson*, 638 P.2d 45, 50 (Colo. 1981), and *People in Interest of B.D.*, 2020 CO 87, 477 P.3d 143)).

3-1:07 MURDER IN THE SECOND DEGREE and 3-2:03 ASSAULT IN THE FIRST DEGREE (EXTREME INDIFFERENCE)

People v. Ornelas-Licano, 2020 COA 62, ¶ 21, 490 P.3d 714, 718 (rejecting the defendant’s argument that attempted second-degree murder is indistinguishable from first-degree assault (extreme indifference) – and

that his conviction for the former thus violated equal protection – and holding instead that the statutes do not proscribe the same conduct because “only one requires a substantial step toward the causation of another’s death”).

3-2:10 ASSAULT IN THE SECOND DEGREE (PEACE OFFICER, FIREFIGHTER, OR EMERGENCY MEDICAL SERVICE PROVIDER – BODILY INJURY) and 8-1:02 RESISTING ARREST (FORCE OR VIOLENCE)

People v. Snider, 2021 COA 19, ¶ 3, 491 P.3d 423, 428 (holding that resisting arrest is a lesser included offense of second-degree assault on a peace officer).

3-2:30 MENACING and 4-3:04 AGGRAVATED ROBBERY (WOUND, STRIKE, OR PUT IN FEAR)

People v. Sauser, 2020 COA 174, ¶ 117, 490 P.3d 1018, 1039 (holding that felony menacing is not a lesser included offense of aggravated robbery).

3-3:09.INT SECOND DEGREE KIDNAPPING – INTERROGATORY (USE, OR SUGGESTED USE, OF A DEADLY WEAPON)

People v. Knobee, 2020 COA 7, ¶ 62, 490 P.3d 543, 553 (stating that when the prosecution seeks the deadly-weapon sentencing enhancer for second-degree kidnapping, the court must instruct the jury that it must find “that the kidnapping was ‘accomplished by’ the use of a deadly weapon”).

3-3:18 INTERNET LURING OF A CHILD and 3-4:46 INTERNET SEXUAL EXPLOITATION OF A CHILD (EXPOSE OR TOUCH)

People v. Battigalli-Ansell, 2021 COA 52M, ¶ 43, 492 P.3d 376, 385 (“[T]he elements of these offenses do not require proof of a desire to have sexual contact with a juvenile. Rather, the crux of the offenses is that the defendant knew or believed he was *communicating* with a person under fifteen years of age. It is irrelevant whether . . . the defendant sought to

have sexual contact with the other person.”).

3-6:01 STALKING (CREDIBLE THREAT AND CONDUCT)

People v. Burgandine, 2020 COA 142, ¶ 28, 484 P.3d 739, 744 (holding that the term “contacts” in the stalking statute “includes phone and text message communications”).

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, 490 P.3d 483, 494 (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).

5-3:26 MONEY LAUNDERING (CONDUCTING OR ATTEMPTING)

People v. Nevelik, 2021 COA 30, ¶ 14, 491 P.3d 492, 494 (holding that, where the record clearly showed that the defendant “committed all money movements in the State of Texas” and “never traveled to, emailed, telephoned, or had any other contact with anyone in Colorado,” Colorado lacked jurisdiction over the money laundering charge).

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

People v. Abad, 2021 COA 6, ¶ 2, 490 P.3d 1094, 1098 (extending *People v. Bott*, 2020 CO 86, 477 P.3d 137, and holding that (1) “simultaneous possession of multiple sexually exploitative videos constitutes a single offense under section 18-6-403(3)(b.5),” and (2) “the fact that sexually exploitative material was found on three different electronic devices or storage sites, standing alone, does not establish factually distinct offenses justifying multiple convictions and punishments”).

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

People v. Delfeld, 2021 COA 131, ¶ 2, __ P.3d __ (“[W]here a defendant is serving an illegal sentence but hasn’t obtained a court order reversing or vacating the judgment of conviction, entering a new sentence, or modifying or dismissing the mandatory section 18-1-1001(1) protection order, and where the illegal portion of the sentence can’t be severed, the protection order remains in effect through the entire sentence and any violation of the order is punishable.”).

7-2:13 PIMPING

People v. Grosko, 2021 COA 28, ¶¶ 2-3, 30, 491 P.3d 484, 486, 489 (holding that pimping is a continuing offense, meaning the defendant could be convicted based on acts “that occurred both within and outside of the statute of limitations”; further holding that the unit of prosecution for pimping is “per person,” meaning a defendant “can be subject to individual charges of pimping per prostitute from whom he is deriving benefit as a result of their prostitution”).

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

People v. Houser, 2020 COA 128, ¶ 18, 490 P.3d 863, 869 (holding that the patronizing a prostituted child statute is not unconstitutionally vague).

8-1:02 RESISTING ARREST (FORCE OR VIOLENCE) and 8-1:03 RESISTING ARREST (ANY MEANS)

People v. Lowe, 2020 COA 116, ¶¶ 45, 47, 486 P.3d 397 (holding that “the unit of prosecution for resisting arrest is the number of *discrete volitional acts* of resisting arrest,” meaning that, where the defendant’s conduct “was a continuous course of action to avoid a single arrest that did not end until he was shot by” police, his multiple convictions must merge).

**8-1:02 RESISTING ARREST (FORCE OR VIOLENCE) and 8-1:05
OBSTRUCTING A PEACE OFFICER, FIREFIGHTER, EMERGENCY
MEDICAL SERVICES PROVIDER, RESCUE SPECIALIST, OR
VOLUNTEER**

People v. Snider, 2021 COA 19, ¶¶ 39, 51–52, 491 P.3d 423, 433–35 (considering a case where the defendant was charged separately with resisting arrest based on his conduct toward one officer and obstructing a peace officer based on his conduct toward a different officer, but the trial court’s elemental instructions didn’t specify a particular deputy; holding that the unit of prosecution for both crimes “is defined in terms of discrete volitional acts rather than the number of officers involved,” meaning the People “were not required to prove that Snider resisted or obstructed a particular officer, just that he resisted or obstructed *any* officer,” and thus the jury “was not required to unanimously agree on which officer was the target or recipient of his actions”).

**8-2:04 INTRODUCING CONTRABAND IN THE FIRST DEGREE
(INTRODUCTION INTO)**

People v. McClintic, 2020 COA 120M, ¶¶ 16–18, 29, 484 P.3d 724, 728 (stating that “active concealment of contraband upon involuntary entry to a detention facility may constitute an unlawful voluntary act giving rise to criminal liability,” but holding that, where the defendant voluntarily turned over marijuana to police while being booked, she could not have committed the crime of introducing contraband because her actions did not “amount to an unlawful voluntary act of concealment”; further stating that to be guilty of this crime, “a defendant whose entry into a detention facility is involuntary must either deny possession when asked or conceal or attempt to conceal the presence of contraband on his or her person”).

**+ 8-2:24.4 UNAUTHORIZED ABSENCE (TAMPERING WITH
MONITORING DEVICE)**

People v. Pennington, 2021 COA 9, ¶¶ 6, 12, 24, 28, 481 P.3d 1186, 1188–91 (applying *People v. Gregory*, 2020 COA 162, 479 P.3d 76, and approving of

the trial court’s decision to retroactively apply H.B. 20-1019, which provided that “the act of leaving and failing to return to a community corrections facility is no longer an escape and instead constitutes the new misdemeanor offense of unauthorized absence”; but further holding that the trial court violated separation of powers when it sua sponte amended Pennington’s charge from felony escape to misdemeanor unauthorized absence, and stating that the court instead “should have simply dismissed the felony escape charge”).

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Barnett, 2020 COA 167, ¶ 1, 490 P.3d 1000, 1001 (holding that an employee of ComCor Inc. can qualify as a public servant for purposes of this crime because the employee “is a person who performs a government function”).

18:19 DISPENSING, SELLING, DISTRIBUTING, OR MANUFACTURING MARIJUANA OR MARIJUANA CONCENTRATE and 18:21 CULTIVATING OR GROWING MARIJUANA

People v. Torline, 2020 COA 160, ¶ 1, 487 P.3d 1284, 1286 (holding that prosecuting a person who grows marijuana for religious reasons does not violate the Free Exercise Clause).

18:21 CULTIVATING OR GROWING MARIJUANA

People v. Garcia-Gonzalez, 2020 COA 166, ¶¶ 1, 15, 478 P.3d 1288, 1290 (holding that the term “land” includes “the property surrounding a residence,” but that it *excludes* “an enclosed, locked space on residential property” such as a garage).

18:22.3 CULTIVATING OR GROWING MARIJUANA (MORE THAN TWELVE PLANTS)

People v. Garcia-Gonzalez, 2020 COA 166, ¶ 19, 478 P.3d 1288, 1291

(“Nothing in the text of section 18-18-406(3)(a)(II) immunizes a residential grow operation from potentially violating other sections of the code.”).

42:09 DRIVING UNDER THE INFLUENCE

People v. Tun, 2021 COA 34, ¶¶ 11-18, 486 P.3d 490, 494-95 (rejecting the defendant’s argument that the felony DUI statute violates equal protection because it allows for harsher punishment than section 42-4-1307(6), C.R.S.).

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

D:12 OUT OF COURT STATEMENTS – CHILD DECLARANT

People v. Chirinos-Raudales, 2021 COA 37, ¶¶ 14-16, 22, __ P.3d __ (considering a case where the defendant was charged with sexual assault on a child – which applies to victims under eighteen – and the prosecution sought a sentence enhancer – which applies to victims under *fifteen* – and the victim was under fifteen at the time of the offense but over fifteen at the time of her forensic interview; holding that the substantive offense governed for purposes of the child hearsay statute, meaning the interview was admissible).

Status: Petition for certiorari granted. Oral arguments not set as of 1/18/22.

People v. Daley, 2021 COA 85, ¶¶ 74, 80, __ P.3d __ (holding that, where the defendant asked the trial court to give “the statutory child hearsay instruction,” the trial court properly refused because “no testimony was admitted under the child hearsay statute”).

Status: Petition for certiorari pending as of 1/18/22.

E:01 DUTIES OF JUDGE AND JURY

People v. Rodriguez, 2022 COA 11, ¶¶ 37, 42, __ P.3d __ (holding that, where the court told the jury, “You have to follow the law,” the court “did not tell

the jurors that they did not have the power to nullify” and thus didn’t commit instructional error (citing COLJI-Crim. E:01)).

Status: Mandate not issued as of 1/18/22.

E:11 SERIES OF ACTS IN A SINGLE COUNT

People v. Hines, 2021 COA 45, ¶¶ 51-52, __ P.3d __ (holding that a modified unanimity instruction wasn’t required because “the prosecution established that Hines had engaged in a continuing course of conduct constituting a single criminal transaction,” i.e., “[e]ach of the discrete acts was committed by Hines with an intent to achieve the objective of inducing the victim to engage in commercial sexual activity for his benefit”).

Status: Petition for certiorari denied on 1/10/22; mandate not issued as of 1/18/22.

E:14 LESSER-INCLUDED OFFENSES

People v. Pellegrin, 2021 COA 118, ¶ 68, __ P.3d __ (interpreting section 18-1-408(5)(c) – which provides that one offense is included in another when it differs “only in the respect that a less serious injury . . . to the same person . . . or a lesser kind of culpability suffices to establish its commission – and holding that “the word ‘or’ in subsection (5)(c) is exclusive,” meaning “an offense is a lesser included one only where the lesser offense differs in the degree of injury . . . or in the kind of culpability, but not both” (emphasis added by the court)).

Status: Petition for certiorari pending as of 1/18/22.

E:19 RETURN OF JURY AFTER POLLING

People v. Pellegrin, 2021 COA 118, ¶¶ 14, 23-26, __ P.3d __ (holding that, where a juror answered “Nope” during polling and the trial court instructed the jury to continue deliberations without asking whether the jury was deadlocked, the court didn’t abuse its discretion because (1) the court’s instruction wasn’t coercive, (2) the court “learned only that the

verdict was not unanimous, not that the jury was deadlocked,” and (3) the court reasonably found that the juror “was unlikely to be bullied into a guilty verdict”).

Status: Petition for certiorari pending as of 1/18/22.

F:88 DEADLY WEAPON

People v. Strickler, 2022 COA 1, ¶ 19, __ P.3d __ (holding that fire can be a deadly weapon under section 18-1-901(3)(e)(II) for crime-of-violence purposes).

Status: Mandate not issued as of 1/18/22.

F:195 KNOWINGLY

People v. Rodriguez, 2022 COA 11, ¶¶ 43, 48, __ P.3d __ (holding that, where the prosecutor said during closing that (1) “[a] person is acting knowingly when they are aware of what they are doing, as opposed to say, sleep walking,” and (2) the defendant “was awake, and he knew what he was doing,” the comments were “perhaps a bit hyperbolic” but were “not so far from the true definition of knowingly as to constitute obvious misconduct”).

Status: Mandate not issued as of 1/18/22.

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

People v. Garcia, 2021 COA 65, ¶¶ 44, 47-49, __ P.3d __ (holding that, where Garcia argued heat of passion and the trial court instructed the jury that he was *not* asserting self-defense, the court didn’t abuse its discretion because the instruction “did not comment on evidence adduced at trial” but “simply reinforced Garcia’s position and said nothing about the defense of heat of passion”; noting that the court issued the instruction “after the trial court found that Garcia’s testimony had made the issue of whether Garcia

was claiming self-defense confusing,” meaning the instruction “clarified that self-defense was not a defense that had been offered by Garcia”).

Status: Petition for certiorari pending as of 1/18/22.

H:64 POSSESSION OF A WEAPON BY A PREVIOUS OFFENDER – CHOICE OF EVILS

People v. Hasadinratana, 2021 COA 66, ¶¶ 3, 26, __ P.3d __ (holding that, to the extent *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011), “stands for the proposition that defendants charged with POWPO are entitled to assert the affirmative defense of choice of evils based solely on a showing that they possessed a firearm while walking in what is generally known as a high-crime neighborhood,” it was overruled by *People v. Carbajal*, 2014 CO 60, ¶ 21, 328 P.3d 104, 109, which approved of a choice of evils instruction explaining that the defense applied where the defendant “possessed a firearm for the purpose of defending himself, home, or property from what he reasonably believed to be a threat of imminent harm”; further holding that, because *DeWitt* was no longer good law, a defendant can’t raise the choice of evils defense where he “showed only that he possessed a firearm while walking in what is generally known as a high-crime neighborhood” because “[t]hat scenario, without more, does not show a threat of imminent harm”).

Status: Petition for certiorari pending as of 1/18/22.

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

People v. Garcia, 2021 COA 80, ¶¶ 8, 16, 18, __ P.3d __ (considering a case where the trial court refused to give the defendant’s tendered instruction defining “universal malice” as “that depravity of the human heart which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim”; stating that “our supreme court has refined the concept [of universal malice] to mean a willingness to take life indiscriminately” (citing *People v. Anderson*, 2019 CO 34, ¶ 15, 442 P.3d 76, 79); holding that the court’s elemental instruction tracking the statute was adequate because “the statutory language makes clear that the

actor's unrestricted and unjustified willingness to harm others includes the potential to cause death").

Status: Petition for certiorari pending as of 1/18/22.

People v. Draper, 2021 COA 120, ¶¶ 29-31, 35, 39, __ P.3d __ (disagreeing with *Garcia*, and holding that, although the trial properly refused to give the defendant's proffered definition of "universal malice," it nonetheless erred in refusing to define "universal malice" pursuant to *Candelaria v. People*, 148 P.3d 178, 181 (Colo. 2006) – that is, as "conduct that, by its very nature and the circumstances of its commission, evidences a willingness to take human life indiscriminately, without knowing or caring who the victim may be or without having an understandable motive or provocation" – because the term "does not have a common meaning or understanding").

Status: Petition for certiorari pending as of 1/18/22.

3-2:09 ASSAULT IN THE SECOND DEGREE (BODILY INJURY WITH A DEADLY WEAPON) and 3-2:21 ASSAULT IN THE THIRD DEGREE (NEGLIGENCE AND DEADLY WEAPON)

People v. Valera-Castillo, 2021 COA 91, ¶ 52, __ P.3d __ ("Third degree assault merges with second degree assault where only a single act constituting one crime occurred. However, separate convictions do not violate double jeopardy if the evidence shows distinct and separate offenses." (citation omitted)).

Status: Petition for certiorari pending as of 1/18/22.

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

People v. Plemmons, 2021 COA 10, ¶¶ 8, 22, 42-43, __ P.3d __ (concluding that the term "harm" in section 18-3-203(1)(h) is ambiguous, but holding that the statute was not unconstitutionally vague; approving of the trial

court's instruction where it (1) defined "harm" as "psychological or emotional harm" that could include "[f]ear, [a]nxiety, [o]r any other type of significant distress that is based upon the danger of injury or infection from contact with bodily fluids," and (2) stated that the defendant "need not have acted with the intent to cause harm that is permanent or longlasting in nature, but the defendant's intent must have been to cause psychological or emotional harm that is not fleeting or minimal in nature" (formatting altered)).

Status: Petition for certiorari granted. Oral arguments not set as of 1/18/22.

3-4:57 FAILURE TO REGISTER AS A SEX OFFENDER (GENERAL)

People v. Dorsey, 2021 COA 126, ¶ 1, __ P.3d __ (holding that section 18-3-412.5(2)(a), which escalates the penalty for "any second or subsequent offense of failure to register as a sex offender," creates a sentence enhancer rather than an element of the offense).

Status: Petition for certiorari pending as of 1/18/22.

3-5:03 HUMAN TRAFFICKING FOR SEXUAL SERVITUDE

People v. Hines, 2021 COA 45, ¶ 34, __ P.3d __ ("[T]he phrase 'for the purpose of coercing' should not be 'construed to mean "with the effect of"' coercing. Rather, in this context, 'for the purpose of' indicates 'an anticipated result that is intended or desired.' To prove that Hines committed human trafficking, then, the prosecution had to present sufficient evidence that he enticed or recruited the victim . . . with the intent of coercing her to engage in commercial sexual activity." (citations omitted) (quoting *Colo. Ethics Watch v. City & Cnty. of Broomfield*, 203 P.3d 623, 625 (Colo. App. 2009))).

Status: Petition for certiorari denied on 1/10/22; mandate not issued as of 1/18/22.

3-6:03 STALKING (SERIOUS EMOTIONAL DISTRESS)

People v. Counterman, 2021 COA 97, ¶¶ 31, 67-73 & n.2, 103, 107, __ P.3d __ (recognizing that a court should analyze whether statements supporting a stalking charge are “true threats” by using the test set out in *People in Interest of R.D.*, 2020 CO 44, 464 P.3d 717; holding that even if the trial court erred in failing to sua sponte instruct the jury that it needed to find that Counterman’s statements were true threats, the error wasn’t obvious because no prior case squarely addressed “whether a defendant is automatically entitled to a jury instruction on true threats when facing a charge that may implicate his protected speech; declining to consider whether the court must provide such an instruction upon request, and stating that the court’s instruction on stalking, which tracked this model instruction, “adequately informed the jury of the guiding law for its decision”; separately holding that, where the trial court responded to a jury question by instructing the jury that the prosecution didn’t need to prove that the victim suffered emotional distress *within the date range charged*, the answer was a simple variance that didn’t prejudice Counterman because Counterman argued that the victim “didn’t experience *any* emotional distress at *any time* as a result of his statements”).

Status: Petition for certiorari pending as of 1/18/22.

3-6:03 STALKING (SERIOUS EMOTIONAL DISTRESS) and 9-1:36 HARASSMENT (COMMUNICATION)

People v. Pellegrin, 2021 COA 118, ¶¶ 3, 28, __ P.3d __ (holding that harassment is not a lesser included offense of stalking; further holding that the stalking statute isn’t unconstitutionally overbroad (citing *People v. Cross*, 127 P.3d 71 (Colo. 2006))).

Status: Petition for certiorari pending as of 1/18/22.

4-1:01 FIRST DEGREE ARSON and 1.3:01.INT CRIME OF VIOLENCE – INTERROGATORY (DEADLY WEAPON)

People v. Magana, 2020 COA 148, ¶¶ 3, 47, __ P.3d __ (holding that the use

of fire can serve as the basis for both a first-degree arson conviction and a crime of violence sentence enhancement; further holding that the unit of prosecution for first-degree arson is “the number of dwellings or structures burned”).

Status: Petition for certiorari granted. Oral arguments set for 2/8/22.

4-1:03 SECOND DEGREE ARSON

People v. Magana, 2020 COA 148, ¶¶ 48, 50, __ P.3d __ (rejecting the contention that the unit of prosecution for second-degree arson is the number of fires set; recognizing that “every separately identifiable piece of property damaged may not necessarily support its own charge,” but holding that the evidence supported two convictions when it showed that the defendant’s actions damaged two vehicles belonging to two different people).

Status: Petition for certiorari granted. Oral arguments set for 2/8/22.

4-1:06 FOURTH DEGREE ARSON

People v. Magana, 2020 COA 148, ¶ 52, __ P.3d __ (holding that the fourth-degree arson statute permits a separate charge “for each person placed in danger by a defendant’s fire or explosion”).

Status: Petition for certiorari granted. Oral arguments set for 2/8/22.

4-2:03 SECOND DEGREE BURGLARY and 9-1:33 HARASSMENT (PHYSICAL CONTACT)

People v. Wright, 2021 COA 106, ¶ 27, __ P.3d __ (holding that harassment is necessarily a “crime against another person,” meaning it can qualify as a predicate offense for second-degree burglary).

Status: Petition for certiorari pending as of 1/18/22.

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

People v. Rojas, 2020 COA 61, ¶ 30, __ P.3d __ (recognizing that section 18-4-401(4)(a) “permits, but does not require, the prosecution to aggregate the thefts and charge them in a single count”).

Status: Petition for certiorari granted on other grounds. Orally argued on 9/14/21.

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

People v. Vialpando, 2020 COA 42, ¶ 30, __ P.3d __ (“The prosecution was required to prove that Vialpando exercised control over the motor vehicle of another without authorization *or* by threat or deception. Because sufficient evidence was presented proving that Vialpando knowingly exercised control over [the victim’s] stolen vehicle without authorization, the prosecution was not also required to prove threat or deception.” (citation omitted)).

Status: Petition for certiorari granted on other grounds. Orally argued on 10/12/21.

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

People v. Curtis, 2021 COA 103, ¶¶ 28, 44, __ P.3d __ (holding that section 1-13-112, which prohibits someone from forging mail ballots, doesn’t prohibit the prosecution from charging someone who illegally filled out a ballot with general forgery under section 18-5-102(1)(d); further holding that felony forgery is not a lesser included offense of forging mail ballots).

Status: Petition for certiorari pending as of 1/18/22.

7-1:06 POSTING A PRIVATE IMAGE FOR HARASSMENT and F:285.6

PRIVATE INTIMATE PARTS

People v. Pellegrin, 2021 COA 118, ¶ 2, __ P.3d __ (holding that “‘breast of a female’ means any portion of the female breast”).

Status: Petition for certiorari pending as of 1/18/22.

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: Judgment reversed on other grounds, *see* 2022 CO 1; court of appeals follow-up action not taken as of 1/18/22.

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

People v. Caswell, 2021 COA 111, ¶ 20, __ P.3d __ (holding that section 18-9-202(2), which provides for a heightened sentence for a second or subsequent conviction, is a penalty enhancer that need not be found by a jury).

Status: Petition for certiorari pending as of 1/18/22.

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

People v. McBride, 2020 COA 111, ¶ 59, __ P.3d __ (“[W]here the defendant is not in exclusive possession of the car or premises in which [a firearm] is

found and there is no evidence aside from mere proximity linking the defendant to that [firearm], a conviction premised on knowing possession cannot stand. . . . [A]ny finding that the defendant knowingly possessed the object would necessarily be based on speculation.”).

Status: Petition for certiorari granted on other grounds. Oral arguments not set as of 1/18/22.

People v. Barajas, 2021 COA 98, ¶¶ 5, 10, 16, __ P.3d __ (holding that, where Barajas was charged with both drug possession and POWPO, the trial court didn’t abuse its discretion when it bifurcated the trial rather than conducting two entirely separate trials; further holding that requiring the same jurors to serve in multiple phases didn’t violate the Uniform Jury Selection and Service Act).

Status: Petition for certiorari pending as of 1/18/22.

12-1:34 PURCHASING OR OBTAINING A FIREARM FOR A PERSON WHO IS INELIGIBLE

People v. Johnson, 2021 COA 102, ¶¶ 17, 28-29, __ P.3d __ (rejecting Johnson’s argument that she couldn’t have purchased a firearm “for transfer to” an ineligible recipient because she didn’t play the role of middleman, and holding instead that the evidence was sufficient to support her conviction where Johnson and the ineligible recipient “shared possession of the firearm,” i.e., Johnson “purchased the firearm with the knowledge that [the ineligible recipient] . . . would access it to protect himself,” and “[t]his constituted a knowing purchase of a firearm for the purpose of ‘transferring’ it to an ineligible person”; further holding that, where the trial court refused to provide a further definition of “transfer,” no plain error occurred).

Status: Petition for certiorari pending as of 1/18/22.

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

FIREARM)

People v. Caimo, 2021 COA 134, ¶¶ 21, 23, __ P.3d __ (holding that, where the charging document only referred to possessing a deadly weapon in a vehicle but the jury instruction referred to possessing a deadly weapon either in a vehicle *or* in a manner that posed a risk to others, no plain error occurred because (1) there was overwhelming evidence “that there was a gun in the car,” and (2) there was *no* evidence that anyone “had access to the gun outside of the vehicle”).

Status: Petition for certiorari pending as of 1/18/22.