

MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated January 29, 2016

Introduction

The Committee intends to keep COLJI-Crim. (2015) current by periodically publishing new editions or supplements. During the periods between these formal publications, the Committee Reporter will maintain a "Reporter's Online Update" by posting these online summaries of developments in the law related to criminal jury instructions based on legislative changes and decisions of the United States Supreme Court, the Colorado Supreme Court, and the Colorado Court of Appeals.

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

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

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

I. Reporter’s Recommended Corrections

[This section will be updated as the Committee becomes aware of required corrections to the 2015 edition]

II. New Legislation

As legislation is enacted in 2016, entries will be added here noting the Reporter’s recommendations for changes that the Committee should make to the model jury instructions and comments that were published in COLJI-Crim. (2015). However, entries will not be included here for legislation relating to other parts of the criminal and traffic codes (i.e., parts of those codes for which model instructions were not included in COLJI-Crim. (2015)). Further, although the Reporter is working with the Committee to incorporate these changes into the next edition of COLJI-Crim., new instructions under review by the Committee will not be posted here.

III. Decisions of the United States Supreme Court

[This section will be updated in the event that the United States Supreme Court issues decisions relevant to Colorado’s criminal jury instructions.]

IV. Decisions of the Colorado Supreme Court

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

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

V. Final Decisions of the Colorado Court of Appeals

E:18 SUPPLEMENTAL INSTRUCTION — WHEN JURORS FAIL TO AGREE

People v. Payne, 2014 COA 81, ¶ 18, 361 P.3d 1040, 1044 (“We agree with the federal authority cited herein, and conclude that a defendant has a right to be present when a modified *Allen* instruction is read to the jury because of the psychological influence his absence or presence may have on the jury.”).

F:81 (DEFINING “CUNNILINGUS”) and F:343 (DEFINING “SEXUAL PENETRATION”)

People v. Morales, 2014 COA 129, ¶¶ 37–44, 356 P.3d 972, 981–82 (holding that the trial court did not commit plain error by using the definition of “cunnilingus” from the prostitution statute, section 18-7-201(2)(b), C.R.S. 2014, to define “sexual penetration” for purposes of sexual assault because: (1) the definition in the prostitution statute is practically identical to the dictionary definition; (2) both COLJI-Crim. F(238) (2008) and COLJI-Crim. F:343 (2014) reference the definition of “cunnilingus” in the prostitution statute for purposes of defining “sexual penetration”; and (3) the definition of “sexual penetration” can be read as requiring some degree of penetration, “however slight,” even if the act at issue is cunnilingus).

F:337 (DEFINING “SEXUAL CONTACT”)

People v. Lovato, 2014 COA 113, ¶¶ 26, 32, 357 P.3d 212, 221, 223 (“[W]e conclude that ‘sexual’ modifies ‘abuse’ in the definition of ‘sexual contact’ contained in section 18-3-401(4). . . . Even in deciding that the term ‘abuse’ in section 18-3-401(4) means ‘sexual abuse,’ and accepting that ‘abuse’ means pain, injury, or discomfort, we nonetheless discern no statutory requirement of a ‘sexual motivation’ on the part of a perpetrator under this definition.”).

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

People v. Heywood, 2014 COA 99, ¶ 28, 357 P.3d 201, 207 (holding that section 18-3-405.4(1)(b) “prohibits an actor from actively and affirmatively importuning, inviting, or enticing a person to view the actor’s intimate parts, *while the actor knows or believes* that the person is less than fifteen years old and at least four years younger than the actor” (emphasis added)).

5-9:01 IDENTITY THEFT (USE)

People v. Campos, 2015 COA 47, ¶ 15 n.3, 351 P.3d 553, 556 n.3 (“[E]ven under the narrower interpretation set forth in [*People v. Beck*, 187 P.3d 1125, 1128–29 (Colo. App. 2008)], employment is a ‘thing of value’ for purposes of identity theft.”).

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

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

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

People v. Cisneros, 2014 COA 49, ¶ 51, 356 P.3d 877, 890 (holding that the trial court did not abuse its discretion by refusing the defendant’s tendered instruction concerning the constitutional right to bear arms because, “[e]ven if the use of the gun for self-defense would ordinarily be constitutionally protected, the simultaneous use of the gun to protect drugs is punishable through an enhanced sentence for drug possession with the intent to distribute”). [Note: The events of this case occurred prior to the 2010 recodification, at a time when the relevant provision was located in section 18-18-407(1)(f).]

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

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

People v. Boyd, 2015 COA 109, ¶¶ 8, 12, __ P.3d __ (holding that, where the trial court stated during voir dire that “if the District Attorney doesn’t prove [defendant is guilty beyond a reasonable doubt], find her not guilty, which, again, doesn’t mean she’s innocent anymore [sic] than any of us is innocent, in the sense of a newborn baby,” the court “should have avoided any comment

during voir dire that implied that the presumption of innocence allows guilty defendants to avoid conviction” but that such error was not “egregious or prejudicial” (alterations in original)).

Status: Petition for certiorari pending as of 1/29/16.

E:05 CREDIBILITY OF WITNESSES

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

Status: Petitions for rehearing pending as of 1/29/16.

People v. Theus-Roberts, 2015 COA 32, ¶¶ 19, 21, __ P.3d __ (“The Colorado Supreme Court has consistently held that it is not error for a trial court to refuse tendered *Telfaire* instructions when the jury receives a general instruction on the credibility of witnesses. . . . Although Theus–Roberts contends that ‘scientific advancements demonstrate the general credibility instruction does not suffice in cases in which eyewitness identification is a material, disputed issue,’ we do not view this case as warranting a departure from controlling Colorado Supreme Court precedent”); *see also id.* at ¶ 47 (Berger, J., specially concurring) (“[W]hile I recognize that we are bound by the supreme court’s prior decisions on this issue, I believe it is important to note how much time has elapsed since the supreme court last visited this subject. The supreme court’s earlier cases do not analyze in depth the scientific, judicial, and scholarly work that casts doubt on the reliability of certain eyewitness identifications because much of this body of work did not exist at the time the court addressed this issue.”).

Status: Petition for certiorari pending as of 1/29/16.

E:11 SERIES OF ACTS IN A SINGLE COUNT

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

Status: Petition for certiorari pending as of 1/29/16.

F:303 (DEFINING “PUBLIC PLACE”)

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

Status: Petition for certiorari pending as of 1/29/16.

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

People v. Castillo, 2014 COA 140, ¶ 32, __ P.3d __ (“[W]e agree with the rationale of [*People v. Manzanares*, 942 P.2d 1235, 1241 (Colo. App. 1996)] and hold that unless a defendant demonstrates the required level of prejudice under a harmless error or plain error standard, the giving of an unsupported instruction on a self-defense exception does not necessarily warrant reversal. To the extent that [*People v. Silva*, 987 P.2d 909, 914 (Colo. App. 1999)] and [*People v. Beasley*, 778 P.2d 304, 305-06 (Colo. App. 1989)] are inconsistent with this holding, we decline to follow them.”). *See also id.* at ¶ 45 n.3 (“The latest version of the Colorado pattern criminal jury instructions, which was not available at the time of the trial in this case, more explicitly instructs the jury that the jury’s determinations regarding the exceptions to self-defense must be made beyond a reasonable doubt by including language that the prosecution must disprove beyond a reasonable doubt that the defendant did not provoke the use of unlawful physical force by the other person and the defendant was not the initial aggressor. COLJI-Crim. H:11, H:12 (2014).”).

Status: Petition for certiorari granted on the following issues:

(1) “Whether the court of appeals erred in finding that erroneously instructing the jury on the provocation exception to self-defense was harmless error where the exception was unsupported by the evidence and where, in closing, the prosecutor asked the jury to apply the exception by misstating the evidence”; (2) “Whether the court of appeals erred by holding that the trial court did not err by instructing the jury on the initial aggressor exception to self-defense.” Oral arguments not scheduled as of 1/29/16.

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

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

Status: Petition for certiorari pending as of 1/29/16.

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

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

Status: Petition for certiorari granted on the following issue: “Whether DUI is a lesser included offense of vehicular assault-DUI or vehicular homicide-DUI.” Oral arguments not scheduled as of 1/29/16.

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

People v. Smoots, 2013 COA 152, ¶ 7, __ P.3d __ (holding that the trial court did not err by instructing the jury that “[f]or the purposes of the strict liability crime of Vehicular Assault, ‘proximate cause’ is established by the voluntary act of driving under the influence of alcohol”).

Status: Petition for certiorari granted on the following issues:
(1) “Whether a double jeopardy claim can be raised for the first time on direct appeal”; and (2) “Whether driving under the influence is a lesser included offense of vehicular assault-driving under the influence, requiring merger.” Oral arguments not scheduled as of 1/29/16.

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

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

Status: Mandate not issued as of 1/29/16.

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

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

Status: Petition for certiorari pending as of 1/29/16.

5-9:01 IDENTITY THEFT (USE)

People v. Perez, 2013 COA 65, ¶ 21, __ P.3d __ (“[W]e hold that, to convict a defendant of identity theft under section 18-5-902(1)(a), the prosecution must prove that the defendant knew the personal identifying information, financial identifying information, or financial device he or she used was, in fact, the information or device of another.”).

Status: Petition for certiorari granted on the following issue: “Whether the court of appeals erred in concluding Colorado’s identity theft statute, section 18-5-902, C.R.S. (2012), requires proof that the offender knew the information he exploited belonged to a real person, and if so, whether no rational juror could reasonably infer that an offender knew the social security number he used over a five-year period belonged to a real person.” The Colorado Supreme Court heard oral arguments on September 29, 2015.

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

People v. Friend, 2014 COA 123M, ¶¶ 62–63, __ P.3d __ (holding that, because section 18-6-401 “is structured to set forth a disjunctive series of acts in an extended single sentence, without any attempt to differentiate them by name or an organizational device . . . the child abuse statute is similar to the one interpreted in [*People v. Abiodun*, 111 P.3d 462 (Colo. 2005), where] the court held that a series of acts, with reference to the same controlled substance and governed by a common mens rea, that included acts that were not mutually exclusive but rather overlapping, constituted different ways of committing a single offense”).

Status: Petition for certiorari pending as of 1/29/16.

People v. Weeks, 2015 COA 77, ¶¶ 79–80, __ P.3d __ (“[W]e conclude that the last phrase ‘ultimately results in the death of a child or serious bodily injury to

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

Status: Petition for certiorari pending as of 1/29/16.

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

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

Status: Petition for certiorari granted as to the following issues:
(1) “Whether images automatically stored by a computer in its Internet cache are sufficient, without additional evidence of a defendant’s awareness of the cache or evidence of a defendant’s affirmative conduct such as downloading or saving such images, to establish ‘knowing possession’ under section 18-6-403, C.R.S. (2012)”; (2) Whether the court of appeals erred when it held that the testimony of a child forensic interviewer was lay opinion testimony and therefore was not subject to the admissibility and discovery requirements for expert witnesses.” The Colorado Supreme Court heard oral arguments on December 8, 2015.

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

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

Status: Petition for certiorari pending as of 1/29/16.

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

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

Status: Petition for certiorari pending as of 1/29/16.