

MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated February 28, 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

8-4:06 FIRST DEGREE OFFICIAL MISCONDUCT (COMMIT ACT)

People v. Berry, 2020 CO 14, ¶¶ 23–24, __ P.3d __ (holding that this crime should be “broadly construed” such that, where the defendant obtained firearms “because of the opportunity afforded by his office as a sheriff’s deputy,” he committed an act “relating to his office” within the meaning of the statute).

8-4:12 EMBEZZLEMENT OF PUBLIC PROPERTY

People v. Berry, 2020 CO 14, ¶ 18, __ P.3d __ (holding that this crime only applies to property *owned* by the state or a political subdivision).

II. Final Decisions of the Colorado Court of Appeals

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

People v. Flynn, 2019 COA 105, ¶¶ 36–38, 42, 49, 456 P.3d 75, 83–85 (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”).

E:11 SERIES OF ACTS IN A SINGLE COUNT

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”).

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).

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 2/27/20.

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

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 2/27/20.

People v. Knobbe, 2020 COA 7, ¶¶ 18, 38, __ P.3d __ (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”).

Status: Mandate not issued as of 2/27/20.

E:11 SERIES OF ACTS IN A SINGLE COUNT

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 2/27/20.

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 2/27/20.

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 2/27/20.

E:11 SERIES OF ACTS IN A SINGLE COUNT 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 2/27/20.

+ E:12.5 MULTIPLE COUNTS (INCONSISTENT ELEMENTS)

People v. Brooks, 2020 COA 25, ¶¶ 22–25, 35, __ P.3d __ (holding that, where the jury found Brooks guilty of burglary with a deadly weapon, “namely a firearm,” but also answered “no” to an interrogatory asking whether he used or possessed and threatened to use a deadly weapon during the burglary, the response to the interrogatory nullified the burglary verdict; further holding that the interrogatory response did *not* nullify the jury’s guilty verdicts on menacing charges because “the jury could well have determined that, though Brooks did not have a weapon when he entered the home, once inside he obtained the weapon from somewhere inside the home and then threatened the victim with it,” and also noting that “[t]here is no irreconcilable conflict in the two crimes such that proof of all of the elements of first degree burglary necessarily means a failure to prove all of the elements of menacing”).

Status: Mandate not issued as of 2/27/20.

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 2/27/20.

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 2/27/20.

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: Petition for certiorari pending as of 2/27/20.

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 2/27/20.

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 2/27/20.

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 set for 5/7/20.

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 2/27/20.

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 2/27/20.

H:34 + SELF-INDUCED (VOLUNTARY) INTOXICATION

People v. Stone, 2020 COA 23, ¶¶ 20, 53, 57, 61–62, __ P.3d __ (rejecting the argument that Colorado’s statute on self-induced intoxication is unconstitutional; holding that, where the court instructed the jury that “[s]elf-induced intoxication is not a defense to any of the [general intent] charges in this case,” the instruction was supported by the evidence because the defendant was “very talkative” and “hyperventilating” and an officer asked him “what are you on?”; further holding that although the trial court’s instruction didn’t precisely track the final sentence of the model instruction, it was nevertheless proper because “[t]elling the jury that it could not consider evidence of voluntary intoxication for purposes of deciding whether the prosecution had proved the elements of the general intent offenses is much the same as telling the jury that voluntary intoxication is not a defense to such crimes” (first alteration in original)).

Status: Mandate not issued as of 2/27/20.

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 2/27/20.

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 2/27/20.

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 2/27/20.

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: Mandate not issued as of 2/27/20.

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 2/27/20.

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 2/27/20.

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

People v. Thomas, 2020 COA 19M, ¶ 36, __ P.3d __ (holding that criminally negligent injury to an at-risk adult is not a lesser included offense of third-degree assault).

Status: Mandate not issued as of 2/27/20.

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: Petition for certiorari pending as of 2/27/20.

3-3:01 FIRST DEGREE KIDNAPPING (FORCIBLY SEIZED AND CARRIED)

People v. Pratarelli, 2020 COA 33, ¶¶ 17-18, __ P.3d __ (noting that the statute does not define “forcibly” or “force,” and using dictionary definitions to determine that the prosecution needed to prove that the defendant “used (or threatened to use) power, violence, or pressure against [the victim] to seize and carry her, and that he did so against opposition or resistance”).

Status: Mandate not issued as of 2/27/20.

3-3:01 FIRST DEGREE KIDNAPPING (FORCIBLY SEIZED AND CARRIED)

People v. Pratarelli, 2020 COA 33, ¶ 27, __ P.3d __ (“[A] custodial parent may not be convicted of second degree kidnapping.” (citing *Armendariz v. People*, 711 P.2d 1268, 1270 (Colo. 1986))).

Status: Mandate not issued as of 2/27/20.

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

People v. Knobbe, 2020 COA 7, ¶ 62, __ P.3d __ (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”).

Status: Mandate not issued as of 2/27/20.

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 2/27/20.

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 2/27/20.

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.

6-4:18 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: Petition for certiorari pending as of 2/27/20.

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 2/27/20.

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 granted. Oral arguments not set as of 2/27/20.

8-1:03 RESISTING ARREST (ANY MEANS)

People v. Thomas, 2020 COA 19M, ¶ 15, __ P.3d __ (“[N]othing in the plain language of the statute dictat[es] that ‘other means’ cannot include conduct that puts an officer at risk of injury by falling or contacting nearby objects or conditions. . . . [T]he jury could properly consider evidence of the physical surroundings in which Thomas was handcuffed and transported to the patrol car.”).

Status: Mandate not issued as of 2/27/20.

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 2/27/20.

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.

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: Mandate not issued as of 2/27/20.

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 certiorari pending as of 2/27/20.

People v. Viburg, 2020 COA 8M, ¶ 10, __ P.3d __ (disagreeing with *Gwinn* and *Quezada-Caro*, and holding instead that “prior convictions are elements of felony DUI,” meaning that “to obtain a conviction for felony DUI, a prosecutor must prove those prior convictions to a jury beyond a reasonable doubt”).

Status: Mandate not issued as of 2/27/20.

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: Mandate not issued as of 2/27/20.