

MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

REPORTER'S ONLINE UPDATE

Updated June 11, 2021

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

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

People v. Mosely, 2021 CO 41, ¶ 19, __ P.3d __ (“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”).

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

People v. Vidauri, 2021 CO 25, ¶¶ 2, 25, 486 P.3d 239 (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).

II. Final Decisions of the Colorado Court of Appeals

DEFENSES

People v. Martinez, 2020 COA 141, ¶¶ 83–86, 486 P.3d 412 (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, __ P.3d __ (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:11 SERIES OF ACTS IN A SINGLE COUNT

People v. Abdulla, 2020 COA 109M, ¶¶ 54-55, 486 P.3d 380 (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).

E:14 LESSER-INCLUDED OFFENSES

People v. Abdulla, 2020 COA 109M, ¶¶ 14, 16, 486 P.3d 380 (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”).

F:337 SEXUAL CONTACT

People v. Abdulla, 2020 COA 109, ¶ 2, 486 P.3d 380 (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”).

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, __ P.3d __ (“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.”).

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”).

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).

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

People v. McClintic, 2020 COA 120M, ¶¶ 16–18, 29, __ P.3d __ (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 (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”).

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 (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: Mandate not issued as of 6/10/21.

E:01 DUTIES OF JUDGE AND JURY

People v. Scott, 2021 COA 71, ¶¶ 21, 25, __ P.3d __ (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”).

Status: Petition for rehearing pending as of 6/10/21.

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 granted. Oral arguments not set as of 6/10/21.

People v. Knobee, 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: Petition for certiorari granted. Oral arguments not set as of 6/10/21.

People v. Pettigrew, 2020 COA 46, ¶¶ 16–28, __ P.3d __ (discussing various statements that the trial court made in an effort to explain reasonable doubt—including (1) distinguishing between “innocent” and “not guilty,” (2) distinguishing “reasonable doubt” from “beyond a shadow of a doubt,” (3) instructing jurors not to rely on what they may have seen on television shows in their deliberations, (4) discussing a hypothetical about disproving a juror’s birthday, and (5) 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 the statements did not lower the prosecution’s burden of proof, but noting that courts “have repeatedly disapproved of similar voir dire statements made by trial courts because they jeopardize otherwise valid convictions and almost never bring additional clarity to the difficult concept of reasonable doubt”).

Status: Petition for certiorari granted. Oral arguments not set as of 6/10/21.

E:11 SERIES OF ACTS IN A SINGLE COUNT

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

Status: Petition for certiorari granted on other grounds. Oral arguments held on 5/4/21.

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: Mandate not issued as of 6/10/21.

E:11 SERIES OF ACTS IN A SINGLE COUNT and H:11 USE OF NON-DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)

People v. Roberts-Bicking, 2021 COA 12, ¶¶ 13-16, 23-27, 41-45, 50, __ P.3d __ (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 alone was inadequate but that the trial court’s supplemental instruction “cured any deficiency” because it was virtually identical to the instruction in *Riley*; disagreeing with *Mosely*, and 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).

Status: Petition for certiorari pending as of 6/10/21.

E:18 SUPPLEMENTAL INSTRUCTION – WHEN JURORS FAIL TO AGREE

People v. Black, 2020 COA 136, ¶¶ 8, 19–22, 24, 27, 32, __ P.3d __ (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)).

Status: Petition for certiorari pending as of 6/10/21.

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

People v. Rau, 2020 COA 92, ¶¶ 17-18, __ P.3d __ (holding that the basement of the apartment complex where the defendant lived constituted a “dwelling” for purposes of section 18-1-704.5, C.R.S., because even though it “was uninhabitable and was accessible to all tenants of the building, it was nonetheless part of the building that was used by [the defendant] for habitation”; declining to follow *People v. Cushinberry*, 855 P.2d 18 (Colo. App. 1992), because it is inconsistent with *People v. Jiminez*, 651 P.2d 395 (Colo. 1982)).

Status: Petition for certiorari granted. Oral arguments not set as of 6/10/21.

F:125 ENTERPRISE

People v. McDonald, 2020 COA 65, ¶¶ 16, 32, 47, __ P.3d __ (deferring to *People v. James*, 40 P.3d 36 (Colo. App. 2001), and rejecting the defendant’s invitation to import factors required in federal prosecutions under the Racketeer Influenced Organizations Act (“RICO”) when interpreting the “enterprise associated in fact” language in the Colorado Organized Crime Control Act (“COCCA”); holding that the trial court did not abuse its discretion when it refused to further define the phrase “associated in fact”).

Status: Petition for certiorari granted. Oral arguments set for 6/22/21.

G2:09 CRIMINAL SOLICITATION

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

Status: Petition for certiorari pending as of 6/10/21.

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

People v. Snider, 2021 COA 19, ¶¶ 17, 24, __ P.3d __ (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).

Status: Petition for certiorari pending as of 6/10/21.

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: Mandate not issued as of 6/10/21.

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 granted on other grounds. Case to be decided on the briefs.

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: Mandate not issued as of 6/10/21.

H:68 MEDICAL MARIJUANA

People v. Cox, 2021 COA 68, ¶¶ 18-20, __ P.3d __ (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)).

Status: Mandate not issued as of 6/10/21.

CHAPTER 1.3: CRIME OF VIOLENCE SENTENCE ENHANCEMENT INTERROGATORIES

People v. Rodriguez, 2021 COA 38M, ¶ 19, __ P.3d __ (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).

Status: Mandate not issued as of 6/10/21.

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: Mandate not issued as of 6/10/21.

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, __ P.3d __ (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”).

Status: Petition for certiorari granted on other grounds. Oral arguments not set as of 6/10/21.

3-2:03 ASSAULT IN THE FIRST DEGREE (EXTREME INDIFFERENCE)

People v. Bowers, 2021 COA 41, ¶¶ 33-35, __ P.3d __ (stating that serious bodily injury “need not be a lasting [injury]” but instead “may continue only for the duration of the conduct,” meaning that, where the defendant strangled the victim and interrupted the blood flow to her brain, the evidence was sufficient to support a finding of serious bodily injury because the jury “could reasonably infer from [the victim’s] altered state and memory loss that her brain had been deprived of oxygen for a time”).

Status: Mandate not issued as of 6/10/21.

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, __ P.3d __ (holding that resisting arrest is a lesser included offense of second-degree assault on a peace officer).

Status: Petition for certiorari pending as of 6/10/21.

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 pending as of 6/10/21.

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: Petition for certiorari granted. Oral arguments not set as of 6/10/21.

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

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

Status: Petition for certiorari pending as of 6/10/21.

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

People v. Knobee, 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: Petition for certiorari granted on other grounds. Oral arguments not set as of 6/10/21.

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 52, ¶ 43, __ P.3d __ (“[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.”).

Status: Mandate not issued as of 6/10/21.

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: Mandate not issued as of 6/10/21.

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 not set as of 6/10/21.

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 not set as of 6/10/21.

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 not set as of 6/10/21.

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 granted on other grounds. Case to be decided on the briefs.

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. Oral arguments not set as of 6/10/21.

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. Oral arguments not set as of 6/10/21.

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

People v. Nevelik, 2021 COA 30, ¶ 14, __ P.3d __ (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).

Status: Mandate not issued as of 6/10/21.

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

People v. Abad, 2021 COA 6, ¶ 2, __ P.3d __ (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”).

Status: Petition for certiorari pending as of 6/10/21.

7-2:13 PIMPING

People v. Grosko, 2021 COA 28, ¶¶ 2-3, 30, __ P.3d __ (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”).

Status: Petition for certiorari pending as of 6/10/21.

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

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

Status: Petition for certiorari pending as of 6/10/21.

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, __ P.3d __ (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").

Status: Petition for certiorari pending as of 6/10/21.

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: Petition for certiorari granted. Oral arguments not set as of 6/10/21.

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 granted on other grounds. Oral

arguments not set as of 6/10/21.

8-3:09 ATTEMPT TO INFLUENCE A PUBLIC SERVANT

People v. Barnett, 2020 COA 167, ¶ 1, __ P.3d __ (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”).

Status: Petition for certiorari pending as of 6/10/21.

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 pending as of 6/10/21.

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, __ P.3d __ (holding that prosecuting a person who grows marijuana for religious reasons does not violate the Free Exercise Clause).

Status: Petition for certiorari pending as of 6/10/21.