

# MODEL CRIMINAL JURY INSTRUCTIONS COMMITTEE

## REPORTER'S ONLINE UPDATE

Updated February 29, 2024

### 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](mailto:mcjic@judicial.state.co.us).

## **I. Decisions of the Colorado Supreme Court**

[none yet since publication of COLJI-Crim. (2023)]

## **II. Final Decisions of the Colorado Court of Appeals**

### **5-9:01 IDENTITY THEFT (USE) and 5-9:06 CRIMINAL POSSESSION OF A FINANCIAL DEVICE**

*People v. Poot-Baca*, 2023 COA 112, ¶ 1, \_\_ P.3d \_\_ (holding that criminal possession of a financial device is not a lesser included offense of identity theft).

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

### **B:01 INTRODUCTORY REMARKS, JUROR QUALIFICATIONS, AND JURY SELECTION**

*People v. Torrez*, 2024 COA 11, ¶¶ 40, 44, \_\_ P.3d \_\_ (holding that, where a trial court neglects to give the empanelment oath to the jury and no party objects, plain error review applies; concluding that even assuming the error here was obvious, it wasn't substantial because the trial court "provided substantial comments, instructions, and guidance that secured the fundamental fairness of Torrez's trial").

Status: Mandate not issued as of 2/28/24.

### **F:332 SERIOUS BODILY INJURY**

*People v. Duncan*, 2023 COA 122, ¶ 1, \_\_ P.3d \_\_ (holding that the word "protracted" in this definition "means 'prolonged, continued, or extended' but does not necessarily mean 'permanent'").

Status: Mandate not issued as of 2/28/24.

### **F:195 KNOWINGLY OR WILLFULLY**

*People v. Schnorenberg*, 2023 COA 82, ¶¶ 19, 22, 36, 541 P.3d 1 (recognizing that "[c]onvictions for securities fraud under section 11-51-501 require proof that the defendant acted 'willfully,'" and holding that "advice of

counsel regarding the materiality of a misstatement or omission is relevant to determining if a defendant had the requisite mental state to commit securities fraud,” meaning the trial court erred in refusing to give the defendant’s tendered instruction “that good faith reliance on the advice of counsel is relevant to whether he had acted willfully”).

Status: Petition for certiorari pending as of 2/28/24.

## **F:272 PERSONAL IDENTIFYING INFORMATION**

*People v. Rodriguez-Morelos*, 2022 COA 107M, ¶¶ 20, 26, 522 P.3d 213 (holding that the term “specific individual” in the statutory definition of “personal identifying information” refers to “one identified human being,” meaning the defendant’s use of a nonprofit entity’s information couldn’t substantiate a conviction for identity theft).

Status: Petition for certiorari granted. Oral arguments set for 5/9/24.

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

*People v. Whiteaker*, 2022 COA 84, ¶¶ 40–42, 519 P.3d 1127 (rejecting the argument that the initial aggressor instruction is only permissible where the defendant initiated the physical conflict *prior* to engaging in self-defense; stating that the exception “does not require that the alleged victim acted in self-defense or, more generally, implicate the conduct of the alleged victim” but instead “solely considers the actions of the first party to “us[e] or threaten[] the imminent use of unlawful physical force” (alterations in original) (quoting *People v. Griffin*, 224 P.3d 292, 300 (Colo. App. 2009))).

Status: Petition for certiorari granted on other grounds. Oral arguments held on 1/16/24.

*People v. Martinez*, 2022 COA 111, ¶¶ 34–36, 522 P.3d 725 (considering a case where the defendant shot the victim while drunk, and the trial court instructed the jury that the defendant’s intoxication was irrelevant because “the reasonable person standard requires the actor using physical force against another in defense to appraise the situation as would a reasonable

sober person”; holding that the instruction accurately stated the law because self-defense “ultimately requires that a reasonable person would have believed and acted as the defendant did,” and that standard “requires a defendant to appraise the situation as would a reasonable sober person”).

Status: Petition for certiorari granted on other grounds. Oral arguments not set as of 2/28/24.

## **H:12 USE OF DEADLY PHYSICAL FORCE (DEFENSE OF PERSON)**

*People v. Jones*, 2023 COA 104, ¶¶ 31–35, \_\_ P.3d \_\_ (holding that a trial court may refuse to give a self-defense instruction when it “calls only for a subjective test” (quoting *People v. Toler*, 981 P.2d 1096, 1099 (Colo. App. 1998)), meaning that where evidence of self-defense was “based only on Jones’s actual belief” that she was afraid for her life, the court properly refused the instruction).

Status: Petition for rehearing pending as of 2/28/24.

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

*People v. Martinez*, 2022 COA 111, ¶ 27, 522 P.3d 725 (holding that, “because a person cannot act both justifiably under the force-against-intruders statute and recklessly,” the defense doesn’t apply to crimes with a mental state of recklessness).

Status: Petition for certiorari granted. Oral arguments not set as of 2/28/24.

*People v. Jones*, 2023 COA 104, ¶ 23, \_\_ P.3d \_\_ (holding that, where Jones shot the victim in his home after mistakenly believing he was an intruder, the trial court properly refused to instruct the jury on the force-against-intruders defense because Jones “did not make the threshold showing of the objective element of the statute – that the victim knowingly entered into the dwelling unlawfully”).

Status: Petition for rehearing pending as of 2/28/24.

## **H:41 FELONY MURDER – DISENGAGEMENT**

*People v. Gallegos*, 2023 COA 47, ¶¶ 5, 35–37, 535 P.3d 108 (holding that a defendant “need not be compelled to admit felony murder, and thus admit the predicate felony, to assert the felony murder affirmative defense”; noting that neither the legislature nor the supreme court has “imposed on the affirmative defense statute a categorical requirement that the defendant admit to the underlying charged offense,” and disagreeing with *People v. Snider*, 2021 COA 19, 491 P.3d 423, “to the extent [it] suggests that a defendant charged with any offense must admit to the offense before he can assert any affirmative defense – at least in the context of felony murder”).

Status: Petition for certiorari granted. Oral arguments not set as of 2/28/24.

## **H:35 INTOXICATION (INVOLUNTARY)**

*People v. Mion*, 2023 COA 110M, ¶ 2, \_\_ P.3d \_\_ (“[T]he affirmative defense of involuntary intoxication is legally cognizable when (1) a defendant knowingly ingests what he believes to be a particular intoxicant; (2) in so doing, he *unknowingly* ingests a different intoxicant; and (3) it is the different intoxicant that deprives him of the capacity to conform his conduct to the requirements of the law.”).

Status: Petition for certiorari pending as of 2/28/24.

## **J:03 COMPLICITY**

*People v. Gallegos*, 2023 COA 47, ¶¶ 75–80, 535 P.3d 108 (holding that, where the fourth element of the trial court’s complicity instruction read, “the defendant was aware of all of the circumstances relating to the elements of the commission of that crime, as defined at the end of this Instruction,” the instruction was an accurate statement of the law).

Status: Petition for certiorari granted on other grounds. Oral arguments not set as of 2/28/24.

### **3-1:07 MURDER IN THE SECOND DEGREE**

*People v. Shockey*, 2023 COA 121, ¶¶ 49–51, \_\_ P.3d \_\_ (holding that, where the jury found Shockey guilty of second-degree murder but answered “no” to a special interrogatory asking whether he used a deadly weapon during the commission of the crime or in immediate flight therefrom, the findings were inconsistent because the jury found both that Shockey shot the victim and that he wasn’t the shooter; recognizing that the only way to reconcile these findings was to apply a complicity theory, but refusing to do so because the trial court refused to instruct the jury on complicity; concluding that the jury’s latter finding “negated the causation and identity elements of second degree murder,” meaning vacatur was required).

Status: Mandate not issued as of 2/28/24.

### **3-1:09 MANSLAUGHTER (RECKLESS), 3-1:12 VEHICULAR HOMICIDE (RECKLESS), and 42:17.INT CARELESS DRIVING – INTERROGATORY (DEATH)**

*People v. Kirby*, 2024 COA 20, ¶ 2, \_\_ P.3d \_\_ (holding that reckless manslaughter and careless driving resulting in death are both lesser included offenses of reckless vehicular homicide).

Status: Mandate not issued as of 2/29/24.

### **3-1:12 VEHICULAR HOMICIDE (RECKLESS)**

*People v. Tarr*, 2022 COA 23, ¶ 49, 511 P.3d 672 (holding that nothing in the vehicular homicide statute evinces a legislative intent “to preclude prosecution under the general murder statutes for causing the death of a person while driving”).

Status: Petition for certiorari granted on other grounds. Oral arguments set for 3/12/24.

### **3-1:12 VEHICULAR HOMICIDE (RECKLESS) and 42:23.INT FAILURE TO FULFILL DUTIES AFTER INVOLVEMENT IN AN ACCIDENT INVOLVING INJURY, SERIOUS BODILY INJURY, OR DEATH –**

## INTERROGATORY

*People v. Kirby*, 2024 COA 20, ¶¶ 56–61, \_\_ P.3d \_\_ (holding that, where the trial court aggravated Kirby’s sentence in part because it found sua sponte that his conduct “was obviously aggravating,” the court erred in performing this fact-finding itself, but concluding that reversal wasn’t required because the court also considered Kirby’s prior convictions, a *Blakely*-exempt factor that sufficed to support its judicial fact-finding).

Status: Mandate not issued as of 2/29/24.

### **3-2:16.7 ASSAULT IN THE SECOND DEGREE (RESTRICT BREATHING), 3-2:20 ASSAULT IN THE THIRD DEGREE (KNOWINGLY OR RECKLESSLY), and 9-1:33 HARASSMENT (PHYSICAL CONTACT)**

*People v. Wade*, 2024 COA 13, ¶¶ 30–32, \_\_ P.3d \_\_ (holding that harassment is not a lesser included offense of either second- or third-degree assault).

Status: Mandate not issued as of 2/28/24.

### **3-2:20 ASSAULT IN THE THIRD DEGREE (KNOWINGLY OR RECKLESSLY) and 6-4:01 CHILD ABUSE (KNOWINGLY OR RECKLESSLY)**

*People v. Wade*, 2024 COA 13, ¶ 39, \_\_ P.3d \_\_ (holding that third-degree assault is a lesser included offense of child abuse).

Status: Mandate not issued as of 2/28/24.

### **3-3:15 ENTICEMENT OF A CHILD**

*People v. Johnson*, 2022 COA 139, ¶¶ 20–21, 24–25, 525 P.3d 1106 (holding that, where the defendant stopped his truck next to a ten-year-old girl, told her that ten was the “perfect age for a boyfriend,” and asked her whether she had “ever touched it,” the defendant’s acts didn’t constitute attempting “to invite or persuade” the child to enter the truck because they never “established or even suggested that he wanted [her] to enter the truck”; further holding that even if the defendant’s act *did* constitute such an attempt, the evidence didn’t show his intent “to commit a sexual assault or

engage in an unlawful sexual contact” but only “to engage in an inappropriate conversation with a child”).

Status: Petition for certiorari granted. Oral arguments held on 1/16/24.

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

*People v. Salazar*, 2023 COA 102, ¶¶ 14, 22, \_\_ P.3d \_\_ (holding that the mental state of “knowingly” doesn’t apply to the position of trust element; disapproving of this model instruction, which applies “knowingly” to all subsequent elements).

Status: Petition for certiorari pending as of 2/28/24.

### **4-3:01 ROBBERY**

*People v. Mortenson*, 2023 COA 92, ¶¶ 12–14, 22–23, 27, 30–31, 541 P.3d 639 (holding that, where Mortenson hid store merchandise in her purse, a security guard approached her in the exit vestibule, and the guard tackled her after she revealed a gun, the evidence was insufficient to establish the “taking” element of robbery because the merchandise wasn’t taken from the guard’s presence and “[r]obbery victims are people, not businesses”; further holding that robbery requires a *successful* taking, meaning that “[w]hen a person is unsuccessful in a taking by force, she could, at most, be guilty of attempted robbery,” and that theft from a store “cannot alone prove a successful taking under the robbery statute”; recognizing that “a perpetrator may be guilty of robbery if she uses force to maintain possession of property already in hand,” but noting that “the use of force must ‘culminat[e] in the taking of property from the victim’s person or presence’” (alteration in original) (quoting *People v. Bartowsheski*, 661 P.2d 235, 244 (Colo. 1983)); rejecting the argument that “immediate flight” can substantiate a robbery taking because that term only appears in the aggravated robbery statute, and commission of simple robbery is a prerequisite for aggravated robbery).

Status: Petition for certiorari pending as of 2/28/24.



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

*People v. Rodriguez-Morelos*, 2022 COA 107M, ¶ 66, 522 P.3d 213 (holding that per *People v. Ramos*, 2017 COA 100, 417 P.3d 902, the prosecution need only prove “all the aggregated thefts that are submitted to the jury,” not “all the aggregated thefts that may have, at one point, appeared in counts and then been removed before the jury was instructed, deliberated, and returned a verdict”).

Status: Petition for certiorari granted on other grounds. Oral arguments set for 5/9/24.

#### **4-4:23 AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE (PROPERTY DAMAGE)**

*People v. Garcia*, 2022 COA 83, ¶ 18, 519 P.3d 1064 (stating that it was “unclear whether the People were required to prove that Garcia ‘knowingly’ caused damage to the truck” because such proof “is a sentence enhancer, not an element,” and “[t]he mental state does not necessarily apply to sentence enhancers”).

Status: Petition for certiorari granted on other grounds. Oral arguments held on 1/16/24.

#### **4-5:03 FIRST DEGREE CRIMINAL TRESPASS**

*People v. Garcia*, 2023 COA 58, ¶¶ 40–41, 46–47, 536 P.3d 847 (holding that, where the charging instrument only alleged that Garcia altered a check but the jury instruction listed a variety of other potential instruments (e.g., deed, codicil, contract), the instruction constituted a constructive amendment, but the error was not plain).

Status: Petition for certiorari pending as of 2/28/24.

#### **5-3:27 MONEY LAUNDERING (TRANSPORTED, TRANSMITTED, OR TRANSFERRED)**

*People v. Woodyard*, 2023 COA 78, ¶¶ 59, 69, 540 P.3d 278 (holding that for a person to commit money laundering under section 18-5-309(1)(b)(I), “it

isn't enough that the person charged was involved in a transfer" but instead that "the person charged must have done the transferring" and "must have transferred 'moneys,' not something else in exchange for moneys"; further holding that the People "aren't required to prove that the funds involved in the transaction or transfer were derived from a preceding offense separate from the transaction or transfer charged" but instead need only "prove that the transaction or transfer promoted the 'commission of a criminal offense'").

Status: Petition for certiorari pending as of 2/28/24.

**7-4:01 SOLICITING FOR CHILD PROSTITUTION (ANOTHER) and  
7-4:02 SOLICITING FOR CHILD PROSTITUTION (ARRANGING)**

*People v. Randolph*, 2023 COA 7, ¶ 31, 528 P.3d 917 (holding that the culpable mental state for the crime of soliciting for child prostitution is "knowingly," and in so holding disagreeing with *People v. Ross*, 2019 COA 79, 482 P.3d 452, *aff'd on other grounds*, 2021 CO 9, 479 P.3d 910).

Status: Petition for certiorari granted. Oral arguments not set as of 2/28/24.

**7-4:09 PIMPING OF A CHILD and 7-4:11 PATRONIZING A  
PROSTITUTED CHILD (ACT)**

*People v. Price*, 2023 COA 96, ¶¶ 56–59, 542 P.3d 268 (rejecting Price's argument that the patronizing a prostituted child statute violates equal protection because it prohibits the same conduct as pimping of a child (yet prescribes a more severe sentence), and holding instead that pimping "prohibits substantially different conduct than patronizing").

Status: Petition for certiorari pending as of 2/28/24.

**8-1:08 ACCESSORY TO CRIME**

*People v. Gallegos*, 2023 COA 47, ¶¶ 66–69, 535 P.3d 108 (holding that, where Gallegos was charged with attempted aggravated robbery, the trial court erred in refusing to instruct the jury on the lesser nonincluded offense of accessory because (1) "there was a rational evidentiary basis for the jury to acquit Gallegos of attempted aggravated robbery," and (2) the jury "still

had a rational evidentiary basis to convict Gallegos of being an accessory”).

Status: Petition for certiorari granted on other grounds. Oral arguments not set as of 2/28/24.

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

*People v. Woodyard*, 2023 COA 78, ¶ 51, 540 P.3d 278 (holding that, where the evidence showed only that Woodyard was “‘close to’ and ‘lived together’ with certain of his associates and had ‘strong connections’ with others,” this was insufficient to “show the kind of ‘structure’ – the ‘ongoing organization of associates functioning as a continuing unit’ – required to prove an associated-in-fact enterprise” (citation omitted) (quoting *McDonald v. People*, 2021 CO 64, ¶ 46, 494 P.3d 1123)).

Status: Petition for certiorari pending as of 2/28/24.

**18:05 UNLAWFUL DISTRIBUTION, MANUFACTURING, DISPENSING, OR SALE**

*People v. Bice*, 2023 COA 98, ¶¶ 2, 10–11, 25, \_\_ P.3d \_\_ (holding that when a defendant is convicted under section 18-18-405(1) for conspiring to perform any of the proscribed acts, their crime’s classification is determined by section 18-18-405(2), meaning section 18-2-206(7)(a) – which provides that “[e]xcept as otherwise provided by law, conspiracy to commit a level 1 drug felony is a level 2 drug felony” – does not apply).

Status: Petition for certiorari pending as of 2/28/24.

**42:09 DRIVING UNDER THE INFLUENCE**

*People v. Montoya*, 2022 COA 55M, ¶¶ 9–10, 34, 38–42, 516 P.3d 970 (trial court admitted video of Montoya refusing a blood test but redacted later portion of video where he changed his mind and volunteered to take the test, and court then instructed jury that it could consider Montoya’s refusal if it found that he refused: holding that the court violated the rule of completeness and that “when refusal to take a chemical test is disputed by the defendant based on the defendant’s recorded or written statement that the prosecution seeks to use at trial, the entire statement must be presented

to the jury for its consideration”; concluding that the error wasn’t harmless because the jury “was *invited* to consider Montoya’s refusal as part of the evidence when it did not have the entire video in which Montoya later claimed a willingness to take the test” (citing *Cox v. People*, 735 P.2d 153, 159 (Colo. 1987)); *see also id.* at ¶¶ 52–61 (Welling, J., specially concurring) (arguing that the trial court’s refusal instruction was problematic because (1) it asked the jury “to make a *finding* regarding whether Montoya refused chemical testing,” even though courts don’t “ask juries to make findings that aren’t elements of charged crimes or facts necessary to enhance a sentence,” (2) “nothing in the court’s instructions tells the jury what it means for a defendant to ‘refuse’ chemical testing,” and (3) the court didn’t advise the jury about the burden of proof as to this finding; discouraging trial courts from giving refusal instructions at all because (1) section 42-4-1301(6)(d) doesn’t require an instruction but simply provides that refusal evidence is admissible, (2) “no reported case holds that a refusal instruction is required or necessary,” (3) “courts don’t generally ask juries to make predicate findings before they can consider evidence,” and (4) “courts don’t generally tell jurors that they *can* consider evidence for a particular purpose,” and when they do, “it’s almost always because their consideration of the evidence is *limited* to that identified purpose,” yet refusal evidence isn’t limited by statute; concluding that “crafting a refusal instruction is a perilous endeavor, particularly when the fact of refusal is contested”).

Status: Petition for certiorari granted. Oral arguments held on 12/13/23.