

CHAPTER 30 CRIMINAL OFFENSES

Pamphlet 50 - Part 1 - Criminal Code

Pamphlet 51 - Part 2 - Other Criminal Offenses

ARTICLE 1 GENERAL PROVISIONS

30-1-1. Name and effective date of code.

This act is called and may be cited as the "Criminal Code." It shall become effective on July 1, 1963.

History: 1953 Comp., § 40A-1-1, enacted by Laws 1963, ch. 303, § 1-1.

ANNOTATIONS

Meaning of "this act". - The words "this act" refer to Laws 1963, ch. 303, which enacted the original Criminal Code. Most of the provisions of Laws 1963, ch. 303, that have not been repealed are compiled in arts. 1 to 28 of this chapter, but some are compiled in Chapter 31. See the Table of Disposition of Acts in Binder 13. In addition, the Criminal Code includes later acts in which the legislature specifically stated its intention to add to the Criminal Code. See, *e.g.*, Laws 1979, ch. 176, which added 30-16A-1 to 30-16A-4.

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For comment, "Survey of New Mexico Law: Criminal Law," see 15 N.M.L. Rev. 231 (1985).

30-1-2. Application of code.

The Criminal Code has no application to crimes committed prior to its effective date.

A crime is committed prior to the effective date of the Criminal Code if any of the essential elements of the crime occurred before that date.

Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed.

History: 1953 Comp., § 40A-1-2, enacted by Laws 1963, ch. 303, § 1-2.

ANNOTATIONS

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Application of savings clause of this section. - Based upon the savings clause of the Criminal Code, found in this section, and N.M. Const., art. IV, § 33, providing that no person shall be exempt from prosecution for any crime by reason of repeal of the law in question, the court correctly applied former 41-16-1, 1953 Comp., the Habitual Criminal Act, when sentence was imposed on defendant. *State v. Tipton*, 78 N.M. 600, 435 P.2d 430 (1967).

30-1-3. Construction of Criminal Code'.

In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern.

History: 1953 Comp., § 40A-1-3, enacted by Laws 1963, ch. 303, § 1-3.

ANNOTATIONS

- I. General Consideration.
- II. Common-law Crimes.
 - A. In General.
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- III. Criminal Intent.
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I. GENERAL CONSIDERATION.

Cross-references. - For provision making the common law the rule of practice and decision, see 38-1-3 NMSA 1978.

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Law reviews. - For article, "Disclosure of Medical Information - Criminal Prosecution of Medicaid Fraud in New Mexico," see 9 N.M.L. Rev. 321 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 7, 9.

Modern status of test of criminal responsibility - state cases, 9 A.L.R.4th 526.

22 C.J.S. Criminal Law § 24.

II. COMMON-LAW CRIMES.

A. IN GENERAL.

Common-law crimes recognized. - Common-law crimes were recognized and enforced by virtue of Laws 1851, p. 144 (41-11-1, 1953 Comp.). *Mosgrave v. McManus*, 24 N.M. 227, 173 P. 196 (1918); *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913).

Common-law crimes recognized only where applicable to state. - Only so much of the common law was adopted as was applicable to New Mexico's conditions and circumstances. *Blake v. Hoover Motor Co.*, 38 N.M. 371, 212 P. 738 (1923); *Childers v. Talbott*, 4 N.M. (Gild.) 336, 16 P. 275 (1888); *Bent v. Thompson*, 5 N.M. 408, 23 P. 234 (1890), *aff'd*, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891); *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913); *Gurule v. Duran*, 20 N.M. 348, 149 P. 302, 1915F L.R.A. 648 (1915).

Common-law crimes recognized when not in conflict with constitution or laws. - The territorial legislature adopted the common law, as the rule of practice and decision in criminal cases, thereby incorporating into the body of our law the common law, *lex non scripta*, of England, and such British statutes of a general nature not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which were applicable to our condition and circumstances, and which were in force at the time of the revolution. *State v. Hartzler*, 78 N.M. 514, 433 P.2d 231 (Ct. App. 1967); *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913).

The common law of crimes applies except where the common law has been changed by statute. *State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982)(specially concurring opinion).

Strict construction of statutes. - The common-law rule for strict construction of criminal statutes was in force in New Mexico. *Territory v. Davenport*, 17 N.M. 214, 124 P. 795 (1912).

Common-law year-and-a-day rule abolished. - The common-law year-and-a-day rule, under which, if a person injured by an assailant survived beyond a year and a day after receiving the injuries, the defendant was excused from criminal culpability for the death, should no longer be recognized in this jurisdiction. Due to modern advances in medical and criminal science and technology, the rationale behind the rule no longer exists. *State v. Gabehart*, 114 N.M. 183, 836 P.2d 102 (Ct. App. 1992).

B. PARTICULAR OFFENSES.

Perjury. - At common law, perjury was committed when a lawful oath was administered in some judicial proceeding to a person who swore willfully, absolutely and falsely in matters material to the issue, and it was perjury to take a false oath in justifying bail in any of the courts or before any person acting as a court, justice or tribunal, having power to hold such proceedings. Hence, a surety on an appeal bond from a justice of the peace (now magistrate) who swore falsely regarding his property was guilty of perjury even where the statute did not require an oath from him. *Territory v. Weller*, 2 N.M. 470 (1883).

Prison breach. - Prison breach, a common-law practice, was punishable in New Mexico under laws 1851, p. 144 (41-11-1, 1953 Comp.). *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913).

Statute of Anne. - The statute of 9 Anne, c. 20 was made a part of New Mexico's common law. *Territory ex rel. Wade v. Ashenfelter*, 4 N.M. (Gild.) 93, 12 P. 879 (1887), appeal dismissed, 154 U.S. 493, 14 S. Ct. 1141, 38 L. Ed. 1079 (1893); *Albright v. Territory ex rel. Sandoval*, 13 N.M. 64, 79 P. 719 (1905), appeal dismissed, 200 U.S. 9, 26 S. Ct. 210, 50 L. Ed. 346 (1906); *United States v. Tallmadge*, 14 N.M. 293, 91 P. 729 (1907); *State ex rel. Owen v. Van Stone*, 17 N.M. 41, 121 P. 611 (1912); *State v. De Armijo*, 18 N.M. 646, 140 P. 1123 (1914).

Offense against public decency. - The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality or obstruct or pervert public justice or the administration of government; and it is the common law of this commonwealth that whatever openly outrages decency and is injurious to public morals is a misdemeanor and punishable at law. *State v. Hartzler*, 78 N.M. 514, 433 P.2d 231 (Ct. App. 1967).

Indecent treatment of dead body. - The offense, which was and is punishable at common law, is that of indecency in the treatment or handling of a dead human body. That which outrages or shocks the public sense of decency and morals, or that which contravenes the established and known public standards of decency and morals, relative to the care, treatment or disposition of a dead human body, is punishable as an act of indecency. *State v. Hartzler*, 78 N.M. 514, 433 P.2d 231 (Ct. App. 1967).

The length of time the body was kept, the manner and places in which it was kept, the obvious facts of changes in and decomposition of the body, and the concealment of the body from the police officers, all evidence failure to conform to the acceptable standards of decency and morals of our society in the treatment or handling of a dead human body. *State v. Hartzler*, 78 N.M. 514, 433 P.2d 231 (Ct. App. 1967).

Act relating to embezzlement not part of state's common law. - The act of parliament passed in 1799 (39 Geo. III), relating to embezzlement and the decisions construing it, was not part of the common law of New Mexico. *Territory v. Maxwell*, 2 N.M. 250 (1882).

III. CRIMINAL INTENT.

Existence of criminal intent essential. - Generally speaking, when an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, although the terms of the statute do not require it. *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

Instruction on intent jurisdictional absent legislative indication to the contrary. - Except where the legislature clearly indicates a desire to eliminate the requirement of criminal intent, criminal statutes will be construed in the light of the common law and criminal intent will be required, and failure to instruct on this required element will be considered jurisdictional. *State v. Fuentes*, 85 N.M. 274, 511 P.2d 760 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973).

Legislative indication must clearly appear. - The legislature may forbid the doing of an act and make its commission criminal, without regard to the intent with which such act is done; but in such case it must clearly appear from the act, from its language or clear inference, that such was the legislative intent. *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

Whether criminal intent is essential is a matter of construction. *State v. Craig*, 70 N.M. 176, 372 P.2d 128 (1962).

IV. INDICTMENT, TRIAL AND JUDGMENT.

Constitutional provisions for presentments, indictments and information were self-executing. *State v. Rogers*, 31 N.M. 485, 247 P. 828 (1926).

Indictment for murder. - The common-law procedure being in force in New Mexico, where the statutes have adopted the common-law definition of murder, an indictment may omit a direct charge of a purpose or intent to kill as an overt act. *Territory v. Montoya*, 17 N.M. 122, 125 P. 622 (1912).

Charging assault with intent to murder. - In indictment for assault with intent to commit murder, the means or instrument of committing the assault should be stated, the common law being made, by statute, the rule of decision and practice, where not specifically changed. *Territory v. Carrera*, 6 N.M. 594, 30 P. 872 (1892).

Raising defense of former jeopardy. - Common law required defense of former jeopardy to be specially pleaded. It could not be raised by motion for instructed verdict

at conclusion of state's case. *Territory v. Lobato*, 17 N.M. 666, 134 P. 222 (1913), *aff'd*, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916).

Trial by jury. - The constitution preserves the right of trial by jury already existing, which means as it existed in the territory prior to adoption of constitution. *Guitierrez v. Gober*, 43 N.M. 146, 87 P.2d 437 (1939).

Common-law presumption relating to spouses. - The presumption of the common law that a married woman committing a crime in presence of her husband was under coercion was rebuttable. *State v. Asper*, 35 N.M. 203, 292 P. 225 (1930).

Opportunity for defendant to speak before judgment. - On failure of trial court to ask defendant before judgment was passed whether he had anything to say why judgment should not be pronounced upon him, or to have the record affirmatively show that fact, the cause must be remanded upon that ground alone. *Territory v. Herrera*, 11 N.M. 129, 66 P. 523 (1901).

Discretion in sentencing. - The common law gives trial courts the discretion to make sentences consecutive or concurrent. *State v. Crouch*, 75 N.M. 533, 407 P.2d 671 (1965).

Assessment of costs in criminal cases was unknown at common law and therefore requires statutory authority. *State v. Valley Villa Nursing Center, Inc.*, 97 N.M. 161, 637 P.2d 843 (Ct. App. 1981).

Review of judgments. - The common law, vested the supreme court with jurisdiction to review judgments in criminal cases by writ of error. *Borrego v. Territory*, 8 N.M. 446, 46 P. 349, *cert. denied*, 8 N.M. 655, 46 P. 211, *aff'd sub nom. Gonzales v. Cunningham*, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

30-1-4. Crime defined.

A crime is an act or omission forbidden by law and for which, upon conviction, a sentence of either death, imprisonment or a fine is authorized.

History: 1953 Comp., § 40A-1-4, enacted by Laws 1963, ch. 303, § 1-4.

ANNOTATIONS

Crime as public offense. - A crime is a public offense, and all public offenses are expressly defined to be crimes in New Mexico. 1959-60 Op. Att'y Gen. No. 59-154 (opinion rendered under 40-1-2 to 40-1-4, 1953 Comp.).

And violation of public law. - A "public offense" is the same as a "crime," and may include a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights. It is an act committed or omitted in violation

of public law. 1959-60 Op. Att'y Gen. No. 59-154 (opinion rendered under 40-1-2 to 40-1-4, 1953 Comp.).

Nature of criminal intent. - Criminal intent is more than intentional taking. It is a mental state of conscious wrongdoing. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

30-1-5. Classification of crimes.

Crimes are classified as felonies, misdemeanors and petty misdemeanors.

History: 1953 Comp., § 40A-1-5, enacted by Laws 1963, ch. 303, § 1-5.

ANNOTATIONS

Meaning of "crime" in Detoxification Act. - The Criminal Code makes it clear that the prohibition in the Detoxification Act (43-2-16 to 43-2-22 NMSA 1978) against charging an individual held in protective custody with any "crime" includes misdemeanors and petty misdemeanors. 1973-74 Op. Att'y Gen. No. 73-52.

30-1-6. Classified crimes defined.

A. A crime is a felony if it is so designated by law or if upon conviction thereof a sentence of death or of imprisonment for a term of one year or more is authorized.

B. A crime is a misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment in excess of six months but less than one year is authorized.

C. A crime is a petty misdemeanor if it is so designated by law or if upon conviction thereof a sentence of imprisonment for six months or less is authorized.

History: 1953 Comp., § 40A-1-6, enacted by Laws 1963, ch. 303, § 1-6.

ANNOTATIONS

Special statute controls over general. - This section and 31-19-1 NMSA 1978 refer generally to the sentence for misdemeanors; former 64-10-1, 1953 Comp., relating to fraudulent applications in motor vehicle registration and the like, provides a specific sentence for that misdemeanor. If the general statute, standing alone, would include the same matter as the special statute and thus conflict with the special statute, the special statute controls since it is considered an exception to the general statute. State v. Sawyers, 79 N.M. 557, 445 P.2d 978 (Ct. App. 1968).

Classification of criminal contempt in discretion of courts. - Where the sole punishment of the criminal contemnor is a fine the New Mexico courts are free to make their own determination as to what is a "petty" and what is a "serious" offense, guided

by the standards of *District of Columbia v. Clawans*, 300 U.S. 617, 57 S. Ct. 660, 81 L. Ed. 843 (1937) and other federal cases. *Seven Rivers Farm, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973).

Penalty imposed as indication of nature of offense. - Under the rule in when the legislature has not expressed a judgment as to the seriousness of an offense by fixing a maximum penalty which may be imposed, the court is to look to the penalty actually imposed as the best evidence of the seriousness of the offense. *Seven Rivers Farm, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973); *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523, 16 L. Ed. 2d 629 (1966).

Speeding is misdemeanor. - A violation of the speeding laws, being Laws 1957, ch. 73 (64-18-1.1 1953 Comp. et seq.), is a public offense, and is classified as a misdemeanor under that section, and the penalty therefore is provided herein. 1959-60 Op. Att'y Gen. No. 59-154.

Falsely obtaining unemployment benefits is petty misdemeanor. - When Subsection C is read together with 51-1-38 NMSA 1978, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is one year under 30-1-8F NMSA 1978. *Robinson v. Short*, 93 N.M. 610, 603 P.2d 720 (1979).

Violation of municipal ordinance constitutes petty misdemeanor because imprisonment may not exceed 90 days. *State v. Luna*, 93 N.M. 773, 606 P.2d 183 (1980).

Effect of altering classification of crime. - Statute under which the placing of poison in food for dogs would be a misdemeanor (Laws 1912, ch. 38, § 2, 40-4-1, 1953 Comp.) was impliedly repealed by subsequent statute (Laws 1919, ch. 82, § 1, 40-4-2, 1953 Comp.) making such offense a felony, under rule that if the same offense, identified by name or otherwise, is altered in degree or incidents, or if a felony is changed to a misdemeanor, or vice versa, the statute making such changes has the effect of repealing the former act. *State v. Anderson*, 40 N.M. 173, 56 P.2d 1134 (1936).

Jury trial of misdemeanor. - Those misdemeanors triable in district court do not provide for a trial by jury unless such crime was of the type which enjoyed and permitted trial by jury at the time of the adoption of N.M. Const., art. II, § 12. 1964 Op. Att'y Gen. No. 64-37.

Persons charged with offenses classified as misdemeanors under the Motor Vehicle Code may under Rule 23, N.M.R. Crim. P. (Magis. Cts.) (now see Rule 6-602) demand a jury trial but are not afforded one as a matter of right. 1979 Op. Att'y Gen. No. 79-17.

Federal right to jury trial for contempt. - So long as the fine for criminal contempt which is, or may be, imposed is not more than \$1000, there is no federal constitutional

right to jury trial as the crime is a petty offense, nor need prosecution be by information. *Seven Rivers Farm, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973).

Federal right to trial on presentment or indictment. - Crimes punishable by imprisonment in a state prison or penitentiary with or without hard labor, where infamous crimes for which persons could not be held to answer in federal courts otherwise than on presentment or indictment of a grand jury. *Mackin v. United States*, 117 U.S. 348, 6 S. Ct. 777, 29 L. Ed. 909 (1886).

Applicability of territorial classifications. - Laws 1853-1854, p. 82 (former 40-1-3, 1953 Comp.), defining a felony, was not applicable to a crime tried under federal statute by the territorial court; only the United States, not the territorial legislature, could define federal crimes as felonies and misdemeanors, although the legislature might prescribe procedural methods for their trial. *United States v. Vigil*, 7 N.M. 296, 34 P. 530 (1893).

For cases applying former 40-1-3, 1953 Comp., so as to classify offenses as felonies, see *State v. Jones*, 73 N.M. 459, 389 P.2d 398 (1964); *State v. Klantcheck*, 59 N.M. 284, 283 P.2d 619 (1955).

Law reviews. - For annual survey of New Mexico criminal procedure, see 16 N.M.L. Rev. 25 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 19, 28 to 30.

Character of offense as felony as affected by discretion of court or jury regarding punishment, 95 A.L.R. 1115.

Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender, 19 A.L.R.2d 227.

22 C.J.S. Criminal Law §§ 9 to 12.

30-1-7. Degrees of felonies.

Felonies under the Criminal Code are classified as follows:

- A. capital felonies;
- B. first degree felonies;
- C. second degree felonies;
- D. third degree felonies; and
- E. fourth degree felonies.

A felony is a capital, first, second, third or fourth degree felony when it is so designated under the Criminal Code. A crime declared to be a felony, without specification of degree, is a felony of the fourth degree.

History: 1953 Comp., § 40A-1-7, enacted by Laws 1963, ch. 303, § 1-7.

ANNOTATIONS

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Purpose of former law. - The purpose of Laws 1871-1872, ch. 31, § 1, was to provide for the punishment of common-law crimes, since penalties for statutory crimes were always enacted. *Ex parte De Vore*, 18 N.M. 246, 136 P. 47 (1913).

Sentence for felony with no specific statutory punishment. - Where no specific statutory punishment was provided for crime of being accessory to murder, one convicted of such crime was to be sentenced under Laws 1871-1872, ch. 31, § 1, providing punishment for felonies when not otherwise prescribed, and not sentenced to death. *State v. Archer*, 32 N.M. 319, 255 P. 396 (1927).

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

30-1-8. Time limitations for commencing prosecution.

No person shall hereafter be prosecuted, tried or punished in any court of this state unless the indictment shall be found or information or complaint filed therefor within the time hereinafter provided:

A. for a capital felony, within fifteen years from the time the crime was committed;

B. for a first degree felony, within fifteen years from the time the crime was committed;

C. for a second degree felony, within six years from the time the crime was committed;

D. for a third or fourth degree felony, within five years from the time the crime was committed;

E. for a misdemeanor, within two years from the time the crime was committed;

F. for a petty misdemeanor, within one year from the time the crime was committed;

G. for any crime against or violation of the revenue laws of this state or of Section 51-1-38 NMSA 1978, within three years from the time the crime was committed; and

H. for any crime not contained in the Criminal Code, or where a limitation is not otherwise provided for, within three years from the time the crime was committed.

History: 1953 Comp., § 40A-1-8, enacted by Laws 1963, ch. 303, § 1-8; 1979, ch. 5, § 1; 1980, ch. 50, § 1.

ANNOTATIONS

Cross-references. - For limitation on prosecutions for violations of municipal ordinances, see 35-15-5 NMSA 1978.

For raising pre-trial motions, defenses and objections, see Rule 5-601.

For time limits for arraignment and commencement of trial, see Rule 5-604.

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Limitation "not otherwise provided for". - A limitation is "otherwise provided for" for purposes of Subsection H, based on Subsection F, if the punishment for the crime is such as to make it a petty misdemeanor under 30-1-6 NMSA 1978, even if the statute under which the defendant was charged does not expressly state the degree of the crime. *Robinson v. Short*, 93 N.M. 610, 603 P.2d 720 (1979).

Period begins running when crime completed. - Where the final "taking" under a fraudulent loan occurred on July 17, 1973, the crimes of fraud and conspiracy to defraud were completed on that date, and the limitation period began to run. *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Limitations against prosecution for conspiracy run from time last overt act in furtherance of the conspiracy was committed. *State v. Thoreen*, 91 N.M. 624, 578 P.2d 325 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Prosecution of misdemeanor. - Under former 41-9-1, 1953 Comp., as well as this section, the maximum time for commencing prosecution for a misdemeanor was within two years from the time the offense was committed. 1957-58 Op. Att'y Gen. No. 57-74.

Time of filing superseding indictment or information not controlling. - Although a felony charge may be initiated by the filing of a complaint, the felony must be prosecuted by indictment or information, so that at some point the complaint is superseded by an indictment or information. This section, however, does not distinguish among complaint, indictment or information, and by providing for a complaint charging a felony within the time limitation, the legislature intended that the time of filing a superseding indictment or information should not control the limitation question. *State v. Martinez*, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Charges initiated by complaint continued by later indictment. - Since upon being advised that a defendant has been indicted prior to a preliminary examination, a magistrate takes no further action in the case, charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and for purposes of this section the prosecution should be considered as commenced by the filing of the complaint. *State v. Martinez*, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Jury to consider solely date charged. - Although it is not error to instruct the jury that it must find that the crime occurred within the applicable statute of limitations, it is error not to limit the jury's consideration to the date charged in the information. *State v. Foster*, 87 N.M. 215, 530 P.2d 949 (Ct. App. 1974).

New prosecution potentially barred after dismissal for failure to prosecute. - If there is a dismissal of a charge for failure to prosecute, a new prosecution would be barred if initiated after the limitation period expires. *State v. Martinez*, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Filing complaint within period tolls statute. - An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third-degree felony may be timely because the limitation period was tolled by the filing of the complaint within the three-year period. *State v. Martinez*, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978);(decided prior to 1979 amendment making limitation period five years).

Time limitation instruction. - Generally, the time limitation instruction is a necessary part of the instructions; however, where the uncontradicted evidence shows the offenses were committed within the time limitation, the instruction stating the time limitation is not a required instruction, but giving it is not error. *State v. Salazar*, 86 N.M. 172, 521 P.2d 134 (Ct. App. 1974).

Error not prejudicial. - Although the offense of unlawfully drawing or discharging a firearm in a settlement was barred by the statute of limitations, which defense was timely raised in the district court, so that the trial court erred in not dismissing this count, nevertheless, no sentence was imposed for this offense, and furthermore, the elements of the offense were embraced in the crime of assault with intent to kill, for which defendant was properly convicted, so that the error was without prejudice to him. *State v. Shawan*, 77 N.M. 354, 423 P.2d 39 (1967).

Falsely obtaining unemployment benefits is petty misdemeanor. - When 30-1-6C NMSA 1978 is read together with 51-1-38 NMSA 1978, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is one year under Subsection F. *Robinson v. Short*, 93 N.M. 610, 603 P.2d 720 (1979).

Contributions payable under 51-1-19 NMSA 1978 are not "revenues" within meaning of Subsection G. *Robinson v. Short*, 93 N.M. 610, 603 P.2d 720 (1979).

Prosecution for sale of property of another not barred. - Under former law, prosecution for unlawful sale of one head of neat cattle, the property of another, was not barred where commenced within three years from time of alleged offense. *State v. Stone*, 41 N.M. 547, 72 P.2d 9 (1937).

Effect of not guilty plea. - Under former law, plea of not guilty in prosecution for rape raised issue of statute of limitations. *State v. Rodman*, 44 N.M. 162, 99 P.2d 711 (1940).

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 223 to 233.

Discharge of accused under a limitation statute as a bar to a subsequent prosecution for the same offense, 3 A.L.R. 519.

Burden on state to show that crime was committed within limitation period, 13 A.L.R. 1446.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Right to require bail or recognizance where, at time of filing, prosecution of principal is barred by statute of limitations, 75 A.L.R.2d 1431.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Waivability of bar of limitations against criminal prosecution, 78 A.L.R.4th 693.

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS §§ 1961-1968, 89 A.L.R. Fed. 887.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

22 C.J.S. Criminal Law §§ 196 to 207.

30-1-9. Tolling of time limitation for prosecution for crimes.

A. If after any crime has been committed the defendant shall conceal himself, or shall flee from or go out of the state, the prosecution for such crime may be commenced

within the time prescribed in Section 1-8 [30-1-8 NMSA 1978], after the defendant ceases to conceal himself or returns to the state. No period shall be included in the time of limitation when the party charged with any crime is not usually and publicly a resident within the state.

B. When

- (1) an indictment, information or complaint is lost, mislaid or destroyed;
- (2) the judgment is arrested;
- (3) the indictment, information or complaint is quashed, for any defect or reason; or
- (4) the prosecution is dismissed because of variance between the allegations of the indictment, information or complaint and the evidence; and a new indictment, information or complaint is thereafter presented, the time elapsing between the preferring of the first indictment, information or complaint and the subsequent indictment, information or complaint shall not be included in computing the period limited for the prosecution of the crime last charged; provided that the crime last charged is based upon and grows out of the same transaction upon which the original indictment, information or complaint was founded, and the subsequent indictment, information or complaint is brought within five years from the date of the alleged commission of the original crime.

History: 1953 Comp., § 40A-1-9, enacted by Laws 1963, ch. 303, § 1-9.

ANNOTATIONS

Cross-references. - For defects, errors and omissions in a complaint, indictment or information, and variances between the allegations therein and the evidence, see Rule 5-204 SCRA 1986.

Constitutionality. - The application of the tolling provision did not violate either defendant's right to travel or his constitutional guarantee of equal protection of the laws. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990).

Statute not exclusive. - Although this section does show a legislative intent that the limitation period is not to be utilized to bar a prosecution delayed by procedural problems, it does not evince an intent to bar prosecutions not beset with procedural problems. *State v. Martinez*, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Indictment timely because complaint had tolled statute. - An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony is timely because the limitation period was tolled by the filing of the

complaint within the three-year period. *State v. Martinez*, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Evidence of absence from state insufficient. - Where there was no evidence tending to show defendant's whereabouts from the time of his escape from prison on September 17, 1956 until his apprehension in Oklahoma on January 24, 1960, defendant's plea of not guilty put the statute of limitations in issue, and his motion for a directed verdict on the grounds that the three-year statute of limitations was a bar to prosecution should have been granted. *State v. Oliver*, 71 N.M. 317, 378 P.2d 135 (1962).

Evidence negating residence insufficient. - There being no substantial evidence in record that defendant was not usually and publicly a resident of state, after commission of crime for sufficient time to toll statute of limitations, he was entitled to instructed verdict in his favor. *State v. Mersfelder*, 34 N.M. 465, 284 P. 113 (1927).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 227, 228, 231, 233.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Imprisonment as tolling the statute of limitations, 76 A.L.R.3d 743.

Finding or return of indictment, or filing of information, as tolling limitation period, 18 A.L.R.4th 1202.

Issuance or service of state-court arrest warrant, summons, citation, or other process as tolling criminal statute of limitations, 71 A.L.R.4th 554.

22 C.J.S. Criminal Law §§ 202 to 204.

30-1-9.1. Offenses against children; tolling of statute of limitations.

The applicable time period for commencing prosecution pursuant to Section 30-1-8 NMSA 1978 shall not commence to run for an alleged violation of Section 30-6-1, 30-9-11 or 30-9-13 NMSA 1978 until the victim attains the age of eighteen or the violation is reported to a law enforcement agency, whichever occurs first.

History: 1978 Comp., § 30-1-9.1, enacted by Laws 1987, ch. 117, § 1.

ANNOTATIONS

Applicability. - Laws 1987, ch. 117, § 2 provides that the act applies only to crimes committed on or after June 19, 1987.

30-1-10. Double jeopardy.

No person shall be twice put in jeopardy for the same crime. The defense of double jeopardy may not be waived and may be raised by the accused at any stage of a criminal prosecution, either before or after judgment. When the indictment, information or complaint charges different crimes or different degrees of the same crime and a new trial is granted the accused, he may not again be tried for a crime or degree of the crime greater than the one of which he was originally convicted.

History: 1953 Comp., § 40A-1-10, enacted by Laws 1963, ch. 303, § 1-10.

ANNOTATIONS

- I. General Consideration.
- II. Tests.
 - A. Lesser Included Offense.
 - B. Same Evidence.
 - C. Merger, Collateral Estoppel and Same Transaction.
- III. Mistrial.
- IV. Raising the Defense.

I. GENERAL CONSIDERATION.

Cross-references. - For constitutional provision on former jeopardy, see N.M. Const., art. II, § 15.

When section applied. - The double jeopardy clause only comes to the aid of defendants subjected to multiple prosecutions for the identical offense, or in such situations in which collateral estoppel, the concept of lesser included offenses or the same evidence test apply. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

Section applies to children's court proceedings involving delinquent child. *State v. Doe*, 90 N.M. 536, 565 P.2d 1053 (Ct. App. 1977).

Acquittal of accused protects against second prosecution for same crime. *Borrego v. Territory*, 8 N.M. 446, 46 P. 349, aff'd sub nom. *Gonzales v. Cunningham*, 164 U.S. 612, 17 S. Ct. 182, 41 L. Ed. 572 (1896).

No jeopardy if information fails to state offense. - Where information failed to state an offense at time of arraignment and entry of plea of not guilty, defendant was not placed in jeopardy. *State v. Ardivino*, 55 N.M. 161, 228 P.2d 947 (1951).

No jeopardy if court lacks jurisdiction. - Since marijuana is not defined as a narcotic drug under the relevant statutes, a charge of violating 30-31-20 NMSA 1978 (trafficking) in the first proceeding brought against defendant for selling marijuana did not charge defendant with a public offense. Hence, as the court lacked jurisdiction in the first proceeding, there was no basis for a claim of double jeopardy where defendant was

later charged under the proper section. *State v. Mabrey*, 88 N.M. 227, 539 P.2d 617 (Ct. App. 1975).

No jeopardy on retrial after appeal. - The former jeopardy clause does not preclude retrial of defendant whose sentence is set aside because of error in the proceedings leading to sentence or conviction. *State v. Sneed*, 78 N.M. 615, 435 P.2d 768 (1967); *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Constitutional protection against double jeopardy does not prevent a second trial for the same offense where the defendant himself, by an appeal, has invoked the action which resulted in the second trial. *State v. Sneed*, 78 N.M. 615, 435 P.2d 768 (1967).

No jeopardy after collateral attack. - Where a conviction is overturned on collateral rather than direct attack, retrial is not precluded on double jeopardy grounds. *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Charging in alternative. - The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative; nor were the concepts of included offenses, same evidence or merger. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Greater sentence after trial de novo. - The greater sentence imposed by the district court for violation of certain municipal ordinances after a trial de novo did not deprive defendant of due process, nor did it amount to double jeopardy. *City of Farmington v. Sandoval*, 90 N.M. 246, 561 P.2d 945 (Ct. App. 1977).

Larceny of cattle distinct from disposition of hides. - Larceny of cattle, completed on one day by driving the cattle away or killing them with intent to steal, was a distinct offense from that of killing cattle and failing to keep the hides and an acquittal of former was no bar to prosecution for latter. *State v. Knight*, 34 N.M. 217, 279 P. 947 (1929).

Conspiracy and completed offense are separate offenses and conviction of both does not amount to double jeopardy. *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses, and a conviction for the conspiracy may be had though the substantive offense was completed. The plea of double jeopardy is not a defense to conviction for both offenses. *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00

and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. *State v. Watkins*, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Double use of prior felony. - It is not legally permissible for the state to present evidence of the same prior felony to prove an essential element of the crime of felon in possession of a firearm, and to rely upon this same evidence for purposes of enhancing the defendants' sentences under the habitual offender criminal statute. *State v. Haddenham*, 110 N.M. 149, 793 P.2d 279 (Ct. App. 1990).

Law reviews. - For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 243 to 320.

Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial, 4 A.L.R. 1266.

Statutes relating to sexual psychopaths, 24 A.L.R.2d 350.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Discharge of accused for holding him excessive time without trial as bar to subsequent prosecution for same offense, 50 A.L.R.2d 943.

Conspiracy: conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Lesser offense: conviction of lesser offense as bar to prosecution for greater on new trial, 61 A.L.R.2d 1141.

Appeal: conviction from which appeal is pending as bar to another prosecution for same offense under rule against double jeopardy, 61 A.L.R.2d 1224.

Plea of guilty as basis of claim of double jeopardy in attempted subsequent prosecution for same offense, 75 A.L.R.2d 683.

Propriety, and effect as double jeopardy, of court's grant of new trial on own motion in criminal case, 85 A.L.R.2d 486.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense, 4 A.L.R.3d 874.

Subsequent trial, after stopping former trial to try accused for greater offense, as constituting double jeopardy, 6 A.L.R.3d 905.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 834.

Increased punishment: propriety of increased punishment on new trial for same offense, 12 A.L.R.3d 978.

Larceny: single or separate larceny predicated upon stealing property from different owners at the same time, 37 A.L.R.3d 1407.

Kidnaping: seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnaping under doctrine of former jeopardy, 43 A.L.R.3d 699.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial, 98 A.L.R.3d 997.

Right of defendant sentenced after revocation of probation to credit for jail time served as condition of probation, 99 A.L.R.3d 781.

Applicability of double jeopardy to juvenile court proceedings, 5 A.L.R.4th 234.

Conviction or acquittal in federal court as bar to prosecution in state court for state offense based on same facts, 6 A.L.R.4th 802.

Retrial on greater offense following reversal of plea-based conviction of lesser offense, 14 A.L.R.4th 970.

What constitutes "manifest necessity" for state prosecutor's dismissal of action, allowing subsequent trial despite jeopardy's having attached, 14 A.L.R.4th 1014.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction, 15 A.L.R.4th 1127.

22 C.J.S. Criminal Law §§ 208 to 276.

II. TESTS.

A. LESSER INCLUDED OFFENSE.

Effect of conviction or acquittal of lesser included offense. - Conviction or acquittal of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Meaning of included offense. - For an offense to be included within another offense, the offense must be necessarily included in the offense charged in the indictment, and for an offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser, and in determining whether an offense is necessarily included, the court will look to the offense charged in the indictment. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Exception to rule. - Conviction of a lesser included offense bars prosecution of a greater offense, subject to one exception: if the court does not have jurisdiction to try the crime, double jeopardy cannot attach, since double jeopardy requires that a court have sufficient jurisdiction to try the charge. Where the magistrate court had no jurisdiction to try the charge of vehicular homicide while driving while intoxicated or recklessly driving, double jeopardy should not bar the vehicular homicide by driving while intoxicated charge. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

Armed robbery and aggravated battery. - The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Driving under the influence and homicide by vehicle. - Where the indictment against defendant was phrased in the alternative charging him with homicide by vehicle while violating either 66-8-102 NMSA 1978 or 64-22-3, 1953 Comp., the prosecution was not barred by a conviction in municipal court for driving under the influence since the lesser offense of driving while under the influence of intoxicating liquor is not necessarily included in the greater offense of homicide by vehicle. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

Possession and distribution. - Possession of marijuana was a lesser offense necessarily included in the greater offense of distribution, arising out of the same events, and since defendant was convicted of the lesser offense, double jeopardy barred his prosecution for the greater. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

B. SAME EVIDENCE.

Nature of test. - The test for determining whether two offenses are the same so as to bring into operation the prohibition against double jeopardy is the "same evidence" test which asks whether the facts offered in support of one offense would sustain a conviction of the other. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975); *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 384 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

The "same evidence" test is whether the facts offered in support of one offense would sustain a conviction of the other offense. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Proof of different facts. - If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977); *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 384 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

If test met, section does not bar consecutive sentencing. - Under the "same evidence" test, where different elements are required to be proved in order to sustain each of three convictions, and different evidence is admitted to prove the different elements, it appears that the three convictions are based in part on separate evidence and the prohibition against double jeopardy does not bar consecutive sentencing under the circumstances of the case. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

Felony murder and armed robbery are separate offenses, although they may arise out of the same transaction. *State v. Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981).

Armed robbery and aggravated battery. - Since taking the victim's purse was a fact required to be proved under the armed robbery charge, but not under the aggravated battery charge, and application of force was a fact required to be proved under the aggravated battery charge, while threatened use of force would be acceptable proof under the armed robbery charge, the elements of the two crimes were not the same, and the "same evidence" test did not apply. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Drunk driving and homicide by vehicle. - Where the facts offered in municipal court to support a conviction for driving while under the influence of intoxicating liquors would not necessarily sustain a conviction for homicide by vehicle in district court, under the "same evidence" test there was no double jeopardy when the state sought to prosecute the defendant for homicide by vehicle. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

C. MERGER, COLLATERAL ESTOPPEL AND SAME TRANSACTION.

Definition of merger. - Merger is the name applied to the concept of multiple punishment when multiple charges are brought in a single trial; it is an aspect of double jeopardy, concerned with whether more than one offense has occurred and is applied to prevent a person from being punished twice for the same offense. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Nature of test. - The test of whether one criminal offense has merged in another is not whether two criminal acts are successive steps in the same transaction (the rejected "same transaction" test), but whether one offense necessarily involves the other. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Merger concept has aspects of "same evidence" test because merger and the "same evidence" test are both concerned with whether more than one offense has been committed. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Merger has aspects of included offense concept. - The merger concept has aspects of the included offense concept, and in determining whether one offense necessarily involves another offense so that merger applies, the decisions have looked to the definitions of the crimes to see whether the elements are the same; this approach is similar to the approach used in determining whether an offense is an included offense (a determination of whether the greater offense can be committed without also committing the lesser). *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Offense of aggravated battery did not merge with armed robbery. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Homicide. - Homicide resulting from great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first-degree kidnaping, and there was no merger with the murder charge on which defendant was acquitted. *State v. Melton*, 90 N.M. 188, 561 P.2d 461 (1977).

Definition of collateral estoppel. - Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Under the rule of collateral estoppel any right, fact or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose or subject matter of the two

suits is the same or not. *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Part of constitutional guarantee. - The principle of collateral estoppel is embodied in the U.S. Const., amend. V guaranty against double jeopardy and is fully applicable to states by force of U.S. Const., amend. XIV. *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

When constitutionally required. - The principle of collateral estoppel is only constitutionally required after a previous acquittal on issues raised in a second prosecution, and bars relitigation between the same parties of issues actually determined at the previous trial. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

Sanity during commission of different crimes. - Where defendant's sanity was raised as an affirmative defense in a first trial, was actually litigated and was absolutely necessary to a decision in that trial, the sanity of the defendant in a second trial for offenses committed some 16 hours prior to the crime which was the subject of the first trial was the same issue of fact as the question of his insanity at the first trial and having been decided there in his favor collateral estoppel was a bar to the second trial. *State v. Nagel*, 87 N.M. 434, 535 P.2d 641 (Ct. App.), cert. denied, 87 N.M. 450, 535 P.2d 657 (1975).

Traffic violations and homicide by vehicle. - Where defendant was convicted in municipal court of violation of certain traffic ordinances, he had no acquittal to raise in his defense in district court on charges of homicide by vehicle, and application of the principle of collateral estoppel was therefore inappropriate. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

Same transaction test rejected. - The "same transaction" test, which is concerned with whether offenses were committed at the same time, were part of a continuous criminal act and inspired by the same criminal intent, has not been imposed by the United States supreme court on the states in double jeopardy cases, and its use is not mandated by N.M. Const., art. II, § 15. It is rejected and disapproved. *State v. Tanton*, 88 N.M. 333, 540 P.2d 813 (1975).

III. MISTRIAL.

Manifest necessity. - Where a mistrial is granted not at the behest of defendant, a second trial is precluded by the double jeopardy clause of the U.S. Const., amend. V unless it can be said that there was a "manifest necessity" or "compelling reason" for the granting of a mistrial. Upon appellate review, the question to be decided is whether the trial court exercised sound judicial discretion to ascertain that there was a manifest necessity for the declaration of the mistrial. *State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975).

Basis of manifest necessity. - The court of appeals would decline to hold there was a manifest necessity for a mistrial based on the state's supposedly prejudiced right to appeal when no appeal was attempted. *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Ends of public justice. - In determining whether a mistrial should be declared, the trial court must consider whether the ends of public justice would be defeated by carrying the first trial to a final verdict; this consideration for the ends of public justice is a concept separate from manifest necessity. *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Prejudice to state. - The failure of defendant to file a timely motion to suppress his statement resulted in prejudice to the state, and since in such circumstances it would be contrary to the ends of public justice to carry the first trial to a final verdict, the trial court did not abuse its discretion in declaring a mistrial; there was no double jeopardy. *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Need for responsible professional conduct. - In considering whether a mistrial was proper unquestionably an important factor to be considered is the need to hold litigants on both sides to standards of responsible professional conduct in the clash of an adversary criminal process. *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (Ct. App.), cert. denied, 89 N.M. 206, 549 P.2d 284 (1976).

Further interests of defendant. - In determining whether a defendant's retrial will place him in double jeopardy after a prior trial has ended with a declaration of a mistrial not at defendant's request include defendant's interest in having his fate determined by the jury first impaneled, which encompasses not only his right to have his trial completed by a particular panel, but also his interest in ending the dispute then and there with an acquittal, which factor would weigh heavily against retrial in all situations where jeopardy has attached, and also the factor of avoiding giving the state a second bite of the apple in order to either strengthen its case or to alter its trial strategy to obtain a conviction. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Discretion of trial court. - The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated; they are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances, which would render it proper to interfere, but the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Upon appellate review of the declaration of a mistrial the question is whether the trial court exercised a sound discretion to ascertain that there was a manifest necessity for a

mistrial. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Mistrial on abuse of discretion. - Where, after the second day of a trial, when jury instructions had already been settled, one of the jurors was frightened by a telephone call unrelated to the trial, and exploring her possible bias for use on voir dire in a future case, and the record did not show that the juror's fear involved either the state or the defendant, the trial court failed to exercise that sound discretion required of him in determining whether a manifest necessity or proper judicial administration mandated a mistrial. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Duty of court before declaring mistrial. - Where there is no manifest necessity for declaring a mistrial, the trial court has some duty to inquire as to possible alternatives thereto; affecting the scope of inquiry required are the factors of magnitude of prejudice and the point at which the proceedings are terminated, and as the magnitude of possible prejudice increases, less effort need be expended in seeking alternative resolutions, while conversely, as the length of trial wears on, more effort should be expended. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Failure to oppose mistrial. - Defense counsel's silence after declaration of a mistrial by the trial court, sua sponte, where simultaneously the defense attorney himself had been held in contempt for implicitly challenging a police officer on recross-examination to take a polygraph test, could not, under the circumstances, be construed as an intentional relinquishment of a known right, the right against double jeopardy, or as the mere play of wits of the sharp practitioner. *State v. Sedillo*, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975).

Retrial after mistrial. - Two considerations must be balanced against the weighty interests of the defendant against retrial after declaration of a mistrial not at his request, namely, whether there was a manifest necessity for the discharge of the first jury, and also whether the ends of public justice would have been defeated by carrying the first trial to final verdict. When the irregularity occurring at trial is of a procedural nature, not rising to the level of jurisdictional error, the necessity to discharge the jury has been held to be not manifest, but where the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury. *State v. De Baca*, 88 N.M. 454, 541 P.2d 634 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

A retrial after a mistrial is not barred by double jeopardy unless the mistrial was caused by prosecutorial overreaching. *State v. Mazurek*, 88 N.M. 56, 537 P.2d 51 (Ct. App. 1975).

Reprosecution after unnecessary mistrial. - Defense counsel's implicit challenge to a police officer to take a polygraph test, absent repeated misconduct, was not a type of

misconduct that would go to the very vitals of the trial itself, and hence, where the trial judge sua sponte declared a mistrial, having made no effort to cure the error or to assure that there was manifest necessity for such a step, reprosecution of the defendant would violate his right under the U.S. Const., amend. V not to be put in jeopardy twice for the same offense. State v. Sedillo, 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975).

IV. RAISING THE DEFENSE.

Estoppel. - An accused is estopped at a second trial to plead the bar of a prior conviction, judgment and sentence of which have been reversed on appeal. State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

A factual basis must appear in the record in order to support a double jeopardy defense. State v. Wood, 117 N.M. 681, 875 P.2d 1113 (Ct. App. 1994).

Raising issue on appeal despite failure to object below. - Even though defendant made no objection at second trial (held after remand of initial trial which had resulted in verdict of first-degree murder with recommendation of clemency) to instruction that the jury could find defendant guilty of murder in the first degree and might or might not recommend clemency, the question of whether this constituted double jeopardy could nevertheless be raised on appeal. State v. Sneed, 78 N.M. 615, 435 P.2d 768 (1967).

Defendant's argument that the state split one criminal defense into five separate prosecutions and that his convictions were not authorized by the legislature under the statute prohibiting the unauthorized practice of law amounted to a defense of double jeopardy which the defendant could raise for the first time on appeal. State v. Edwards, 102 N.M. 413, 696 P.2d 1006 (Ct. App. 1984).

Waiver of defense. - Plea of former jeopardy must be interposed at the earliest opportunity, otherwise it is waived; it cannot be raised for first time after verdict. State v. Mares, 27 N.M. 212, 199 P. 111 (1921)(case decided prior to enactment of 1963 Criminal Code).

Failure to properly raise same. - An oral motion to dismiss the information, claiming former jeopardy, was not sufficient to raise the question, and defendants were not entitled to a hearing on the point in the supreme court. State v. Spahr, 64 N.M. 395, 328 P.2d 1093 (1958)(case decided prior to enactment of 1963 Criminal Code).

30-1-11. Criminal sentence permitted only upon conviction.

No person indicted or charged by information or complaint of any crime shall be sentenced therefor, unless he has been legally convicted of the crime in a court having competent jurisdiction of the cause and of the person. No person shall be convicted of a crime unless found guilty by the verdict of the jury, accepted and recorded by the court; or upon the defendant's confession of guilt or a plea of nolo contendere, accepted and

recorded in open court; or after trial to the court without jury and the finding by the court that such defendant is guilty of the crime for which he is charged.

History: 1953 Comp., § 40A-1-11, enacted by Laws 1963, ch. 303, § 1-11.

ANNOTATIONS

Cross-references. - For constitutional right to trial by jury, see N.M. Const., art. II, §§ 12 and 14.

For arraignment and plea procedure, see Rules 5-303 and 5-304 SCRA 1986.

For right to jury trial, and waiver of same, see Rule 5-605 SCRA 1986.

Conviction refers to finding of guilt and does not include imposition of sentence. State v. Garcia, 99 N.M. 466, 659 P.2d 918 (Ct. App. 1983).

To justify conviction evidence must establish every essential element of the offense charged, and whatever is essential must affirmatively appear from the record. State v. Losolla, 84 N.M. 151, 500 P.2d 436 (Ct. App. 1972).

Guilty pleas authorized. - The power of a court to accept a plea of guilty is traditional and fundamental and specifically authorized by this section. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Waiver of jury permissible. - Though charged with a felony, a defendant may waive a trial by jury. State v. Hernandez, 46 N.M. 134, 123 P.2d 387 (1942).

Guilty plea as waiver of rights, defenses. - By pleading guilty the defendant admitted the acts well pleaded in the charge, waived all defenses other than that the indictment or information charges no offense, and waived the right to trial and the incidents thereof, and the constitutional guarantees with respect to the conduct of criminal prosecutions, including right to jury trial, right to counsel subsequent to guilty plea and right to remain silent. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Guilty plea as confession to charge. - Where appellant admittedly incriminated himself by his plea of guilty, he could not be heard to complain since by his plea he confessed the charge contained in the information. State v. Daniels, 78 N.M. 768, 438 P.2d 512 (1968).

Express adjudication of conviction or finding of guilt is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. State v. Gallegos, 92 N.M. 370, 588 P.2d 1045 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Safeguards in admitting confession. - Before a confession may be admitted into evidence it should first be determined by the court, on an inquiry out of the presence of the jury, and as a preliminary matter, that the confession, prima facie at least, possesses all the earmarks of voluntariness. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

State must overcome evidence of excuse or justification in the form of tangible affirmative defensive or factual matter capable of specific disproof included in a confession or admission. *State v. Casaus*, 73 N.M. 152, 386 P.2d 246 (1963).

Defendant to be heard on integrity of confession. - Any time a defendant makes it known that he has something to say touching the integrity of a confession claimed to have been made by him, however incredible it may appear to the trial court, the judge must hear him. In declining to do so, the court committed reversible error. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Plea of nolo contendere with deferred sentence. - Where defendant entered a plea of nolo contendere, which was accepted and defendant's counsel after conferring with defendant made an explanation to the court about defendant feeling sorry for what he had done, there can be no real doubt from what was said and recorded at the arraignment proceedings, from the entry of the "judgment and sentence," and from the entry of the "order of probation" that the court and defendant both understood that defendant's plea had been accepted, that defendant had been adjudged guilty of the charge on the basis of this plea, that his sentence for the offense was being deferred and that he was being placed on probation for two years upon certain expressly recited conditions. *State v. Apodaca*, 80 N.M. 155, 452 P.2d 489 (Ct. App. 1969).

Procedural irregularities not constitutionally significant. - Where defendant's attorney pleaded guilty for the defendant, who was present, after plea bargaining, the fact that the defendant himself did not enter the plea, that the court did not inquire whether the plea was made voluntarily and that the plea was not accepted and recorded in open court, as required by this section, did not deprive defendant of due process or raise any constitutional questions for federal habeas corpus review. *Anaya v. Rodriguez*, 372 F.2d 683 (10th Cir.), cert. denied, 389 U.S. 863, 88 S. Ct. 123, 19 L. Ed. 2d 133 (1967).

Misuse of word in verdict not jurisdictional. - Since the trial court unquestionably had jurisdiction over the person of defendant and over the subject matter of the offense charged, the inadvertent use of the word "information" in the jury's verdict did not raise a jurisdictional question. *State v. Ortega*, 79 N.M. 744, 449 P.2d 346 (Ct. App. 1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law § 525.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Plea of nolo contendere or non vult contendere, 89 A.L.R.2d 540.

24 C.J.S. Criminal Law §§ 1458, 1480, 1481.

30-1-12. Definitions.

As used in the Criminal Code:

A. "great bodily harm" means an injury to the person which creates a high probability of death; or which causes serious disfigurement; or which results in permanent or protracted loss or impairment of the function of any member or organ of the body;

B. "deadly weapon" means any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers, brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, bludgeons; or any other weapons with which dangerous wounds can be inflicted;

C. "peace officer" means any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes;

D. "another" or "other" means any other human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

E. "person" means any human being or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

F. "anything of value" means any conceivable thing of the slightest value, tangible or intangible, movable or immovable, corporeal or incorporeal, public or private. The term is not necessarily synonymous with the traditional legal term "property";

G. "official proceeding" means a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or depositions in any proceeding;

H. "lawful custody or confinement" means the holding of any person pursuant to lawful authority, including, without limitation, actual or conseructive [constructive] custody of prisoners temporarily outside a penal institution, reformatory, jail, prison farm or ranch;

I. "public officer" means any elected or appointed officer of the state or any of its political subdivisions, and whether or not he receives remuneration for his services; and

J. "public employee" means any person receiving remuneration for regular services rendered to the state or any of its political subdivisions.

History: 1953 Comp., § 40A-1-13, enacted by Laws 1963, ch. 303, § 1-13.

ANNOTATIONS

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

"Protracted impairment". - Section 66-8-101B NMSA 1978, which defines great bodily injury by a motor vehicle as "the injuring of a human being, to the extent defined in Section 30-1-12 NMSA 1978, in the unlawful operation of a motor vehicle," is not unconstitutionally vague. The term "protracted impairment" in 30-1-12A NMSA 1978 is capable of reasonable application by a jury of common intelligence after consideration of the circumstances involved. *State v. Jim*, 107 N.M. 779, 765 P.2d 195 (Ct. App. 1988).

"Serious disfigurement". - Under this section, the word "disfigurement" has no technical meaning and should be considered in the ordinary sense, as should the word "serious." *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966).

"High probability of death". - Sheriff's description of being choked by defendant was evidence that the choking created a "high probability of death" which is one part of the definition of great bodily harm. *State v. Hollowell*, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

"Great bodily harm" includes mayhem. - The legislature adopted the definition in Subsection A of this section in an effort to cover, among others, the crime of mayhem, originally enacted in 1853 to 1854 and compiled as former 40-30-1, 1953 Comp. *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966).

Establishing "great bodily harm". - The conditions in Subsection A are not cumulative, and only one need be shown in order to establish "great bodily harm." *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

"Great bodily harm" does not require that disfigurement be permanent. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

Great bodily harm need not be proved solely by medical experts. - Furthermore, the law does not require that "great bodily harm" be proved exclusively by medical testimony. The jury is entitled to rely upon rational inferences deducible from the evidence. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977).

Degree of bodily harm a question of fact. - Where the evidence showed that defendants forcibly tattooed victim with a needle and India ink, which tattoo extended from the back of the victim's neck to the center part of the waist and recited an offensive sentence, it became a question of fact as to whether or not the injuries sustained were sufficiently substantial to come within the statutory definition of "great bodily harm." State v. Ortega, 77 N.M. 312, 422 P.2d 353 (1966).

Instruction on personal injury. - In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at 30-9-10C NMSA 1978, and also gave the statutory definition of great bodily harm in Subsection A of this section in the instruction on first-degree criminal sexual penetration, the lack of additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect, and since he did not do so, he could not complain of the lack of additional definition of the term. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Corporate defendant as "person". - Although a corporate defendant may be charged and convicted of the offense of racketeering, it was error to submit the racketeering charge against the corporate defendant to the jury because the corporate defendant was not specifically charged with commission of such crime in the indictment. State v. Crews, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Knife as "deadly weapon". - For a knife to be a deadly weapon it must come within the portion of this statute as to any other deadly weapons with which dangerous wounds can be inflicted. State v. Martinez, 57 N.M. 174, 256 P.2d 791 (1953).

Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. There was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. State v. Riddall, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

Wounds establishing deadliness of knife. - Where no one directly testified the knife was one with which dangerous wounds could be inflicted, but the wounds were described by the physician who treated the victim, and they were sufficiently severe to keep him in a hospital under the doctor's care for a week, and in addition, the scars caused by the knife wounds were shown to the jury, in view of the depth and the length of the wounds the jury was fully justified in finding the knife used was a deadly weapon, although the blade used was only about two inches in length. State v. Martinez, 57 N.M. 174, 256 P.2d 791 (1953).

Jury to determine character of weapon. - The question of whether a weapon is capable of producing death or great bodily harm or is a weapon with which dangerous wounds can be inflicted is ordinarily for the jury who are to determine the question by

considering the character of the instrument and the manner of its use, either by a description thereof (even though the weapon is not in evidence) or by viewing the weapon admitted into evidence (even though it is not described). *State v. Gonzales*, 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973).

Although the screwdriver was not introduced into evidence, the jury could determine the factual question of whether a deadly weapon was used by a description of the weapon and its use. *State v. Candelaria*, 97 N.M. 64, 636 P.2d 883 (Ct. App. 1981).

Jury to determine existence of weapon. - Whether defendant actually had gun, defined in this section as a deadly weapon, whether loaded or unloaded, in her hand as testified to by robbery victim was for the jury to resolve. *State v. Eence*, 79 N.M. 23, 439 P.2d 240 (Ct. App. 1968).

Insufficient evidence to show deadly character of weapon. - Evidence that defendant raised an undescribed tire tool over attendant's head "like a threat," without more, was insufficient for a determination that the tire tool was a deadly weapon capable of producing death or great bodily harm or a weapon with which dangerous wounds could be inflicted. *State v. Gonzales*, 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973).

Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 94 N.M. 168, 608 P.2d 144 (1980).

Special deputy a "peace officer". - Absent a limitation of authority a special deputy is a peace officer and is cloaked with all of the powers and duties of such. 1965-66 Op. Att'y Gen. No. 66-92.

But not school security force. - Use of the term "peace officer" in describing security officers who were regular employees of the school system organized into a security and patrol force to guard school buildings and property would be improper. 1969-70 Op. Att'y Gen. No. 70-87 (unofficial opinion issued to superintendent of Albuquerque public schools).

Juvenile correctional officers were not "peace officers" within the meaning of this section, where, although they may have had the power to maintain order and make arrests in their particular domain, they were not vested by law with a duty to do so. *State v. Tabaha*, 103 N.M. 789, 714 P.2d 1010 (Ct. App. 1986).

Officers of state game commission are state officers. *Allen v. McClellan*, 77 N.M. 801, 427 P.2d 677 (1967), overruled on other grounds *New Mexico Livestock Bd. v. Dose*, 94 N.M. 68, 607 P.2d 606 (1980).

Meaning of "criminal intent". - Criminal intent is more than intentional taking; it is a mental state of conscious wrongdoing. State v. Austin, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

Law reviews. - For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

30-1-13. Accessory.

A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code.

History: 1953 Comp., § 40A-1-14, enacted by Laws 1963, ch. 303, § 1-14; 1972, ch. 97, § 66.

ANNOTATIONS

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

Accessory is one who "procures" commission of a crime. State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Abolition of distinction between principal and accessory places defendant on notice that he or she could be charged as a principal and convicted as an accessory or vice versa. State v. Wall, 94 N.M. 169, 608 P.2d 145 (1980).

Meaning of terms. - The word "crime," as used in the statute, means the principal offense, as in this case "armed robbery," and the term "as an accessory" is merely describing in different terms one who aids and abets in the commission of the crime, and authorizes such person to be charged with and convicted of the crime. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Aiding and abetting not distinct offense. - There is nothing in this section indicating an intent to make one who aids and abets in the commission of a crime a separate offense distinct and different from the crime committed by the one actually perpetrating it, and the purpose of the legislature to authorize charging and convicting an accessory

as a principal is made evident by the fact that no different penalty is provided by law for one who aids and abets. Hence, this section is to be read as though the words "as an accessory" were omitted. *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Means of aiding and abetting varied. - The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval. Mere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Salazar*, 78 N.M. 329, 431 P.2d 62 (1967); *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937); *State v. Luna*, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

The evidence shows aiding and abetting if it shows that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known that commission of an offense already undertaken has the aider's support or approval. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Manifestation of approval required. - Neither presence nor presence with mental approbation is sufficient to sustain a conviction as an aider or abettor. Presence must be accompanied by some outward manifestation or expression of approval. *State v. Phillips*, 83 N.M. 5, 487 P.2d 915 (Ct. App. 1971); *State v. Luna*, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

Criminal intent and purpose required. - Conviction could stand only if the record supported a conclusion that defendant shared the criminal intent and purpose of the principals, and mere presence without some outward manifestation of approval was insufficient. *State v. Salazar*, 78 N.M. 329, 431 P.2d 62 (1967).

In order for an individual to be guilty as an aider and abettor, all that was necessary was that he share the criminal intent of defendant and that a community of purpose and partnership in the unlawful undertaking be present. *State v. Ortega*, 77 N.M. 7, 419 P.2d 219 (1966); *State v. Luna*, 92 N.M. 680, 594 P.2d 340 (Ct. App. 1979).

Foreseeability of result immaterial. - The fact that defendant did not bargain for the result is not material; the material fact is that he did "procure" another to perform an "unlawful act." *State v. Holden*, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Accessory may be convicted regardless of principal's fate. - It was the obvious intent of the legislature to extend the statute then in force so as to permit an accessory to be prosecuted even though the one who directly committed the crime was either not prosecuted, had been acquitted, was a juvenile or had been convicted of a different

crime or degree thereof. *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Aider and abettor may be tried and convicted even though the actual slayer is never apprehended or has been tried and acquitted. *State v. Ochoa*, 41 N.M. 589, 72 P.2d 609 (1937).

Distinctions abolished. - The distinction between an accessory before the fact and a principal was abolished in this state so that every person concerned in the commission may be prosecuted, tried and punished as a principal. *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

An accessory may be charged and convicted as a principal. *State v. Roque*, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Accused may be indicted as principal even though at common law it would have been necessary to charge him as an accessory. *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Although charged with disturbing meeting, defendants could be convicted of aiding and abetting that disturbance. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

The contention that defendant could not be charged as a principal and convicted on the basis of being an accomplice is answered by this section. *State v. Smith*, 89 N.M. 777, 558 P.2d 46 (Ct. App.), rev'd on other grounds, 89 N.M. 770, 558 P.2d 39 (1976).

Defendant found guilty on theory of accomplice liability. - See *State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Effect of rule. - Rule 5(d), N.M.R. Crim. P. (now see Paragraph D of Rule 5-201), which requires that the indictment allege "essential facts constituting the offense," does not change the procedure authorized by this section, since "the offense," as used in Rule 5(d), N.M.R. Crim. P., means the principal offense; thus, defendant was not required to be charged as an accessory and indictment was sufficient where the language contained therein informed defendant of the essential facts of the charge of armed robbery. *State v. Roque*, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Varying degrees of conviction permissible. - The fact that the accessory was convicted of involuntary manslaughter while the principal was convicted of voluntary manslaughter is a permissible result under the accessory statute. *State v. Holden*, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Criminal intent a jury question. - The question of whether the alleged aider and abettor did share the principal's criminal intent, and whether he knew the latter acted

with criminal intent is one of fact for the jury and may be inferred from circumstances. State v. Riley, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

Intent may be inferred. - Where one defendant completed the crime of burglary by an unauthorized entry with the necessary intent and his partner knew this fact and was present and participated, the partner's intent, as an element of the crime, although not susceptible of proof by direct evidence, may be inferred from his acts. State v. Riley, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

Instruction on burden of proof. - Where trial court instructed on the presumption of innocence and the state's burden of proof, it was not improper to refuse defendant's proffered instruction that there was no presumption that defendant was an accessory and that he did not have burden of proving that he was not an accessory. State v. Gunzelman, 85 N.M. 535, 514 P.2d 54 (Ct. App. 1973).

Evidence sufficient to go to jury. - Evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent can be reasonably inferred, was sufficient for the issue of aiding and abetting to be submitted to the jury and was also sufficient to submit the issue of disturbing a lawful assembly. State v. Orzen, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Defendant's particular role not important. - Where the evidence as to which of the robbers took the change is sparse and conflicting, it does not matter that the evidence fails to establish, with any particularity, that defendant was the one who took the change as the jury was instructed on aiding and abetting and the evidence is substantial that defendant was at least an aider and abettor of the robbery of the change. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Jury may find dependent aided and abetted, but did not personally commit, crime. - That the jury could have refused to find that the defendant personally committed the crime in question is not alone a sufficient reasonable hypothesis that he did not aid and abet its commission. State v. Ballinger, 99 N.M. 707, 663 P.2d 366 (Ct. App. 1983).

While mere presence is insufficient, relationship to victim relevant. - Although mere presence is insufficient to establish that defendant aided and abetted a crime, defendant's relationship with victim is a factor invoking criminal liability. Where defendant is charged with care and welfare of child, he stands in position of parent and may be convicted on the basis that he failed to take reasonable steps to prevent the molestation, coupled with his friendship with perpetrator. State v. Orosco, 113 N.M. 789, 833 P.2d 1155 (Ct. App. 1991), aff'd, State v. Orosco, 113 N.M. 780, 833 P.2d 1146 (1992).

Shooting at police car indicative of intent. - Defendant's theory that there is no evidence that he knew of the robbery until after its commission and thus could not have been an aider and abetter is invalid, as evidence of aiding and abetting is as broad and varied as are the means of communicating thought from one individual to another;

shooting at the pursuing police car was evidence that defendant approved of the robbery and shared the robber's criminal intent. State v. O'Dell, 85 N.M. 536, 514 P.2d 55 (Ct. App. 1973).

Evidence sufficient. - Evidence was sufficient to support defendant's conviction as an accessory to armed robbery, where his confession, found to be voluntary, was corroborated by other evidence at trial. Church v. Sullivan, 942 F.2d 1501 (10th Cir. 1991).

Evidence insufficient. - Circumstantial evidence which was not incompatible with defendant's innocence nor incapable of explanation upon any reasonable hypothesis of same was insufficient to permit a finding that defendant aided a forger by procuring checks for her; there were too many other explanations to account for her possession of the checks. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

The fact that the defendant accompanied the forger of certain checks at the time that she cashed them was not sufficient to support a finding of aiding and abetting, for mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Aiding and abetting and conspiracy are distinct and separate concepts. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 166, 167, 169 to 173.

Acquittal of principal, or his conviction of lesser degree of offense, as affecting prosecution of accessory, or aider and abettor, 9 A.L.R.4th 972.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

22 C.J.S. Criminal Law §§ 132 to 139.

30-1-14. Venue.

All trials of crime shall be had in the county in which they were committed. In the event elements of the crime were committed in different counties, the trial may be had in any county in which a material element of the crime was committed. In the event death results from the crime, trial may be had in the county in which any material element of

the crime was committed, or in any county in which the death occurred. In the event that death occurs in this state as a result of criminal action in another state, trial may be had in the county in which the death occurred. In the event that death occurs in another state as a result of criminal action in this state, trial may be had in the county in which any material element of the crime was committed in this state.

History: 1953 Comp., § 40A-1-15, enacted by Laws 1963, ch. 303, § 1-15.

ANNOTATIONS

- I. General Consideration.
- II. Nature of Venue.
- III. Proof.
- IV. Waiver.
- V. Specific Situations.

I. GENERAL CONSIDERATION.

Cross-references. - For rights of persons accused of crime, see N.M. Const., art. II, § 14.

For provisions on change of venue, see 38-3-3 to 38-3-8 NMSA 1978.

For venue in prosecution for violation of act regulating motion pictures, see 57-5-20 NMSA 1978.

This section merely reiterates constitutional right of venue in N.M. Const., art. II, § 14. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Section is consistent with present constitutional and statutory provisions regarding the place of prosecution. 1979 Op. Att'y Gen. No. 79-12.

Meaning of "trial". - In its strict definition, the word "trial" in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict; and the term "trial" does not extend to such preliminary steps as the arraignment and giving of the pleas, nor does it comprehend a hearing in error. *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968).

"Material element of offense" of contempt. - The act of causing the service of a restraining order to be made in Eddy county constituted a material element of the alleged offense of criminal contempt and under those circumstances the venue properly laid in Eddy county. *Norton v. Reese*, 76 N.M. 602, 417 P.2d 205 (1966).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 361 to 371.

Mail or telegraph, where offense of obtaining money by fraud through use of, is deemed to be committed, 43 A.L.R. 545.

Constitutionality of statute for prosecution of offense in county other than that in which it was committed, 76 A.L.R. 1034.

Desertion: venue of criminal charge for child desertion or nonsupport as affected by nonresidence of parent or child, 44 A.L.R.2d 886.

Criminal conspiracies as to gambling, 91 A.L.R.2d 1148.

Venue: change of venue by state in criminal case, 46 A.L.R.3d 295.

Venue in homicide cases where crime is committed partly in one county and partly in another, 73 A.L.R.3d 907.

Venue: where is embezzlement committed for purposes of territorial jurisdiction or venue, 80 A.L.R.3d 514.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Venue in bribery cases where crime is committed partly in one county and partly in another, 11 A.L.R.4th 704.

Venue for currency reporting offense under Currency and Foreign Transactions Reporting Act (CFTRA) (31 USC § 5311 et seq.), 113 A.L.R. Fed. 639.

22 C.J.S. Criminal Law §§ 177 to 181.

II. NATURE OF VENUE.

Distinction between jurisdiction and venue. - Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried. State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Right of venue is legal concept separate and distinct from territorial jurisdiction of magistrate, and a statute affecting one does not necessarily affect the other. 1979 Op. Att'y Gen. No. 79-12.

Privilege personal to accused. - Venue provision of the constitution confers a personal privilege of venue upon an accused, and this privilege may be waived. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Extent of constitutional venue provision. - The framers of the constitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury of the county wherein the crime is alleged to have occurred. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Assertion of privilege. - A defendant may insist on personal right or privilege of venue, and the correctness of a venue decision is reviewable to determine whether defendant was tried in the proper county. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Change of venue effective in overcoming local bias and prejudice. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

III. PROOF.

Venue need not be proven beyond a reasonable doubt. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Affirmative proof of venue unnecessary. - It is not necessary in a trial for murder that venue be affirmatively proven. *Territory v. Hicks*, 6 N.M. 596, 30 P. 872 (1892), overruled on other grounds *Haynes v. United States*, 9 N.M. 519, 56 P. 282 (1899).

Venue may be proved by circumstantial evidence, and when there is nothing in the record to raise an inference to the contrary, slight circumstances are sufficient to prove venue by a preponderance of the evidence. *State v. Nelson*, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959).

Venue, like any other fact in a case, may be proven by circumstantial evidence. *State v. Mares*, 27 N.M. 212, 199 P. 111 (1921).

Venue proved by incidental evidence. - If evidence incidentally given in connection with facts in case shows that venue was properly laid, it is a sufficient proof of venue. *Territory v. Hicks*, 6 N.M. 596, 30 P. 872 (1892), overruled on other grounds *Haynes v. United States*, 9 N.M. 519, 56 P. 282 (1899).

Omission in indictment not fatal. - Trial of one charged with homicide may take place either where the mortal wound was inflicted or where the person died, and where prosecution was in county where the mortal wound was inflicted, an indictment omitting allegation of place of death was not fatally defective. *State v. Montes*, 22 N.M. 530, 165 P. 797 (1917).

Credibility of venue testimony. - Attacks upon the credibility of the witnesses who testified concerning venue is a matter for the jury to decide. *State v. Garcia*, 78 N.M. 136, 429 P.2d 334 (1967).

No instruction on venue is required, because so long as the crime occurred in New Mexico, the county of the crime is not necessary for jury determination. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Although prior to the adoption of U.J.I. Criminal the practice was to instruct on venue, this practice is discontinued therein, since venue is not jurisdictional, but is a personal right or privilege of the accused which may be waived. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Instruction and finding sufficient. - Where a jury was specifically instructed that it must find, beyond a reasonable doubt, that the fatal blow and the death occurred in the county of the venue and this the jury did so find, any argument that the blow or the cause of death may have occurred elsewhere was of no consequence. *Nelson v. Cox*, 66 N.M. 397, 349 P.2d 118 (1960); *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct. App.) But see, cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

IV. WAIVER.

Venue provision confers personal privilege upon accused which may be waived. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Venue unlike jurisdiction. - Venue does not affect the power of the court and can be waived, but a jurisdictional defect can never be waived because it goes to the very power of the court to entertain the action, and such a defect can be raised at any stage of the proceedings, even sua sponte by the appellate court. *State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

Failure to object. - Right to trial in the county or district in which the offense is alleged to have been committed is waived by failure to make timely objection. *City of Roswell v. Gallegos*, 77 N.M. 170, 420 P.2d 438 (1966).

Right to be tried in a certain county or district is a right or privilege to a particular venue which may be waived by an accused person in a number of ways, and when defendant goes to trial in another judicial district, without objection on his part, he has waived the privilege, and cannot be heard to say that the court trying him was without jurisdiction. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

Acquiescence in venue change. - Defendant who agreed to a change of venue waived any right he may have had to insist on a continuance of the case. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

Record of affirmative waiver unnecessary. - The record need not affirmatively show that the trial court fully informed defendant of his right of venue and of his privilege to waive this right, or was advised that defendant had been so fully informed, that defendant affirmatively waived this right or that the trial court announced its satisfaction as to the genuineness of this waiver. *State v. Lopez*, 84 N.M. 805, 508 P.2d 1292 (1973).

V. SPECIFIC SITUATIONS.

Venue for violation of municipal ordinance must be laid in the municipality where the violation presumably occurred. *City of Roswell v. Gallegos*, 77 N.M. 170, 420 P.2d 438 (1966).

Prosecution for embezzlement. - Venue in embezzlement is properly laid in the county where the possession becomes adverse to the owner. *Territory v. Hale*, 13 N.M. 181, 81 P. 583 (1905).

Murder trial in county of death. - In a trial for murder, the evidence that the person alleged to have been murdered died in county where venue was laid, is a sufficient proof of venue. *Territory v. Hicks*, 6 N.M. 596, 30 P. 872 (1892), overruled on other grounds *Haynes v. United States*, 9 N.M. 519, 56 P. 282 (1899).

Death in Texas after wounding here. - Where decedent dies in Texas of wound inflicted in a county in New Mexico, defendant may be prosecuted in that New Mexico county. *Bourguet v. Atchison, T. & S.F.R.R.*, 65 N.M. 200, 334 P.2d 1107 (1958).

Although the deceased died in Texas, the blow was struck in Quay county, and hence venue was proper in that county. *State v. Justus*, 65 N.M. 195, 334 P.2d 1104 (1959), cert. denied, 365 U.S. 828, 81 S. Ct. 714, 5 L. Ed. 2d 706 (1961).

Venue proper in New Mexico where theft occurred out of state. - A person who steals property outside New Mexico and brings the stolen property into this state may be prosecuted, convicted, and punished for larceny in New Mexico. *State v. Stephens*, 110 N.M. 525, 797 P.2d 314 (Ct. App. 1990).

Venue improper where offenses completed before reaching county. - Where the first six criminal sexual penetration offenses were completed before reaching Bernalillo county, trial in Bernalillo county as to those offenses was improper. *State v. Ramirez*, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

Absent prejudice venue provisions inapplicable to Rule 93 hearing. - Neither constitutional nor statutory provisions on venue apply to a hearing under Rule 93, N.M.R. Civ. P. (considering defendant's motion to vacate judgment and sentence against him, now withdrawn), because such a hearing is neither a criminal trial nor a criminal prosecution, but rather a civil proceeding. *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968).

Since defendant had no right to be present at a hearing under Rule 93, N.M.R. Civ. P. (now withdrawn), a fortiori he had no right to be heard in a particular place, absent a showing of prejudice. *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968).

Effect of special venue statute. - Former statute providing for prosecution of a person who obtained possession of personal property from its owner by a conditional sales contract and before securing title transferred and conveyed it without consent of its owner, in the counties where such sales contract may be recorded, did not repeal the general law authorizing prosecutions where the crime was committed. *State v. Shedoudy*, 45 N.M. 516, 118 P.2d 280 (1941).

ARTICLE 2

HOMICIDE

30-2-1. Murder.

A. Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:

(1) by any kind of willful, deliberate and premeditated killing;

(2) in the commission of or attempt to commit any felony; or

(3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.

B. Unless he is acting upon sufficient provocation, upon a sudden quarrel or in the heat of passion, a person who kills another human being without lawful justification or excuse commits murder in the second degree if in performing the acts which cause the death he knows that such acts create a strong probability of death or great bodily harm to that individual or another.

Murder in the second degree is a lesser included offense of the crime of murder in the first degree.

Whoever commits murder in the second degree is guilty of a second degree felony resulting in the death of a human being.

History: 1953 Comp., § 40A-2-1, enacted by Laws 1963, ch. 303, § 2-1; 1980, ch. 21, § 1; 1994, ch. 23, § 1.

ANNOTATIONS

- I. General Consideration.
- II. Deliberation and Premeditation.
- III. Felony Murder.
- III-A. Greatly Dangerous Acts.
- IV. Second Degree Murder.
- V. Manslaughter.
- VI. Defenses.
- VII. Indictment and Information.
- VIII. Evidence and Proof.
- IX. Jury Instructions.
- X. Malice.

I. GENERAL CONSIDERATION.

Cross-references. - For attempt to commit a felony, see 30-28-1 NMSA 1978.

For homicide by vehicle, see 66-8-101 NMSA 1978.

For homicide instructions, see UJI 14-201 et seq.

For instruction on the essential elements of felony murder, see UJI 14-202.

The 1994 amendment, effective July 1, 1994, added "resulting in the death of a human being" at the end of the last paragraph of Subsection B.

Applicability. - Laws 1994, ch. 23, § 4 makes the provisions of the act applicable only to persons sentenced for crimes committed on or after the effective date of the act.

Provisions applicable to murders committed prior to May 14, 1980. - The provisions of this section applicable to murders committed prior to May 14, 1980 may be found in the original pamphlet.

Constitutionality. - Because the statute and court decisions clearly indicate that the element of deliberation is what distinguishes first-degree murder from second-degree murder, and the distinction between first and second-degree murder has been clearly enunciated by the supreme court, this section and former 30-2-2 NMSA 1978, relating to malice (now repealed), are not unconstitutional on the grounds that they make impossible an ascertainable distinction between first and second-degree murder. *State v. Valenzuela*, 90 N.M. 25, 559 P.2d 402 (1976).

New Mexico Const., art. IV, § 18, relating to the amendment of statutes, did not apply to 40-24-4, 1953 Comp., the former felony-murder statute, which was enacted prior to adoption of the constitutional provision. *State v. Hines*, 78 N.M. 471, 432 P.2d 827 (1967).

Open charge of murder gives defendant notice that he must defend against a charge of unlawfully taking a human life. State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979).

Element of intent is seldom susceptible to direct proof, since it involves the state of mind of the defendant, and it thus may be proved by circumstantial evidence. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Act indicating depraved mind not affected by intent to kill particular individual. - A murder committed by an act which indicates a depraved mind is a first-degree murder. The existence of an intent to kill any particular individual does not remove the act from this class of murder. State v. Sena, 99 N.M. 272, 657 P.2d 128 (1983).

For legislative history of term "human being" in definition of murder, as found throughout homicide statutes, see State v. Willis, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982).

Fair trial. - Defendant's right to fair trial was not violated when, in a prosecution for first-degree murder, the state secured an instruction for the lesser included offense of second-degree murder and then argued against this lesser included offense at closing, contending that the evidence could only support a first-degree murder conviction. State v. Armendarez, 113 N.M. 335, 825 P.2d 1245 (1992).

Conviction of lesser offense only if supported by evidence. - No statute which purports to authorize an appellate court to sustain a conviction unsupported by the evidence may be approved, and accordingly Laws 1937, ch. 199, § 1 (not compiled), is invalid to the extent that it authorizes a conviction for a lesser-included homicide offense when no evidence was contained in the record to prove the essentials of the elements of the offense of which the defendant stands convicted. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Unsupported conviction unconstitutional. - A conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged violates due process. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

"Torture". - Murder by strangling and suffocation was not murder by "torture," which was conclusively made first-degree murder by Laws 1907, ch. 36, § 1 (40-24-4, 1953 Comp.). State v. Bentford, 39 N.M. 293, 46 P.2d 658 (1935).

Conviction of principal in second degree. - A principal in the second degree was guilty of crime the same as the principal in the first degree, and might be tried and convicted, even though the latter has been acquitted or convicted of a lesser degree of the offense. State v. Martino, 27 N.M. 1, 192 P. 507 (1920).

Double jeopardy. - Defendant's conviction for both shooting into an occupied motor vehicle under 30-3-8 NMSA 1978 and first-degree murder under this section was not double jeopardy because the legislature intended to have separate punishments for

similar conduct that can result in a violation of both statutes. *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992).

Homicide charge not merged. - The homicide resulting from the great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first-degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 90 N.M. 188, 561 P.2d 461 (1977).

Merger of lesser offense found. - Where a defendant was charged with numerous counts of child abuse resulting in death or great bodily injury and with murder, but the state did not charge or offer proof that the acts of child abuse arose as separate and distinct episodes, the rule of merger precluded the defendant's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where the defendant was convicted of one or more offenses which were merged into the greater offense, he could be punished for only one. *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990)(events occurred prior to 1989 amendment to NMSA 30-6-1).

Bail. - To be admitted to bail on habeas corpus petition, if proof of capital crime is plain and presumption great, court would not weigh it against other, apparently contradictory, facts and circumstances. *Ex parte Wright*, 34 N.M. 422, 283 P. 53 (1929).

Prosecutor's comments on defendant's story appropriate. - Prosecutor's comments on the veracity of defendant's story did not deprive defendant of a fair trial. If after a case is presented, the evidence is essentially reduced to which of two conflicting stories is true, a party may reasonably infer, and thus argue, that the other side is lying. *State v. Aguilar*, 117 N.M. 501, 873 P.2d 247, cert. denied, U.S. , 115 S. Ct. 168, 168 L. Ed. 2d 105, U.S. , 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

Review. - On appeal from conviction for second- degree murder, the court must review the evidence as to cause of death in the light most favorable to the state. *State v. Ewing*, 79 N.M. 489, 444 P.2d 1000 (Ct. App. 1968).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "State v. Jackson: A Solution to the Felony-Murder Rule Dilemma," see 9 N.M.L. Rev. 433 (1979).

For article, "Constitutionality of the New Mexico Capital Punishment Statute," see 11 N.M.L. Rev. 269 (1981).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

For comment, "An Equal Protection Challenge to First Degree Depraved Mind Murder Under the New Mexico Constitution", see 19 N.M.L. Rev. 511 (1989).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide, §§ 41 to 53.

Attempt to conceal or dispose of body as evidence connecting accused with homicide, 2 A.L.R. 1227.

Homicide by unlawful act aimed at another, 18 A.L.R. 917.

Criminal responsibility of peace officers for killing one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

Arson, necessity of intent to kill to bring death resulting from, within statute making homicide in perpetration of felony murder in first degree, 87 A.L.R. 414.

Malice: inference of malice or intent where killing is by blow without weapon, 22 A.L.R.2d 854.

Hunting accident: criminal responsibility for injury or death resulting from, 23 A.L.R.2d 1401.

Threats: causing one, by threats or fright, to leap or fall to his death, 25 A.L.R.2d 1186.

Fright or shock, homicide by, 47 A.L.R.2d 1072.

Premeditation: presumption of deliberation or premeditation from the fact of killing, 86 A.L.R.2d 656.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

"Lying in wait," what constitutes, 89 A.L.R.2d 1140.

Medical or surgical attention, failure to provide, 100 A.L.R.2d 483.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 A.L.R.2d 769.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 A.L.R.3d 1292.

Intoxication: modern status of the rules as to voluntary intoxication as defense to criminal charge, 8 A.L.R.3d 1236.

Automobile: homicide by automobile as murder, 21 A.L.R.3d 116.

Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Intoxicants: criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 A.L.R.3d 589.

Arrest: private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Killing by set gun or similar device on defendant's own property, 47 A.L.R.3d 646.

Unintentional killing or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Felony: homicide in commission of felony where the killing was the act of one not a participant in the felony, 56 A.L.R.3d 239.

Homicide as affected by time elapsing between wound and death, 60 A.L.R.3d 1316.

Withholding food, clothing or shelter, 61 A.L.R.3d 1207.

Intoxication: when deemed involuntary so as to constitute a defense to criminal charge, 73 A.L.R.3d 195.

Torture: what constitutes murder by torture, 83 A.L.R.3d 1222.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Judicial abrogation of felony-murder doctrine, 13 A.L.R.4th 1226.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction, 16 A.L.R.4th 666.

Modern status of the rules requiring malice "aforethought," "deliberation" or "premeditation," as elements of murder in the first degree, 18 A.L.R.4th 961.

Admissibility of expert or opinion testimony on battered wife or battered woman syndrome, 18 A.L.R.4th 1153.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 A.L.R.4th 861.

Validity and construction of statute defining homicide by conduct manifesting "depraved indifference," 25 A.L.R.4th 311.

Homicide: sufficiency of evidence of mother's neglect of infant born alive, in minutes or hours immediately following unattended birth, to establish culpable homicide, 40 A.L.R.4th 724.

Homicide by causing victim's brain-dead condition, 42 A.L.R.4th 742.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Application of felony-murder doctrine where person killed was co-felon, 89 A.L.R.4th 683.

Validity and construction of "extreme indifference" murder statute, 7 A.L.R.5th 758.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 A.L.R.5th 497.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Ineffective assistance of counsel: battered spouse syndrome as defense to homicide or other criminal offense, 11 A.L.R.5th 871.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

What constitutes "puts in jeopardy" within enhanced penalty provision of federal bank robbery act, 32 A.L.R. Fed. 279.

40 C.J.S. Homicide §§ 29 to 68.

II. DELIBERATION AND PREMEDITATION.

Period of deliberation. - Murder in the first degree is a willful, deliberate and premeditated killing, and although a deliberate intention means an intention or decision arrived at after careful thought and after a weighing of the reasons for the commission of the killing, such a decision may be reached in a short period of time. State v. Lucero, 88 N.M. 441, 541 P.2d 430 (1975).

Burden of proof. - The burden is on the State to prove that a defendant not only had an opportunity to form deliberate intent but did in fact form a deliberate intent to kill. State v. Motes, N.M. , 885 P.2d 648 (1994).

Transferred intent to kill. - In a homicide case where A shot at B, and the bullet struck C and killed him, the malice or intent followed the bullet. State v. Carpio, 27 N.M. 265, 199 P. 1012 (1921).

Charge that murder was done willfully, deliberately and premeditatedly and with malice aforethought was sustained by proof that it was committed with a mind imbued with those qualities, though they were directed against a person other than the one killed. State v. Carpio, 27 N.M. 265, 199 P. 1012 (1921).

Transferred intent applicable to murder and attempted murder. - The doctrine of transferred intent applies to both murder and attempted murder. State v. Gillette, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Period of time to abandon intent. - Just as it requires no period of time to form a deliberate intent to kill, so too, it does not require a certain period of time to abandon a pre-existing depraved mind. Although the initial act of defendant shooting indiscriminately at two people at two different times, could have been found by the jury to be a depraved-mind action and one done with a wicked and malignant heart, these actions did not wound or kill the victim or anyone else. It is the criminal intent at the time

of the commission of the crime that is determinative. State v. Hernandez, 117 N.M. 497, 873 P.2d 243 (1994).

Question of deliberation and premeditation in murder case was for jury to determine upon a consideration of all the surrounding circumstances tending to show the relation of the parties to each other and the animus of the accused toward the deceased. State v. Smith, 76 N.M. 477, 416 P.2d 146 (1966).

Direct or circumstantial evidence. - While deliberation and premeditation are essential elements of murder in the first degree, these, like other elements, may be shown by direct evidence or by circumstances from which their existence may be inferred by the jury. State v. Montoya, 72 N.M. 178, 381 P.2d 963 (1963).

The essential elements of murder in the first degree, including the elements of deliberation and premeditation, may be shown not only by direct evidence but by circumstances from which their existence may be inferred. State v. Smith, 76 N.M. 477, 416 P.2d 146 (1966).

Evidence of wounds inflicted in fight was sufficient to support a finding of premeditation, intent to kill and malice. State v. Garcia, 61 N.M. 291, 299 P.2d 467 (1956).

Striking victim with car. - In case where the defendant struck the deceased with his automobile after an argument between the two and after deceased was seen to strike defendant's mother, the facts and surrounding circumstances warranted a finding by the jury that the killing was malicious, deliberate and premeditated. State v. Montoya, 72 N.M. 178, 381 P.2d 963 (1963).

Forcing car off road. - From evidence that in the course of a high speed police chase defendant made a deliberate sharp turn into the police car, forcing it off the road while driving at a speed of 110 m.p.h., the jury could reasonably have inferred that defendant intended to murder the police officers. State v. Bell, 84 N.M. 133, 500 P.2d 418 (Ct. App. 1972)(affirming conviction of assault on police officers with intent to commit a violent felony).

Shooting deceased's fleeing wife. - Where defendant's shooting of decedent's wife occurred within a second or so after the shooting of decedent and as she sought to escape, shooting her under the circumstances had real probative value upon the issues of deliberation and intent, and constituted evidence of a preconceived plan to kill her as well as her husband. State v. Lucero, 88 N.M. 441, 541 P.2d 430 (1975).

Premeditation a necessary element in proof of second-degree murder. State v. White, 61 N.M. 109, 295 P.2d 1019 (1956).

III. FELONY MURDER.

Felony murder statute constitutional. - Constitutional objection that felony murder statute under which petitioner was convicted was so broad and vague as to be unconstitutional was rejected. *Hines v. Baker*, 309 F. Supp. 1017 (D.N.M. 1968), aff'd, 422 F.2d 1002 (10th Cir. 1970).

Purpose. - In our felony-murder statute the legislature has permissibly determined that a killing in the commission or attempted commission of a felony is deserving of more serious punishment than other killings in which the killer's mental state might be similar but the circumstances of the killing are not as grave. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

The intent to kill for felony murder need not be a "willful, deliberate and premeditated" intent as contemplated by the definition of first degree murder in Subsection (A)(1) of this section, nor need the act be "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life", as contemplated by the definition in Subsection (A)(3). *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

An intent to kill in the form of knowledge that the defendant's acts "create a strong probability of death or great bodily harm" to the victim or another, so that the killing would be only second degree murder under Subsection B of this section if no felony were involved, is sufficient to constitute murder in the first degree when a felony is involved - or so the legislature has determined. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

The "malice" required for murder (both first and second degree), as opposed to manslaughter, is an intent to kill or an intent to do an act greatly dangerous to the lives of others or with knowledge that the act creates a strong probability of death or great bodily harm. The same intent should be required to invest with first degree murder status a killing in the commission of or attempt to commit a first degree or other inherently dangerous felony. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

In addition to proof that the defendant caused (or aided and abetted) the killing, there must be proof that the defendant intended to kill (or was knowingly heedless that death might result from his conduct). An unintentional or accidental killing will not suffice. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

Felony murder does have a mens rea element, which cannot be presumed simply from the commission or attempted commission of a felony. *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991).

The felony-murder intent requirement is satisfied if there is proof that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm to the victim or another person, or acted in a manner greatly dangerous to the lives of others. *State v. Griffin*, 116 N.M. 689, 866 P.2d 1156 (1993).

Conclusive presumption disapproved. - To presume conclusively that one who commits any felony has the requisite mens rea to commit first-degree murder is a legal fiction which can no longer be supported where the felony is of lesser than first degree. State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977).

Murder during commission of first-degree felony. - In a felony murder case where the collateral felony is a first-degree felony, the res gestae test shall be used. State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977).

Murder during commission of dangerous lesser degree felony. - In a felony murder charge, involving a collateral felony, which is not of the first degree, that felony must be inherently dangerous or committed under circumstances that are inherently dangerous to support a felony murder conviction. State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977).

Dangerous lesser degree felony high probability of death. - Of the felonies which are not of the first degree, only those known to have a high probability of death may be utilized for a conviction of first-degree murder. State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977).

Underlying felony need not be dangerous. - It is irrelevant that, in the abstract, trafficking a controlled substance by possession with intent to distribute is not necessarily a dangerous crime. The standard applied to defendant was, while engaging in that particular felony, and as a consequence of the felony, defendant intended to kill. State v. Bankert, 117 N.M. 614, 875 P.2d 370 (1994).

Jury to determine dangerous. - Both the nature of the felony and the circumstances of its commission may be considered to determine whether it was inherently dangerous to human life; this is for the jury to decide, subject to review by the appellate courts. State v. Harrison, 90 N.M. 439, 564 P.2d 1321 (1977).

Sequence not determinative. - If a homicide occurs within the res gestae of a felony, the felony murder provision of the statute is applicable, and whether the homicide occurred before or after the actual commission of the felony is not determinative of the applicability of the felony murder provision. State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971); Nelson v. Cox, 66 N.M. 397, 349 P.2d 118 (1960).

Intent not determinative. - Killing by person engaged in commission of a felony was first-degree murder by both the principal and accessory present aiding and abetting, whether the killing was intentional or accidental. State v. Smelcer, 30 N.M. 122, 228 P. 183 (1924).

Felony murder applicable to attempts. - The felony murder provision is clearly applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony, and an attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission

of the felony, has been performed or undertaken with intent to commit the felony. State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971).

Where the evidence clearly supported a reasonable inference that defendant had already formed the intent to take the automobile and was in the process of executing that intent when the shooting occurred and before the death of decedent, an instruction on the felony murder rule was appropriate. State v. Flowers, 83 N.M. 113, 489 P.2d 178 (1971).

Crime of attempted felony murder does not exist in New Mexico and the trial court cannot have jurisdiction over such a charge. Since the trial court lacks jurisdiction, there is no basis for a claim of double jeopardy, and on remand, the prosecution may file an alternate, proper charge. State v. Price, 104 N.M. 703, 726 P.2d 857 (Ct. App. 1986).

Precise felony to be named in charge. - Before defendant can be convicted of felony murder, he must be given notice of the precise felony with which he is being charged and the name of the felony underlying the charge must be either contained in the information or indictment or furnished to the defendant in sufficient time to enable him to prepare his defense. State v. Hicks, 89 N.M. 568, 555 P.2d 689 (1976).

Attempt subsumed under offense named. - Conviction of first-degree murder under the felony murder rule for an attempt to commit a felony when the charge under the indictment alleged the completion of the felony did not infringe fundamental rights of defendant, since the attempt to commit the crime charge is a necessarily included offense. State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960).

Felony murder requires absence of independent intervening force. - In a felony murder, the death must be caused by the acts of the defendant or his accomplice without an independent intervening force. State v. Adams, 92 N.M. 669, 593 P.2d 1072 (1979); State v. Perrin, 93 N.M. 73, 596 P.2d 516 (1979).

First degree murder and robbery not same offense. - Because the first degree murder statute requires proof of an unlawful killing, which the robbery statute does not, and the robbery statute requires proof of the taking of another's property, which the first degree murder statute does not, the offenses are not the same even though it is necessary to prove the underlying felony in order to convict the defendant of first degree murder; therefore, a defendant is not being subjected to double punishment and consecutive sentences are proper. State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979).

Evidence of holdups inadmissible. - Evidence of two "holdups" perpetrated by defendant just prior to murder for which he is charged, and concerning which there is no evidence of robbery, was inadmissible. Roper v. Territory, 7 N.M. 255, 33 P. 1014 (1893).

Not felony murder of cofelon where killing committed by resisting victim. - A coperpetrator of a felony cannot be charged under this section with the felony murder of a cofelon when the killing is committed by the intended robbery victim while resisting the commission of the offense. Jackson v. State, 92 N.M. 461, 589 P.2d 1052 (1979).

III-A. GREATLY DANGEROUS ACTS.

Depraved mind murder requires extremely reckless conduct evidencing indifference for the value of human life. State v. Ibn Omar-Muhammad, 102 N.M. 274, 694 P.2d 922 (1985).

No such crime as attempted "depraved mind" murder. - The crime of attempted "depraved mind" murder does not exist since in order to convict for such an offense, the jury would have to find that the defendant intended to perpetrate an unintentional killing, a logical impossibility. State v. Johnson, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

Defendant must subjectively know of risks. - The depraved mind provision of this section requires proof that the defendant had subjective knowledge of the risk involved in his actions. State v. Ibn Omar-Muhammad, 102 N.M. 274, 694 P.2d 922 (1985).

Subjective knowledge that acts are "greatly dangerous to the lives of others". - Where defendants fired at a truck they presumed was empty, killing the victim inside, subjective knowledge that their acts were greatly dangerous to the lives of others is present if those acts were very risky and, under the circumstances known to them, the defendants should have realized this very high degree of risk. State v. McCrary, 100 N.M. 671, 675 P.2d 120 (1984).

Vehicular homicide by reckless conduct is lesser included offense of depraved mind murder by vehicle. State v. Ibn Omar-Muhammad, 102 N.M. 274, 694 P.2d 922 (1985).

IV. SECOND DEGREE MURDER.

Compiler's notes. - Most of the annotations appearing under this analysis line are taken from cases decided prior to the 1980 amendment, which removed the element of malice from the statute.

Distinction between degrees of murder. - The distinction between first and second-degree murder has generally been viewed as the difference in the "kind of malice present." State v. Aragon, 85 N.M. 401, 512 P.2d 974 (Ct. App. 1973); Torres v. State, 39 N.M. 191, 43 P.2d 929 (1935).

Under 1064, 1897, C.L., second-degree murder was not excusable or justifiable homicide, or killing in a cruel and unusual manner, or by means of a dangerous weapon under such circumstances as would not constitute excusable or justifiable homicide. Territory v. Guillen, 11 N.M. 194, 66 P. 527 (1901).

Second-degree murder was murder with malice, but without deliberation. State v. Smith, 26 N.M. 482, 194 P. 869 (1921).

Second-degree murder is generally considered as murder without deliberation, but it is murder with premeditation or with malice aforethought. State v. Aragon, 85 N.M. 401, 512 P.2d 974 (Ct. App. 1973).

Element of deliberation excluded. - The legislature intended to exclude from second degree murder the element of deliberation but not to exclude otherwise intentional killings from that crime; under New Mexico's statutory scheme, murder consists of two categories of intentional killings: those that are willful, deliberate, and premeditated; and those that are committed without such deliberation and premeditation but with knowledge that the killer's acts create a strong probability of death or great bodily harm. State v. Garcia, 114 N.M. 269, 837 P.2d 862 (1992).

Includes intentional murder. - Fact that 1980 amendments require only the elements of a killing in the performance of an act which the defendant knows creates the requisite probability does not mean that second degree murder excludes intentional murders. State v. Johnson, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

Malice synonymous with premeditation. - Second-degree murder was murder without deliberation, but was murder with premeditation or malice aforethought, "aforethought" being synonymous with "premeditation," the distinguishing feature being the absence of deliberation. State v. Sanchez, 27 N.M. 62, 196 P. 175 (1921).

Malice and premeditation elements necessarily included. - Necessarily included in the finding of a verdict of murder in the second degree is a finding of malice and premeditation. State v. Ochoa, 61 N.M. 225, 297 P.2d 1053 (1956).

Second-degree murder, assisted suicide, not same offense. - The second-degree murder statute (Subsection B) is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute (30-2-4 NMSA 1978) is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. State v. Sexson, 117 N.M. 113, 869 P.2d 301 (Ct. App. 1994).

Suicide pact not exemption from conviction for murder. - The existence of a suicide pact does not exempt someone from a conviction for committing murder. However, that general rule may not apply if the means of attempted suicide used presents the same risk to both of the parties at the same time, such as when a couple drive off a cliff together. Such is not the case when the victim is killed by a rifle, the trigger of which is pulled by the defendant. State v. Sexson, 117 N.M. 113, 869 P.2d 301 (Ct. App. 1994).

There was enough evidence to support a conviction of second degree murder because there was sufficient evidence to show that the defendant actively participated in a

suicide by holding the gun to the victim's head and pulling the trigger. State v. Sexson, 117 N.M. 113, 869 P.2d 301 (Ct. App. 1994).

V. MANSLAUGHTER.

Distinction between murder and manslaughter. - To reduce the killing from murder to voluntary manslaughter all that is required is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, and to exclude malice, and to render the defendant incapable of cool reflection. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Manslaughter is included in charge of murder. State v. Rose, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969); State v. Lopez, 46 N.M. 463, 131 P.2d 273 (1942); State v. La Boon, 67 N.M. 466, 357 P.2d 54 (1960).

Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit N.M.U.J.I. Crim. 2.20 (now see UJI 14-220) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

One indicted of murder could be found guilty of manslaughter, provided there was sufficient evidence on that issue. United States v. Densmore, 12 N.M. 99, 75 P. 31 (1904).

Effect of unsupported manslaughter conviction. - It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second-degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. Smith v. State, 89 N.M. 770, 558 P.2d 39 (1976).

Instruction not appropriate. - In prosecution for first-degree murder, where the uncontradicted evidence was that defendant killed her husband with two and possibly three well placed shots into his person, which shots were fired at close range while the victim was lying down on the couch and while defendant stood over him, immediately after a discussion about the victim leaving the defendant, and that the shots came from a pistol purchased by appellant earlier the day of the homicide, no foundation existed for instruction on involuntary manslaughter. State v. Gardner, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

Voluntary manslaughter instruction refused where no provocation. - Defendant could not create the provocation which would reduce murder to manslaughter, and his requested instruction on attempted voluntary manslaughter was therefore properly refused. State v. Durante, 104 N.M. 639, 725 P.2d 839 (Ct. App. 1986).

Use of too great force as manslaughter. - Defendant's choice of deadly force when confronted with a possible battery of less than deadly force would sustain a conviction of voluntary manslaughter, but not for murder. State v. McLam, 82 N.M. 242, 478 P.2d 570 (Ct. App. 1970).

VI. DEFENSES.

General rule as to insanity. - The rule of law applicable to the defense of insanity in criminal cases is that, at the time of committing the act, the accused, as a result of disease of the mind, (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it. State v. White, 58 N.M. 324, 270 P.2d 727 (1954).

Proof of derangement short of insanity. - In a murder trial, proof of mental derangement short of insanity is admissible, as evidence of lack of deliberation or premeditated design; this contemplates full responsibility, but only for the crime actually committed. State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959).

Reduction of charge to second-degree murder. - The court should have instructed the jury that they might consider mental defects and mental condition in ascertaining whether or not defendant had the power to deliberate the acts charged, so as to reduce the charge from first-degree murder to second-degree murder. State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959).

No reduction of charge to manslaughter. - While a disease or defect of the mind may render an accused incapable of cool deliberation and premeditation and may be sufficient to reduce the charge against him from first to second-degree murder, it does not follow that such mental condition may reduce the charge to voluntary manslaughter. State v. Chambers, 84 N.M. 309, 502 P.2d 999 (1972).

Use of expert evidence on incapacity. - Nothing compels the trier of the facts to disregard the nonexpert testimony and to accept the opinions of defendant's medical experts as to his probable state of mind and incapacity to control his will at the time of committing a criminal act. The jury is not required to accept these expert opinions and disregard all other evidence bearing on the question of his mental and emotional state, nor is the trial court bound to accept these expert opinions and dismiss the charges of first and second-degree murder. State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969).

Voluntary intoxication is no defense to murder in second degree. State v. Gray, 80 N.M. 751, 461 P.2d 233 (Ct. App. 1969); State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

In this state, no specific intent to kill is required for a conviction for second-degree murder; hence, voluntary intoxication is no defense to such a charge. State v. Tapia, 81 N.M. 274, 466 P.2d 551 (1970).

Jury to determine effect of intoxication. - In a homicide case the defendant is entitled to have the jury determine the degree and effect of his intoxication upon his mental capacity and deliberative powers; however, the evidence as to intoxication must be substantial and must relate to defendant's condition as of the time of the commission of the homicide, or be so closely related in time that it can reasonably be inferred that the condition continued to the time of the commission of the homicide. State v. Williams, 76 N.M. 578, 417 P.2d 62 (1966).

Lack of justification not an element of homicide. - Every killing of a person by another is presumed to be unlawful, and only when it can be shown to be excusable or justifiable will it be held otherwise; when the evidence permits, excuse of justification may be raised as a defense and decided by the fact finder, but initially, the absence of excuse or justification is not an element of homicide to be proven by the prosecution. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).

Defendant to raise reasonable doubt. - Defendant, of course, did not have the burden of proving that he killed in self-defense. All he was required to do was produce evidence which would raise a reasonable doubt in the minds of the jurors. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Issue of self-defense for jury. - The line of demarcation between a homicide which amounts to voluntary manslaughter and one which amounts to justifiable homicide in self-defense is not always clearly defined and depends upon the facts of each case as it arises. Those facts are for the jury, under instructions from the court, laying down the principles of law governing the same, as was done in this case. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Instruction improper. - Defendant in homicide prosecution claiming self-defense was not entitled to instruction on justifiable homicide under belief that deceased was about to have carnal intercourse with defendant's wife. State v. Greenlee, 33 N.M. 449, 269 P. 331 (1928).

Justifiable killing. - Where defendant was violently assaulted by deceased, and then defendant drew his pistol and fired two shots at deceased which killed him instantly, such killing was not cruel and unusual within statutes defining third-degree murder, since the killing was justifiable. Territory v. Fewel, 5 N.M. 34, 17 P. 569 (1888).

Defense of chastity. - In murder prosecution, the refusal of an instruction that the defense of one's person included, in the case of a woman, the protection of her chastity and that if, under the circumstances, she had reason to believe that the attack would lead to the sexual abuse of her person, she would be justified in using such force as was necessary, even to the extent of taking the life of her assailant, to protect her honor and chastity and her body from sexual abuse, was erroneous where the defense was that accused killed decedent to protect herself from an attempted rape. *State v. Martinez*, 30 N.M. 178, 230 P. 379 (1924).

Defense of habitation. - Where defense of habitation was invoked in homicide case, the danger or apparent danger was to be considered from standpoint of prisoner at time shot was fired, and not according to facts as they developed at trial. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Instruction that injury to dwelling to be felonious so as to justify killing must be of a substantial character constituted prejudicial error. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Killing in prevention of crime. - A well-founded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when the necessity ceases, and the supposed felon flees, and thereby abandons his proposed design, a killing in pursuit, however well-grounded the belief may be that he intended to commit a felony, will not extenuate the offense of the pursuer. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Murder while resisting arrest. - Killing of person making authorized arrest is murder but where the arrest is illegal, the offense is reduced to manslaughter, unless the proof shows express malice toward the deceased. If the outrage of an attempted illegal arrest has not excited the passions, a killing will be murder. *Territory v. Lynch*, 18 N.M. 15, 133 P. 405 (1913).

Instruction not proper in absence of awareness of arrest. - Where defendant in homicide case was unaware that an attempt to arrest him was to be made, his action in killing the officer was to be viewed as in any other case, and instruction as to illegality of arrest reducing the offense to manslaughter was properly refused. *State v. Middleton*, 26 N.M. 353, 192 P. 483 (1920).

Murder while resisting search. - Homicide committed in resisting deputy sheriff who was searching defendant's house without a warrant was first-degree murder if such resistance constituted a felony, as when the deputy had been engaged in serving any process, rule or order of court, or judicial writ, and instruction leaving jury to determine degree of murder was erroneous. *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933).

VII. INDICTMENT AND INFORMATION.

Open charge of murder sufficient notice. - A charge of murder in violation of statutes pertaining to first and second-degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes, nor is it a charge of distinct and separate offenses; rather, the charge is an open charge of murder, a form of charging approved, under which the jury is to be instructed on the degrees of the unlawful killing for which there is evidence, and it gave defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

Allegation of murderous intent not required. - Murder indictment may omit direct charge of purpose or intent to kill, as part of overt act alleged as a crime. *Territory v. Montoya*, 17 N.M. 122, 125 P. 622 (1912).

Transferred intent need not be charged. - Where the defendant, indicted on an "open" charge of murder, contends that since he was not charged under the specific transferred intent subsection that the instruction on that theory was improper, the defendant misapprehends the nature of this theory. Transferred intent is merely the doctrine that allows the elements of malice or intent to be demonstrated when an "innocent" nonoriginal victim is killed, and therefore, it is not necessary to charge the defendant with transferred intent because the indictment specifically informed the defendant of the crime and what he must be prepared to meet. *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976).

Aggravating circumstances not alleged. - Death penalty proceedings are not precluded where the indictment does not allege the existence of aggravating circumstances. Since aggravating circumstances are not elements of the crime of murder, an indictment is not deficient for failure to allege them. *State v. Morton*, 107 N.M. 478, 760 P.2d 170 (Ct. App. 1988).

Charge sufficiently specific. - The charge, "by shooting him with a gun," gave defendant sufficient particulars of the offense alleged to enable the defendant to prepare a defense. *State v. Smith*, 76 N.M. 477, 416 P.2d 146 (1966).

Adequate charge on cause of victim's death. - An indictment for first-degree murder, in other respects sufficient, which concluded in the following language, "did strike and beat the said Juan Trujillo, giving to him, the said Juan Trujillo, in and upon the top of the head of him the said Juan Trujillo, one mortal contusion bruise, fracture and wound, of which said mortal wound, the said Juan Trujillo thence continually languished until . . . he there died" charged that deceased died of the mortal wound alleged to have been inflicted by defendant. *Territory v. Lobato*, 17 N.M. 666, 134 P. 222 (1913), *aff'd*, 242 U.S. 199, 37 S. Ct. 107, 61 L. Ed. 244 (1916).

District attorney may obtain indictment for first-degree murder following second-degree indictment. - Where a defendant is originally indicted for second-degree murder, but later the district attorney reviews the case and decides the evidence

supports first-degree murder, he may seek and obtain a second indictment, this time for first-degree murder. *State v. Sena*, 99 N.M. 272, 657 P.2d 128 (1983).

May not charge first-degree murder in information based on second-degree bind-over. - A prosecutor is not authorized to charge first-degree murder in an information based on a magistrate's bind-over order for trial on second-degree murder. *State v. McCrary*, 97 N.M. 306, 639 P.2d 593 (Ct. App. 1982).

Indictment charging first-degree murder would support second-degree murder conviction. *Territory v. McGinnis*, 10 N.M. 269, 61 P. 208 (1900), overruled on other grounds *State v. Deltenre*, 77 N.M. 497, 424 P.2d 782 (1966).

Waiver of indictment not constitutionally required. - Defendant's rights under the fifth and fourteenth amendments to the U.S. constitution were not violated when his murder prosecution was based upon an information filed by the district attorney, despite the fact that he never waived his right to be tried by indictment. *State v. Vaughn*, 82 N.M. 310, 481 P.2d 98, cert. denied, 403 U.S. 933, 91 S. Ct. 2262, 29 L. Ed. 2d 712 (1971).

Information charging murder sufficient. - Information charging that defendant did "murder" a named person was sufficient appraisal of offense charged. *State v. Roy*, 40 N.M. 397, 60 P.2d 646 (1936).

Information permits submission of felony murder. - Under an information charging murder in the ordinary form, it was not improper to permit introduction of proof that murder was committed in perpetrating a felony. *State v. Smith*, 51 N.M. 184, 181 P.2d 800 (1947).

Information permits voluntary manslaughter. - Although information charged only first-degree murder, submission of voluntary manslaughter was not error. *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934).

Appropriate crime charged. - The offense of murder and the offense of child abuse resulting in the child's death are not the same, nor is the same proof required for the two offenses, since generally speaking, murder requires an intent, whereas child abuse does not require an intent, and therefore, the indictment properly charged defendant with first-degree murder. *State v. Gutierrez*, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

VIII. EVIDENCE AND PROOF.

Defendant entitled to details. - A defendant in a murder case is entitled to know the exact date and the approximate time of day, the exact place where the body was found, and a description and identification details of the means or weapon used. *State v. Mosley*, 75 N.M. 348, 404 P.2d 304 (1965).

Admissibility of evidence in discretion of court. - The admissibility of evidence is a matter addressed to the sound discretion of the trial court. *State v. Armstrong*, 61 N.M. 258, 298 P.2d 941 (1956).

Proof of corpus delicti. - To prove the corpus delicti in a homicide case, the state must show that the person whose death is alleged is in fact dead and that his death was criminally caused. *State v. Coulter*, 84 N.M. 647, 506 P.2d 804 (Ct. App. 1973).

In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another. *State v. Armstrong*, 61 N.M. 258, 298 P.2d 941 (1956).

In homicide cases, if it was shown that person whose death was alleged in indictment was in fact dead, and that his death was criminally caused, the corpus delicti was sufficiently proven; circumstantial evidence would be sufficient, and eyewitness testimony was unnecessary. *State v. Chaves*, 27 N.M. 504, 202 P. 694 (1921).

Proof adequate. - Where it is obvious from the evidence that deceased died as a result of wounds inflicted by someone with some sharp object at the time in question, the corpus delicti has been adequately proven. *State v. Casaus*, 73 N.M. 152, 386 P.2d 246 (1963).

Effect of lack thereof. - Where there was no substantial evidence of corpus delicti in homicide case, verdict finding defendant guilty of second-degree murder would be set aside on appeal. *State v. Woodman*, 26 N.M. 55, 188 P. 1101 (1920).

"Substantial evidence" of cause of death. - Where the pathologist testified that death ". . . was the direct result of complications from the bullet wounds, the complications being infection . . .," and that the cause of death was gunshot wounds, this is "substantial evidence" as that term has been defined in New Mexico decisions. *State v. Ewing*, 79 N.M. 489, 444 P.2d 1000 (Ct. App. 1968).

Effect of medical treatment of victim on cause of death. - Surgical operation undertaken to save one from the probable fatal effect of a wound did not preclude homicide conviction unless it clearly appeared that maltreatment of the wound, and not the wound itself, was the sole cause of the death. *Territory v. Yee Dan*, 7 N.M. 439, 37 P. 1101 (1894).

Use of circumstantial evidence. - Circumstantial evidence is sufficient to establish guilt in a prosecution for homicide; those circumstances must point unerringly to the defendant and be incompatible with and exclude every reasonable hypothesis other than guilt. *State v. Coulter*, 84 N.M. 647, 506 P.2d 804 (Ct. App. 1973).

Threats made by accused admissible. - Threats made by accused to kill some person not definitely designated were admissible with other explanatory matter on issue of

corpus delicti especially when made shortly before commission of crime. *State v. Martinez*, 25 N.M. 328, 182 P. 868 (1919).

Evidence of motive. - Evidence of facts which could not operate on mind of defendant were inadmissible to show motive. *State v. Allen*, 25 N.M. 682, 187 P. 559 (1920).

Deceased's reputation and disposition. - Trial court in second-degree murder prosecution properly excluded proffered testimony which defense wanted to use to corroborate the testimony of other witnesses which showed the deceased's reputation and disposition for fighting, his violent temper and his conduct as a bully. *State v. Snow*, 84 N.M. 399, 503 P.2d 1177 (Ct. App.), cert. denied, 84 N.M. 390, 503 P.2d 1168 (1972).

Escape evidence admitted to show depraved mind. - District court did not abuse its discretion in determining that evidence of defendant's unauthorized departure from a Colorado juvenile detention facility was admissible at his trial for murder, where the court properly could have concluded that defendant's reasons for eluding the police were circumstantial evidence relevant to the jury's determination of whether his acts indicated a depraved mind regardless of human life and whether he had a subjective knowledge of the risk involved in his actions. *State v. Omar-Muhammad*, 105 N.M. 788, 737 P.2d 1165 (1987).

Polygraph test results. - Polygraph test results may be admitted when qualifications of the polygraph operator establish his expertise, there is testimony to establish the reliability of the testing procedure employed as approved by the authorities in the field and there is evidence to show the validity of the tests made on the particular subject. However, requirements that polygraph tests be stipulated to by both parties and that no objection be made at trial to their introduction are mechanistic, inconsistent with due process and repugnant to the New Mexico rules of evidence. *State v. Dorsey*, 88 N.M. 184, 539 P.2d 204 (1975)(affirming court of appeals, which had ruled polygraph results offered by defendant admissible to show intent and provocation).

Photographs of body. - Question of inflammation and possible prejudice, created by admission into evidence of photographs of body of alleged victim in murder trial, is left to the discretion of the trial judge absent a showing of abuse of that discretion. *State v. Gardner*, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

Photographs of the body of the victim were relevant to the issues of the case in that they were used by the doctors to describe the injuries and condition of the body, and served to clarify and illustrate the testimony of witnesses and to corroborate other

evidence. The admission of photographs into evidence rests within the sound discretion of the trial court and absent a showing of an abuse the trial court's discretion will not be disturbed. *State v. Coulter*, 84 N.M. 647, 506 P.2d 804 (Ct. App. 1973).

Admission of hearsay constitutionally impermissible under circumstances. -

Admission of extra-judicial statements attributed to children of murder victim was reversible error where the children were not called as witnesses, because defendant was thereby denied his constitutional right of confrontation. *State v. Lunn*, 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971).

Effect of admission of illegal evidence. - In prosecution for first or second-degree murder under Laws 1891, ch. 80, §§ 4, 5, 1063, 1064, 1897 C.L., repealed by Laws 1907, ch. 36, § 23, verdict of first-degree murder could not stand unless it was apparent that no injury resulted from admission of illegal evidence. *Territory v. Armijo*, 7 N.M. 428, 37 P. 1113 (1894).

Transcript of taped confession. - Where the state conceded (during closing arguments) that the transcript of defendant's taped confession was erroneous, and the district court, counsel for the prosecution, and the defense counsel urged the jury to rely upon the tapes over the transcript as evidence, any misleading statements in the transcript were adequately corrected so that defendant's due process rights were not violated. *State v. Boeglin*, 105 N.M. 247, 731 P.2d 943 (1987).

Evidence sufficient for conviction. - Evidence that on the day deceased was shot, defendant visited the deceased's home on three different occasions, an argument developing between the two during the second visit and that when defendant returned for the third time he shot a witness and the deceased, along with the inferences the jury was entitled to draw from the evidence, was sufficient to sustain conviction of first-degree murder. *State v. Riggsbee*, 85 N.M. 668, 515 P.2d 964 (1973).

Where defendant had armed himself with a rock before entering victim's apartment, admitted striking the victim with the rock when she caught him in the house, and stated that she fell and hit her head against a table, the facts and circumstances unerringly established appellant's guilt of first-degree murder beyond any reasonable doubt. *State v. Jimenez*, 84 N.M. 335, 503 P.2d 315 (1972).

See *State v. Sanders*, 117 N.M. 452, 872 P.2d 870 (1994).

IX. JURY INSTRUCTIONS.

Requisites of instructions. - All that can be required of court's instructions is that they properly give to the jury the essential facts which must be established beyond a reasonable doubt before the defendant can be convicted. *State v. Anaya*, 80 N.M. 695, 460 P.2d 60 (1969).

Failure to define crime. - An instruction on second-degree murder which did not define the offense was insufficient. *Territory v. Gutierrez*, 13 N.M. 138, 79 P. 716 (1905).

Instruction on motive required. - Where all the evidence is circumstantial and there is no proof of motive, it was incumbent on trial judge to present a properly framed instruction on motive, instructing the jury that absence of evidence thereof should be considered along with all other circumstances in determining guilt or innocence of one accused of murder. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975).

Offenses submitted depend on supporting evidence. - Defendant in murder trial had the right to have instructions on lesser included offenses submitted to the jury, but this right depended on there being some evidence tending to establish the lesser included offenses. *State v. Anaya*, 80 N.M. 695, 460 P.2d 60 (1969).

The court was only required to charge as to such degrees of murder as evidence tended to sustain. It was the duty of the court to charge as to all such degrees, and failure to do so was error. *Territory v. Romero*, 2 N.M. 474 (1883).

An accused is entitled to an instruction on second degree murder if there is some evidence in the record to support it. *State v. Stephens*, 93 N.M. 458, 601 P.2d 428 (1979).

Evidence to support instruction on intoxication. - To authorize an instruction on intoxication the record must contain some evidence showing or tending to show that defendant consumed an intoxicant and that the intoxicant affected his mental state at or near the time of the homicide. The instruction does not, however, require expert evidence regarding the effect of intoxication upon defendant's ability to form a deliberate intent to kill. *State v. Privett*, 104 N.M. 79, 717 P.2d 55 (1986).

Submission of first-degree charge required. - As there was evidence to the effect that the killing occurred while the defendant was in the commission of or an attempt to commit robbery, there was evidence from which the jury could have found that the homicide was committed while in the act of perpetrating a felony and the submission of the charge of first-degree murder became a statutory mandate. *State v. Torres*, 82 N.M. 422, 483 P.2d 303 (1971), overruled on other grounds *State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973). But see *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).

Where the defendant was engaged in committing a felony at time gun was accidentally discharged, trial court did not err in instructing that under the circumstances the accidental discharge did not reduce the homicide below first-degree murder. *State v. Smith*, 51 N.M. 184, 181 P.2d 800 (1947).

Under former law, it was not error for court to charge that there was no evidence to show that the killing of the deceased was justifiable, or that there was any circumstance to bring it within the definition of any degree of murder less than the first where all

evidence showed that the killing took place during a robbery. *Territory v. Romero*, 2 N.M. 474 (1883).

Defendant has burden to introduce evidence for lesser-included-offense instruction. - The defendant has the burden to come forward with evidence establishing sufficient provocation in order to be entitled to an instruction on voluntary manslaughter as a lesser included offense. *State v. Manus*, 93 N.M. 95, 597 P.2d 280 (1979).

Instruction on lesser degree improper. - Where state established a case which would have sustained conviction of first-degree murder, instruction of the court permitting conviction of second-degree murder was reversible error. *State v. Reed*, 39 N.M. 44, 39 P.2d 1005 (1934).

Where evidence on charge of first-degree murder did not tend to reduce crime to murder in the second degree, court was not authorized to instruct on second-degree murder. *State v. Granado*, 17 N.M. 542, 131 P. 497 (1913).

Where evidence showed either first-degree murder or excusable homicide, it was proper to instruct the jury that in their verdict they must either find defendant guilty of first-degree murder or not guilty, and court properly refused to give instructions in the second or third degrees. *Sandoval v. Territory*, 8 N.M. 573, 45 P. 1125 (1896).

In murder prosecution, where evidence showed either murder in the first degree, or nothing, court properly instructed on first-degree murder only. *Faulkner v. Territory*, 6 N.M. 464, 30 P. 905 (1892).

Refusal by the trial court to give an instruction on second-degree murder is appropriate when the evidence simply did not support a finding of second-degree murder. There was no evidence that the killing was anything less than deliberate and intentional. *State v. Aguilar*, 117 N.M. 501, 873 P.2d 247, cert. denied, U.S. , 115 S. Ct. 168, 168 L. Ed. 2d 105, U.S. , 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

Instructions on lesser degree mandatory. - Where there was no eyewitness to killing and death resulted from gunshot wound, and there was no evidence showing the murder was by poison or torture or lying in wait, or that it was perpetrated in committing, or attempting to commit a felony, failure to instruct jury other than on first-degree murder was reversible error. *Territory v. Padilla*, 8 N.M. 510, 46 P. 346 (1896); *Aguilar v. Territory*, 8 N.M. 496, 46 P. 342 (1896).

Adequate felony murder instruction described. - A jury instruction which requires the state to prove, beyond a reasonable doubt, a causal relationship between the felony committed and the death of the victim is adequate. *State v. Perrin*, 93 N.M. 73, 596 P.2d 516 (1979).

Waiver of instructions on lesser included offenses. - Consistent with the constitutional guarantees of a fair trial, the defendant in a first degree murder prosecution may take his chances with the jury by waiving instructions on lesser included offenses, even against the express advice of counsel, and cannot be heard to complain on appeal if he has gambled and lost. State v. Boeglin, 105 N.M. 247, 731 P.2d 943 (1987).

First and second-degree properly submitted. - Where there was evidence presented which tended to indicate that sufficient time elapsed during which the defendant could have weighed his actions and considered their consequences and that the shooting was not in the heat of argument, instructions on first and second-degree murder were proper. State v. Aragon, 85 N.M. 401, 512 P.2d 974 (Ct. App. 1973).

Absent request for instruction, no fundamental error. - Where the defendant does not request that an instruction be given and, consequently, it is not given, the trial court does not commit a fundamental error. State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979).

Submission of second degree generally required, in absence of exceptions. - Except in a case where the very means employed in committing a homicide, as by torture, poison or lying in wait supply proof of the deliberation, the intensified malice, necessary to raise the grade of the offense to first degree as a matter of law, or unless it be one committed in the perpetration of, or attempt to perpetrate, a felony where by legislative fiat the circumstances under which the killing occurred render conclusive the presence of such deliberation, it is always necessary to submit second degree and thus permit the jury to say whether it is the one or the other - first or second-degree. State v. Ortega, 77 N.M. 7, 419 P.2d 219 (1966).

It was necessary to submit second as well as first-degree murder to jury to permit them to determine degree of murder except when means employed in perpetrating crime supplied proof of deliberation or when homicide was committed in perpetrating or attempting another felony. State v. Kappel, 53 N.M. 181, 204 P.2d 443 (1949).

Second degree instruction with sudden impulse theory. - Where confession of accused had been admitted and in it he stated that he had killed his wife on sudden impulse, it was error to refuse to instruct on second-degree murder. State v. Wickman, 39 N.M. 198, 43 P.2d 933 (1935).

Second degree instruction with self-defense theory. - Where prosecution attempted to prove first-degree murder, perpetrated by lying in wait, and defendant pleaded self-defense, the court properly instructed jury on murder in the second degree. State v. Smith, 26 N.M. 482, 194 P. 869 (1921).

Self-defense instruction refused where defendant entered store with weapon, prepared to rob. - Where the defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably

point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. *State v. Chavez*, 99 N.M. 609, 661 P.2d 887 (1983).

Question as to manner of killing. - Where evidence presented jury question as to manner in which killing occurred, instruction on second-degree murder was properly given although state contended that crime constituted first-degree murder. *State v. Parks*, 25 N.M. 395, 183 P. 433 (1919).

It was not error to submit issue of second-degree murder, where the accused was convicted of a degree of crime properly within the evidence. *State v. Armstrong*, 61 N.M. 258, 298 P.2d 941 (1956).

Failure to instruct on lesser included offense of vehicular homicide. - District court committed reversible error in refusing to instruct the jury on the lesser included offense of vehicular homicide, where the evidence of the defendant's use of marijuana the night before and the morning of the killing could have supported a conviction of vehicular homicide while under the influence of drugs. *State v. Omar-Muhammad*, 105 N.M. 788, 737 P.2d 1165 (1987).

Failure to instruct on aggravated battery. - The jury found the defendant guilty of attempted first degree murder, in that he had a deliberate intention to take the life of the victim, not that he simply had knowledge that his acts created a strong probability of great bodily harm. The jury having thus failed to find the lesser included offense of attempted murder in the second degree, the failure to instruct on aggravated battery was harmless. *State v. Escamilla*, 107 N.M. 510, 760 P.2d 1276 (1988).

Third-degree murder instruction. - In trial for murder under Laws 1891, ch. 80, § 1 (40-24-1, 1953 Comp.), on indictment charging first-degree murder, the court was not required to instruct as to murder in the third degree in absence of evidence that the homicide was without intent. *Territory v. Clark*, 15 N.M. 35, 99 P. 697 (1909); *Territory v. Hendricks*, 13 N.M. 300, 84 P. 523 (1906).

Under 1064, 1897, C.L., evidence necessitated instruction that jury had right to find defendant guilty of second-degree murder, but did not justify like instruction as to murder in third degree. *Territory v. Kimmick*, 15 N.M. 178, 106 P. 381 (1909).

When court has no duty to instruct on voluntary manslaughter. - Where neither prosecution nor defense in a murder trial requested an instruction on voluntary manslaughter, and both defendant and counsel stated that they did not desire such an instruction despite the court's explanation that there was sufficient evidence to warrant it, there was no duty for the trial court to instruct on voluntary manslaughter. *State v. Najjar*, 94 N.M. 193, 608 P.2d 169 (1980).

Defendant was not entitled to instructions specifically relating to his theory that a police officer's search of his house was illegal and constituted provocation so as to reduce murder to manslaughter. *State v. Chamberlain*, 112 N.M. 723, 819 P.2d 673 (1991).

Instruction on manslaughter improper. - It was error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts established either first or second-degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused was required. *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968).

Where evidence in prosecution for murder made it clear that defendant did not kill deceased "upon a sudden quarrel, or in the heat of passion," or "in the commission of an unlawful act not amounting to a felony," or "of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection," so as to make the act "manslaughter," instruction on manslaughter was not warranted. *Territory v. Archuleta*, 16 N.M. 219, 114 P. 285 (1911).

Various theories submitted. - Where the evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting, such questions were factual ones to be resolved by the jury, and the trial court properly submitted the issues of second-degree murder, voluntary manslaughter and self-defense to the jury. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

Overinclusive instruction intolerably confusing. - Defendant convicted of first-degree murder for killing the victim by striking her with a cinder block after allegedly raping her was entitled to reversal of conviction, even in absence of objection by defendant at trial, where evidence supported judge's instruction on willful, deliberate or premeditated killing, but did not support instructions on theories of felony murder; murder by act dangerous to others, indicating depraved mind; or murder from deliberate and premeditated design unlawfully and maliciously to effect death of any human being (transferred intent). Such error was fundamental, since an intolerable amount of confusion was introduced into the case, and defendant could have been convicted without proof of all necessary elements. *State v. DeSantos*, 89 N.M. 458, 553 P.2d 1265 (1976).

Overinclusiveness reversible error. - Where defendant was indicted only under Subsection A(3) of this section (for felony murder), it was reversible error to include the willful, deliberate language of Subsection A(1) in the jury instructions. *State v. Trivitt*, 89 N.M. 162, 548 P.2d 442 (1976)(decided prior to 1980 amendment).

Confusing instruction on self-defense, critical issue in case, required reversal. *State v. Garcia*, 83 N.M. 51, 487 P.2d 1356 (1971).

Confusing instruction raised on appeal. - Giving of a confusing instruction on second-degree murder which first included, then excluded, premeditation, was jurisdictional error, and could be first raised on appeal. *State v. Buhr*, 82 N.M. 371, 482 P.2d 74 (Ct. App. 1971).

Objections to form must be preserved. - Where instructions on second-degree murder included the elements of the offense, without uncertainty, and were not misleading, they contained neither jurisdictional defect nor fundamental error; asserted inadequacy as to their form, not called to the attention of the trial court, was not preserved for review. *State v. Moraga*, 82 N.M. 750, 487 P.2d 178 (Ct. App. 1971).

Error in instructions harmless. - Although the jury, not the judge or the district attorney, was to determine the sentence imposed for first-degree murder, so that the trial court was in error in failing to submit to the jury a form of verdict calling for the death sentence, the error was harmless and could not be prejudicial to the accused. *State v. Sanchez*, 58 N.M. 77, 265 P.2d 684 (1954).

Failure to instruct on lesser charges upheld. - In the murder trial of a prisoner for killing a guard in which the death penalty was sought but not imposed, there was no fundamental miscarriage of justice because of the failure to instruct on second degree murder and voluntary manslaughter with respect to the officer's death, even though as an initial matter the evidence might have been sufficient to support such instructions, where the evidence supporting these lesser included offense instructions was not "unequivocally strong." *Trujillo v. Sullivan*, 815 F.2d 597 (10th Cir.)

Refusal of cumulative instructions. - Where the trial court instructed the jury as to the statutory definition of murder in the first degree; in another instruction listed the essential elements thereof and instructed the jury that each of these elements must be proven to the jury's satisfaction beyond a reasonable doubt; defined each of the essential terms, such as willfully, express malice, deliberation, etc.; and gave an instruction concerning the effect on defendant's state of mind from intoxication, it was not error in refusing defendant's requested instructions which were merely cumulative of the court's instruction. *State v. Rushing*, 85 N.M. 540, 514 P.2d 297 (1973).

Trial court was not in error when it refused to give defendant's requested instruction on exculpatory statements contained in his confession, since the court adequately instructed on self-defense, and since defendant's own testimony corresponded to the exculpatory matter contained in the confession. *State v. Casaus*, 73 N.M. 152, 386 P.2d 246 (1963).

Use of jury instructions. - New Mexico U.J.I. Crim. 2.00 (now see UJI 14-201) does not change the necessary elements to be proven for a conviction of first-degree murder, and it was not error to use it in advance of the effective date. *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977).

Answering jury's questions. - Since, under 40-24-10, 1953 Comp., the jury had sole responsibility for fixing the penalty for murder in the first degree, it was not error for the trial court to answer the jury's inquiry for information relating to the possibility of parole or pardon or a verdict of life imprisonment by quoting applicable constitutional and statutory provisions. *State v. Nelson*, 65 N.M. 403, 338 P.2d 301, cert. denied, 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959).

X. MALICE.

Compiler's notes. - Prior to the 1980 amendment, "malice aforethought" was one of the elements of murder.

Malice could exist without deliberate intention to take human life, and might be express or implied. *State v. Smith*, 26 N.M. 482, 194 P. 869 (1921).

Express and implied malice. - A finding of express malice is mandatory in order to support a conviction of first-degree murder, while implied malice will suffice for second-degree murder. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975).

Implied malice does not suffice to constitute first-degree murder in this jurisdiction. *State v. Ulibarri*, 67 N.M. 336, 355 P.2d 275 (1960).

Finding of express malice mandatory to support first-degree murder conviction. *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976); *State v. Hicks*, 89 N.M. 568, 555 P.2d 689 (1976).

Failure to so instruct a jurisdictional error. - An instruction permitting conviction for first-degree murder, based upon a finding of implied rather than express malice, was incomplete and misleading and constituted reversible error. Being jurisdictional, the issue could be raised for the first time on appeal although defense counsel had made no objection to the instruction at the time of trial. *State v. Hicks*, 89 N.M. 568, 555 P.2d 689 (1976).

Absence of evidence of malice. - Where the state presented no evidence, circumstantial or otherwise, as to express malice on the part of defendant, and there was no showing of a deliberate intention unlawfully to take away the life of a fellow creature, the conviction of first-degree murder must be reversed. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975).

Inference of malice authorized. - The propositions that malice must be proved and not inferred, and that premeditation must be proved and not be presumed are true if they are intended to mean that there must be some evidence in the case from which the jury can conclude that there was malice and premeditation; but they are not true if intended to mean that malice and premeditation must be proved directly by evidence. The jury has the right to infer their existence from actions or words of the accused, or collateral

circumstances proved before them, and without this right in the majority of cases, it would be impossible to prove them at all. *Territory v. Romine*, 2 N.M. 114 (1881).

Express malice established. - Killing was with express malice so as to sustain conviction of murder where facts established that the defendant planned to force sexual intercourse with decedent, that decedent threatened to report him, and that defendant thereupon stabbed her to death because he was frightened. *State v. Young*, 51 N.M. 77, 178 P.2d 592 (1947).

Malice necessary to sustain second-degree murder conviction may be implied. *State v. Ochoa*, 61 N.M. 225, 297 P.2d 1053 (1956).

Malice may be implied by use of deadly weapon. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975); *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Although it is frequently difficult, if not impossible, to pinpoint specific items of evidence that bear upon malice, malice may be implied from the mere fact that a deadly weapon was used. *State v. Casaus*, 73 N.M. 152, 386 P.2d 246 (1963).

Malice implied by lack of provocation. - Malice could be implied from evidence of absence of provocation or from the undisputed fact that the killing was with a deadly weapon. *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct. App.), cert. denied, 80 N.M. 731, 460 P.2d 261 (1969).

Malice implied by fact of unlawful killing. - Malice supporting conviction of second-degree murder would be implied if, by reason of intoxication, defendant was incapable of the cool and deliberate premeditation necessary to constitute first-degree murder, but the killing was unlawful. *State v. Cooley*, 19 N.M. 91, 140 P. 1111 (1914).

But may not be inferred from mere carrying of gun. *State v. Ochoa*, 61 N.M. 225, 297 P.2d 1053 (1956).

It is within province of jury to imply malice in a case where a killing with a deadly weapon has been established. *State v. Ochoa*, 61 N.M. 225, 297 P.2d 1053 (1956); *State v. Gilbert*, 37 N.M. 435, 24 P.2d 280 (1933).

Ordinary malice. - Refusal to find "intensified or first-degree malice" left a residuum of ordinary malice which constituted second-degree murder. *State v. Reed*, 39 N.M. 44, 39 P.2d 1005 (1934).

Torture. - Under former law murder perpetrated by means of torture was first-degree murder, whether or not done with deliberation and malice aforethought to effect death. *State v. Reed*, 39 N.M. 44, 39 P.2d 1005 (1934).

30-2-2. Repealed.

ANNOTATIONS

Repeals. - Laws 1980, ch. 21, § 2, repeals 30-2-2 NMSA 1978, relating to malice.

30-2-3. Manslaughter.

Manslaughter is the unlawful killing of a human being without malice.

A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

Whoever commits voluntary manslaughter is guilty of a third degree felony resulting in the death of a human being.

B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

Whoever commits involuntary manslaughter is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-2-3, enacted by Laws 1963, ch. 303, § 2-3; 1994, ch. 23, § 2.

ANNOTATIONS

- I. General Consideration.
- II. Voluntary Manslaughter.
- III. Involuntary Manslaughter.
- A. In General.
- B. Proximate Cause.
- IV. Evidence.
- V. Jury Instructions.

I. GENERAL CONSIDERATION.

Cross-references. - For homicide by vehicle, see 66-8-101 NMSA 1978.

For negligence of overseer of coal mine which caused death, being deemed manslaughter, see 69-14-18 NMSA 1978.

For instruction on voluntary manslaughter, see UJI 14-220.

The 1994 amendment, effective July 1, 1994, added "resulting in the death of a human being" at the end of the second paragraph of both Subsections A and B.

Applicability. - Laws 1994, ch. 23, § 4 makes the provisions of the act applicable only to persons sentenced for crimes committed on or after the effective date of the act.

Crime and punishment properly separated. - The fact that the former manslaughter statute, 40-24-7, 1953 Comp., merely defined the offense, while 40-24-10, 1953 Comp., provided the penalty, does not mean that the statute was defective or the acts defined not crimes; crime and punishment can be separated and distinguished by the legislature. *State v. McFall*, 67 N.M. 260, 354 P.2d 547 (1960).

Applicability to motor vehicle accidents. - This section, the involuntary manslaughter statute, was in no sense repealed by adoption of the negligent homicide statute (64-22-1, 1953 Comp.), but has been in full force and effect at all times; although cases of death resulting from driving while under the influence of intoxicating liquor were taken out from under its operation by adoption of 66-8-102 NMSA 1978, which made driving under the influence a felony, because when a death resulted it would not be "in the commission of an unlawful act not amounting to a felony," upon repeal of the negligent homicide statute by Laws 1957, ch. 239, § 7, and reinstatement of the offense of driving under the influence as a misdemeanor by Laws 1955, ch. 184, § 8, the reapplicability of the involuntary manslaughter statute automatically ensued. *State v. Deming*, 66 N.M. 175, 344 P.2d 481 (1959).

Manslaughter is one of the four kinds of homicide, and is included within a charge of murder. *State v. La Boon*, 67 N.M. 466, 357 P.2d 54 (1960); *State v. McFall*, 67 N.M. 260, 354 P.2d 547 (1960).

Manslaughter is included in the charge of murder. *State v. Rose*, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Manslaughter not "necessarily included" in murder. - Under appropriate circumstances, where there is evidence that the defendant acted as a result of sufficient provocation, a charge of manslaughter could properly be said to be included in a charge of murder, and, accordingly, it would not be error to submit N.M.U.J.I. Crim. 2.20 (now see UJI 14-220) to the jury; however, it cannot seriously be maintained that manslaughter is invariably "necessarily included" in murder, since different kinds of proof are required to establish the distinct offenses. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

Open charge of murder adequate. - A charge of murder in violation of statutes pertaining to first and second-degree murder and voluntary and involuntary manslaughter is not a charge of mutually exclusive crimes, nor is it a charge of distinct and separate offenses; rather, the charge is an open charge of murder, a form of charging approved, under which the jury is to be instructed on the degrees of the unlawful killing for which there is evidence, and it gave defendant notice that he must defend against a charge of unlawfully taking a human life. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

Information sufficiently particular. - Information charging manslaughter, which enumerated the section defining the offense and the section fixing the penalty, did not contravene N.M. Const., art. II, § 14; although defendant was entitled "to demand the nature and cause of the accusation," against him, that remedy was available by way of a bill of particulars. *State v. Romero*, 69 N.M. 187, 365 P.2d 58 (1961).

Information insufficient. - An information was insufficient which charged that defendants willfully and feloniously killed named person contrary to statute. *State v. Gray*, 38 N.M. 203, 30 P.2d 278 (1934).

Permissible to convict accessory of lesser offense. - The fact that the accessory was convicted of involuntary manslaughter while the principal was convicted of voluntary manslaughter is a permissible result under the accessory statute. *State v. Holden*, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Review of unpreserved error. - Court would consider errors in record in a close case notwithstanding failure of counsel to properly save question for review, but would not imply that it would reverse a conviction which was manifestly correct merely because defense counsel did not try the case as well as he might have. *State v. Varos*, 69 N.M. 19, 363 P.2d 629 (1961), distinguished in *State v. Chavez*, 80 N.M. 786, 461 P.2d 919 (Ct. App. 1969).

Suspension of convicted attorney. - Plea of guilty to crime of involuntary manslaughter, resulting from driving under the influence, supported recommendation of suspension of defendant attorney from practice of law. *In re Morris*, 74 N.M. 679, 397 P.2d 475 (1964).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For article, "Sufficiency of Provocation for Voluntary Manslaughter in New Mexico: Problems in Theory and Practice," see 12 N.M.L. Rev. 747 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For article, "The Guilty But Mentally Ill Verdict and Plea in New Mexico," see 13 N.M.L. Rev. 99 (1983).

For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

For article, "Unintentional homicides caused by risk-creating conduct: Problems in distinguishing between depraved mind murder, second degree murder, involuntary manslaughter, and noncriminal homicide in New Mexico," 20 N.M.L. Rev. 55 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide §§ 54 to 70.

Wanton or reckless use of firearm without express intent to inflict injury, 5 A.L.R. 603, 23 A.L.R. 1554.

Negligent homicide as affected by negligence or other misconduct of the decedent, 67 A.L.R. 922.

Test or criterion of term "culpable negligence," "criminal negligence" or "gross negligence," appearing in statute defining or governing manslaughter, 161 A.L.R. 10.

Sleep or drowsiness of operator of automobile as affecting charge of negligent homicide, 63 A.L.R.2d 983.

Manslaughter, who other than actor is liable for, 95 A.L.R.2d 175.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour, 93 A.L.R.3d 925.

Criminal liability for injury or death caused by operation of pleasure boat, 8 A.L.R.4th 886.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Propriety of manslaughter conviction in prosecution for murder, absent proof of necessary elements of manslaughter, 19 A.L.R.4th 861.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

40 C.J.S. Homicide §§ 69 to 92.

II. VOLUNTARY MANSLAUGHTER.

Meaning of "unlawful". - Subsection A defines voluntary manslaughter as "the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of

passion." From 30-2-1 NMSA 1978 it may be inferred that "unlawful" means "without lawful justification or excuse." *State v. Parish*, 118 N.M. 39, 878 P.2d 988 (1994).

Provocation part of voluntary manslaughter. - Although the court has not ruled unequivocally either that provocation is or is not an "element" of voluntary manslaughter, there must be some evidence that the killing was committed upon a sudden quarrel or in the heat of passion in order for a conviction of voluntary manslaughter to stand; in this sense, provocation is a part of voluntary manslaughter. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

Nature of sufficient provocation. - To reduce the killing from murder to voluntary manslaughter all that is required is sufficient provocation to excite in the mind of the defendant such emotions as either anger, rage, sudden resentment or terror as may be sufficient to obscure the reason of an ordinary man, and to prevent deliberation and premeditation, and to exclude malice, and to render the defendant incapable of cool reflection. *State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Evidence of provocation sufficient to reduce a charge of second-degree murder to voluntary manslaughter must be such as would affect the ability to reason and cause a temporary loss of self control in ordinary person of average disposition. *State v. Jackson*, 99 N.M. 478, 660 P.2d 120 (Ct. App.), rev'd on other grounds, 100 N.M. 487, 672 P.2d 660 (1983).

Words insufficient provocation. - No mere words, however opprobrious or indecent, were deemed sufficient to arouse ungovernable passion, so as to reduce a homicide from murder to manslaughter. *State v. Trujillo*, 27 N.M. 594, 203 P. 846 (1921). See *State v. Lujan*, 94 N.M. 232, 608 P.2d 1114 (1980), but see *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

Words alone, however scurrilous or insulting, will not furnish adequate provocation to make a homicide voluntary manslaughter. *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979), but see *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

"Informational words" may constitute adequate provocation. - Informational words, as distinguished from mere insulting words, may constitute adequate provocation. The substance of the informational words spoken, the meaning conveyed by those informational words and the ensuing arguments and other actions of the parties, when taken together, can amount to provocation. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

Sudden quarrel or passion mandatory. - Evidence of a sudden quarrel or heat of passion, tending to show provocation sufficient to negate malice and reduce the degree of felonious homicide from murder to manslaughter, is indispensable to a conviction for voluntary manslaughter. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

To convict of voluntary manslaughter, the jury must have evidence that there was a sudden quarrel or heat of passion at the time of the commission of the crime (in order, under the common-law theory, to show that the killing was the result of provocation sufficient to negate the presumption of malice). *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976). See *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

It is voluntary manslaughter when the killing is committed upon a sudden quarrel or in the heat of passion. *State v. Harrison*, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Sudden anger or heat of passion and provocation must concur to make a homicide voluntary manslaughter. *State v. Castro*, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

Provocation must concur with sudden anger or heat of passion, such that an ordinary person would not have cooled off before acting. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

Evidence of passion or quarrel sufficient. - Where there was sufficient evidence, even under the circumstances testified to by the appellant herself, from which the jury could find that the shooting occurred in the heat of passion or as the result of a sudden quarrel, there was sufficient evidence to sustain the manslaughter conviction. *State v. Rose*, 79 N.M. 277, 442 P.2d 589 (1968), cert. denied, 393 U.S. 1028, 89 S. Ct. 626, 21 L. Ed. 2d 571 (1969).

Evidence of "sudden quarrel" insufficient. - Evidence which may support an inference of a smoldering desire within the defendant to avenge his former girl friend dating another male by doing away with both of them would not support an inference of a "sudden quarrel"; nor can such facts be held to give rise to that provocation recognized in the law as being adequate and proper to negate the presumption of malice. *State v. Robinson*, 94 N.M. 693, 616 P.2d 406 (1980).

Passion engendered by fear. - Instruction as to voluntary manslaughter was not error where, from defendant's own testimony, he shot deceased during heat of passion engendered by fear or terror. *State v. Vargas*, 42 N.M. 1, 74 P.2d 62 (1937).

Transference of passion theory unauthorized. - Where there was no evidence that such a condition as a sudden quarrel or the heat of passion existed between defendant and his baby boy, the only evidence of quarrel or heat of passion being between defendant and his wife, there was no evidence tending to establish voluntary manslaughter, since the weight of authority is against allowing transference of one's passion from the object of the passion to a related bystander. *State v. Gutierrez*, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

To reduce murder to voluntary manslaughter, victim must be source of provocation. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

If the defendant intentionally caused the victim to do acts which the defendant could claim provoked him, he cannot kill the victim and claim that he was provoked; in such case, the circumstances show that he acted with malice aforethought, and the offense is murder. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Acts of peace officer insufficient. - Acts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Exercise of legal right insufficient. - The exercise of a legal right, no matter how offensive, is not such provocation as lowers the grade of homicide from murder to voluntary manslaughter. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979); State v. Marquez, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

Distinction between manslaughter and self-defense. - The line of demarcation between a homicide which amounts to voluntary manslaughter and one which amounts to justifiable homicide in self-defense is not always clearly defined and depends upon the facts of each case as it arises; those facts are for the jury, under instructions from the court. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Conviction for manslaughter on failure of self-defense plea. - When facts are present which give rise to a plea of self-defense, it is not unreasonable that if the plea fails, the accused should be found guilty of voluntary manslaughter. State v. Harrison, 81 N.M. 623, 471 P.2d 193 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970); State v. Lopez, 79 N.M. 282, 442 P.2d 594 (1968).

Not manslaughter absent supporting evidence. - Where defendant contended he shot deceased solely to protect himself from a threatened attack, and stated that at the time he shot and killed deceased he was calm and cool, being by nature so disposed, the trial court was correct in refusing to submit the issue of voluntary manslaughter to the jury. State v. Luttrell, 28 N.M. 393, 212 P. 739 (1923).

Unnecessary force in defending self. - Defendant's choice of deadly force when confronted with a possible battery of less than deadly force would sustain a conviction of voluntary manslaughter but not for murder. State v. McLam, 82 N.M. 242, 478 P.2d 570 (Ct. App. 1970).

Killing of fleeing, would-be felon. - A well-founded belief that a known felony was about to be committed will extenuate a homicide committed in prevention of the supposed crime, and this upon a principle of necessity; but when the necessity ceases, and the supposed felon flees, and thereby abandons his proposed design, a killing in pursuit, however well-grounded the belief may be that he intended to commit a felony,

will not extenuate the offense of the pursuer. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Accidental killing will not support conviction of voluntary manslaughter. *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968).

Diminished responsibility for manslaughter. - The defense of diminished responsibility is analogous to that of insanity, in that expert testimony on the issue of diminished responsibility by reason of mental disease or defect is not conclusive on the fact finder. The jury is free to believe or disbelieve such testimony, and if such testimony is disbelieved the presumption of full responsibility, which is viewed as included in the presumption of sanity, remains in effect. *State v. Holden*, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Issue of responsibility properly submitted. - Evidence of insanity may be so overwhelming as to require the direction of a verdict of acquittal, as may be evidence of diminished responsibility. Where the evidence was not of such a quality as to require a directed verdict, the issue of defendant's responsibility for the crime of voluntary manslaughter was properly submitted to the jury. *State v. Holden*, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Effect of conviction unsupported by evidence. - It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second-degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *State v. Lopez*, 79 N.M. 282, 442 P.2d 594 (1968).

III. INVOLUNTARY MANSLAUGHTER.

A. IN GENERAL.

Involuntary manslaughter statute excludes all cases of intentional killing, and includes only unintentional killings by acts unlawful, but not felonious, or lawful, but done in an unlawful manner, or without due caution and circumspection; the killing must be unintentional to constitute involuntary manslaughter, and, if it is intentional and not justifiable, it belongs in some one of the classes of unlawful homicide of a higher degree than involuntary manslaughter. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

Involuntary manslaughter was confined to cases where the killing was unintentional. *State v. Pruett*, 27 N.M. 576, 203 P. 840 (1921).

Involuntary manslaughter may be committed by both unlawful and lawful acts. *State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Distinction between lawful and unlawful acts. - In distinguishing between unlawful and lawful acts, the statute applies the language, defined by the courts to mean criminal negligence, only to the lawful act portion of the statute. *State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Criminal negligence is not element of involuntary manslaughter by unlawful act under Subsection B, nor the negligence which is a part of 30-7-4 NMSA 1978 (relating to negligent use or handling of a weapon). *State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Criminal negligence required for involuntary manslaughter by lawful act. - A killing by lawful act, to be involuntary manslaughter, depends on whether the lawful act was done in an unlawful manner or without due caution and circumspection. The phrase "without due caution and circumspection" has been held to involve the concept of "criminal negligence," which concept includes conduct which is reckless, wanton or willful. *State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Reckless disregard of others. - Merely driving on the wrong side of the road could be inadvertence and not sufficient to convict, but driving on the wrong side of the road coming up a hill, where visibility was obstructed, showed a heedless and reckless disregard of the rights of others. *Garrett v. Howden*, 73 N.M. 307, 387 P.2d 874 (1963).

Inadvertently allowing an automobile to encroach upon the wrong side of the road while going up an incline so steep cars beyond its crest may not be seen constitutes a reckless, willful and wanton disregard of consequences to others, and will support conviction for manslaughter if one be killed as a result thereof. *State v. Rice*, 58 N.M. 205, 269 P.2d 751 (1954).

Negligent use of weapon. - A conviction of involuntary manslaughter by negligent use of a weapon requires negligence which is ordinary. *State v. Grubbs*, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Use of firearm enhancement for negligent use. - Under the facts of this case, the state was required to prove that the defendant negligently used a firearm to commit a noncapital felony and this conduct resulted in the death of a human being. Use of a firearm is the same conduct required to enhance the defendant's sentence under 31-18-16A NMSA 1978. Because the state would not be required to prove any additional facts in order to have the defendant's sentence enhanced, the firearm enhancement statute is subsumed within the offense of involuntary manslaughter by negligent use of a firearm. *State v. Franklin*, 116 N.M. 565, 865 P.2d 1209 (Ct. App. 1993).

Negligent self-defense as involuntary manslaughter. - If defendant could be viewed as in a position where his safety or the safety of his friend was threatened, and if in an attempt to protect himself or ward off the attackers, defendant inadvertently shot the victim, then his actions could be viewed as a lawful act of self-defense committed in a unlawful manner or without due caution and circumspection, such that an instruction on

involuntary manslaughter based on negligent self-defense should have been given. State v. Arias, 115 N.M. 93, 847 P.2d 327 (Ct. App. 1993).

Resisting search. - Homicide committed in resisting deputy sheriff who was searching defendant's house without a warrant was involuntary manslaughter if the resistance constituted a misdemeanor, as when the deputy was merely engaged in the "execution of his office," and instruction leaving jury to determine the degree of murder was erroneous. State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933).

Inflicting a beating is an unlawful act. State v. Holden, 85 N.M. 397, 512 P.2d 970 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Involuntary manslaughter instruction improper. - Inflicting a beating is an unlawful act, and accordingly, there was no basis for an instruction on involuntary manslaughter by lawful act, nor was there any basis for an instruction on manslaughter by unlawful act not amounting to a felony at defendant's trial for murder of his baby boy. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

No foundation for involuntary theory. - Where the uncontradicted evidence showed that defendant killed her husband with two and possibly three well-placed shots into his person fired at close range while he lay on the couch and defendant stood over him with a pistol purchased by defendant earlier in the day, and immediately following a discussion about the victim leaving the defendant, no foundation existed for an instruction on involuntary manslaughter, and the trial court properly refused to instruct on this theory of the case. State v. Gardner, 85 N.M. 104, 509 P.2d 871, cert. denied, 414 U.S. 851, 94 S. Ct. 145, 38 L. Ed. 2d 100 (1973).

Intentional shooting not involuntary manslaughter. - The killing of a person by intentionally shooting him with a rifle, if not justified by the law of self-defense, would constitute at least an assault with a deadly weapon, and would be a felony, and hence not involuntary manslaughter. State v. Pruett, 27 N.M. 576, 203 P. 840 (1921).

Evidence insufficient to convict. - Evidence that defendant was driving an unfamiliar car over relatively unfamiliar roads, that 800 feet north of where the accident occurred defendant drove over a hill with a 2% grade with a curve at the bottom of it and did not slow down, that defendant had consumed two beers before the accident, and that, unknown to defendant, the tire that blew out was defective, even when considered cumulatively, failed to disclose the state of mind required to be shown for a conviction under this section. State v. Hayes, 77 N.M. 225, 421 P.2d 439 (1966).

Health and safety violations. - Subsection B of this section is applicable to violations of the New Mexico Occupational Health and Safety Act. 1973-74 Op. Att'y Gen. No. 73-32.

Willful violation of a state occupational health and safety standard which causes the death of an employee would appear to constitute a violation of Subsection B of this section. 1973-74 Op. Att'y Gen. No. 73-32.

B. PROXIMATE CAUSE.

Proximate cause requisite for conviction. - Unlawful act must constitute proximate cause of the homicide to warrant a conviction of involuntary manslaughter. *State v. Seward*, 46 N.M. 84, 121 P.2d 145 (1942).

Proximate cause not necessarily direct immediate cause. - The act of defendant must be a proximate cause of death but need not be the direct immediate cause; it is sufficient if the direct cause resulted naturally from the act of accused. *State v. Fields*, 74 N.M. 559, 395 P.2d 908 (1964).

Proximate cause in reckless driving. - Wanton and reckless operation of an automobile which must be shown as proximate cause of a death in order to secure a conviction for involuntary manslaughter is not different from that required to be shown under guest statute (64-24-1, 1953 Comp.) before one injured may recover against driver host. *State v. Hayes*, 77 N.M. 225, 421 P.2d 439 (1966); *State v. Clarkson*, 58 N.M. 56, 265 P.2d 670 (1954).

Heedless or reckless disregard of others. - To establish heedlessness or reckless disregard of the right of others, a particular state of mind that comprehends evidence of an utter irresponsibility on the part of the defendant or of a conscious abandonment of any consideration for the safety of passengers must be established. *State v. Hayes*, 77 N.M. 225, 421 P.2d 439 (1966).

Criminal negligence in driving while intoxicated. - The act of an intoxicated person in driving an automobile recklessly might be such criminal negligence as would warrant a finding of manslaughter if such operation of the automobile was the proximate cause of death. *State v. Sisneros*, 42 N.M. 500, 82 P.2d 274 (1938).

Contributory negligence no defense. - Conduct of the driver of car struck by defendant had no application in trial for manslaughter, since it was the criminal negligence of defendant that caused the deaths of the two victims. *State v. Romero*, 69 N.M. 187, 365 P.2d 58 (1961).

Evidence of reckless driving as proximate cause sufficient. - Evidence that defendant struck vehicle in which decedents were riding on a well-lighted street from the rear, that he was driving at a speed of between 60 to 80 m.p.h. in a 35 m.p.h. zone immediately prior to the collision and that he was intoxicated, established beyond any reasonable doubt that his conduct in driving was the proximate cause of the accident, and that it was so reckless, wanton and willful as to show an utter disregard for the rights of others. *State v. Romero*, 69 N.M. 187, 365 P.2d 58 (1961).

Proximate cause not recklessness. - Where statements of defendant and his companion, which were introduced by the state, and not controverted, negated any wanton or reckless operation of the car, or any high speed, and were corroborated to a great extent by a witness for the state who was a companion of the deceased at the time of the accident, the evidence did not establish that the proximate cause of the fatal striking of deceased was the wanton or reckless operation of the vehicle by the defendant. State v. Clarkson, 58 N.M. 56, 265 P.2d 670 (1954).

Nor unlawfully carrying weapon. - Involuntary manslaughter was not proved by evidence that a loaded revolver fell to the floor at a public dance and discharged, killing another, since unlawful act of carrying the weapon was not proximate cause of death. State v. Nichols, 34 N.M. 639, 288 P. 407 (1930).

Instruction on unlawful act improper absent proximate cause. - Unless it could be said that failure of a defendant to have a driver's license in his possession at time and place of accident was the proximate cause of death, an instruction that defendant was guilty of involuntary manslaughter if it was found he operated the automobile without a license or was under influence of intoxicating liquor would be erroneous. State v. Seward, 46 N.M. 84, 121 P.2d 145 (1942).

IV. EVIDENCE.

Proof beyond reasonable doubt. - The burden of proof on the part of the state to support a charge of manslaughter by automobile beyond a reasonable doubt is clearly established in New Mexico. State v. Rice, 58 N.M. 205, 269 P.2d 751 (1954).

Establishment of corpus delicti. - In homicide cases, proof of the corpus delicti is established when it is shown that the person whose death is alleged in the information is in fact dead, and that the death was criminally caused. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Proof of corpus delicti was established beyond a reasonable doubt where witness testified that his wife and son were dead at the scene of the accident, that he took the bodies to South Carolina, and was present when they were interred there. State v. Romero, 69 N.M. 187, 365 P.2d 58 (1961).

Proof of victim's identity mandatory. - In this state, proof that the person killed is the same person as the one charged in the indictment to have been killed is part of the corpus delicti; failure so to prove is more than a variance between the charge and the proof, it is a failure to prove that the crime charged has been committed. State v. Vallo, 81 N.M. 148, 464 P.2d 567 (Ct. App. 1970), (ordering defendant discharged since the judgment was reversed for failure of proof rather than error in the trial proceedings).

Misrepresentation of polygraph's accuracy. - Verdict of jury finding defendant guilty of voluntary manslaughter was tainted by introduction of testimony calculated to prejudice the jury by implying that polygraph test was the ultimate in tests for truth,

which testimony cast doubts upon the truth and veracity of the defendant in a manner not countenanced by the courts; it would not be allowed to stand. *State v. Varos*, 69 N.M. 19, 363 P.2d 629 (1961), distinguished in, *State v. Chavez*, 80 N.M. 786, 461 P.2d 919 (Ct. App. 1969).

Unrelated crimes. - Interjection of criminal offenses of narcotics pushing and heroin smuggling in the opening statement and on cross-examination, which offenses were irrelevant to the homicide for which defendant was being tried, constituted reversible error under the circumstances. *State v. Garcia*, 83 N.M. 51, 487 P.2d 1356 (Ct. App. 1971).

Threat inadmissible. - Threat made by defendant against narcotics agent some 14 months prior to the crime, which did not point with any reasonable certainty to deceased, a police officer, individually or as a member of a class, and about which deceased was not shown to have had any knowledge, was not admissible as bearing on defendant's actions toward deceased or to show why deceased acted as he did. *State v. Garcia*, 83 N.M. 51, 487 P.2d 1356 (Ct. App. 1971).

Admitting evidence of threats prejudicial error. - Since a basic contention of defense was that defendant acted in self-defense, improper admission of testimony as to a threat made by defendant was prejudicial error. *State v. Garcia*, 83 N.M. 51, 487 P.2d 1356 (Ct. App. 1971).

Photographs of body. - The admission into evidence in a murder trial of photographs of the decedent taken during her autopsy is proper if they are reasonably relevant to material issues in the trial, showing the identity of the victim, and the number and location of the wounds inflicted upon her body. *State v. Ho'o*, 99 N.M. 140, 654 P.2d 1040 (Ct. App. 1982).

V. JURY INSTRUCTIONS.

Submission of issue proper. - In prosecution on information charging first-degree murder, the submission of voluntary manslaughter was not error. *State v. Burrus*, 38 N.M. 462, 35 P.2d 285 (1934).

Generally, it is for the jury to determine whether there is sufficient provocation under an appropriate instruction on voluntary manslaughter. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

Question of degree for jury. - Where the evidence on provocation sufficient to reduce the killing from murder to voluntary manslaughter and the evidence of self-defense was conflicting, such questions were factual ones to be resolved by the jury, and the trial court properly submitted the issues of second-degree murder, voluntary manslaughter and self-defense to the jury. *State v. King*, 90 N.M. 377, 563 P.2d 1170 (Ct. App. 1977), overruled on other grounds *State v. Reynolds*, 98 N.M. 527, 650 P.2d 811 (1982).

Defendant entitled to manslaughter instruction. - Any evidence tending to bring homicide within grade of manslaughter entitled defendant to instruction on the law of manslaughter, and it was fatal error to refuse it. *State v. Crosby*, 26 N.M. 318, 191 P. 1079 (1920); *Territory v. Lynch*, 18 N.M. 15, 133 P. 405 (1913).

If there is enough circumstantial evidence to raise an inference that the defendant was sufficiently provoked to kill the victim, he is entitled to an instruction on manslaughter. *State v. Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981).

Defendant is entitled to instruction on voluntary manslaughter if there is some evidence to support it. *State v. Maestas*, 95 N.M. 335, 622 P.2d 240 (1981); *State v. Marquez*, 96 N.M. 746, 634 P.2d 1298 (Ct. App. 1981).

The defendant is entitled to an instruction on voluntary manslaughter as a lesser included offense of murder in the first degree if there is evidence to support, or tending to support, such an instruction. *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982).

When court has no duty to instruct on voluntary manslaughter. - Where neither prosecution nor defense in a murder trial requested an instruction on voluntary manslaughter, and both defendant and counsel stated that they did not desire such an instruction despite the court's explanation that there was sufficient evidence to warrant it, there was no duty for the trial court to instruct on voluntary manslaughter. *State v. Najjar*, 94 N.M. 193, 608 P.2d 169 (1980).

Instructions incomplete. - In homicide prosecution where one of defendant's theories was involuntary manslaughter, and record was replete with testimony that defendant was drunk while he rode around in automobile with deceased and witness, holding and handling sawed-off shotgun, court's refusal to instruct the jury that negligent use of a weapon while under the influence of intoxicant was a petty misdemeanor left jury without a guide to determine whether this was a killing while in the commission of a misdemeanor, and was reversible error. *State v. Durham*, 83 N.M. 350, 491 P.2d 1161 (Ct. App. 1971).

Overinclusive instruction erroneous. - Where trial court, at commencement of trial, removed the issue of manslaughter by "commission of a lawful act which might produce death, in an unlawful manner or without due caution and circumspection" from the case, it was reversible error to reinject this false issue into the case by including it in the definition of involuntary manslaughter given the jury in the instructions, and instructing the jury that in order to find defendant guilty it must find that his conduct was of the kind described in the definition. *State v. Salazar*, 58 N.M. 489, 272 P.2d 688 (1954).

Separate instructions not necessary. - Claim that the trial court should have instructed separately on the law applicable to crime of homicide resulting from driving under the influence and resulting from reckless driving was without merit, where jury was adequately instructed as to the proof required in either circumstance. *State v. Fields*, 74 N.M. 559, 395 P.2d 908 (1964).

Erroneous to submit unsupported issue of manslaughter. - It is error for the court to submit to the jury an issue of whether defendant was guilty of voluntary manslaughter when the facts establish either first or second-degree murder, but could not support a conviction of voluntary manslaughter and, accordingly, upon acquittal of murder and conviction of voluntary manslaughter, a reversal and discharge of the accused is required. *Smith v. State*, 89 N.M. 770, 558 P.2d 39 (1976).

It is reversible error to submit, in a murder case, the issue of voluntary manslaughter to the jury where no such issue is involved in the evidence. *State v. Luttrell*, 28 N.M. 393, 212 P. 739 (1923); *State v. Trujillo*, 27 N.M. 594, 203 P. 846 (1921); *State v. Pruett*, 27 N.M. 576, 203 P. 840 (1921). See *State v. Lujan*, 94 N.M. 232, 608 P.2d 1114 (1980).

Because misleading to jury. - A party is entitled to have the jury instructed on all correct legal theories of his case which are supported by substantial evidence but in this case the court's refusal to give the involuntary manslaughter instruction was correct where to have given the requested instruction, which included acts for which there was no evidentiary support, would have introduced false issues and would have been misleading to the jury. *LaBarge v. Stewart*, 84 N.M. 222, 501 P.2d 666 (Ct. App.), cert. denied, 84 N.M. 219, 501 P.2d 663 (1972).

No right to instruction on blood alcohol test refusal. - Nothing in N.M. Const., art. II, §§ 14 or 15, or in statutory or case law, gives defendant in prosecution for manslaughter the legal right to have jury instructed that he had right to refuse to take a blood alcohol test. *State v. Fields*, 74 N.M. 559, 395 P.2d 908 (1964).

Standing to complain. - Where the appellant was convicted of involuntary manslaughter, he could not complain of error in court's instruction in regard to murder. *State v. Carabajal*, 26 N.M. 384, 193 P. 406 (1920).

Review of requested instruction. - Since the instruction on voluntary manslaughter was given at defendant's request, the appeals court can refuse to review since the trial court merely instructed the jury as the defendant requested. *State v. Young*, 117 N.M. 687, 875 P.2d 1119 (Ct. App. 1994).

Omission of words "without malice". - Omission of words "without malice" in instruction in prosecution for voluntary manslaughter did not decrease amount of proof required to convict. *Territory v. Trapp*, 16 N.M. 700, 120 P. 702 (1911), rev'd on other grounds, 222 F. 968 (8th Cir. 1915).

Instruction upon manslaughter which did not tell jury that the killing must be without malice was beneficial rather than harmful to defendant, and he could not complain thereof. *State v. Carabajal*, 26 N.M. 384, 193 P. 406 (1920).

Failure to preserve error in instruction. - Defective instruction which failed to advise the jury that defendant's reckless and wanton operation of his automobile must have been proximate cause of victim's death would not be considered on appeal where not

raised in the trial court prior to reading of instruction to jury. *State v. Clarkson*, 58 N.M. 56, 265 P.2d 670 (1954).

30-2-4. Assisting suicide.

Assisting suicide consists of deliberately aiding another in the taking of his own life.

Whoever commits assisting suicide is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-2-5, enacted by Laws 1963, ch. 303, § 2-5.

ANNOTATIONS

Second-degree murder, assisted suicide, not same offense. - The second-degree murder statute (30-2-1B NMSA 1978) is aimed at preventing an individual from actively causing the death of someone contemplating suicide, whereas the assisting suicide statute is aimed at preventing an individual from providing someone contemplating suicide with the means to commit suicide. Thus, the two statutes do not condemn the same offense. *State v. Sexson*, 117 N.M. 113, 869 P.2d 301 (Ct. App. 1994).

Suicide pact not exemption from conviction for murder. - The existence of a suicide pact does not exempt someone from a conviction for committing murder. However, that general rule may not apply if the means of attempted suicide used presents the same risk to both of the parties at the same time, such as when a couple drive off a cliff together. Such is not the case when the victim is killed by a rifle, the trigger of which is pulled by the defendant. *State v. Sexson*, 117 N.M. 113, 869 P.2d 301 (Ct. App. 1994).

There was enough evidence to support a conviction of second degree murder because there was sufficient evidence to show that the defendant actively participated in a suicide by holding the gun to the victim's head and pulling the trigger. *State v. Sexson*, 117 N.M. 113, 869 P.2d 301 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide § 585.

Criminal liability for death of another as result of accused's attempt to kill self or assist another's suicide, 40 A.L.R.4th 702.

83 C.J.S. Suicide § 4.

30-2-5. Excusable homicide.

Homicide is excusable in the following cases:

A. when committed by accident or misfortune in doing any lawful act, by lawful means, with usual and ordinary caution and without any unlawful intent; or

B. when committed by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, if no undue advantage is taken, nor any dangerous weapon used and the killing is not done in a cruel or unusual manner.

History: 1953 Comp., § 40A-2-6, enacted by Laws 1963, ch. 303, § 2-6.

ANNOTATIONS

Instruction on excusable homicide inapplicable to defense of accidental killing. -

In prosecution for murder, where the defense of accidental killing was interposed, an instruction in the exact language of Laws 1853-1854, p. 88 (former 40-24-15, 1953 Comp.), defining excusable homicide, was properly refused as being inapplicable and as being abstract. *State v. Bailey*, 27 N.M. 145, 198 P. 529 (1921).

Limited instruction erroneous. - Instruction limiting defendant's defense of excusable homicide, by omitting homicide committed in doing a lawful act, by lawful means, and with ordinary caution, constituted reversible error. *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide §§ 110 to 138.

Discharge of firearm without intent to inflict injury as proximate cause of homicide resulting therefrom, 55 A.L.R. 921.

Hunting accident: criminal responsibility for injury or death resulting from, 23 A.L.R.2d 1401.

Druggist's criminal responsibility for death or injury in consequence of mistake, 55 A.L.R.2d 714.

Criminal responsibility for injury or death in operation of mechanically defective motor vehicle, 88 A.L.R.2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Retreat: duty to retreat where assailant and assailed share the same living quarters, 26 A.L.R.3d 1296.

Improper treatment of disease, 45 A.L.R.3d 114.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

40 C.J.S. Homicide §§ 101 to 138.

30-2-6. Justifiable homicide by public officer or public employee.

A. Homicide is justifiable when committed by a public officer or public employee or those acting by their command and in their aid and assistance:

- (1) in obedience to any judgment of a competent court;
- (2) when necessarily committed in overcoming actual resistance to the execution of some legal process or to the discharge of any other legal duty;
- (3) when necessarily committed in retaking felons who have been rescued or who have escaped or when necessarily committed in arresting felons fleeing from justice; or
- (4) when necessarily committed in order to prevent the escape of a felon from any place of lawful custody or confinement.

B. For the purposes of this section, homicide is necessarily committed when a public officer or public employee has probable cause to believe he or another is threatened with serious harm or deadly force while performing those lawful duties described in this section. Whenever feasible, a public officer or employee should give warning prior to using deadly force.

History: 1953 Comp., § 40A-2-7, enacted by Laws 1963, ch. 303, § 2-7; 1989, ch. 222, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added the present designation for Subsection A, redesignated former Subsections A through D as Paragraphs (1) through (4) of present Subsection A, and added present Subsection B.

Legislative recognition of common law. - This section and 30-2-7 NMSA 1978 are in reality a legislative recognition of the common law which empowered officers to perform their duty of apprehending and bringing felons to the bar of justice. *Alaniz v. Funk*, 69 N.M. 164, 364 P.2d 1033 (1961).

Arresting officer to use best judgment. - When the state sends an officer to make an arrest for a felony, he must use his best judgment to make the arrest, peaceably if he can, but forcibly if he must. *Alaniz v. Funk*, 69 N.M. 164, 364 P.2d 1033 (1961).

Use of necessary force in making arrest. - An officer having the right to arrest an offender may use such force as is necessary to effect his purpose, to the extent of taking life. *State v. Vargas*, 42 N.M. 1, 74 P.2d 62 (1937).

Reasonableness a jury question. - Generally, the question of the reasonableness of the actions of the officer in using lethal force to apprehend a felon is a question of fact for the jury. *Alaniz v. Funk*, 69 N.M. 164, 364 P.2d 1033 (1961).

Self-defense authorized. - Although an officer must not kill for an escape where the party is in custody for a misdemeanor, if the party assaults the officer with such violence that he had reasonable ground to believe his life in peril, he may justify killing the party. *State v. Vargas*, 42 N.M. 1, 74 P.2d 62 (1937).

Large rocks, hurled by misdemeanant at deputy sheriff in resisting arrest, were dangerous weapons, justifying resort to extreme measures on part of deputy. *State v. Vargas*, 42 N.M. 1, 74 P.2d 62 (1937).

Duty not to retreat. - In a wrongful death suit, where the evidence showed that decedent committed at least two felonies in the presence of police officers, the officers' duty, when he fired upon them, was not to retreat but to press forward and place him under physical restraint, and, in so doing, the officers could defend themselves and use deadly force if such were justified by the circumstances. *Cordova v. City of Albuquerque*, 86 N.M. 697, 526 P.2d 1290 (Ct. App. 1974).

Instruction appropriate. - Officer charged with killing one resisting an arrest for felony was entitled to have jury instructed as to what constitutes justifiable homicide. *Territory v. Gutierrez*, 13 N.M. 138, 79 P. 716 (1905).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide §§ 121, 134 to 137.

Misdemeanor, degree of force that may be employed in arresting one charged with, 3 A.L.R. 1170, 42 A.L.R. 1200.

Peace officers' criminal responsibility for killing or wounding one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

40 C.J.S. Homicide §§ 104 to 107.

30-2-7. Justifiable homicide by citizen.

Homicide is justifiable when committed by any person in any of the following cases:

A. when committed in the necessary defense of his life, his family or his property, or in necessarily defending against any unlawful action directed against himself, his wife or family;

B. when committed in the lawful defense of himself or of another and when there is a reasonable ground to believe a design exists to commit a felony or to do some great personal injury against such person or another, and there is imminent danger that the design will be accomplished; or

C. when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed in his presence, or in lawfully suppressing any riot, or in necessarily and lawfully keeping and preserving the peace.

History: 1953 Comp., § 40A-2-8, enacted by Laws 1963, ch. 303, § 2-8.

ANNOTATIONS

Recognition of common law. - This section and 30-2-6 NMSA 1978 are in reality a legislative recognition of the common law which empowered officers to perform their duty of apprehending and bringing felons to the bar of justice. *Alaniz v. Funk*, 69 N.M. 164, 364 P.2d 1033 (1961).

Former law qualified. - Laws 1853-1854, p. 86, (40-24-13, 1953 Comp.), relating to killing in defense of person or property, apprehending felon, suppressing riot or preserving peace, was not repealed by Laws 1907, ch. 36, § 11, (former 40-24-11, 1953 Comp.), relating to justifiable homicide in defense of self, family or property, but the latter merely qualified it to the extent that the word "necessary" appearing in the later statute was to be given effect. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Three elements necessary before self-defense instruction can be given are: (1) an appearance of immediate danger of death or great bodily harm to the defendant; (2) the defendant was in fact put in such fear; and (3) a reasonable person would have reacted in a similar manner. *State v. Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981).

To warrant self-defense instruction evidence must raise reasonable doubt in the minds of the jury as to whether or not a defendant accused of homicide did act in self-defense. *State v. Martinez*, 95 N.M. 421, 622 P.2d 1041 (1981).

Subjective apprehension of harm necessary. - It was not sufficient to justify the taking of human life that a person had reason to apprehend death or great bodily harm to himself unless he killed his assailant; he must entertain such belief and must be acting upon it. *State v. Parks*, 25 N.M. 395, 183 P. 433 (1919).

Threat of great personal injury. - Laws 1853-1854, p. 86, (former 40-24-13, 1953 Comp.), defining homicide as justifiable when committed in lawful self-defense on reasonable ground to apprehend some great personal injury meant something more

than apprehension, however imminent, of a mere battery, not amounting to a felony, and required an apparent design either to take the life or inflict great personal injury on the person assailed, amounting to a felony, if carried out, and imminent danger of such design being accomplished. *Territory v. Baker*, 4 N.M. (Gild.) 236, 13 P. 30 (1887).

Defense of chastity. - Woman accused of voluntary manslaughter was entitled, on written request, to special instruction on her claim of defense of her chastity. *State v. Martinez*, 30 N.M. 178, 230 P. 379 (1924).

Protection of paramour not contemplated. - Under former 40-24-13, 1953 Comp., inclusion of "mistress" in enumeration of persons one might kill to defend referred to the feminine of "master" and meant "a woman having power, authority or ownership," not a female companion in an extra-marital relationship. *State v. Brooks*, 59 N.M. 130, 279 P.2d 1048 (1955).

Defense of habitation authorized. - The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, gave householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

While no law countenances wanton slaying, the protection and security of life being the most vital interest of society, the law of habitation and the resistance to the commission of a felony thereon gave householder the right to kill the aggressor, if such killing was necessary or apparently necessary to prevent or repel the felonious aggression. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Householder not obliged to retreat. - When one's home was attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants had, was not obliged to retreat but might pursue his adversaries until out of danger. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Substantial injury to dwelling not necessary. - Instruction that injury to a dwelling, to be felonious so as to justify killing, must be of a substantial character constituted a prejudicial error. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Property other than dwelling. - Under former law, trespass upon real estate not the dwelling house of accused did not of itself justify or excuse killing of trespasser. *State v. Martinez*, 34 N.M. 112, 278 P. 210 (1929).

Requisites of instructions. - It is not imperative that the charge to the jury use the precise terms of the statute; instructions are sufficient which substantially follow the language of the statute or use equivalent language, adequately covering every phase of the case raised by the evidence on which the defendant is entitled to have the jury instructed. *State v. Maestas*, 63 N.M. 67, 313 P.2d 337 (1957).

Jury to consider threat of danger from defendant's standpoint. - Where defense of habitation is invoked in homicide case, the danger or apparent danger must be considered from the standpoint of accused, and not according to the actual facts as they developed at the trial. State v. Couch, 52 N.M. 127, 193 P.2d 405 (1946).

The jury was adequately instructed where it was charged that if it reasonably appeared to the defendant that his brother was in imminent danger of death or great bodily injury, then the defendant had a right to use such force as would appear reasonably necessary to repel the attack, and the jury was further instructed to view the matter from defendant's viewpoint, even though it afterward appeared that no injury was intended and no danger existed. State v. Maestas, 63 N.M. 67, 313 P.2d 337 (1957).

Instruction on right to act in view of wife's health. - Refusal of instruction relating to defendant's right to act in view of his wife's condition and effect which repeated assaults upon the habitation had had upon her health was reversible error. State v. Couch, 52 N.M. 127, 193 P.2d 405 (1946).

When self-defense instruction mandatory. - Where self-defense is involved in a criminal case and there is any evidence, although slight, to establish the same, it is not only proper for the court, but its duty as well, to instruct the jury fully and clearly on all phases of the law on the issue that are warranted by the evidence, even though such defense is supported only by the defendant's own testimony. State v. Heisler, 58 N.M. 446, 272 P.2d 660 (1954).

Evidence held to support theory of self-defense. - The recovery of a spent bullet, after trial, from under the hood of the defendant's car, and evidence regarding its angle of entry and rifling characteristics consistent with its having been fired by a gun of the type and caliber known by police to be owned by the victim, was not merely cumulative evidence, but was a material piece of demonstrative evidence strengthening the defendant's theory of self-defense. State v. Melendez, 97 N.M. 740, 643 P.2d 609 (Ct. App. 1981), rev'd on other grounds, 97 N.M. 738, 643 P.2d 607 (1982).

When inappropriate. - If the evidence in the case is insufficient to raise a reasonable doubt as to whether a defendant accused of a homicide did act in self-defense, any instruction on that issue is properly refused. State v. Heisler, 58 N.M. 446, 272 P.2d 660 (1954).

Instructions properly refused. - An instruction on Laws 1853-1854, p. 86, (former 40-24-13, 1953 Comp.), relating to killing in apprehending felon, suppressing riot or preserving peace, was properly left out where no riot was taking place and defendant was not serving as a police officer. State v. Martinez, 53 N.M. 432, 210 P.2d 620 (1949).

Defendant was not entitled to instruction under Laws 1853-1854, p. 86, (former 40-24-13, 1953 Comp.), relating to killing in apprehending felon, suppressing riot or preserving

peace, when he had claimed self-defense. *State v. Greenlee*, 33 N.M. 449, 269 P. 331 (1928).

In prosecution for assault with intent to kill, refusal to instruct that person has a right to defend his property from trespass or larceny, and that jury should acquit defendant if it found he shot at prosecuting witness to stop him from removing defendant's property and that such action was necessary to prevent it was not error where evidence did not show prosecuting witness was on land leased by defendant at time of assault and in light of instructions given. *State v. Waggoner*, 49 N.M. 399, 165 P.2d 122 (1946).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homicide §§ 110 to 126, 138.

Duty to retreat as affected by illegal character of premises on which homicide occurs, 2 A.L.R. 518.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter, 10 A.L.R. 861.

Killing of third person by shot or blow aimed at another in self-defense, 18 A.L.R. 917.

Duty to retreat when not on one's premises, 18 A.L.R. 1279.

Homicide in defense of habitation or property, 25 A.L.R. 508, 32 A.L.R. 1541, 34 A.L.R. 1488.

Evidence of improper conduct by deceased toward defendant's wife as admissible in support of plea of self-defense, 44 A.L.R. 860.

Retreat: extent of premises which may be defended without retreat under right of self-defense, 52 A.L.R.2d 1458.

Instructions: duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Admissibility of evidence of uncommunicated threats on issue of self-defense in prosecution for homicide, 98 A.L.R.2d 6.

Relationship with assailant's wife as provocation depriving defendant of right of self-defense, 9 A.L.R.3d 933.

Retreat: duty to retreat where assailant and assailed share the same living quarters, 26 A.L.R.3d 1296.

Arrest: private person's authority, in making arrest for felony, to shoot or kill alleged felon, 32 A.L.R.3d 1078.

Duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 A.L.R.3d 584.

Killing by set gun or similar device on defendant's own property, 47 A.L.R.3d 646.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 A.L.R.3d 239.

Duty to retreat where assailant is social guest on premises, 100 A.L.R.3d 532.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Construction and application of statutes justifying the use of force to prevent the use of force against another, 71 A.L.R.4th 940.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

40 C.J.S. Homicide §§ 108 to 138.

30-2-8. When homicide is excusable or justifiable defendant to be acquitted.

Whenever any person is prosecuted for a homicide, and upon his trial the killing shall be found to have been excusable or justifiable, the jury shall find such person not guilty and he shall be discharged.

History: 1953 Comp., § 40A-2-9, enacted by Laws 1963, ch. 303, § 2-9.

30-2-9. Murderer may not profit from wrongdoing; public policy.

A. The acquiring, profiting or anticipating of benefits by reason of the commission of murder where the person committing such crime is convicted of either a capital, first or second degree felony, is against the public policy of this state and is prohibited.

B. In all cases involving devises or bequests, or heirships under the laws of descent and distribution, or cotenancies, or future interests, or community estates, or contracts, whether of real, personal or mixed properties, where a person, who, by committing murder and where such person is convicted of either a capital, first or second degree felony, and might receive some benefit therefrom either directly or indirectly, the common-law maxim to the effect that one cannot take advantage of his own wrong, shall control and be applied to the interpretation, construction and application of all

statutes or decisions of this state in order to deprive and prevent him from profiting from such wrongful acts.

History: 1953 Comp., § 40A-2-10, enacted by Laws 1963, ch. 303, § 2-10.

ANNOTATIONS

Section distinct from common law. - This section is not merely declaratory of the common law, nor is it a mere extension of or addition to the common-law maxim that a beneficiary may not profit by his own crime. *Rose v. Rose*, 79 N.M. 435, 444 P.2d 762 (1968).

Nature of prohibition. - If the legislature had intended it as merely declaratory of the common law, it would have been easy to have said that one who is convicted of feloniously causing the death of another shall not benefit therefrom. However, the legislature, by express and unambiguous language, prohibited only those convicted of murder from so profiting. *Rose v. Rose*, 79 N.M. 435, 444 P.2d 762 (1968).

Matter for legislature. - This is a legislative matter, and where, in 1942, prior to passage of Laws 1955, ch. 61, providing that a murderer could not inherit the estate of his victim, defendant killed his mother, pleading guilty to murder in the second degree for the crime, the court would refuse to amend or set aside the unambiguous statutes of descent and distribution under which the property of the mother descended to the son. *Reagan v. Brown*, 59 N.M. 423, 285 P.2d 789 (1955).

Criminal proceeding determinative. - The question of whether the insured was murdered by the person to whom the property would ordinarily go is one to be judicially determined, the legislature having seen fit to provide that such determination must be ascertained in a criminal proceeding. *Rose v. Rose*, 79 N.M. 435, 444 P.2d 762 (1968).

Law reviews. - For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Descent and Distribution §§ 101 to 109, 134; 41 Am. Jur. 2d Husband and Wife § 73; 44 Am. Jur. 2d Insurance § 1715.

Murder of life tenant by remainderman or reversioner as affecting latter's rights to remainder or reversion, 24 A.L.R.2d 1120.

Insurance: right to proceeds of life insurance, as between estate of murdered insured and alternative beneficiary named in policy, where murderer was made primary beneficiary, 26 A.L.R.2d 987.

Insurance: killing of insured by beneficiary as affecting life insurance or its proceeds, 27 A.L.R.3d 794.

Felonious killing of one cotenant by the other as affecting latter's rights in the property, 42 A.L.R.3d 1116.

Homicide as precluding taking under will or by intestacy, 25 A.L.R.4th 787.

26A C.J.S. Descent and Distribution § 47; 41 C.J.S. Husband and Wife § 32; 46A C.J.S. Insurance § 1429; 94 C.J.S. Wills § 104.

ARTICLE 3

ASSAULT AND BATTERY

30-3-1. Assault.

Assault consists of either:

- A. an attempt to commit a battery upon the person of another;
- B. any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery; or
- C. the use of insulting language toward another impugning his honor, delicacy or reputation.

Whoever commits assault is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-3-1, enacted by Laws 1963, ch. 303, § 3-1.

ANNOTATIONS

Cross-references. - For assault by prisoner, see 30-22-17 NMSA 1978.

For assaults upon peace officers, see 30-22-21 to 30-22-23, 30-22-25, 30-22-26 NMSA 1978.

For assault and battery upon revenue division employees, see 7-1-75 NMSA 1978.

Constitutional infirmity in Subsection C may exist insofar as first and fourteenth amendment rights are concerned. *State v. Parrillo*, 94 N.M. 98, 607 P.2d 636 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1979).

Distinction between lawful and unlawful violence. - By using the word "unlawfully" in the statute, the legislature intended to discriminate between lawful and unlawful acts of violence. *Ruiz v. Territory*, 10 N.M. 120, 61 P. 126 (1900); *Territory v. Miera*, 1 N.M. 387 (1866).

Insulting language. - Language that meant "follow the road, don't go" did not, as a matter of law, tend toward impugning the honor, delicacy or reputation of another. *State v. Vasquez*, 83 N.M. 388, 492 P.2d 1005 (Ct. App. 1971).

Requisites of assault. - For there to have been an assault upon a victim, there must have been an act, threat or conduct which caused him to reasonably believe he was in danger of receiving an immediate battery. *State v. Mata*, 86 N.M. 548, 525 P.2d 908 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

While assault and battery are closely related, one may exist without the other. All batteries do not include an assault. For there to be an assault, there must have been an act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery. *Baca v. Velez*, 114 N.M. 13, 833 P.2d 1194 (Ct. App. 1992).

Evidence of victim's apprehension. - Where there was no direct evidence of an alleged victim's belief that he was in danger of receiving an immediate battery, the evidence was insufficient to show that any assault had been committed. *State v. Mata*, 86 N.M. 548, 525 P.2d 908 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Definition mandatory part of instructions. - The definition of assault found in this section contains essential elements of the crime of which defendant was convicted, assault with intent to commit a violent felony, and hence, failure to instruct on the definition of assault constituted jurisdictional error. *State v. Jones*, 85 N.M. 426, 512 P.2d 1262 (Ct. App. 1973).

Crimes of assault and robbery must merge, as the operative elements of the two are the same. *State v. Maes*, 100 N.M. 78, 665 P.2d 1169 (Ct. App. 1983).

Instruction on assault as lesser included offense. - In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the nonenumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Jurisdiction formerly. - Under former law, it was the intention of the legislature to give to justices of the peace (now magistrates) absolute and exclusive jurisdiction of this offense. *Territory v. Valdez*, 1 N.M. 548 (1873); *Bray v. United States*, 1 N.M. 1 (1852).

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assault and Battery §§ 8 to 36.

Assault in defense of habitation or property, 32 A.L.R. 1541, 34 A.L.R. 1488.

"Third degree," police officers' criminal liability in respect of examination of persons under arrest, 79 A.L.R. 457.

Assault in connection with use of automobile for unlawful purpose or in violation of law, 99 A.L.R. 756.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

Motor vehicle: criminal responsibility for assault and battery by operation of mechanically defective motor vehicle, 88 A.L.R.2d 1165.

Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one in loco parentis, 89 A.L.R.2d 396.

Deadly or dangerous weapon, intent to do serious harm as essential to crime of assault with, 92 A.L.R.2d 635.

Unintentional killing of or injury to third person during attempted self-defense, 55 A.L.R.3d 620.

Automobile as dangerous or deadly weapon within meaning of assault or battery statute, 89 A.L.R.3d 1026.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Civil liability for insulting or abusive language - modern status, 20 A.L.R.4th 773.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

Liability of hotel or motel operator for injury to guest resulting from assault by third party, 28 A.L.R.4th 80.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Franchisor's tort liability for injuries allegedly caused by assault or other criminal activity on or near franchise premises, 2 A.L.R.5th 369.

Transmission or risk of transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Effect of federal assault statute (18 USCS § 113) on prosecutions under Assimilative Crimes Act (18 USCS § 13) making state criminal laws applicable to acts committed on federal reservations, 57 A.L.R. Fed. 957.

6A C.J.S. Assault and Battery § 64.

30-3-2. Aggravated assault.

Aggravated assault consists of either:

- A. unlawfully assaulting or striking at another with a deadly weapon;
- B. committing assault by threatening or menacing another while wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner, so as to conceal identity; or
- C. willfully and intentionally assaulting another with intent to commit any felony.

Whoever commits aggravated assault is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-3-2, enacted by Laws 1963, ch. 303, § 3-2.

ANNOTATIONS

Cross-references. - For aggravated assault upon peace officer, see 30-22-22 NMSA 1978.

For instruction on general criminal intent, see UJI 14-141.

Lesser included offense of aggravated battery. - Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. State v. DeMary, 99 N.M. 177, 655 P.2d 1021 (1982).

Meaning of "deadly weapon". - Deadly weapons shall be construed to mean any kind or class of pistol or gun, whether loaded or unloaded. State v. Montano, 69 N.M. 332, 367 P.2d 95 (1961).

Drawing weapon. - The word "draw" in Laws 1887, ch. 30, § 2 (former 40-17-3, 1953 Comp.), which prohibited the drawing or handling of deadly weapon in threatening manner, meant "intentionally point." State v. Boyles, 24 N.M. 464, 174 P. 423 (1918).

Apprehension of danger required. - For there to be an aggravated assault there must first be an assault; for there to be an assault upon a victim, there must have been an act, threat or conduct which caused him to reasonably believe he was in danger of receiving an immediate battery. State v. Mata, 86 N.M. 548, 525 P.2d 908 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

General criminal intent is necessary element of aggravated assault although the terms of the statute do not require it. Consequently, something done "not with an evil purpose, but for fun, or as a practical joke" is not done with the requisite criminal intent necessary to constitute the crime of aggravated assault. State v. Cruz, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974).

Intent defined as conscious wrongdoing. - Although Subsection A does not refer to intent, intent is required; the intent involved is that of conscious wrongdoing. State v. Mascarenas, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974).

Intent to harm not requisite. - An intent to do physical or bodily injury is not an element of Subsection A of this section. State v. Cruz, 86 N.M. 455, 525 P.2d 382 (Ct. App. 1974).

Specific intent to do bodily harm is not a necessary element of aggravated assault under New Mexico law. Proof of intent under the aggravated assault statute is achieved by showing the defendant intended to commit a simple assault and did so with a deadly weapon. United States v. Boone, 347 F. Supp. 1031 (D.N.M. 1972).

State is not required to prove that accused intended to assault victim, but only that he did an unlawful act which caused the victim to reasonably believe that she was in danger of receiving an immediate battery, that the act was done with a deadly weapon, and that it was done with a general criminal intent. State v. Manus, 93 N.M. 95, 597 P.2d 280 (1979).

Great bodily harm is not element of aggravated assault charge. State v. Davis, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

Use of deadly weapon to protect property. - The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable, both civilly and criminally, for the assault. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Resisting arrest with deadly weapon. - Resistance of lawful arrest with deadly weapon was not excused by fact that the officer acted from personal motives. *State v. Nieto*, 34 N.M. 232, 280 P. 248 (1929).

Intentional shooting. - The killing of a person by intentionally shooting him with a rifle, if not justified by the law of self-defense, would constitute at least an assault with a deadly weapon and would be a felony, and hence not involuntary manslaughter. *State v. Pruett*, 27 N.M. 576, 203 P. 840 (1921).

No double jeopardy where facts differ. - If the factual basis for the alleged conviction for assault in municipal court and the factual basis for the aggravated assault conviction differ, then there would be no double jeopardy and the burden will be on defendant to prove a factual basis showing double jeopardy. *State v. Woods*, 85 N.M. 452, 513 P.2d 189 (Ct. App. 1973).

Separate criminal acts. - Assault with a deadly weapon, even though committed in connection with a larceny is a separate criminal act, as distinguished from a necessary ingredient of the crime of larceny, and, accordingly, there may be a conviction and punishment for both. *State v. Martinez*, 77 N.M. 745, 427 P.2d 260 (1967).

Separate punishment for aggravated assault and arson. - The legislature intended separate punishment for the crimes of arson and aggravated assault. While these statutes may be violated together, they are not necessarily violated together. Punishment for a violation of either statute is not enhanced for a violation of the other. The legislature intended separate punishment for unitary conduct violating both statutes. *State v. Rodriguez*, 113 N.M. 767, 833 P.2d 244 (Ct. App.), cert. denied, 113 N.M. 636, 830 P.2d 553 (1992).

Crimes of aggravated assault and robbery must merge, as the operative elements of the two are the same. *State v. Maes*, 100 N.M. 78, 665 P.2d 1169 (Ct. App. 1983).

Prosecution after acquittal of other charges. - State did not violate guarantee against double jeopardy in prosecuting defendant for assault with intent to commit a violent felony and false imprisonment, after an acquittal on charges of assault on a jail and false imprisonment and kidnapping of another individual, arising out of the same incident, since where the jury in the first trial acquitted defendant they did not necessarily conclude that he was not present at the jail that day and thus did not commit any crimes, but simply that he was not guilty of the crimes alleged. *State v. Tijerina*, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Assault offenses not necessarily included. - Assault with a deadly weapon (Laws 1907, ch. 36, § 19, former 40-17-4, 1953 Comp.) was not necessarily included within offense of assault with intent to murder (Laws 1853-1854, pp. 92, 94, former 40-6-4, 40-6-5, 1953 Comp.). State v. Taylor, 33 N.M. 35, 261 P. 808 (1927).

Aggravated assault not lesser included offense. - Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. State v. Patterson, 90 N.M. 735, 568 P.2d 261 (Ct. App. 1977).

Lesser assaults included in indictment. - An indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former 40-17-4, 1953 Comp.) included the common-law crime of simple assault, if not that specified in Laws 1889, ch. 17, § 22 (former 40-6-2, 1953 Comp.), unlawful touching another as assault and battery, and both forms coexisted in the territory. It was not important that the greater offense charged be statutory or common law, provided it necessarily included the crime of which defendant was found guilty. Chacon v. Territory, 7 N.M. 241, 34 P. 448 (1893).

Lesser included offense of 18 U.S.C. § 113(c). - The New Mexico offense of aggravated assault is a lesser included offense of the federal crime of assault with a dangerous weapon with specific intent to do bodily harm, 18 U.S.C. § 113(c). United States v. Abeyta, 27 F.3d 470 (10th Cir. 1994).

Statutory language to be used. - An indictment for drawing or handling deadly weapon in threatening manner under Laws 1887, ch. 30, § 2 (former 40-17-3, 1953 Comp.) was required to follow language of statute. Territory v. Armijo, 7 N.M. 571, 37 P. 1117 (1894).

Word "unlawfully" was not necessary in indictment if other words were used which conveyed the same meaning. Ruiz v. Territory, 10 N.M. 120, 61 P. 126 (1900).

Allegation that gun was loaded unnecessary. - In prosecution for an assault with a deadly weapon, a gun, it was not necessary to allege that the gun was loaded. Territory v. Gonzales, 14 N.M. 31, 89 P. 250 (1907).

Indictment failing to specify appropriate statutory section. - An indictment framed under Laws 1887, ch. 30, prescribing penalties for drawing or handling deadly weapon in threatening manner, assault with a deadly weapon and drawing or discharging firearm in public place was insufficient when the offense charged did not come within scope of any section of that act. Territory v. Armijo, 7 N.M. 571, 37 P. 1117 (1894).

Where the state originally charged defendant with assault with intent to commit the violent felony of robbery but later amended the indictment to charge assault with intent to commit the felony of larceny, the fact that the amended indictment continued to contain the statutory references to assault with intent to commit a violent felony was not

fatal to the indictment, since misreference to statutory sections is not a sufficient reason to dismiss the indictment. *State v. Gallegos*, 109 N.M. 55, 781 P.2d 783 (Ct. App. 1989).

Failing to describe weapon or allege unlawful assault. - An indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former 40-17-6, 1953 Comp.) was insufficient if it did not describe the knife used or failed to charge that it was one with which dangerous cuts could be given or dangerous thrusts inflicted or that defendant "did unlawfully assault." *Territory v. Armijo*, 7 N.M. 571, 37 P. 1117 (1894).

Use of circumstantial evidence. - On trial of charge of assault with deadly weapon, whether the weapon was in fact used may be shown by circumstantial evidence. *State v. Conwell*, 36 N.M. 253, 13 P.2d 554 (1932).

Proof of motive is not indispensable to conviction. *State v. Brito*, 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969).

Without contention that defendant did not shoot victim, the state is not required to prove motive. *State v. Brito*, 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969).

Evidence of victim's prior conviction. - Exclusion of bare fact that person threatened with deadly weapon had been convicted of voluntary manslaughter, offered as bearing on self-defense, was within discretion of trial court. *State v. Nieto*, 34 N.M. 232, 280 P. 248 (1929).

Evidence sufficient. - Evidence that defendant pulled the loaded gun from his pocket and made threat to kill after argument over girlfriend was substantial evidence of an attempt to apply force in either an insolent or angry manner and therefore sufficient evidence of aggravated assault. *State v. Woods*, 82 N.M. 449, 483 P.2d 504 (Ct. App. 1971).

Evidence that defendant told victim to leave, fired revolver within one foot of and in the direction of victim, and called victim a son of a bitch and told him to get up, supports conviction for aggravated assault. *State v. Brito*, 80 N.M. 166, 452 P.2d 694 (Ct. App. 1969).

The evidence was sufficient to sustain defendant's conviction for offense of aggravated assault when he pointed a gun at victim and asked for money, which was handed over, victim testifying that he was worried because the gun was loaded. *State v. Anaya*, 79 N.M. 43, 439 P.2d 561 (Ct. App. 1968).

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. See *State v. Peterson*, 103 N.M. App. 638, 711 P.2d 915 (1985), cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

A defendant's acts of specifically pointing a rifle at each of several victims on two or more separate instances, accompanied by verbal threats, constituted evidence from

which the jury could properly determine that defendant committed the separate offenses of aggravated assault and false imprisonment against each victim. Moreover, the jury could find that defendant falsely imprisoned his victims at the beginning of the episode and thereafter committed additional independent aggravated assaults for which he could be separately punished. *State v. Bachicha*, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

Where evidence on charge is overwhelming, defendant cannot be prejudiced by the testimony as to the extent of a victim's injuries after the jury is told to disregard that testimony. *State v. Davis*, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

Jury instructions on aggravated assault as lesser included offense. - In prosecution for assault with a deadly weapon with specific intent to do bodily harm (18 U.S.C. § 113(c)), where the record was rife with testimony that alcohol might have affected defendant's ability to appreciate the import of his actions, defendant was entitled to an instruction on the lesser included New Mexico offense of aggravated assault, which has the same action elements but does not include a specific intent to injure. *United States v. Abeyta*, 27 F.3d 470 (10th Cir. 1994).

Instruction's definitions sufficient. - Instruction defining "assault" as an attempt to commit a battery upon the person of another and "unlawful" as means contrary to law and without legal excuse or justification, held not to be error. *State v. Woods*, 82 N.M. 449, 483 P.2d 504 (Ct. App. 1971).

Instructions on intent insufficient. - Conscious wrongdoing is an essential element of Subsection A of this statute, and instructions in the language of the statute were insufficient to inform the jury of the intent required. Hence, defendant's conviction was reversed. *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Word "unlawful" insufficient description of intent. - When a statute sets forth the requisite intent, instructions in the language of the statute sufficiently instruct on the required intent. However, where the applicable statute speaks of "unlawfulness," instructions informing the jury that defendant's conduct must have been unlawful does not inform the jury that conscious wrongdoing is an element of the crime of aggravated assault. *State v. Mascarenas*, 86 N.M. 692, 526 P.2d 1285 (Ct. App. 1974).

Use of word "unlawfully" unnecessary. - It was not necessary to use the word "unlawfully" in an instruction, where the jury was informed that the assault must have been committed without excuse or justification, and another instruction defined an assault as an "unlawful attempt." *Territory v. Gonzales*, 14 N.M. 31, 89 P. 250 (1907).

Use of "feloniously" unnecessary. - Although an indictment for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former 40-17-4, 1953 Comp.) used the word "feloniously," there was no error in omitting it from the instruction as to elements of

crime, as the use of the word in the indictment was unnecessary, and the jury was not required to fix the penalty. *Territory v. Gonzales*, 14 N.M. 31, 89 P. 250 (1907).

Use of phrase "without excuse or justification" proper. - In prosecution for assault with a deadly weapon under Laws 1907, ch. 36, § 19 (former 40-17-4, 1953 Comp.), it was not error to use the words "without excuse or justification" in an instruction. *Territory v. Gonzales*, 14 N.M. 31, 89 P. 250 (1907).

No double jeopardy for sentence enhancement. - Double jeopardy did not prohibit the trial court from enhancing defendant's sentence for aggravated assault with a deadly weapon under the firearm enhancement section, 31-18-16A NMSA 1978, since each section contains an element or elements not included in the other and the phrase "a noncapital felony" means "any noncapital offense". *State v. Charlton*, 115 N.M. 35, 846 P.2d 341 (Ct. App. 1992).

Sentence improper. - Sentence of 7 to 15 years for convictions of assault with intent to kill and assault with a deadly weapon were not in accordance with the so-called indeterminate sentence law, former 41-17-1, 1953 Comp., which required a trial judge to sentence a person found guilty of an offense to the minimum and maximum provided by statute for the offense. *State v. Romero*, 73 N.M. 109, 385 P.2d 967 (1963).

Breaking-and-entering instruction refused since defendant intended to threaten. - A requested instruction on breaking and entering as a lesser-included offense was properly refused, where although the evidence was susceptible to inferences that defendant did not have the requisite intent to commit any batteries or homicides until he got inside, there was no evidence other than he had the intent, when he entered a house, to threaten someone while masked. *State v. Durante*, 104 N.M. 639, 725 P.2d 839 (Ct. App. 1986).

Merger of conviction for aggravated assault into offense of false imprisonment. - Even though a defendant's acts of threatening each of multiple victims with a deadly weapon constituted the means by which his victims were restrained or confined against their will so as to cause the assault to merge into the crime of false imprisonment, the trial court did not err in refusing to merge defendant's convictions of aggravated assault into the offenses of false imprisonment, because there was evidence of multiple acts of aggravated assault committed against each victim. *State v. Bachicha*, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: *State v. Gillette*," see 17 N.M.L. Rev. 189 (1987).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assault and Battery §§ 48 to 55.

Sense of shame, or other disagreeable emotion on part of female, as essential to an aggravated or indecent assault, 27 A.L.R. 859.

Deadly or dangerous weapon, intent to do physical harm as essential element of crime of assault with, 92 A.L.R.2d 635.

Sexual nature of physical contact as aggravating offense, 63 A.L.R.3d 225.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 8 A.L.R.5th 775.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 A.L.R.5th 823.

6A C.J.S. Assault and Battery §§ 72 to 82.

30-3-3. Assault with intent to commit a violent felony.

Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary.

Whoever commits assault with intent to commit a violent felony is guilty of a third degree felony.

History: 1953 Comp., § 40A-3-3, enacted by Laws 1963, ch. 303, § 3-3; 1977, ch. 193, § 2.

ANNOTATIONS

Cross-references. - For offense of murder, see 30-2-1 NMSA 1978.

For offense of criminal sexual penetration, see 30-9-11 NMSA 1978.

For offenses of robbery and burglary, see 30-16-2 and 30-16-3 NMSA 1978.

For assault with intent to commit violent felony upon peace officer, see 30-22-23 NMSA 1978.

Validity of former law. - Laws 1921, ch. 65, § 1 (40-6-5, 1953 Comp.) was not void for uncertainty or indefiniteness, at least so far as the first clause thereof, pertaining to assault with intent to murder, was concerned. *State v. Martin*, 32 N.M. 48, 250 P. 842 (1926).

No double jeopardy bar to punishment. - There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

No repeal of former law by implication. - While assault with intent to kill (Laws 1929, ch. 44, § 1, 40-6-6, 1953 Comp.) was generally deemed a less serious offense than assault with intent to murder (Laws 1921, ch. 65, § 1, 40-6-5, 1953 Comp.), the fact that penalty enacted for assault with intent to kill was more severe than that for offense of

assault with intent to murder did not indicate that the latter section was repealed by implication. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

"Intent" less comprehensive than "attempt". - The word "attempt" was more comprehensive than the word "intent" implying both the purpose and the actual effort to carry that purpose into execution. State v. Grayson, 50 N.M. 147, 172 P.2d 1019 (1946).

Essential elements of offense. - Essential elements and ingredients of assault with intent to murder were willfully and unlawfully to assault a person with malicious intent to murder such person, so that intent was an essential ingredient of the crime. Territory v. Baca, 11 N.M. 559, 71 P. 460 (1903).

Malice as element. - Malice was an essential element in assault with intent to murder, but not in assault with intent to kill or commit manslaughter. State v. Melendrez, 49 N.M. 181, 159 P.2d 768 (1945).

Aggravated assault not lesser included offense. - Assault with intent to kill can be committed without use of a deadly weapon; thus, aggravated assault with a deadly weapon was not a lesser included offense. State v. Patterson, 90 N.M. 735, 568 P.2d 261 (Ct. App. 1977).

No merger with kidnapping conviction. - Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. State v. Williams, 105 N.M. 214, 730 P.2d 1196 (Ct. App. 1986).

No merger with shooting at an inhabited dwelling. - This section and 30-3-8 NMSA 1978 (shooting at an inhabited dwelling) are two sections directed toward the protection of different social norms and indicate an intention on the part of the legislature to allow for multiple punishment for the same conduct. The legislature was concerned with conduct typically designed to terrorize or intimidate in 30-3-8 NMSA 1978. In contrast, this section is directed toward conduct which is motivated by an intention to effect another's death. State v. Highfield, 113 N.M. 606, 830 P.2d 158 (Ct. App. 1992).

Collateral estoppel not applicable to facts. - Acquittal of defendant on charge of assault on a jail did not collaterally estop state from bringing subsequent prosecution against him on charge of assault with intent to commit a violent felony, even where both offenses allegedly occurred at same time and place, since charge of assault with intent to commit a violent felony required a jury to consider facts not required in the first trial. State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Applicability of former law. - Laws 1853-1854, p. 94 (40-6-4, 1953 Comp.), assault with intent to commit a felony, did not apply to assault with intent to rape a child under the age of consent. *State v. Ballamah*, 28 N.M. 212, 210 P. 391 (1922).

Justification insufficient. - An attempt to recover property in the absence of a threatened trespass to one's habitation did not justify an attempt to take the life of a trespasser. *State v. Waggoner*, 49 N.M. 399, 165 P.2d 122 (1946).

Manner and means of assault to be charged. - Indictment for assault with intent to commit murder must state the manner and means of the assault so far, at least, as to show that the crime would have been murder had not the acts stopped short of their full effect. *Territory v. Carrera*, 6 N.M. 594, 30 P. 872 (1892); *Territory v. Sevailles*, 1 N.M. 119 (1855).

Averment of use of deadly weapon. - An indictment for an assault with intent to kill was insufficient unless it averred that the assault was committed with a deadly weapon and with every ingredient necessary to have constituted the crime of murder if death had ensued. *Territory v. Sevailles*, 1 N.M. 119 (1855).

Knife as deadly weapon. - An indictment averring an assault with a knife with intent to kill was sufficient, although not stating the knife to be a deadly weapon. *Territory v. Sevailles*, 1 N.M. 119 (1855).

Conviction under section other than that charged. - Under count charging assault with intent to murder, alleging essentials of assault with deadly weapon, defendant could not be convicted of latter offense. *State v. Taylor*, 33 N.M. 35, 261 P. 808 (1927).

Sufficiency of indictments under former law. - Laws 1853-1854, p. 94 (former 40-6-4, 1953 Comp.), assault with intent to commit a felony, was inapplicable to indictment framed under Laws 1921, ch. 65, § 1 (former 40-6-5, 1953 Comp.), charging assault with intent to murder. *State v. Martin*, 32 N.M. 48, 250 P. 842 (1926).

In an indictment under 712, 713, 1884, C.L. (former 40-30-1, 40-6-5, 1953 Comp.), for assault with intent to murder, it was not necessary to allege an intent to kill and murder in any of the ways mentioned in § 712, defining mayhem, for it was not an indictment for an assault with intent to maim or disfigure, but with intent to murder. *Territory v. Vigil*, 8 N.M. 583, 45 P. 1117 (1896).

Evidence of victim's character. - Absent any claim of self-defense the victim's asserted character traits were not essential elements of the defense in a prosecution for assault with intent to commit a violent felony and were not provable by specific acts of conduct, but were only provable by reputation or opinion evidence. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Evidence of other crime. - In prosecution for assault with pistol with intent to kill, where there was some evidence that accused intended to kill the prosecuting witness as a

"stool pigeon," it was not error to permit inquiry, on cross-examination of accused, whether he had not been indicted the day before the assault for a prohibition violation. State v. Solis, 38 N.M. 538, 37 P.2d 539 (1934).

Statements of deceased victim as hearsay. - The oral statements of one who died after an assault with intent to kill and before trial were not admissible on a prosecution for the offense since they constituted hearsay and were incompetent and irrelevant. State v. Waggoner, 49 N.M. 399, 165 P.2d 122 (1946).

Weight of defendant's statements of intent. - Statement by defendant that he wanted to indulge in a lascivious act other than intercourse upon the person of prosecutrix did not negate possible intent to compel sexual intercourse since jury might well have believed that defendant's announced intention was only preliminary to raping her. State v. Compos, 56 N.M. 89, 240 P.2d 228 (1952).

Evidence sufficient to go to jury. - There was sufficient evidence to take case to jury where elements of malice, unlawfulness, deliberateness and premeditated design together with an intent to take the life of the person assaulted were amply shown. State v. Waggoner, 49 N.M. 399, 165 P.2d 122 (1946).

Instructions to contain definition of assault. - The definition of assault found in 30-3-1 NMSA 1978 contains essential elements of the crime of which defendant was convicted, assault with intent to commit a violent felony and failure of the trial judge to define assault was jurisdictional error. State v. Jones, 85 N.M. 426, 512 P.2d 1262 (Ct. App. 1973).

Charge on right to defend property properly refused. - In prosecution for assault with intent to kill, trial court did not err in refusing an instruction that a person has a right to defend his property from trespass or larceny and that jury should acquit defendant if it found that he shot at prosecuting witness to stop him from removing defendant's property and such action was necessary to prevent it, where evidence did not show prosecuting witness was on land leased by defendant at time of assault and in light of instructions given. State v. Waggoner, 49 N.M. 399, 165 P.2d 122 (1946).

Refusal to instruct not prejudicial. - Defendant was not prejudiced by refusal to give requested instruction on accidental discharge of gun, while not engaged in the commission of a felony, where the subject was adequately covered in the court's general charge. State v. Smith, 51 N.M. 184, 181 P.2d 800 (1947).

Instruction improper. - Where gun accidentally discharged while defendant was engaged in committing a felony or misdemeanor at the time of the homicide, an instruction which did not recognize defendant's liability to conviction was improper. State v. Smith, 51 N.M. 184, 181 P.2d 800 (1947).

Informing jury of co-defendant's guilty plea deemed error. - The fact that a co-defendant has pled guilty to conspiracy to commit murder, presented to the jury in a

case involving the defendant's conspiracy, does not come within Rule 803(22), N.M.R. Evid. (now see Paragraph V of Rule 11-803) is hearsay, and informing the jury of this guilty plea is error. *State v. Urioste*, 94 N.M. 767, 617 P.2d 156 (Ct. App. 1980).

Sentence not excessive. - Where minimum sentence was less than a third of the maximum which could have been imposed for conviction of assault with intent to rape, sentence was not excessive, particularly in view of liberal policy of giving prisoners time off for good behavior, and liberal commutations. *State v. Compos*, 56 N.M. 89, 240 P.2d 228 (1952).

Sentence improper. - Sentence of 7 to 15 years for convictions of assault with intent to kill and assault with a deadly weapon were not in accordance with the so-called indeterminate sentence law, former 41-17-1, 1953 Comp., which required a trial judge to sentence a person found guilty of an offense to the minimum and maximum provided by statute for the offense. *State v. Romero*, 73 N.M. 109, 385 P.2d 967 (1963).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assault and Battery §§ 48 to 55.

Assault with intent to kill in connection with the use of automobile for unlawful purpose or in violation of law, 99 A.L.R. 756.

Impotency as defense to charge of rape, attempt to rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

What constitutes offense of "sexual battery," 87 A.L.R.3d 1250.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Admissibility of evidence of character or reputation of party in civil action for assault on issues other than impeachment, 91 A.L.R.3d 718.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of assault and battery laws limited to protection of females or which provide greater penalties for males than for females, 5 A.L.R.4th 708.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

6A C.J.S. Assault and Battery §§ 72, 75 to 81.

30-3-4. Battery.

Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.

Whoever commits battery is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-3-4, enacted by Laws 1963, ch. 303, § 3-4.

ANNOTATIONS

Cross-references. - For battery upon peace officers, see 30-22-24 NMSA 1978.

For assault and battery upon revenue division employees, see 7-1-75 NMSA 1978.

Battery of spouse. - There is no language in this statute indicating that different standards should be employed when the victim of a battery is the spouse of the defendant. *State v. Seal*, 76 N.M. 461, 415 P.2d 845 (1966).

Where there was testimony that appellant grabbed his wife, pushed or "slammed" her against a parked car, held her there and after she broke away, followed her to her car where he proceeded to talk to her for at least an hour while she cried and screamed for him to let her go, there was ample evidence for the trial court to conclude that appellant acted in a rude, insolent or angry manner as defined in this section when he applied force to the person of his wife. *State v. Seal*, 76 N.M. 461, 415 P.2d 845 (1966).

Battery is included within offense of aggravated battery. State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

Offense not included. - The crime of unlawfully touching another (Laws 1889, ch. 17, § 22, former 40-6-2, 1953 Comp.) was not included in assault with a deadly weapon (Laws 1907, ch. 36, § 19, former 40-17-4, 1953 Comp.), although the common-law crime of simple assault was included in the crime of assault with a deadly weapon. Chacon v. Territory, 7 N.M. 241, 34 P. 448 (1893).

Battery does not merge with false imprisonment. - Since false imprisonment requires a constraining or confining with knowledge of lack of legal authority and battery does not, and the elements for proving the two offenses differ, the two offenses do not merge. State v. Muise, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985).

Proof of battery demands conviction or acquittal thereon. - Regardless of whether either assault or aggravated assault is included in the charge of battery since there was proof of a battery, defendant should be convicted of some degree of battery (either aggravated or simple) or acquitted. State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

Charge of unlawfulness mandatory. - Indictment charging that defendant "did beat, bruise and wound" a person, but omitting to aver it was done "unlawfully" was bad; by using the word "unlawfully" the statute intended to discriminate between lawful and unlawful acts of violence. Territory v. Miera, 1 N.M. 387 (1866).

Double jeopardy. - Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. Brecheisen v. Mondragon, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Instruction on simple battery wrongly refused. - Battering a peace officer while in the lawful discharge of his duties is battering the person of another, and where there was evidence that the victim police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Where there was evidence tending to establish the included offense of battery in charge of aggravated battery, trial court erred in refusing to instruct on lesser included offense. State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct

on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assault and Battery §§ 37 to 41.

Peace officers' criminal responsibility for wounding one whom they wished to investigate or identify, 18 A.L.R. 1368, 61 A.L.R. 321.

Right of one in loco parentis other than teacher to punish child, 43 A.L.R. 507.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423.

Criminal liability as barring or mitigating recovery of punitive damages, 98 A.L.R.3d 870.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary - modern cases, 73 A.L.R.4th 993.

6A C.J.S. Assault and Battery §§ 70, 71.

30-3-5. Aggravated battery.

A. Aggravated battery consists of the unlawful touching or application of force to the person of another with intent to injure that person or another.

B. Whoever commits aggravated battery, inflicting an injury to the person which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a misdemeanor.

C. Whoever commits aggravated battery inflicting great bodily harm or does so with a deadly weapon or does so in any manner whereby great bodily harm or death can be inflicted is guilty of a third degree felony.

History: 1953 Comp., § 40A-3-5, enacted by Laws 1963, ch. 303, § 3-5; 1969, ch. 137, § 1.

ANNOTATIONS

Cross-references. - For aggravated battery upon peace officer, see 30-22-25 NMSA 1978.

Section not violative of constitution's title requirements. - Although this section provides that an aggravated battery may be either a misdemeanor or a felony, depending on the circumstances, N.M. Const., art. IV, § 16 is not violated, since title clearly shows that the subject of the act is aggravated battery and that more than one penalty is provided. *State v. Segura*, 83 N.M. 432, 492 P.2d 1295 (Ct. App. 1972).

Section not void for vagueness. - This section is not void for vagueness because a defendant's aggravated battery may be either a felony or misdemeanor or that it depends entirely on the view of the evidence taken by the trier of facts. *State v. Segura*, 83 N.M. 432, 492 P.2d 1295 (Ct. App. 1972).

This section is not unconstitutionally vague either when its subsections are compared or when the entire section is compared with 30-3-4 NMSA 1978. *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Section not in conflict with 31-18-15.1 NMSA 1978. - This section and 31-18-15.1 NMSA 1978 (aggravating circumstances affecting sentencing) do not provide punishment for the same offense, and these sections are not in conflict. *State v. Wilson*, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

The elements of an offense do no more than establish the offense. The circumstances surrounding the offense, including the circumstances surrounding each of the elements of the offense, may be considered under 31-18-15.1 NMSA 1978. *State v. Wilson*, 97 N.M. 534, 641 P.2d 1081 (Ct. App. 1982).

Double jeopardy. - It was not double jeopardy to try defendant on charge of aggravated battery when lesser charge of attempt was dismissed prior to trial, and no issue as to double punishment or merged offenses was involved. *State v. Hibbs*, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Aggravated assault is lesser included offense. - Aggravated assault by use of a threat with a deadly weapon is a lesser included offense of aggravated battery. *State v. DeMary*, 99 N.M. 177, 655 P.2d 1021 (1982).

Merger with robbery. - Aggravated battery merges with a robbery offense where a defendant's intent to take the victim's purse includes an intent to injure the victim. *State v. Gammil*, 108 N.M. 208, 769 P.2d 1299 (Ct. App. 1989).

No merger with armed robbery. - Offense of aggravated battery did not merge with the armed robbery. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Battery is included within offense of aggravated battery. State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

When instruction on battery required. - Where there was evidence tending to establish the included offense of battery in charge of aggravated battery, trial court erred in refusing to instruct on lesser included offense. State v. Duran, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

In prosecution for aggravated battery, lesser offense of simple battery may necessarily be included in court's charge to jury only in the event there is some evidence which would justify a conviction of the lesser offense. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

There was no evidence to support a finding that defendant did not intend to injure victim, and therefore the trial court did not err in refusing to give an instruction on simple battery, which is a lesser included offense of aggravated battery. State v. Pettigrew, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993).

Instruction must be tendered. - Alleged error of court in failing to instruct on lesser included offense of simple battery in prosecution for aggravated battery was not properly before appellate court for review where no instruction on lesser offense was ever submitted to the trial court. State v. James, 76 N.M. 376, 415 P.2d 350 (1966).

Instruction not warranted. - Where defendant, convicted of aggravated battery, admitted that he had pistol in his possession at time of fight with which he shot victim and that he intended to hit victim with it, instruction on lesser included offense was not warranted. State v. Jaramillo, 82 N.M. 548, 484 P.2d 768 (Ct. App. 1971).

Concept inapplicable. - The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Defendant charged in the alternative. - Aggravated battery is a third-degree felony if it causes great bodily harm or if it was committed with a deadly weapon. There is nothing unfair in charging a defendant in the alternative, where the evidence supports a third-degree felony conviction under both alternatives. State v. Kenny, 112 N.M. 642, 818 P.2d 420 (Ct. App. 1991).

Conviction or acquittal of proved offense. - Regardless of whether either assault or aggravated assault is included in charge of battery, where there is proof of a battery,

defendant should be convicted of some degree of battery (either aggravated or simple) or acquitted. *State v. Duran*, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969).

This section requires intent to injure, of which there must be substantial evidence for there to be proof that the crime of aggravated battery has been committed. *State v. Mora*, 81 N.M. 631, 471 P.2d 201 (Ct. App.), cert. denied, 81 N.M. 668, 472 P.2d 382 (1970).

Specific intent to injure is essential element of crime of aggravated battery, and the state must prove beyond a reasonable doubt that the defendant knowingly committed the crime purposely intending to violate the law. *State v. Crespín*, 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974); *State v. Mills*, 94 N.M. 17, 606 P.2d 1111 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Intent to injure may be inferred. - Intent to injure, as required by this section, need not be established by direct evidence but may be inferred from conduct and the surrounding circumstances. *State v. Valles*, 84 N.M. 1, 498 P.2d 693 (Ct. App. 1972).

Under former law, specific intent to commit mayhem was inferred as a matter of law. Where the defendant deliberately committed the crime of assault and battery, in so doing, he committed mayhem. *State v. Hatley*, 72 N.M. 377, 384 P.2d 252 (1963).

Instructing on intent. - Subsection C of this section requires an "intent to injure" and where requested instruction referred to "a specific intent to commit an aggravated battery," this would have been misleading to the jury and was properly denied. *State v. Vasquez*, 83 N.M. 388, 492 P.2d 1005 (Ct. App. 1971).

Under former law, court's instruction that in order to establish mayhem, state was required to prove, beyond a reasonable doubt, that "the right eye of (victim) was destroyed, and that the defendants destroyed his right eye with malicious intent to maim or disfigure" correctly stated the law; instruction that jury must find "that defendants actually destroyed the right eye of (victim) and that such destruction was done by the defendants with malicious intent to so destroy" was properly refused. *State v. Trujillo*, 54 N.M. 307, 224 P.2d 151 (1950).

Defendant need not intend particular result. - In a prosecution for aggravated battery, the defendants requested the following instruction, which was properly refused: "A defendant may not be held guilty as aider and abettor for independent act of another person, even though same victim was assaulted by both, since sharing of criminal intent is absent." The evidence demonstrated that the defendants and the principal defendant did not act independently of each other, even if the defendants did not intend or foresee the stabbing of the victim by the principal defendant. *State v. Dominguez*, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Great bodily harm. - Subsection C of this section requires only that great bodily harm could result, not that it must result. *State v. Pettigrew*, 116 N.M. 135, 860 P.2d 777 (Ct. App. 1993).

Great bodily harm includes permanent loss or impairment (permanent injury). *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Material element of offense. - In instruction defining the material elements of crime in this section, one of the elements to be proved beyond a reasonable doubt was that defendant inflicted great bodily harm. *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Proximate cause of harm. - Whether battery caused great bodily harm is to be determined by "proximate cause" and a defendant's act need not be a direct, that is, immediate, cause. *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Nature of injury determines degree of crime. - Whether crime is a misdemeanor or a felony depends largely, as shown by Subdivisions B and C, on the nature of the injury inflicted. *State v. Chavez*, 82 N.M. 569, 484 P.2d 1279 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

The nature of the injury was an important element of mayhem. *State v. Martin*, 32 N.M. 48, 250 P. 842 (1926).

Degree of harm for jury. - It was a question of fact for the jury whether forcible tattooing of victim with needle and India ink from back of neck to center part of waist, which tattoo recited an offensive sentence in large letters and could be removed only with strenuous and extensive skin grafting, was "great bodily harm" as required under this section and defined at 30-1-12 NMSA 1978. *State v. Ortega*, 77 N.M. 312, 422 P.2d 353 (1966).

It was for the jury to determine whether the injuries inflicted on gasoline station attendant who was robbed, beaten and set on fire with gasoline were likely to cause death or great bodily harm, and defendant's motion for dismissal of the indictment, which charged him with a felony, on his assertion that doctor's testimony "proved" he was guilty only of misdemeanor, was properly refused. *State v. Foster*, 82 N.M. 573, 484 P.2d 1283 (Ct. App. 1971).

Knife as deadly weapon. - For a knife to be a deadly weapon it must come within the portion of this statute as to any other deadly weapons with which dangerous wounds can be inflicted. *State v. Martinez*, 57 N.M. 174, 256 P.2d 791 (1953).

Jury justified in so finding. - Where no one directly testified the knife was one with which dangerous wounds could be inflicted, but the wounds were described by the

physician who treated the victim, and they were sufficiently severe to keep him in a hospital under the doctor's care for a week, and in addition, the scars caused by the knife wounds were shown to the jury, in view of the depth and length of the wounds the jury was fully justified in finding the knife used was a deadly weapon, although the blade used was only about two inches in length. *State v. Martinez*, 57 N.M. 174, 256 P.2d 791 (1953).

Consent is not defense to crime of aggravated battery, irrespective of whether the victim invites the act and consents to the battery. *State v. Fransua*, 85 N.M. 173, 510 P.2d 106 (Ct. App. 1973).

Intoxication a valid defense. - A showing of intoxication to a degree that would make specific intent impossible would establish a valid defense to the charge of aggravated battery and since the evidence in defendant's case raised an issue of fact for the jury on the question of intent to injure by showing intoxication to such a degree that defendant was unable to form the necessary intent, defendant was entitled to an instruction on this defense; the failure to so instruct was reversible error. *State v. Crespín*, 86 N.M. 689, 526 P.2d 1282 (Ct. App. 1974).

Protection of property. - The use of a deadly weapon in the protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable, both civilly and criminally, for the assault. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Right of confrontation not violated. - Where no prior statement of any kind by the victim of an aggravated assault was brought to the attention of the jury or offered by the state, and defendant neither sought a continuance nor indicated that he desired to call the victim as a witness or what evidence he believed might be developed from the victim, his constitutional right of confrontation was not violated by absence of victim from trial. *State v. James*, 76 N.M. 376, 415 P.2d 350 (1966).

Corroboration of victim's testimony unnecessary. - Victim's testimony supported determination that defendant committed battery with a gun and with intent to injure, and did not require corroboration. *State v. Tafoya*, 80 N.M. 494, 458 P.2d 98 (Ct. App. 1969).

Testimony corroborated. - Defendant's testimony that he threw gun away after leaving scene of burglary and aggravated battery, along with photographs of victim showing facial cuts and abrasions, corroborated victim's testimony that defendant used a gun in commission of crimes. *State v. Tafoya*, 80 N.M. 494, 458 P.2d 98 (Ct. App. 1969).

Continuance properly refused. - Defendant's effort to have aggravated battery case continued and to have victim examined by another doctor was properly refused where there was nothing to show that defense was surprised by doctor's testimony or that defendant was prejudiced in his defense on the merits. *State v. Foster*, 82 N.M. 573, 484 P.2d 1283 (Ct. App. 1971).

Aggravation of sentence. - Rule against use of elements of a crime as the basis for aggravating the sentence for that crime was not violated where the defendant's failure to aid the victim and the brutality of the crime were used to aggravate the defendant's sentence; defendant's failure to aid the victim after the beating is clearly not an element of aggravated battery and the brutality of the crime, although it is a fact used to prove great bodily harm, does not equate to great bodily harm for purposes of the aggravation statute. *State v. Kurley*, 114 N.M. 514, 841 P.2d 562 (Ct. App. 1992).

Where the defendant pleaded guilty to aggravated battery with great bodily harm, the defendant's sentence could be aggravated without actual evidence that his own acts, rather than the acts of his companions, were brutal; defendant's participation in the beating, which was brutal enough to actually cause death, standing alone, was sufficient. *State v. Kurley*, 114 N.M. 514, 841 P.2d 562 (Ct. App. 1992).

Circumstantial evidence was sufficient for a reasonable mind to infer defendant shot the victim with a pellet gun, where there was evidence that defendant came out of his house with a rifle or other gun in his hand and shouted at the victim and his companions to "go somewhere else and play," after they had been shooting off fireworks, and five or ten minutes later the victim was struck with a pellet as a noise was heard from the direction of defendant's house. *State v. Stenz*, 109 N.M. 536, 787 P.2d 455 (Ct. App. 1990).

Evidence sufficient to support conviction. - Where evidence, though disputed, showed that defendant was playing pool with several persons, that an argument began and that in the resulting altercation defendant pulled a gun, shot at one person and missed, and shot at another and hit him in the leg, held that it was sufficient to support a verdict of aggravated battery. *State v. Santillanes*, 86 N.M. 627, 526 P.2d 424 (Ct. App. 1974).

Where the victim testified that she was hit on the head three times with an object which she described as "very hard" and it appeared from the record that following the attack she was taken to the hospital and six stitches were required to close the wound on her head, this evidence sufficiently established an aggravated battery under Subsection C. *State v. Turner*, 81 N.M. 450, 468 P.2d 421 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

There was substantial evidence to support the charge since the evidence established that the defendant acted in a way that would have likely resulted in great bodily harm or even death to the victim, despite the lack of evidence of such harm. *State v. Dominguez*, 115 N.M. 445, 853 P.2d 147 (Ct. App. 1993).

Since the victims testified that the two defendants intruded into their home, beat and kicked the husband, and dragged both him and his wife around the house in search of money, this evidence sufficiently established an aggravated battery under Subsection A. *State v. Ibarra*, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993).

Evidence of mayhem insufficient. - Under former law conviction of mayhem was not sustained by proof of an assault and a blow which cut prosecuting witness' lip, requiring some stitches, but resulting in no permanent injury or disfigurement. Court would take notice of such lack of evidence even though defendant failed to preserve proper exceptions. State v. Raulie, 40 N.M. 318, 59 P.2d 359 (1936).

General instruction superfluous. - An instruction generally defining aggravated battery was not needed to guide the jury and was superfluous where the trial court instructed the jury as to the material elements of the aggravated battery elements of the aggravated battery charge. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Allegedly inconsistent instruction not jurisdictional error. - Defendant's claim that instruction defining aggravated battery covered three alternatives and thus was inconsistent with the specific charge of aggravated battery by use of a deadly weapon did not amount to jurisdictional error. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Inconsistent instruction not fundamental error. - In conviction for aggravated battery, where the evidence was clear that a deadly weapon was used, even if the giving of general definition of aggravated battery was error, it did not shock the conscience to let defendant's conviction stand, and there was no basis for applying the doctrine of fundamental error. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Waiver of error. - Where defendant pleaded not guilty when arraigned and proceeded to trial without questioning propriety of magistrate's bind over, his claim that criminal information charged him with offense of aggravated battery, rather than attempted aggravated battery, concerning which there had been no preliminary examination, was waived. State v. Hibbs, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Defendant was bound by plea of guilty to attempt to commit aggravated battery and was not entitled to post-conviction relief either on grounds that his actions did not constitute attempt to commit aggravated battery or that state had failed to establish his intent. State v. Bonney, 82 N.M. 508, 484 P.2d 350 (Ct. App. 1971).

Withdrawal of plea properly denied. - Trial court's denial of defendant's motion to withdraw his plea of guilty to a charge of aggravated assault after sentence was imposed did not violate due process where the only basis asserted for withdrawal of the plea was that the trial court refused to follow the sentencing recommendation of the district attorney. State v. Ramos, 85 N.M. 438, 512 P.2d 1274 (Ct. App. 1973).

Firearm enhancement statute constitutionally applied to conviction under section. - Neither the rules of statutory construction nor the federal and state constitutional provisions against double jeopardy prohibit the application of the firearm enhancement statute to a person convicted of aggravated battery with a deadly weapon when the weapon used was a firearm. State v. Gonzales, 95 N.M. 636, 624 P.2d 1033

(Ct. App.), overruled on other grounds *Buzbee v. Donnelly*, 96 N.M. 692, 634 P.2d 1244 (1981).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assault and Battery §§ 48, 49.

Danger or apparent danger of death or great bodily harm as condition of self-defense in prosecution for assault as distinguished from prosecution for homicide, 114 A.L.R. 634.

Danger or apparent danger of great bodily harm or death as condition of self-defense in civil action for assault and battery, personal injury or death, 25 A.L.R.2d 1215.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

6A C.J.S. Assault and Battery § 72.

30-3-6. Reasonable detention; assault, battery, public affray or criminal damage to property.

A. As used in this section:

(1) "licensed premises" means all public and private rooms, facilities and areas in which alcoholic beverages are sold or served in the customary operating procedures of establishments licensed to sell or serve alcoholic liquors;

(2) "proprietor" means the owner of the licensed premises or his manager or his designated representative; and

(3) "operator" means the owner or the manager of any establishment or premises open to the public.

B. Any law enforcement officer may arrest without warrant any persons he has probable cause for believing have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property. Any proprietor or operator who causes such an arrest shall not be criminally or civilly liable if he has actual knowledge, communicated truthfully and in good faith to the law enforcement officer, that the persons so arrested have committed the crime of assault or battery as defined in Sections 30-3-1 through 30-3-5 NMSA 1978 or public affray or criminal damage to property.

History: Laws 1981, ch. 255, § 1; 1983, ch. 268, § 1.

ANNOTATIONS

The 1983 amendment deleted "on licensed premises" following "detention" in the catchline, added "or criminal damage to property" at the end of the catchline, inserted Paragraph (3) of Subsection A, substituted "Sections" for "Section" in the first sentence of Subsection B, added "or criminal damage to property" at the end of the first and second sentences of Subsection B and inserted "or operator" and "communicated truthfully and in good faith to the law enforcement officer" in the second sentence of Subsection B.

30-3-7. Injury to pregnant woman.

A. Injury to [a] pregnant woman consists of a person other than the woman injuring a pregnant woman in the commission of a felony causing her to suffer a miscarriage or stillbirth as a result of that injury.

B. As used in this section:

(1) "miscarriage" means the interruption of the normal development of the fetus, other than by a live birth and which is not an induced abortion, resulting in the complete expulsion or extraction from a pregnant woman of a product of human conception; and

(2) "stillbirth" means the death of a fetus prior to the complete expulsion or extraction from its mother, irrespective of the duration of pregnancy and which is not an induced abortion; and death is manifested by the fact that after the expulsion or extraction the fetus does not breathe spontaneously or show any other evidence of life such as heart beat, pulsation of the umbilical cord or definite movement of voluntary muscles.

C. Whoever commits injury to [a] pregnant woman is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1985, ch. 239, § 1.

ANNOTATIONS

Cross-references. - For injury to pregnant woman by vehicle, see 66-8-101.1 NMSA 1978.

Bracketed material. - The bracketed words in Subsections A and C were inserted by the compiler for purposes of clarity. The bracketed material was not enacted by the legislature and is not a part of the law.

30-3-8. Shooting at dwelling or occupied building; shooting at or from a motor vehicle.

A. Shooting at a dwelling or occupied building consists of willfully discharging a firearm at a dwelling or occupied building. Whoever commits shooting at a dwelling or occupied building that does not result in great bodily harm to another person is guilty of a fourth degree felony. Whoever commits shooting at a dwelling or occupied building that results in injury to another person is guilty of a third degree felony. Whoever commits shooting at a dwelling or occupied building that results in great bodily harm to another person is guilty of a second degree felony.

B. Shooting at or from a motor vehicle consists of willfully discharging a firearm at or from a motor vehicle with reckless disregard for the person of another. Whoever commits shooting at or from a motor vehicle that does not result in great bodily harm to another person is guilty of a fourth degree felony. Whoever commits shooting at or from a motor vehicle that results in injury to another person is guilty of a third degree felony. Whoever commits shooting at or from a motor vehicle that results in great bodily harm to another person is guilty of a second degree felony.

C. This section shall not apply to a law enforcement officer discharging a firearm in the lawful performance of his duties.

History: Laws 1987, ch. 213, § 1; 1993, ch. 78, § 1.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, deleted "Inhabited" preceding "Dwelling" and inserted "shooting at or from a motor vehicle" in the section heading; designated the formerly undesignated provisions as Subsection A and rewrote the provisions thereof; and added Subsections B and C.

Compiler's note. - The following decisions were decided prior to the 1993 amendment to 30-3-8 NMSA 1978.

No violation of double jeopardy. - Defendant's conviction for both shooting into an occupied motor vehicle under this section and first-degree murder under 30-2-1 NMSA 1978 was not double jeopardy because the legislature intended to have separate punishments for similar conduct that can result in a violation of both statutes. *State v. Gonzales*, 113 N.M. 221, 824 P.2d 1023 (1992) (decided prior to 1993 amendment).

No merger with assault with intent to commit a violent felony. - 30-3-3 NMSA 1978 (assault with intent to commit a violent felony) and this section are two sections directed toward the protection of different social norms and indicate an intention on the part of the legislature to allow for multiple punishment for the same conduct. The legislature was concerned with conduct typically designed to terrorize or intimidate in this section. It does not matter whether or not the dwelling is actually occupied at the time of the shooting. In contrast, 30-3-3 NMSA 1978 is directed toward conduct which is motivated by an intention to effect another's death. *State v. Highfield*, 113 N.M. 606, 830 P.2d 158 (Ct. App. 1992) (decided prior to 1993 amendment).

Knowledge that building occupied required. - The statute requires not only that the discharge of the firearm be intentional and that it be discharged at a building intentionally, but that the discharge occur with the knowledge or reason to believe that the building was occupied at the time of the shooting. *State v. Elmquist*, 114 N.M. 551, 844 P.2d 131 (Ct. App. 1992) (decided prior to 1993 amendment).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Weapons and Firearms § 29.

94 C.J.S. Weapons §§ 19, 20.

30-3-8.1. Seizure and forfeiture of motor vehicle; procedure; exception.

A. A motor vehicle shall be subject to seizure and forfeiture when the vehicle is used or intended for use in the commission of the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978.

B. A motor vehicle subject to seizure and forfeiture may be seized by a law enforcement officer:

- (1) upon an order issued by the district court having jurisdiction;
- (2) without an order if the seizure is incident to an arrest; or
- (3) without an order if the seizure is incident to a search under a valid search warrant.

C. In the event of seizure pursuant to Subsection B of this section, proceedings under the Rules of Civil Procedure for the District Courts and Subsection D of this section shall be instituted promptly.

D. A motor vehicle seized under this section shall not be subject to replevin, but is deemed to be in the custody of the seizing law enforcement agency subject only to the orders and decrees of the district court. When a motor vehicle is seized pursuant to the provisions of this section, a law enforcement officer may remove the property to a place designated by the district court or by the head of the officer's agency for disposition in accordance with the law.

E. When a vehicle is forfeited pursuant to this section, the seizing law enforcement agency shall sell the motor vehicle at a public auction, and the proceeds, after all costs for impoundment, forfeiture and sale are repaid, shall be forwarded to the state treasurer for credit to the crime victims reparation fund pursuant to Section 31-22-21 NMSA 1978 within thirty days. If the sale of the motor vehicle does not cover the cost of impounding, forfeiting and selling the motor vehicle, the law enforcement agency may deduct the uncovered portion of the cost from the proceeds of the next sale.

F. No motor vehicle shall be subject to forfeiture when the owner of the motor vehicle establishes that the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978 was committed without his knowledge or consent. A forfeiture of a motor vehicle encumbered by a recorded bona fide security interest shall be subject to the interest of the secured party if the secured party did not have knowledge of or did not consent to the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978.

History: 1978 Comp., § 30-3-8.1, enacted by Laws 1993, ch. 78, § 2.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 78, § 5 makes the act effective on July 1, 1993.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Who is exempt from forfeiture of conveyances under "innocent owner" provision of 21 USC § 881(a)(4), 112 A.L.R. Fed. 589.

30-3-8.2. Court record of conviction; revocation of driver's license.

Upon a conviction for the offense of shooting at or from a motor vehicle pursuant to Subsection B of Section 30-3-8 NMSA 1978, or of a conviction for a conspiracy or attempt to commit that offense, the district court shall send a record of the conviction to the motor vehicle division of the taxation and revenue department. The division shall immediately revoke the driver's licenses or driving privileges of all persons convicted of the offense of shooting at or from a motor vehicle, or convicted of conspiring or

attempting to commit that offense, pursuant to the provisions of Subsection E of Section 66-5-29 NMSA 1978.

History: 1978 Comp., § 30-3-8.2, enacted by Laws 1993, ch. 78, § 3.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 78, § 5 makes the act effective on July 1, 1993.

30-3-9. Assault; battery; school personnel.

A. As used in this section:

(1) "in the lawful discharge of his duties" means engaged in the performance of the duties of a school employee; and

(2) "school employee" includes a member of a local public school board and public school administrators, teachers and other employees of that board.

B. Assault upon a school employee consists of:

(1) an attempt to commit a battery upon the person of a school employee while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct which causes a school employee while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

Whoever commits assault upon a school employee is guilty of a misdemeanor.

C. Aggravated assault upon a school employee consists of:

(1) unlawfully assaulting or striking at a school employee with a deadly weapon while he is in the lawful discharge of his duties;

(2) committing assault by threatening or menacing a school employee who is engaged in the lawful discharge of his duties by a person wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner so as to conceal identity; or

(3) willfully and intentionally assaulting a school employee while he is in the lawful discharge of his duties with intent to commit any felony.

Whoever commits aggravated assault upon a school employee is guilty of a third degree felony.

D. Assault with intent to commit a violent felony upon a school employee consists of any person assaulting a school employee while he is in the lawful discharge of his duties with intent to kill the school employee.

Whoever commits assault with intent to commit a violent felony upon a school employee is guilty of a second degree felony.

E. Battery upon a school employee is the unlawful, intentional touching or application of force to the person of a school employee while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

Whoever commits battery upon a school employee is guilty of a fourth degree felony.

F. Aggravated battery upon a school employee consists of the unlawful touching or application of force to the person of a school employee with intent to injure that school employee while he is in the lawful discharge of his duties.

Whoever commits aggravated battery upon a school employee, inflicting an injury to the school employee which is not likely to cause death or great bodily harm but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

Whoever commits aggravated battery upon a school employee, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

G. Every person who assists or is assisted by one or more other persons to commit a battery upon any school employee while he is in the lawful discharge of his duties is guilty of a fourth degree felony.

History: Laws 1989, ch. 344, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

ARTICLE 3A HARASSMENT AND STALKING

30-3A-1. Short title.

This act [30-3A-1 to 30-3A-4 NMSA 1978] may be cited as the "Harassment and Stalking Act".

History: Laws 1993, ch. 86, § 1.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 86, § 5 makes the Harassment and Stalking Act effective on July 1, 1993.

30-3A-2. Harassment; penalties.

A. Harassment consists of knowingly pursuing a pattern of conduct that is intended to annoy, seriously alarm or terrorize another person and which serves no lawful purpose. The conduct must be such that it would cause a reasonable person to suffer substantial emotional distress.

B. Whoever commits harassment is guilty of a misdemeanor.

History: Laws 1993, ch. 86, § 2.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 86, § 5 makes the Harassment and Stalking Act effective on July 1, 1993.

30-3A-3. Stalking; penalties.

A. Stalking consists of knowingly pursuing a pattern of conduct that poses a credible threat to another person and that is intended to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint; provided that, in furtherance of the threat, the stalker must commit one or more of the following acts on more than one occasion:

(1) following a person, other than in the residence of the stalker;

(2) placing a person under surveillance by remaining present outside that person's school, residence, workplace or vehicle or any other place frequented by the person other than in the residence of the stalker; or

(3) harassing a person.

B. As used in this section, "credible threat" means a threat, verbal or nonverbal, made with the intent and the apparent ability to carry out the threat, that would cause a reasonable person to fear for his safety or the safety of a household member, including a spouse, former spouse, family member, present or former household member or co-parent of a child.

C. Whoever commits stalking is guilty of a misdemeanor. Upon a second conviction, the offender shall be sentenced to a jail term of at least seventy-two consecutive hours that shall not be suspended, deferred or taken under advisement. Upon a third or subsequent conviction, the offender shall be guilty of a fourth degree felony.

History: Laws 1993, ch. 86, § 3.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 86, § 5 makes the Harassment and Stalking Act effective on July 1, 1993.

30-3A-4. Exceptions.

The provisions of the Harassment and Stalking Act [30-3A-1 to 30-3A-4 NMSA 1978] do not apply to:

A. picketing or public demonstrations that are otherwise lawful or that arise out of a bona fide labor dispute; or

B. a law enforcement officer in the performance of his duties.

History: Laws 1993, ch. 86, § 4.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 86, § 5 makes the Harassment and Stalking Act effective on July 1, 1993.

ARTICLE 4 KIDNAPING

30-4-1. Kidnaping.

A. Kidnaping is the unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim:

(1) be held for ransom;

(2) as a hostage, confined against his will; or

(3) be held to service against the victim's will.

B. Whoever commits kidnaping is guilty of a first degree felony except that he is guilty of a second degree felony when the victim is freed without having had great bodily harm inflicted upon him by his captor.

History: 1953 Comp., § 40A-4-1, enacted by Laws 1963, ch. 303, § 4-1; 1973, ch. 109, § 1.

ANNOTATIONS

Constitutionality. - Defendant's contention that the words "held to service against the victim's will" had no general meaning which the public could comprehend and thus rendered the statute unconstitutionally vague was without merit. *State v. Aguirre*, 84 N.M. 376, 503 P.2d 1154 (1972).

If multiple victims, kidnaping offense committed against each one. - Where the criminal information charges that each of a number of victims was held as hostage, the defendant is put on notice that the state charges that one offense of kidnaping was committed by holding any one of the victims as a hostage, and the defendant should be prepared to defend the charge in connection with each of the victims. *State v. Davis*, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

Standing to challenge validity. - Defendant, who by standing mute in fact entered a plea of not guilty and was convicted on trial of a second-degree felony for kidnaping, had no standing to attack the validity of the kidnaping statute (as it read prior to the 1973 amendment) on grounds that leaving to the jury the decision as to whether the crime should be a capital or second-degree felony constituted a denial of equal protection. *State v. Sharpe*, 81 N.M. 637, 471 P.2d 671 (Ct. App. 1970).

Construction. - Subsection A(1) of this section should read "Kidnaping is the unlawful taking, . . . with the intent that the victim be held for ransom and confined against his will," and Subsection A(2) should read "Kidnaping is the unlawful taking, . . . with the intent that the victim be held as a hostage and confined against his will." *State v. Clark*, 80 N.M. 340, 455 P.2d 844 (1969).

"Force". - "Force" cannot be construed to mean merely violent or deadly force, as it could not have been the legislative intention to so limit the statute, for many kidnappings are accomplished by the use of only minimal force, as, for example, where a child is abducted. *State v. Clark*, 80 N.M. 340, 455 P.2d 844 (1969).

"Deception" necessarily implies that the victim is unaware that she is being kidnaped. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

"Hostage". - Term "hostage," when used with reference to a person and in the context in which it is used in New Mexico's kidnaping statute, implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person. *State v.*

Crump, 82 N.M. 487, 484 P.2d 329 (1971); State v. Davis, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

"Held to service". - The purpose of being so compelled or induced - "for the purpose of performing some act" - probably could be better stated; for example, using Webster's: "for the purpose of assisting or benefiting someone or something." Such an explanation serves to distinguish kidnaping from false imprisonment, which is a lesser offense included within kidnaping. State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

The third objective mentioned in the statute, holding for service, should be construed to effectuate the same overall scheme as the first two objectives - holding for ransom and as a hostage - namely, to accomplish some goal that the perpetrator may view as beneficial to himself or herself. State v. Ortega, 112 N.M. 554, 817 P.2d 1196 (1991).

Incidental restraint in homicide not sufficient. - The mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnaping. Unlike cases involving criminal sexual penetration or robbery, no "service" is performed by the victim of a shooting with intent to kill because the victim does not confer any independent assistance or benefit to the perpetrator of the crime. State v. Vernon, 116 N.M. 737, 867 P.2d 407 (1993).

Person asked to do or forbear act cannot be same as victim in a prosecution for kidnaping. State v. Davis, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

Each of two hostages may also be third person. - If it is charged that X and Y were held as hostages, this does not prohibit a conviction of kidnaping on the basis that X was hostage for the performance of some act by Y, and vice versa. State v. Davis, 92 N.M. 563, 591 P.2d 1160 (Ct. App. 1979).

Intent required. - There must be an intent to confine against the victim's will when he is taken, restrained or confined with intent that he be held for ransom, or as a hostage, but it is not necessary that he be confined against his will when the purpose of the taking, restraining or confining is that the victim be held to service against his will. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969).

Determination of intent for jury. - Under the pertinent definition of kidnaping, it is the intent of the defendant which controls, and the determination as to whether this intent was present is for the trier of the facts when this is an issue in the case. State v. Aguirre, 84 N.M. 376, 503 P.2d 1154 (1972).

Reversal of conviction where evidence of intent lacking. - Where there was neither direct evidence nor proof of acts, occurrences or circumstances which could serve as support for an inference of intent to hold victim for ransom or as a hostage, or to service against her will, the finding of guilt could not stand. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969).

Proof of victim's state of mind is not essential to prove kidnaping by deception; rather, the offense may be proved by circumstantial evidence. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Conviction sufficient if kidnaper rapes victim during course of abduction. - A conviction for kidnaping with the intent to hold for services is sufficient if the kidnaper rapes the victim during the course of the abduction. It is immaterial whether or not the intent to rape existed at the beginning of the act. *State v. Hutchinson*, 99 N.M. 616, 661 P.2d 1315 (1983).

No merger with assault conviction. - Merger of kidnapping and assault with intent to commit criminal sexual penetration convictions was not required by double jeopardy considerations where there was evidence apart from the defendant's subsequent sexual assault from which the jury could infer that the defendant restrained the victim with the intent of holding her for services and where, under the facts, the assault with intent to commit criminal sexual penetration occurred after the victim had been restrained and held for services. *State v. Williams*, 105 N.M. 214, 730 P.2d 1196 (Ct. App. 1986).

Charges of kidnaping and second-degree criminal sexual penetration do not merge since the elements of the offense of second-degree criminal sexual penetration do not involve all of the elements of kidnaping. *State v. Singleton*, 102 N.M. 66, 691 P.2d 67 (Ct. App. 1984).

Consecutive sentences for kidnaping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990).

The fact that a kidnaping charge was used to raise a charge of criminal sexual penetration to a second-degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnaping statutes protect different social norms. *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990).

Admission of evidence. - It was not error for trial court to admit into evidence gun and other items found on person of individual who participated with defendant in an attempted robbery, out of which grew the crime of kidnaping with which defendant was charged. *State v. Samora*, 83 N.M. 222, 490 P.2d 480 (1971).

Evidence sufficient. - Evidence that defendant bound and gagged a girl and her mother, raped the mother and stated that the girl and her mother were to take defendant out of state, to Oklahoma, was sufficient to show the kidnaping of the girl with the intent to hold her to service against her will. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App. 1977), rev'd in part on other grounds, 90 N.M. 191, 561 P.2d 464 (1977).

Lesser included offense. - False imprisonment is a lesser offense necessarily included in kidnaping by holding to service. State v. Armijo, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

Distinction between kidnaping and false imprisonment. - The distinction between false imprisonment and kidnaping by holding to service is whether the defendant intended to hold the victim to service against the victim's will. State v. Armijo, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

Merely to confine or restrain against a person's will without the requisite intention is not kidnaping, but is false imprisonment under 30-4-3 NMSA 1978, when done with knowledge of an absence of authority. State v. Clark, 80 N.M. 340, 455 P.2d 844 (1969).

No merger with murder charge. - The homicide resulting from the great bodily harm was sufficient evidence for the jury to find aggravated sodomy and first-degree kidnaping, and there was no merger with the charge of murder of which defendant was acquitted. State v. Melton, 90 N.M. 188, 561 P.2d 461 (1977).

Consecutive sentences for kidnaping and criminal sexual penetration. - Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnaping and the predicate felony of kidnaping with intent to hold for service is, in general, permissible because the two crimes address different social norms. State v. Tsethlikai, 109 N.M. 371, 785 P.2d 282 (Ct. App. 1989).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "Criminal Procedure - Preventive Detention in New Mexico," see 4 N.M.L. Rev. 247 (1974).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abduction and Kidnaping § 1 et seq.

Fraud or false pretenses, kidnaping by, 95 A.L.R.2d 450.

What is "harm" within provisions of statutes increasing penalty for kidnaping where victim suffers harm, 11 A.L.R.3d 1053.

Seizure or detention for purpose of committing rape, robbery or similar offense as constituting separate crime of kidnaping, 43 A.L.R.3d 699.

Seizure of prison officials by inmates as kidnaping, 59 A.L.R.3d 1306.

False imprisonment as included offense within charge of kidnaping, 68 A.L.R.3d 828.

Necessity and sufficiency of showing, in kidnaping prosecution, that detention was with intent to "secretly" confine victim, 98 A.L.R.3d 733.

Loco parentis, taking of child by person in, 20 A.L.R.4th 823.

Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Coercion, compulsion, or duress as defense to charge of kidnaping, 69 A.L.R.4th 1005.

51 C.J.S. Kidnaping § 1.

30-4-2. Criminal use of ransom.

Criminal use of ransom consists of knowingly receiving, possessing, concealing or disposing of any portion of money or other property which has at any time been delivered for the ransom of a kidnaped person.

Whoever commits criminal use of ransom is guilty of a third degree felony.

History: 1953 Comp., § 40A-4-2, enacted by Laws 1963, ch. 303, § 4-2.

30-4-3. False imprisonment.

False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.

Whoever commits false imprisonment is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-4-3, enacted by Laws 1963, ch. 303, § 4-3.

ANNOTATIONS

Motive is not necessary element of crime of false imprisonment. *State v. Tijerina*, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), *aff'd*, 86 N.M. 31, 519 P.2d 127 (1973), *cert. denied*, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

False imprisonment does not require physical restraint of the victim; it may also arise out of words, acts, gestures, or similar means. *State v. Corneau*, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).

Lesser included offense of kidnaping. - False imprisonment is a lesser offense necessarily included in kidnaping by holding to service. The distinction between these two offenses is whether the defendant intended to hold the victim to service against the victim's will. *State v. Armijo*, 90 N.M. 614, 566 P.2d 1152 (Ct. App. 1977).

Absence of intent. - Merely to confine or restrain against a person's will without the requisite intention is not kidnaping, but is false imprisonment under this section, when done with knowledge of an absence of authority. *State v. Clark*, 80 N.M. 340, 455 P.2d 844 (1969).

False imprisonment does not merge with battery. - Since battery required a touching or application of force and false imprisonment does not, and the elements for proving the two offenses differ, the two offenses do not merge. *State v. Muise*, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985).

Consecutive sentences for armed robbery and false imprisonment were proper; since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it was clear the crimes did not merge even when considered in light of the facts. *State v. Moore*, 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989).

Because the statutory definitions of armed robbery and false imprisonment make it clear that the legislature intended to protect different individual interests and, therefore, create separately punishable offenses for violations of those interests, and since the record separated the conduct of the defendant which comprised armed robbery and the conduct which comprised false imprisonment and showed how the conduct for each conviction involved completely separate and distinct actions on the part of the defendant, conviction on both counts was proper. *State v. Ibarra*, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993).

Merger of conviction for aggravated assault into offense of false imprisonment. - Even though defendant's acts of threatening each of multiple victims with a deadly weapon constituted the means by which his victims were restrained or confined against their will so as to cause the assault to merge into the crime of false imprisonment, the trial court did not err in refusing to merge defendant's convictions of aggravated assault into the offenses of false imprisonment, because there was evidence of multiple acts of aggravated assault committed against each victim. *State v. Bachicha*, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

Merger of assault and false imprisonment. - The charge of assault by a prisoner should not be merged for sentencing purposes with the charge of false imprisonment where the facts supporting the two charges are not identical. Merger is also inappropriate in such a case because the statute prohibiting assault and the statute prohibiting false imprisonment advance two distinct social norms. *State v. Gibson*, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Evidence sufficient to support conviction. - The evidence was sufficient to support a conviction for false imprisonment where it was shown that the defendant, acting in concert with another, forced a school bus to stop, disabled the bus, and forced the driver, through fear of violence, to remain confined in the bus until police and rescue arrived. *State v. Muise*, 103 N.M. 382, 707 P.2d 1192 (Ct. App. 1985).

A defendant's acts of specifically pointing a rifle at each of several victims on two or more separate instances, accompanied by verbal threats, constituted evidence from which the jury could properly determine that defendant committed the separate offenses of aggravated assault and false imprisonment against each victim. Moreover, the jury could find that defendant falsely imprisoned his victims at the beginning of the episode and thereafter committed additional independent aggravated assaults for which he could be separately punished. *State v. Bachicha*, 111 N.M. 601, 808 P.2d 51 (Ct. App. 1991).

Evidence introduced to show how the defendant and his cohorts carefully orchestrated a prison escape was sufficient for the jury to find that the defendant planned, anticipated, and intended the assault and false imprisonment of a peace officer during the escape. The defendant need not have known the peace officer's name, but only that the victim would be a peace officer. *State v. Gibson*, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Evidence that intruders threw the house residents, husband and wife, into a closet, sufficed for a conviction of false imprisonment. *State v. Ibarra*, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993).

Verdict not ambiguous. - Handwritten addition to typewriter guilty verdict form which reiterated the guilty verdict but also spoke of defendant's motive in committing crime of false imprisonment did not render the verdict ambiguous and the court committed no error in accepting it. *State v. Tijerina*, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), *aff'd*, 86 N.M. 31, 519 P.2d 127, 1973, cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

No collateral estoppel. - State did not violate guarantee against double jeopardy in prosecuting defendant for assault with intent to commit a violent felony and false imprisonment, after an acquittal on charges of assault on a jail and false imprisonment and kidnaping of another individual arising out of the same incident, since when the jury in the first trial acquitted defendant they did not necessarily conclude that he was not present at the jail that day and thus did not commit any crimes, but simply that he was not guilty of the crimes alleged. *State v. Tijerina*, 86 N.M. 31, 519 P.2d 127 (1973), *aff'd*, 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 32 Am. Jur. 2d False Imprisonment §§ 151, 153.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for false arrest or imprisonment, 93 A.L.R.3d 1109.

Liability for negligently causing arrest or prosecution of another, 99 A.L.R.3d 1113.

Civil liability for "deprogramming" member of religious sect, 11 A.L.R.4th 228.

Penalties for common-law criminal offense of false imprisonment, 67 A.L.R.4th 1103.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Free exercise of religion clause of First Amendment as defense to tort liability, 93 A.L.R. Fed. 754.

35 C.J.S. False Imprisonment § 71.

30-4-4. Custodial interference; penalties.

A. As used in this section:

(1) "child" means an individual who has not reached his eighteenth birthday;

(2) "custody determination" means a judgment or order of a court of competent jurisdiction providing for the custody of a child, including visitation rights;

(3) "person" means any individual or legal entity, whether incorporated or unincorporated, including the United States, the state of New Mexico or any subdivision thereof;

(4) "physical custody" means actual possession and control of a child; and

(5) "right to custody" means the right to physical custody or visitation of a child arising from:

(a) a parent-child relationship between the child and a natural or adoptive parent absent a custody determination; or

(b) a custody determination.

B. Custodial interference consists of any person, having a right to custody of a child, maliciously taking, detaining, concealing or enticing away or failing to return that child

without good cause and with the intent to deprive permanently or for a protracted time another person also having a right to custody of that child of his right to custody. Whoever commits custodial interference is guilty of a fourth degree felony.

C. Unlawful interference with custody consists of any person, not having a right to custody, maliciously taking, detaining, concealing or enticing away or failing to return any child with the intent to detain or conceal permanently or for a protracted time that child from any person having a right to custody of that child. Whoever commits unlawful interference with custody is guilty of a fourth degree felony.

D. Violation of Subsection B or C of this section is unlawful and is a fourth degree felony.

E. A peace officer investigating a report of a violation of this section may take a child into protective custody if it reasonably appears to the officer that any person will flee with the child in violation of Subsection B or C of this section. The child shall be placed with the person whose right to custody of the child is being enforced, if available and appropriate, and, if not, in any of the community-based shelter care facilities as provided for in Section 32-1-25.1 NMSA 1978.

F. Upon recovery of a child a hearing by the civil court currently having jurisdiction or the court to which the custody proceeding is assigned, shall be expeditiously held to determine continued custody.

G. A felony charge brought under this section may be dismissed if the person voluntarily returns the child within fourteen days after taking, detaining or failing to return the child in violation of this section.

H. The offenses enumerated in this section are continuous in nature and continue for so long as the child is concealed or detained.

I. Any defendant convicted of violating the provisions of this section may be assessed the following expenses and costs by the court, with payments to be assigned to the respective person or agency:

(1) any expenses and costs reasonably incurred by the person having a right to custody of the child in seeking return of that child; and

(2) any expenses and costs reasonably incurred for the care of the child while in the custody of the human services department.

J. Violation of the provisions of this section is punishable in New Mexico, whether the intent to commit the offense is formed within or outside the state, if the child was present in New Mexico at the time of the taking.

History: 1978 Comp., § 30-4-4, enacted by Laws 1989, ch. 206, § 1.

ANNOTATIONS

Repeals and reenactments. - Laws 1989, ch. 206, § 1 repeals former 30-4-4 NMSA 1978, as enacted by Laws 1977, ch. 58, § 1, relating to custodial interference, and enacts the above section, effective April 4, 1989. For provisions of former section, see 1984 Replacement Pamphlet.

Severability clauses. - Laws 1989, ch. 206, § 2 provides for the severability of the act if any part or application thereof is held invalid.

Compiler's note. - Section 32-1-25.1 NMSA 1978, referred to in Subsection E, was repealed in 1993. For present comparable provisions, see 32A-4-8 NMSA 1978.

Awareness of custody orders meets "knowing" requirement. - The "knowing" requirement of this section is met if a person accused of custodial interference was actually aware of a court's custody orders or, in the exercise of reasonable diligence, should have been aware of such orders at the time the child was taken. *State v. Sanders*, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

Legal right to custody not absolute. - Parents' natural and legal right to custody of their children is prima facie and not an absolute right. *State v. Sanders*, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

Parent's natural right to custody includes the right to remove the child from this jurisdiction in the absence of any legal modification of that right, but that right may be lost through court order. *State v. Whiting*, 100 N.M. 447, 671 P.2d 1158 (Ct. App. 1983).

Parental right to custody curtailed by custody order. - Because of the custody order under 40-4-7(B)(4) and 40-4-9.1 NMSA 1978, defendant's otherwise natural and usual right to remove her children from the court's jurisdiction is curtailed to the extent that she could not do so without the court's consent. *State v. Whiting*, 100 N.M. 447, 671 P.2d 1158 (Ct. App. 1983).

Right continues until terminated by appropriate authority. - A parent has a legal right to the custody of his child unless that right had been terminated, however temporarily, by appropriate authority. *State v. Sanders*, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

And by written judgment. - A parent's legal right to custody of a child does not end until entry of, and the giving of, notice of a judgment in compliance with Rule 62(a), N.M.R. Child. Ct. (now see Rule 10-310), requiring a signed written judgment and disposition. *State v. Sanders*, 96 N.M. 138, 628 P.2d 1134 (Ct. App. 1981).

Law reviews. - For annual survey of New Mexico law relating to domestic relations, see 12 N.M.L. Rev. 325 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Kidnaping or related offense by taking or removing of child by or under authority of parent or one in loco parentis, 20 A.L.R.4th 823.

Liability of legal or natural parent, or one who aids or abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

ARTICLE 5 ABORTION

30-5-1. Definitions.

As used in this article [30-5-1 to 30-5-3 NMSA 1978];

A. "pregnancy" means the implantation of an embryo in the uterus;

B. "accredited hospital" means one licensed by the health and social services department [public health division of the department of health];

C. "justified medical termination" means the intentional ending of the pregnancy of a woman at the request of said woman or if said woman is under the age of eighteen years, then at the request of said woman and her then living parent or guardian, by a physician licensed by the state of New Mexico using acceptable medical procedures in an accredited hospital upon written certification by the members of a special hospital board that:

(1) the continuation of the pregnancy, in their opinion, is likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman; or

(2) the child probably will have a grave physical or mental defect; or

(3) the pregnancy resulted from rape, as defined in Sections 40A-9-2 through 40A-9-4 NMSA 1953. Under this paragraph, to justify a medical termination of the pregnancy, the woman must present to the special hospital board an affidavit that she has been raped and that the rape has been or will be reported to an appropriate law enforcement official; or

(4) the pregnancy resulted from incest;

D. "special hospital board" means a committee of two licensed physicians or their appointed alternates who are members of the medical staff at the accredited hospital where the proposed justified medical termination would be performed, and who meet for

the purpose of determining the question of medical justification in an individual case, and maintain a written record of the proceedings and deliberations of such board.

History: 1953 Comp., § 40A-5-1, enacted by Laws 1969, ch. 67, § 1.

ANNOTATIONS

Repeals and reenactments. - Laws 1969, ch. 67, § 1, repeals former 40A-5-1, 1953 Comp., relating to criminal abortion, and enacts the above section.

Bracketed material. - The bracketed reference to the public health division of the department of health in Subsection B was inserted by the compiler, as the health and social services department was abolished by Laws 1977, ch. 253, § 5. Section 4 of that act established the health and environment department, consisting of several divisions, including the health services division. However, Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the department of health and environment and enacts a new 9-7-4 NMSA 1978, creating the department of health. Subsection B of that section provides that all references to the "health service division" shall be construed to be references to the "public health division". The bracketed material was not enacted by the legislature and is not part of the law.

Compiler's note. - Sections 40A-9-2 to 40A-9-4, 1953 Comp., which are referred to in Paragraph (3) Subsection C, were repealed by Laws 1975, ch. 109, § 8. The crime of rape has been replaced by the crime of criminal sexual penetration. See 30-9-11 NMSA 1978.

Section partially unconstitutional. - Portions of this section which define those "justified medical terminations" not proscribed by 30-5-3 NMSA 1978 as only those where physician used acceptable medical procedures in accredited hospitals after approval by special hospital board, and either where continuation of pregnancy would result in death or grave injury to mother, where child was likely to have grave physical or mental defects or where pregnancy resulted from rape or incest, held unconstitutional by virtue of 1973 holdings in *Doe v. Bolton* (410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201) and *Roe v. Wade* (410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147). *State v. Strance*, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973).

Enforceability of section. - Under current law, 30-5-2 NMSA 1978 is entirely enforceable, and this section and 30-5-3 NMSA 1978 are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico. 1990 Op. Att'y Gen. No. 90-19.

Consent of husband not required. - Consent of the husband of a woman over the age of 18 is not required when she requests a justified medical termination of her pregnancy. 1969-70 Op. Att'y Gen. No. 70-91.

Married woman under eighteen. - A woman under eighteen, but lawfully married, can request a justified medical termination of her pregnancy without the consent of her parent or guardian, or of her husband. 1969-70 Op. Att'y Gen. No. 70-91.

Divorced or separated woman. - A married woman who subsequently is divorced or separated, regardless of age, is an emancipated person who is entitled to determine herself, without the consent of any other person, whether she will request medical termination of her pregnancy hereunder. 1969-70 Op. Att'y Gen. No. 70-91.

Parental consent provision. - New Mexico's parental consent provision may become enforceable either through legislative enactment of amendments to existing law or, under certain circumstances, through modification of current federal abortion jurisprudence. 1990 Op. Att'y Gen. No. 90-19.

Law reviews. - For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

For article, "Rape Law: The Need for Reform," see 5 N.M.L. Rev. 279 (1975).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "Perspectives on the Abortion Decision," see 9 N.M.L. Rev. 175 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Constitutional right of prisoners to abortion services and facilities - federal cases, 90 A.L.R. Fed. 683.

30-5-2. Persons and institutions exempt.

This article does not require a hospital to admit any patient for the purposes of performing an abortion, nor is any hospital required to create a special hospital board. A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital, in which a justified medical termination has been authorized and who objects to the justified medical termination on moral or religious grounds shall not be required to participate in medical procedures which will result in the termination of pregnancy, and the refusal of any such person to participate shall not form the basis of any disciplinary or other recriminatory action against such person.

History: 1953 Comp., § 40A-5-2, enacted by Laws 1969, ch. 67, § 2.

ANNOTATIONS

Repeals and reenactments. - Laws 1969, ch. 67, § 2, repeals former 40A-5-2, 1953 Comp., relating to the definition of pregnancy, and enacts the above section.

Enforceability of section. - Under current law, this section is entirely enforceable, and 30-5-1 and 30-5-3 NMSA 1978 are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico. 1990 Op. Att'y Gen. No. 90-19.

Law reviews. - For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

For comment, "Perspectives on the Abortion Decision," see 9 N.M.L. Rev. 175 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of state statutes and regulations limiting or restricting public funding for abortions sought by indigent women, 20 A.L.R.4th 1166.

Medical malpractice in performance of legal abortion, 69 A.L.R.4th 875.

Parent's child support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort pregnancy, 2 A.L.R.5th 337.

30-5-3. Criminal abortion.

Criminal abortion consists of administering to any pregnant woman any medicine, drug or other substance, or using any method or means whereby an untimely termination of her pregnancy is produced, or attempted to be produced, with the intent to destroy the fetus, and the termination is not a justified medical termination.

Whoever commits criminal abortion is guilty of a fourth degree felony. Whoever commits criminal abortion which results in the death of the woman is guilty of a second degree felony.

History: 1953 Comp., § 40A-5-3, enacted by Laws 1969, ch. 67, § 3.

ANNOTATIONS

Repeals and reenactments. - Laws 1969, ch. 67, § 3, repeals former 40A-5-3, 1953 Comp., relating to permissive abortion, and enacts the above section.

Severability clauses. - Laws 1969, ch. 67, § 4, provides for the severability of the act if any part or application thereof is held invalid.

Constitutionality of former law. - Laws 1919, ch. 4, §§ 1 to 3 (former 40-3-1 to 40-3-3, 1953 Comp.), denouncing attempt to produce abortion, and making such attempt, followed by death, murder in the second degree, contained but one subject which was clearly expressed in its title. *State v. Grissom*, 35 N.M. 323, 298 P. 666 (1930).

This section does not define murder, homicide or feticide, but is concerned with the special circumstances required for abortion to be a criminal offense. *State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982) (specially concurring opinion).

Enforceability of section. - Under current law, 30-5-2 NMSA 1978 is entirely enforceable, and this section and 30-5-1 NMSA 1978 are enforceable only to the extent that they criminalize and punish the act of performing an abortion on an unconsenting woman, or the performance of an abortion by a person who is not a physician licensed by the State of New Mexico. 1990 Op. Att'y Gen. No. 90-19.

Meaning of "abortion". - The word "abortion" was commonly employed in law to designate the means used to procure miscarriage, and was properly so used in the title of Laws 1919, ch. 4 (former 40-3-1 to 40-3-3, 1953 Comp.). *State v. Grissom*, 35 N.M. 323, 298 P. 666 (1930).

Meaning of "justified medical termination". - When limited definition of "justified medical termination" necessitated by court's reading of *Roe v. Wade* (410 U.S. 113) and *Doe v. Bolton* (410 U.S. 179) into 30-5-1 NMSA 1978 is applied to this section what emerges is a criminal statute penalizing the act of performing abortions on the unconsenting, or performing an abortion on a woman under the age of 18 years without the consent of both the woman and her then living parent or guardian, or the performance of an abortion by a person who is not a physician licensed by the state. *State v. Strance*, 84 N.M. 670, 506 P.2d 1217 (Ct. App. 1973).

Sufficiency of information. - Under former law, differentiating between abortion in general and abortion causing death of the woman, an information for attempt to produce abortion by operation was not demurrable for failure to negative that the act culminated in the woman's death. *State v. Lewis*, 36 N.M. 218, 12 P.2d 849 (1932).

Proof of pregnancy. - Although there was no direct, positive proof that on the day of the first attempted abortion the fetus was living, there was ample evidence for the jury to reasonably arrive at such a conclusion where the physician who had originally examined the woman on whom the abortion was performed testified as to the tests he had made on her and expressed the opinion that she was about two months pregnant. *State v. Gutierrez*, 75 N.M. 580, 408 P.2d 503 (1965).

Condition presumed to continue. - Although there was proof which might be construed to the effect that it was impossible to tell whether on the day of the original abortion attempt the fetus was alive or dead, the rule in this jurisdiction is that a condition once shown to exist will be presumed to continue until the contrary is established by evidence, direct or presumptive. *State v. Gutierrez*, 75 N.M. 580, 408 P.2d 503 (1965).

Evidence of other abortions. - The gist of offense under Laws 1919, ch. 4, § 1 (former 40-3-1, 1953 Comp.), was intent to murder a quick child by performing an abortion upon mother; in a prosecution under that section, proof of other abortions where the child had

not quickened was not relevant and should be excluded. *State v. Bassett*, 26 N.M. 476, 194 P. 867 (1921).

Instruments and drugs. - Instruments and drugs were sufficiently connected with the accused and with the operation to make them admissible on his trial for abortion. *State v. Grissom*, 35 N.M. 323, 298 P. 666 (1930).

In a prosecution for an attempted abortion, exhibition of dilator in cross-examination of accused was not error. *State v. Lewis*, 36 N.M. 218, 12 P.2d 849 (1932).

Erroneous instructions on corroboration. - Instruction that testimony of woman on whom abortion was performed must be corroborated by some other evidence, although erroneous, became the law of the case. *State v. Gutierrez*, 75 N.M. 580, 408 P.2d 503 (1965).

In prosecution for abortion, defendant could be convicted by uncorroborated testimony of an accomplice, but where court gave instruction requiring corroboration, there must be some other evidence in the record tending to show that defendant took part in the commission of the crime. *State v. Gutierrez*, 75 N.M. 580, 408 P.2d 503 (1965).

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 *Nat. Resources J.* 122 (1961).

For article, "New Mexico's 1969 Criminal Abortion Law," see 10 *Nat. Resources J.* 591 (1970).

For article, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 *N.M.L. Rev.* 106 (1973).

For article, "Rape Law: The Need for Reform," see 5 *N.M.L. Rev.* 279 (1975).

For comment, "Perspectives on the Abortion Decision," see 9 *N.M.L. Rev.* 175 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 *Am. Jur. 2d* Abortion and Birth Control § 1 et seq.

Criminal responsibility of one other than subject or actual perpetrator of abortion, 4 *A.L.R.* 351.

Revocation of physician's or surgeon's license for performing abortion, 82 *A.L.R.* 1184.

Admissibility in prosecution for abortion of evidence of other abortions or attempted abortions by accused on same woman, 15 *A.L.R.2d* 1080.

Necessity, to warrant conviction of abortion, that fetus be living at time of commission of acts, 16 A.L.R.2d 949.

Pregnancy as element of abortion, 46 A.L.R.2d 1393.

1 C.J.S. Abortion and Birth Control; Family Planning §§ 10 to 12.

ARTICLE 6

CRIMES AGAINST CHILDREN AND DEPENDENTS

30-6-1. Abandonment or abuse of a child.

A. As used in this section:

(1) "child" means a person who has not reached his age of majority; and

(2) "neglect" means that a child is without proper parental care and control of subsistence, education, medical or other care or control necessary for his well-being because of the faults or habits of his parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them.

B. Abandonment of a child consists of the parent, guardian or custodian of a child intentionally leaving or abandoning the child under circumstances whereby the child may or does suffer neglect.

Whoever commits abandonment of a child is guilty of a misdemeanor, unless the abandonment results in the child's death or great bodily harm, in which case he is guilty of a second degree felony.

C. Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

(1) placed in a situation that may endanger the child's life or health;

(2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather.

Whoever commits abuse of a child which does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony and for second and subsequent offenses is guilty of a second degree felony. If the abuse results in great bodily harm or death to the child, he is guilty of a first degree felony.

History: 1953 Comp., § 40A-6-1, enacted by Laws 1973, ch. 360, § 10; 1977, ch. 131, § 1; 1978, ch. 103, § 1; 1984, ch. 77, § 1; 1984, ch. 92, § 5; 1989, ch. 351, § 1.

ANNOTATIONS

Cross-references. - For sexual exploitation of children, see 30-6A-1 NMSA 1978 et seq.

For secretary of the human services department, see 9-8-6 NMSA 1978.

For licensure of health facilities, see 24-1-5 NMSA 1978.

For powers of state department of public welfare, see 27-1-2 NMSA 1978.

For sentencing for noncapital felonies, see 31-18-15 NMSA 1978.

For Children's Code, see 32A-1-1 NMSA 1978 et seq.

For Nursing Practice Act, see 61-3-1 NMSA 1978 et seq.

For instruction on the essential elements of aggravated battery without great bodily harm, see UJI 14-321.

For instruction on the essential elements of aggravated battery with great bodily harm, see UJI 14-323.

Repeals and reenactments. - Laws 1973, ch. 360, § 10, repealed former 40A-6-1, 1953 Comp., relating to abandonment of child, and enacted a new 40A-6-1, 1953 Comp.

1984 amendments. - Laws 1984, ch. 77, § 1, which substituted "does" for "may or does" near the end of the first sentence in Subsection B, deleted "or negligently" for "intentionally" in the introductory paragraph in Subsection C, substituted "endangers" for "may endanger" in Subsection C(1), deleted former Subsections C(3) and C(4) which read, "(3) exposed to the inclemency of the weather; or (4) engaged in a prohibited sexual act or in the simulation of such an act, if the child is under sixteen years of age and if such person knows, or has reason to know or intends that such act may be photographed, filmed or publicly performed," and rewrote the last paragraph, was approved March 6, 1984. However, Laws 1984, ch. 92, § 5, which deleted former Subsections A(3) and A(4), defining "prohibited sexual acts" and "public," deleted former Subsection C(4), relating to engaging of a child under sixteen years of age in a prohibited sexual act, and rewrote the last paragraph which formerly read, "Whoever commits abuse of a child is guilty of a fourth degree felony, unless the abuse results in the child's death or great bodily harm, in which case he is guilty of a second degree felony," but did not give effect to the first 1984 amendment, was approved March 6, 1984. This section is set out as amended by Laws 1984, ch. 95, § 5. For former provisions of this section as amended through Laws 1978, ch. 103, § 1, see 1983 Cumulative Supplement.

The 1989 amendment, effective June 16, 1989, in the concluding paragraph of Subsection C, substituted "third degree felony" for "fourth degree felony" in the first sentence and substituted the present second sentence for the former second sentence, which read "If the abuse results in great bodily harm or the child's death, as a result of an intentional act, he is for the first offense, guilty of a second degree felony and for second and subsequent offenses, is guilty of a first degree felony".

Constitutionality. - Statute proscribing child abuse does not deny equal protection simply because it makes a distinction between those persons who batter a child and those persons who batter an adult, since children, who are often defenseless, are in need of greater protection than adults, and a stricter penalty is one means of attaining this greater degree of protection. *State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

This section is not unconstitutional on the grounds that it allows arbitrary and discriminatory enforcement. *State v. Williams*, 100 N.M. 322, 670 P.2d 122 (Ct. App. 1983), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Subsection C is not vague, as it clearly sets forth and segregates the type of conduct proscribed by the law. *State v. Coe*, 92 N.M. 320, 587 P.2d 973 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978); *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993)(1978 amendment adding Subsection (4)(c) not construed), overruled on other grounds,.

Criminal intent is not required to commit child abuse. *State v. Fuentes*, 91 N.M. 554, 577 P.2d 452 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978); *State v. Lucero*, 98 N.M. 204, 647 P.2d 406 (1982).

Section is strict liability statute. - See *State v. Lucero*, 98 N.M. 204, 647 P.2d 406 (1982); *State v. Leal*, 104 N.M. 506, 723 P.2d 977 (Ct. App. 1986), but see *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Neither mistake of fact nor duress are defenses to child abuse because the mental state of the defendant is not essential to the crime. *State v. Lucero*, 98 N.M. 204, 647 P.2d 406 (1982).

Validity of making negligent act a crime. - Fact that Subsection C of this statute makes no distinction among intentional, knowing or negligent acts is immaterial, since the legislature has the authority to make a negligent act a crime as well as an intentional one. *State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975).

Meaning of negligence. - The application of a civil negligence standard in the prosecution of child abuse under Subsection C of this section goes beyond the statute's intended scope and impermissibly criminalizes innocent conduct. A standard of criminal

negligence should be applied in construing this statute to all cases presently pending but in which a verdict has not been reached. *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Section does not apply to ordinary situations where child is injured but only to those where the parent performs or fails to perform some abusive act; the statute requires abuse and not mere normal parental action or inaction. *State v. Coe*, 92 N.M. 320, 587 P.2d 973 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Act required for crime. - Although the level of criminal intent is not a factor in determining whether a crime has been committed under this section, the defendant must have committed an unlawful act. *State v. Leal*, 104 N.M. 506, 723 P.2d 977 (Ct. App. 1986).

Actual injury not necessary. - A defendant may be convicted of child abuse even though the child does not suffer a physical injury. *State v. Ungarten*, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993).

State must prove what is charged. - Although charging a defendant with "charging or permitting" may enable the state to prosecute where it is not clear who actually inflicted the abuse, when the state chooses to charge under only one portion of the statute (that defendant "caused" or defendant "permitted" the abuse), the prosecution is limited to proving what it has charged. *State v. Leal*, 104 N.M. 506, 723 P.2d 977 (Ct. App. 1986).

Parents have duty to care for their infant child. *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976), overruled on other grounds, *Santillanes v. State*, 115 N.M. 215, 849 P.2d 358 (1993).

Protection of children extends beyond parents. - Subsection C forbids anyone from endangering the life or health of a child: There is no reason to believe that the legislature intended that the statutory protection be limited only to the children of abusive parents. *State v. Lujan*, 103 N.M. 667, 712 P.2d 13 (Ct. App. 1985).

Reasonable probability of injury needed. - The term "may" as used in Subsection C(1) does not connote a mere possibility, however remote, that harm may result from defendant's acts; instead, the legislature intended the phrase "may endanger" to convey a more restrictive meaning in child abuse cases, i.e., "a reasonable probability or possibility" that the child will be endangered. *State v. Ungarten*, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993).

Distinction between child abuse and murder. - The offense of murder and the offense of child abuse resulting in the child's death are not the same, nor is the same proof required for the two offenses, since generally speaking, murder requires an intent, whereas child abuse does not require an intent, and therefore, the indictment properly

charged defendant with first-degree murder. State v. Gutierrez, 88 N.M. 448, 541 P.2d 628 (Ct. App. 1975).

Merger with murder found. - Where a defendant was charged with numerous counts of child abuse resulting in death or great bodily injury and with murder, but the state did not charge or offer proof that the acts of child abuse arose as separate and distinct episodes, the rule of merger precluded the defendant's conviction and sentence for a crime that is a lesser included offense of a greater charge upon which defendant has also been convicted. Although the state properly may charge in the alternative, where the defendant was convicted of one or more offenses which were merged into the greater offense, he could be punished for only one. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990)(events occurred prior to 1989 amendment to this section).

Doctor's testimony as to prior injury relevant. - In a prosecution of a mother for child abuse resulting in the death of her infant child, a doctor's testimony that he treated the infant less than two months before her death for a fractured leg is relevant. State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 91 N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

Doctor's testimony admissible under Rules of Evidence. - In a prosecution for child abuse resulting in the death of a child, a doctor's testimony concerning his treatment of the child's fractured leg less than two months before the child's death is properly admitted under Rule 404(b), N.M.R. Evid. (now see Paragraph B of Rule 11-404); also, the probative value of the testimony concerning the fracture is not outweighed by its prejudicial impact. State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

Circumstances under which limiting jury instruction on prior incidents necessary. - Where evidence as to the defendant's responsibility for a child's injury is severely disputed, and the defendant's credibility is crucial, there is a sufficient showing of prejudice so that the failure to give an instruction limiting a jury's consideration of prior incidents of child abuse is reversible error. State v. Sanders, 93 N.M. 450, 601 P.2d 83 (Ct. App. 1979).

Self-defense as defense. - In a prosecution for child abuse when a defendant is charged with having intentionally or negligently endangered the life or health of a child, if the evidence otherwise supports a claim that a defendant's acts were carried out in self-defense, the defendant is entitled to have the jury consider his claim of self-defense as justification for his acts. State v. Ungarten, 115 N.M. 607, 856 P.2d 569 (Ct. App. 1993).

Evidence is sufficient if rational inference of great bodily harm is deducible from the evidence. State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92

N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

Evidence sufficient to convict. - There was sufficient evidence to prove that the defendant knowingly, intentionally or negligently, and without justifiable cause, caused his children to be tortured or cruelly punished where he, among other things, made two of the children eat soap, made them drink from the commode, forced one child to vomit, slashed the children's clothes, stuffed the crotch of dirty underwear in the mouth of the oldest boy and forced the children to eat more food than was reasonable. State v. Fulton, 99 N.M. 348, 657 P.2d 1197 (Ct. App. 1983).

Evidence was sufficient to support defendant's conviction for child abuse, where medical testimony established that the victim had suffered skull fractures on both sides of the head, and medical experts rejected defendant's explanation that the injuries could have been caused by a child flipping or jumping into the playpen where the victim was kept. State v. Sheldon, 110 N.M. 28, 791 P.2d 479 (Ct. App.), cert. denied, 498 U.S. 969, 111 S. Ct. 435, 112 L. Ed. 2d 418 (1990).

Insufficient evidence that defendant permitted abuse. - See State v. Leal, 104 N.M. 506, 723 P.2d 977 (Ct. App. 1986).

Standard of review for child abuse conviction resulting in death. - On appeal from a conviction of child abuse resulting in the death of the defendant's child, the court of appeals reviews the evidence as to the cause of death in the light most favorable to the state. State v. Robinson, 93 N.M. 340, 600 P.2d 286 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1979), overruled on other grounds, Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993).

Law reviews. - For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 51 to 64; 42 Am. Jur. 2d Infants §§ 16, 17.

Adopted child, abandonment of, 44 A.L.R. 820.

Failure to provide medical attention for child as criminal neglect, 12 A.L.R.2d 1047.

What constitutes abandonment or desertion of child by its parents within purview of adoption laws, 35 A.L.R.2d 662, 78 A.L.R.3d 712.

Illegitimate children: application of criminal statutes relating to abandonment, neglect and nonsupport of children, 99 A.L.R.2d 746.

Child's right of action against third person who causes parent to desert, or otherwise neglect his parental duty, 60 A.L.R.3d 924.

Admissibility of expert medical testimony on battered child syndrome, 98 A.L.R.3d 306.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 A.L.R.3d 854.

Validity and construction of penal statute prohibiting child abuse, 1 A.L.R.4th 38.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child, 21 A.L.R.4th 239.

Running of limitations against action for civil damages for sexual abuse of child, 9 A.L.R.5th 321.

Failure of state or local government to protect child abuse victim as violation of federal constitutional right, 79 A.L.R. Fed. 514.

43 C.J.S. Infants § 94; 67A C.J.S. Parent and Child §§ 165 to 167.

30-6-2. Abandonment of dependent.

Abandonment of dependent consists of a person having the ability and means to provide for his spouse and minor child's support, and abandoning or failing to provide for the support of such dependent and thereby leaving such spouse or minor child dependent upon public support.

Whoever commits abandonment of dependent is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-6-2, enacted by Laws 1963, ch. 303, § 6-2; 1969, ch. 182, § 4; 1973, ch. 241, § 1.

ANNOTATIONS

Cross-references. - For enforcement of duty of support owed to spouse or minor children by the human services department, see 27-2-28 to 27-2-31 NMSA 1978.

For mutual obligation of support between husband and wife, see 40-2-1 NMSA 1978.

For Uniform Interstate Family Support Act, see 40-6A-101 NMSA 1978 et seq.

Section not void for vagueness. - This section conveys a definite warning of proscribed conduct; it is not unconstitutionally vague and does not violate due process. State v. Villalpando, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

No unequal classification. - Since the crime proscribed in this section is defined in terms of a defendant's actions, the contention of unequal classification of defendants

allegedly (based on the actions of the victims in seeking or not seeking public support) has no factual basis. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

No affirmative action required of dependents. - This statute contains no requirement that official action be taken to obtain public welfare benefits from the health and social services department (now the human services department) and hence the equal protection claim based on the concept that public welfare benefits must be sought by those abandoned in order to support a prosecution hereunder is without merit. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

This statute is not written in terms of becoming dependent, but rather, refers to acts of a defendant which leave the victim dependent on public support. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Both legitimate and illegitimate children are entitled to support from their mothers and fathers. *Stringer v. Dudoich*, 92 N.M. 98, 583 P.2d 462 (1978).

Partial correction of social evil acceptable. - Fact that this section fails to cover all abandonments and failures to support, by focusing only on those persons whose actions leave their dependents dependent on public support, does not violate the requirement of equal protection because the partial correction of the social evil in question has a rational relation to the object of the legislation. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Standing to question constitutionality. - Since defendant was charged only with abandoning his minor children, that offense applying equally to both men and women, his rights were not affected by statutory distinction formerly making it an offense for a man to abandon his wife, but not for a wife to abandon her husband, and accordingly his claims of unconstitutionality based on sex discrimination did not present an issue for decision. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Meaning of "public support". - "Public support" may include support from the health and social services department (now the human services department), but is not limited to support from that governmental department. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Social evil. - Abandonment of or failure to support minor children is a social evil. *State v. Villalpando*, 86 N.M. 193, 521 P.2d 1034 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Evidence sufficient. - Where the record was replete with evidence that defendant abandoned his minor children without sufficient means of support, it amply supported conviction of abandonment under former 40-2-4, 1953 Comp., and obviated

consideration of whether evidence must show that children were destitute when defendant left them. *State v. Seaton*, 75 N.M. 511, 407 P.2d 354 (1965).

Law reviews. - For comment, "Artificial Insemination in New Mexico," see 10 Nat. Resources J. 353 (1970).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For comment, "Voluntary Sterilization in New Mexico: Who Must Consent?" see 7 N.M.L. Rev. 121 (1976-77).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Desertion and Nonsupport §§ 1 to 23, 51 to 64.

Criminal responsibility of husband for abandonment or nonsupport of wife who refuses to live with him, 3 A.L.R. 107, 8 A.L.R. 1314.

Adultery of wife as affecting criminal charge of abandonment against husband, 17 A.L.R. 999.

Illegitimate child as within statute relating to duty to support child, 30 A.L.R. 1075.

Extent or character of support contemplated by statute making nonsupport of wife offense, 36 A.L.R. 866.

Power to make abandonment, desertion or nonsupport of wife or family criminal offense, 48 A.L.R. 1193.

Criminal liability of father for desertion of or failure to support child as affected by decree of divorce or separation, 73 A.L.R.2d 960.

41 C.J.S. Husband and Wife §§ 242 to 246; 67A C.J.S. Parent and Child § 165 to 167.

30-6-3. Contributing to delinquency of minor.

Contributing to the delinquency of a minor consists of any person committing any act or omitting the performance of any duty, which act or omission causes or tends to cause or encourage the delinquency of any person under the age of eighteen years.

Whoever commits contributing to the delinquency of a minor is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-6-3, enacted by Laws 1963, ch. 303, § 6-3; 1990, ch. 19, § 1.

ANNOTATIONS

The 1990 amendment, effective July 1, 1990, substituted "the delinquency of a minor" for "delinquency of minor" in two places.

Constitutionality. - Former statute creating offense of contributing to juvenile delinquency, was not so vague, indefinite and uncertain as to be incapable of interpretation and enforcement. *State v. Roessler*, 58 N.M. 96, 266 P.2d 351 (1954); *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949).

Jurisdiction. - Insofar as the juvenile law formerly purported to confer "exclusive original jurisdiction" on juvenile courts over persons contributing to the delinquency of juveniles it was invalid since the constitution vests sole and exclusive jurisdiction for the trial of all felony cases in the district courts. *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949).

Contributing minor triable in district court. - A minor, properly transferred from children's court to district court, may be tried and convicted of contributing to the delinquency of a minor under this section. *State v. Pitts*, 103 N.M. 778, 714 P.2d 582 (1986).

Infants have generally been favored class for special protection in New Mexico; therefore, the legislature intended to make the commission of the act of contributing to the delinquency of a minor a crime without regard to intent. *State v. Gunter*, 87 N.M. 71, 529 P.2d 297 (Ct. App.), cert. denied, 87 N.M. 48, 529 P.2d 274 (1974), 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975).

Acts of commission or omission. - Any act of commission or omission causing or tending to cause juvenile delinquency as specifically defined came within the act. *State v. McKinley*, 53 N.M. 106, 202 P.2d 964 (1949).

Evidence that act causes delinquency. - No separate evidence that the act causes delinquency is necessary. *State v. Trevino*, 116 N.M. 528, 865 P.2d 1172 (1993).

In order to prove the offense of contributing to the delinquency of a minor, the state does not need to prove that the defendant's acts had any particular effect on the victim; it is enough that his acts encourage the child to engage in delinquent behavior. *State v. Lucero*, N.M. , 884 P.2d 1175 (Ct. App. 1994).

Defendant need not actually cause delinquency. - The jury can convict if the defendant's act actually caused or encouraged the particular minor to commit a delinquent act or if the act only tends to cause or encourage delinquency generally. The "tends to cause or encourage" language refers to an objective view of the defendant's conduct. There is no requirement that the defendant actually cause delinquency. *State v. Trevino*, 116 N.M. 528, 865 P.2d 1172 (1993).

Tending to cause, encourage delinquency. - Defendant's acts or omissions must have caused or tended to cause or encourage the delinquency of the juvenile. State v. Grove, 82 N.M. 679, 486 P.2d 615 (Ct. App. 1971).

Tending to cause violation of law, or immorality. - Defendant's acts must have tended to cause or encourage the prosecuting witness to violate the law of the state or to conduct himself in a manner injurious to his morals. State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Habituality of juveniles' conduct not prerequisite to conviction of defendant. - Defendant's contention that for his acts to be criminal hereunder they must tend to encourage "habitual" conduct on the part of the minor was unfounded, as the end result of defendant's acts, that is, whether they result in habitual conduct on the part of the juvenile, is not a prerequisite to the charge of contributing to the delinquency of a minor. State v. Leyba, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Criminal sexual contact of a minor is separate offense. - The legislature intended for the crimes of criminal sexual contact of a minor and contributing to the delinquency of a minor to be separate crimes, punishable separately even when unitary conduct violates both statutes. Therefore, convictions under both statutes do not violate double jeopardy principles. State v. Trevino, 116 N.M. 528, 865 P.2d 1172 (1993).

Indecent exposure is separate offense. - An element of indecent exposure is that the defendant's acts take place in "public view;" there is no such element in contributing to delinquency of a minor, and the trial court's refusal to give the instruction as a lesser included offense was proper. State v. Henderson, 116 N.M. 537, 865 P.2d 1181 (1993).

Criminal sexual penetration is separate offense. - Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. State v. Walker, 116 N.M. 546, 865 P.2d 1190 (1993).

Sufficiency of information. - Information charging defendant with contributing to delinquency of minor did not fail to charge an offense even though it did not name the victim or allege particular acts. State v. Roessler, 58 N.M. 96, 266 P.2d 351 (1954).

Where the information charged accused with "contributing to delinquency of minor" by "selling liquor to him" it adequately stated the manner in which the defendant allegedly caused or tended to cause the delinquency. State v. Sena, 54 N.M. 213, 219 P.2d 287 (1950).

A charging document need not allege time or date of offense charged unless such allegations are necessary to give a defendant notice of the crime charged. Thus, where the time of commission of the alleged offenses was an element unessential to the crimes charged, and thus an allegation unnecessary to the information, the criminal information sufficiently charged the offenses. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990).

Evidence of similar acts. - The admission of evidence of other acts with the prosecutrix similar in nature to those charged but occurring at times not covered in the indictment was not error as whenever the proof of another act or crime tends to prove the guilt of the person on trial, it is admissible, notwithstanding the consequences to the defendant. *State v. Dodson*, 67 N.M. 146, 353 P.2d 364 (1960).

Cautionary instruction necessary. - Where the testimony of the prosecutrix concerning the conduct complained of was uncorroborated and met directly with a denial by defendant who took the stand in her own behalf, the refusal to give an instruction to the jury to examine the testimony of prosecutrix with caution was reversible error. *State v. Dodson*, 67 N.M. 146, 353 P.2d 364 (1960).

Evidence sufficient. - Evidence that a 17 year old boy bought two cans of beer at defendant's place and drank one of them, that the girl from whom he purchased the beer took the money into the bedroom where defendant was in bed and handed it to her or placed it on the bed beside her, and that officer found four boys in defendant's living room with empty and open cans of beer in front of them, was sufficient to warrant a conviction hereunder. *State v. Ferguson*, 77 N.M. 441, 423 P.2d 872 (1967).

Defendant's acts in indecently touching the private parts of a minor and talking indecently to him tended to cause or encourage his victim to violate former 40A-9-8, 1953 Comp., prohibiting indecent exposure, and also tended to cause or encourage him to conduct himself in a manner injurious to his morals. *State v. Leyba*, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Evidence that defendant showed a men's magazine to a minor and told him to unbutton his pants was sufficient for the jury to find defendant guilty of contributing to the delinquency of a minor, even without evidence that defendant engaged in fellatio or had criminal sexual contact with the minor. *State v. Corbin*, 111 N.M. 707, 809 P.2d 57 (Ct. App. 1991).

Evidence insufficient. - If from the evidence, it could be inferred that defendant was present when juvenile engaged in his admitted activities with marijuana, nevertheless there was no evidence that defendant had anything to do with these activities nor any evidence that defendant approved of them. In the absence of such evidence an inference that defendant was present when juvenile engaged in his marijuana activities was insufficient to sustain defendant's conviction for contributing to the delinquency of the juvenile. *State v. Grove*, 82 N.M. 679, 486 P.2d 615 (Ct. App. 1971).

Jury instruction proper. - Where time limitation was not an essential element of the offense of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990).

Trial court was not without jurisdiction to impose sentence against defendant following his conviction some seven years earlier of contributing to delinquency of a minor child, at which time the court had deferred sentence until the "further order of the court." *State v. Sorrows*, 63 N.M. 277, 317 P.2d 324 (1957).

Sentencing discretion not abused. - Where defendant pled guilty to contributing to delinquency of a minor, two counts of attempted rape being thereafter dismissed, it could not be said as a matter of law that the trial court abused its discretion by not adopting report of psychiatrist recommending probation or in not requesting diagnosis and recommendation from the department of corrections (now the criminal justice department) pursuant to 31-20-3 NMSA 1978. *State v. Hogan*, 83 N.M. 608, 495 P.2d 388 (Ct. App. 1972).

Availability of psychiatric help in penitentiary. - Where defendant convicted of contributing to delinquency of a minor asked court of appeals to take judicial notice that no psychiatric or psychological help was available for him at the penitentiary, but cited neither source nor reference for such a proposition and court found none in its search, assertion was not a matter for judicial notice. *State v. Hogan*, 83 N.M. 608, 495 P.2d 388 (Ct. App. 1972).

Conviction allowed to stand. - Since appellate court could only speculate as to why the jury acquitted defendant of assault, that acquittal, even though irreconcilable with conviction for contributing to delinquency of a minor by indecently touching his private parts, did not require the conviction to be set aside as a matter of law. *State v. Leyba*, 80 N.M. 190, 453 P.2d 211 (Ct. App.), cert. denied, 80 N.M. 198, 453 P.2d 219 (1969).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Juvenile Courts and Delinquent and Dependent Children §§ 63 to 70.

Acts in connection with marriage of infant below marriageable age as contributing to delinquency, 68 A.L.R.2d 745.

Applicability of statute against contributing to the delinquency of children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Criminal liability for contributing to delinquency of minor by sexually immoral acts as affected by fact that minor was married at time of acts charged, 84 A.L.R.2d 1254.

Criminal liability for contributing to delinquency of minor as affected by the fact that minor has not become a delinquent, 18 A.L.R.3d 824.

Mens rea or guilty intent as necessary element of offense of contributing to delinquency or dependency of minor, 31 A.L.R.3d 848.

Drugs: giving, selling or prescribing, dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

43 C.J.S. Infants § 95.

30-6-4. Obstruction of reporting or investigation of child abuse or neglect.

Obstruction of reporting or investigation of child abuse or neglect consists of:

A. knowingly inhibiting, preventing, obstructing or intimidating another from reporting, pursuant to Section 32-1-15 NMSA 1978, child abuse or neglect, including child sexual abuse; or

B. knowingly obstructing, delaying, interfering with or denying access to a law enforcement officer or child protective services social worker in the investigation of a report of child abuse or sexual abuse.

Whoever commits obstruction of reporting or investigation of child abuse or neglect is guilty of a misdemeanor.

History: Laws 1989, ch. 287, § 1.

ANNOTATIONS

Compiler's note. - Section 32-1-15 NMSA 1978 was repealed in 1993. For present comparable provisions, see 32A-4-3 NMSA 1978.

ARTICLE 6A SEXUAL EXPLOITATION OF CHILDREN

30-6A-1. Short title.

Sections 1 through 4 [30-6A-1 to 30-6A-4 NMSA 1978] of this act may be cited as the "Sexual Exploitation of Children Act."

History: Laws 1984, ch. 92, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of 18 USCS §§ 371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography, 86 A.L.R. Fed. 359.

30-6A-2. Definitions.

As used in the Sexual Exploitation of Children Act [30-60A-1 to 30-60A-4 NMSA 1978]:

A. "prohibited sexual act" means:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadomasochistic abuse for the purpose of sexual stimulation; or

(5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation;

B. "visual or print medium" means:

(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or

(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery;

C. "performed publicly" means performed in a place which is open to or used by the public; and

D. "manufacture" means the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age.

History: Laws 1984, ch. 92, § 2; 1993, ch. 116, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, in Subsection A(5), substituted "lewd and sexually explicit exhibition with a focus on" for "lewd exhibition of"; in Subsection B(1), substituted "computer diskette, videotape, videodisc or any computer or electronically generated imagery" for "videotape or videodisk"; in Subsection B(2), substituted "computer diskette, videotape, videodisc or any computer generated or electronically generated imagery" for "videotape or videodisk"; and in Subsection D, deleted "for pecuniary profit" following "repackaging" and substituted "eighteen" for "sixteen".

30-6A-3. Sexual exploitation of children.

A. It is unlawful for any person to intentionally distribute or possess with intent to distribute any visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. Any person who violates this subsection is guilty of a third degree felony.

B. It is unlawful for any person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any visual or print medium or performed publicly. Any person who violates this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony.

C. It is unlawful for any person to intentionally manufacture any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age. Any person who violates this subsection is guilty of a second degree felony.

D. The penalties provided for in this section shall be in addition to those set out in Section 30-9-11 NMSA 1978.

History: Laws 1984, ch. 92, § 3; 1989, ch. 170, § 1; 1993, ch. 116, § 2.

ANNOTATIONS

Cross-references. - For sentencing for noncapital felonies, see 31-18-15 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection A deleted "for pecuniary profit" following "possess with intent to distribute" in the first sentence, and substituted "third" for "fourth" in the second sentence; in Subsection B substituted "third" for "fourth" near the beginning of the second sentence and "second" for "third" near the end of that sentence; deleted former Subsection C, which read: "It is unlawful for any person to intentionally cause or permit a child under sixteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows or intends that

the act be recorded in any visual or print medium made for the purpose of sale or other pecuniary profit. Any person who violates this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony"; redesignated former Subsection D as present Subsection C, while substituting "second" for "third" in the second sentence therein; and added present Subsection D.

The 1993 amendment, effective June 18, 1993, inserted "that person knows or has reason to know that" in the first sentence of Subsection A; and substituted "eighteen" for "sixteen" in the first sentence of Subsections A, B, and C.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of statutes regulating sexual performance by child, 21 A.L.R.4th 239.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

30-6A-4. Sexual exploitation of children by prostitution.

A. Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony.

B. Any person hiring or offering to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act is guilty of a second degree felony.

C. Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium depicting such an act is guilty of a third degree felony.

History: Laws 1984, ch. 92, § 4; 1989, ch. 170, § 2.

ANNOTATIONS

Cross-references. - For abandonment or abuse of child, see 30-6-1 NMSA 1978.

For enticement of child, see 30-9-1 NMSA 1978.

For criminal sexual contact of a minor, see 30-9-13 NMSA 1978.

For sentencing for noncapital felonies, see 31-18-15 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection A inserted "knowingly" near the beginning of the subsection, and substituted "second" for "third" near the middle of the subsection and "first" for "second" near the end of the subsection; substituted "second" for "third" near the end of Subsection B; and substituted "third" for "fourth" near the end of Subsection C.

ARTICLE 7 WEAPONS AND EXPLOSIVES

30-7-1. "Carrying a deadly weapon."

"Carrying a deadly weapon" means being armed with a deadly weapon by having it on the person, or in close proximity thereto, so that the weapon is readily accessible for use.

History: 1953 Comp., § 40A-7-1, enacted by Laws 1963, ch. 303, § 7-1.

ANNOTATIONS

Cross-references. - For definition of deadly weapon, see 30-1-12 NMSA 1978.

For possession of deadly weapon or explosive by prisoner, see 30-22-16 NMSA 1978.

Loaded revolver. - A loaded revolver was a deadly weapon. *Territory v. Watson*, 12 N.M. 419, 78 P. 504 (1904).

Deadliness a jury question. - Where instrument used in assault was not per se a deadly weapon under Laws 1887, ch. 30, whether it was so was ordinarily a question for jury to determine, considering its character and manner of use. *State v. Conwell*, 36 N.M. 253, 13 P.2d 554 (1932).

Character of weapon used went only to aggravation of offense. *Territory v. Armijo*, 7 N.M. 571, 37 P. 1117 (1894); *Chacon v. Territory*, 7 N.M. 241, 34 P. 448 (1893).

Omission in indictment to describe kind of knife was fatal, as it was necessary to charge that the knife was one "with which dangerous cuts could be given, or with which dangerous thrusts can be inflicted." *Territory v. Armijo*, 7 N.M. 571, 37 P. 1117 (1894).

Instructions. - In instructing the jury, deadly weapon could be defined in the terms of the statute. *State v. Dickens*, 23 N.M. 26, 165 P. 850 (1917).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Weapons and Firearms §§ 7 to 19.

Firearm used as a bludgeon as a deadly weapon, 8 A.L.R. 1319.

Gun control laws, validity and construction of, 28 A.L.R.3d 845.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

Validity of state gun control legislation under state constitutional provisions securing the right to bear arms, 86 A.L.R.4th 931.

94 C.J.S. Weapons §§ 3 to 23.

30-7-2. Unlawful carrying of a deadly weapon.

A. Unlawful carrying of a deadly weapon consists of carrying a concealed loaded firearm or any other type of deadly weapon anywhere, except in the following cases:

(1) in the person's residence or on real property belonging to him as owner, lessee, tenant or licensee;

(2) in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property;

(3) by a peace officer in accordance with the policies of his law enforcement agency who is certified pursuant to the Law Enforcement Training Act [29-7-1 to 29-7-11 NMSA 1978]; or

(4) by a peace officer in accordance with the policies of his law enforcement agency who is employed on a temporary basis by that agency and who has successfully completed a course of firearms instruction prescribed by the New Mexico law enforcement academy or provided by a certified firearms instructor who is employed on a permanent basis by a law enforcement agency.

B. Nothing in this section shall be construed to prevent the carrying of any unloaded firearm.

C. Whoever commits unlawful carrying of a deadly weapon is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-2, enacted by Laws 1963, ch. 303, § 7-2; 1975, ch. 134, § 1; 1985, ch. 174, § 1.

ANNOTATIONS

Cross-references. - For right of people to bear nonconcealed arms, see N.M. Const., art. II, § 6.

For right of sheriffs to carry concealed arms, see 4-41-10, 4-41-10.1 NMSA 1978.

For sentencing for misdemeanors, see 31-19-1 NMSA 1978.

The 1985 amendment substituted "in accordance with the policies of his law enforcement agency who is certified pursuant to the Law Enforcement Training Act; or" for "in the lawful discharge of his duties" in Subsection A(3) and added Subsection A(4).

Constitutionality. - This section does not violate equal protection on the basis that it impermissibly distinguishes between rich and poor, in that homeowners and vehicle owners may properly conceal weapons whereas poor people do not own a residence or vehicle in which to conceal a weapon. *State v. McDuffie*, 106 N.M. 120, 739 P.2d 989 (Ct. App. 1987).

When object "deadly weapon". - Under this section, any object, even if manufactured for an innocent, nonviolent purpose, may be a deadly weapon, if it has a potential violent use and if, under the surrounding circumstances, the purpose of carrying the object was for use as a weapon. *State v. Blea*, 100 N.M. 237, 668 P.2d 1114 (Ct. App. 1983).

Applicability to school security force. - Members of a security and patrol force composed of regular full-time employees of the Albuquerque public school system to guard school buildings and property could not be properly described as peace officers and must operate in compliance with the state statutes restricting possession and use of deadly weapons. 1969-70 Op. Att'y Gen. No. 70-87.

Peace officers. - None of the officers named in Laws 1891, ch. 63, § 3 (former 40-17-9, 1953 Comp.), providing when peace officers might carry weapons, had any more right to carry weapons than a private citizen, except when the same was done in the proper and necessary discharge of official duties. *Guysel v. Territory*, 7 N.M. 228, 34 P. 295 (1893).

Mounted police. - Mounted police officers, while such force existed, were not subject to Laws 1907, ch. 36, § 18 (former 40-17-1, 1953 Comp.), which prohibited the carrying of deadly weapons. *State v. Jordi*, 24 N.M. 426, 174 P. 204 (1918).

Carrying arms while traveling. - The word "travelers" in Laws 1887, ch. 30, § 9 (former 40-17-8, 1953 Comp.), providing that arms might be carried while traveling, did not include a ranch owner who made daily trips of less than ten miles to his ranch; nor could it have included one who had reached his objective before the homicide. *State v. Sedillo*, 24 N.M. 549, 174 P. 985 (1918).

Fugitive from justice was not a "person traveling" under Laws 1887, ch. 30, § 9 (former 40-17-8, 1953 Comp.), and was therefore not permitted to carry arms. *State v. Starr*, 24 N.M. 180, 173 P. 674 (1917), writ of error dismissed, 254 U.S. 611, 41 S. Ct. 61, 65 L. Ed. 437 (1920).

Statute inapplicable to murder case. - Statute pertaining to carrying weapon upon one's "landed estate" had no bearing in a murder case where accused pleaded self-defense, and testimony thereunder was properly excluded. *State v. Martinez*, 34 N.M. 112, 278 P. 210 (1929).

Instruction properly refused in burglary case. - Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and the trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754, denial of post-conviction relief affirmed, 83 N.M. 393, 492 P.2d 1010 (Ct. App. 1971).

Evidence of crime. - Evidence tending to establish that defendant was armed with a loaded .38 caliber pistol concealed on his person was evidence tending to establish crime hereunder. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754, denial of post-conviction relief affirmed, 83 N.M. 393, 492 P.2d 1010 (Ct. App. 1971).

Probable cause to arrest. - Sight of pistol in defendant's pocket gave arresting officer all the probable cause needed to make an arrest, regardless of whether the weapon later was found to be unloaded. *Ramirez v. Rodriguez*, 467 F.2d 822 (10th Cir. 1972), cert. denied, 410 U.S. 987, 93 S. Ct. 1518, 36 L. Ed. 2d 185 (1973).

There was probable cause to arrest the defendant for carrying a concealed weapon, where his belligerent behavior had led to a police officer's request to step out of his car and the officer was justified in performing a patdown search after seeing another weapon fall out of the vehicle when defendant opened the door. *United States v. Henning*, 906 F.2d 1392 (10th Cir. 1990), cert. denied, 498 U.S. 1069, 111 S. Ct. 789, 112 L. Ed. 2d 852 (1991).

Reasonable grounds of belief. - Where officer was told that man who assaulted deceased had gone into building where he subsequently found defendant wearing a coat which appeared to have bloodstains on the right sleeve, and he saw butt of a pistol protruding from defendant's pants pocket which had been concealed until the coat was opened, under the circumstances the officer had reasonable grounds to believe that defendant was unlawfully carrying a deadly weapon. *State v. Ramirez*, 79 N.M. 475, 444 P.2d 986 (1968).

Tort liability of parents. - Absent knowledge on part of parent that child of 13 years was indiscreet or reckless in handling of firearms, mere keeping of a loaded gun on

premises, and leaving the child there alone, did not make the parent liable for torts committed by the minor. *Lopez v. Chewiwie*, 51 N.M. 421, 186 P.2d 512 (1947).

No duty on "Saturday night special" manufacturers not to sell. - In the area of firearm manufacture and sale, the New Mexico legislature, while imposing certain restrictions, has not seen fit to make such distribution per se unlawful and in the absence of any legislative action, or specific guidance from the New Mexico courts, the court held, in a case involving a "Saturday night special" used to kill plaintiff's husband, that it would not impose a "duty" upon manufacturers of firearms not to sell their products, merely because such products have the potential to be misused for purposes of criminal activity. *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771 (D.N.M. 1987), aff'd, 843 F.2d 406 (10th Cir. 1988).

Demonstration of switchblade to jury held proper. - Where a defendant was charged with unlawful possession of a switchblade, the trial court did not err in permitting a demonstration of how the knife worked. The issue for the jury in this case was how the knife could be opened. Therefore, the officer's demonstration was properly allowed over the objection made at trial. *State v. Riddall*, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

Sufficiency of evidence. - Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. There was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. *State v. Riddall*, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Weapons and Firearms §§ 8 to 20.

Firearm used as bludgeon as a deadly weapon, 8 A.L.R. 1319.

Offense of carrying weapon on person as affected by place where defendant was at the time, 73 A.L.R. 839.

Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Offense of carrying concealed weapons as affected by manner of carrying or place of concealment, 43 A.L.R.2d 492.

Scope and effect of exception in statute forbidding carrying of weapons, as to person on his own premises, 57 A.L.R.3d 938.

What constitutes "dangerous weapon" under statutes prohibiting the carrying of dangerous weapons in motor vehicle, 2 A.L.R.4th 1342.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

What constitutes a "bludgeon," "blackjack" or "billy" within meaning of criminal possession statute, 11 A.L.R.4th 1272.

Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Propriety of imposing consecutive sentences upon convictions, under federal statutes, of unlawful receipt, transportation, or making and possession of same firearm, 55 A.L.R. Fed. 633.

94 C.J.S. Weapons §§ 3 to 23.

30-7-2.1. Unlawful carrying of a deadly weapon on school premises.

A. Unlawful carrying of a deadly weapon on school premises consists of carrying a deadly weapon on school premises except by:

(1) a peace officer;

(2) school security personnel;

(3) a student, instructor or other school-authorized personnel engaged in army, navy, marine corps or air force reserve officer training corps programs or state-authorized hunter safety training instruction;

(4) a person conducting or participating in a school-approved program, class or other activity involving the carrying of a deadly weapon; or

(5) a person older than nineteen years of age on school premises in a private automobile or other private means of conveyance, for lawful protection of the person's or another's person or property.

B. As used in this section, "school premises" means:

(1) the buildings and grounds, including playgrounds, playing fields and parking areas and any school bus of any public elementary, secondary, junior high or high school in or on which school or school-related activities are being operated under the supervision of a local school board; or

(2) any other public buildings or grounds, including playing fields and parking areas that are not public school property, in or on which public school-related and sanctioned activities are being performed.

C. Whoever commits unlawful carrying of a deadly weapon on school premises is guilty of a fourth degree felony.

History: Laws 1987, ch. 232, § 1; 1989, ch. 285, § 1; 1994, ch. 17, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "fourth degree felony" for "misdemeanor" at the end of Subsection C.

The 1994 amendment, effective July 1, 1994, inserted "older than nineteen years of age" in Paragraph A(5); and, in Subsection B, divided the formerly undivided language into an introductory paragraph and Paragraph (1), added Paragraph (2) and, in Paragraph (1), deleted "on school grounds" following "bus" and added "or" at the end.

30-7-2.2. Unlawful possession of a handgun by a person; exceptions; penalty.

A. Unlawful possession of a handgun by a person consists of a person knowingly having a handgun in his possession or knowingly transporting a handgun, except when the person is:

(1) in attendance at a hunter's safety course or a handgun safety course;

(2) engaging in the use of a handgun for target shooting at an established range authorized by the governing body of the jurisdiction in which the range is located or in an area where the discharge of a handgun without legal justification is not prohibited by law;

(3) engaging in an organized competition involving the use of a handgun;

(4) participating in or practicing for a performance by an organization that has been granted exemption from federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended or renumbered;

(5) legal hunting or trapping activities;

(6) traveling, with an unloaded handgun in his possession, to or from an activity described in Paragraph (1), (2), (3), (4) or (5) of this subsection; or

(7) on real property under the control of the person's parent, grandparent or legal guardian and the person is being supervised by his parent, grandparent or legal guardian.

B. A person who commits unlawful possession of a handgun by a person is guilty of a misdemeanor.

C. As used in this section:

(1) "person" means an individual who is less than nineteen years old; and

(2) "handgun" means a loaded or unloaded pistol, revolver or firearm which will or is designed to or may readily be converted to expel a projectile by the action of an explosion and the barrel length of which, not including a revolving, detachable or magazine breech, does not exceed twelve inches.

History: Laws 1994, ch. 22, § 2.

ANNOTATIONS

Effective dates. - Laws 1994, ch. 22, § 4 makes the act effective on July 1, 1994.

Internal Revenue Code. - Section 501 of the federal Internal Revenue Code is found as 26 U.S.C. § 501.

30-7-2.3. Seizure and forfeiture of a handgun possessed or transported by a person in violation of unlawful possession of a handgun by a person; exception.

A. A handgun is subject to seizure and forfeiture by a law enforcement agency when the handgun is possessed or transported by a person in violation of the offense of unlawful possession of a handgun by a person.

B. A handgun seized pursuant to a violation of unlawful possession of a handgun by a person shall not be subject to replevin, but is deemed to be in the custody of the law enforcement agency, subject only to orders and decrees of the district court.

C. When a handgun is seized pursuant to the provisions of this section, the handgun may be disposed of pursuant to the provisions of Section 29-1-14 NMSA 1978.

D. A handgun shall not be forfeited when the owner of the handgun establishes that the offense of unlawful possession of a handgun by a person was committed without the knowledge and consent of that owner. A forfeiture of a handgun encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party did not have knowledge of or did not consent to the offense of unlawful possession of a handgun by a person.

History: Laws 1994, ch. 22, § 3.

ANNOTATIONS

Effective dates. - Laws 1994, ch. 22, § 4 makes the act effective on July 1, 1994.

30-7-3. Unlawful carrying of a firearm in licensed liquor establishments.

A. Unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages consists of carrying a loaded or unloaded firearm on any premises licensed by the department of alcoholic beverage control for the dispensing of alcoholic beverages except:

(1) by a law enforcement officer in the lawful discharge of his duties;

(2) by the owner, lessee, tenant or operator of the licensed premises or their agents, including privately employed security personnel during the performance of their duties;

(3) by a person in that area of the licensed premises usually and primarily rented on a daily or short-term basis for sleeping or residential occupancy, including hotel or motel rooms; or

(4) by a person on that area of a licensed premises primarily utilized for vehicular traffic or parking.

B. Whoever commits unlawful carrying of a firearm in an establishment licensed to dispense alcoholic beverages is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-7-2.1, enacted by Laws 1975, ch. 149, § 1; 1977, ch. 160, § 1.

ANNOTATIONS

Temporary provisions. - Laws 1975, ch. 149, § 2, provides that the director of the department of alcoholic beverage control shall, by November 1, 1975, furnish copies of a poster prohibiting the carrying of a firearm on the premises, without cost, to all persons licensed to sell or serve alcoholic beverages and require, by rule or regulation, that the licensees post the furnished copy in a conspicuous place on their premises.

Purpose of statute is to protect innocent patrons of businesses held out to the public as licensed liquor establishments. *State v. Soto*, 95 N.M. 81, 619 P.2d 185 (1980).

State's prima facie case requires proof of licensing, and is satisfied by the testimony of the owner of the bar and by a copy of the license. State v. Soto, 95 N.M. 81, 619 P.2d 185 (1980).

This section is constitutional, as being within the police powers of the legislature, and is a valid regulation of a constitutional privilege. State v. Dees, 100 N.M. 252, 669 P.2d 261 (Ct. App. 1983).

Section applicable to any premises licensed for dispensing. - This section does not refer to a particular type of license; it applies to any premises licensed for dispensing; it is not limited to a dispenser's license and it is to be read with 60-3-1Q NMSA 1978 (now 60-3A-3 NMSA 1978). State v. Montoya, 91 N.M. 262, 572 P.2d 1270 (Ct. App. 1977).

State of mind necessary for commission of the crime. - The requisite mens rea element of this crime is that the possession be intentional; in other words, that the offender have actual knowledge of the possession. The jury needs only to find that the defendant acted intentionally and that he or she purposely did an act which the law declared to be a crime, whether or not the defendant knew the act to be unlawful. State v. Powell, 115 N.M. 188, 848 P.2d 1115 (Ct. App. 1993).

Evidence sufficient for conviction. See State v. Rivera, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

Instructions. - The listing of the persons excepted in Subsection A does not constitute an essential element of the offense and the failure to instruct on these exceptions is not jurisdictional and reversible error, especially when the defendant has not cited proof nor stated any facts to show that the exceptions apply to him. State v. Roybal, 100 N.M. 155, 667 P.2d 462 (Ct. App. 1983).

Sale of firearms. - The selling of firearms in a licensed liquor establishment would be unlawful pursuant to this section. 1977 Op. Att'y Gen. No. 77-23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Weapons and Firearms § 27.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

94 C.J.S. Weapons § 7.

30-7-4. Negligent use of a deadly weapon.

A. Negligent use of a deadly weapon consists of:

(1) discharging a firearm into any building or vehicle or so as to knowingly endanger a person or his property;

(2) carrying a firearm while under the influence of an intoxicant or narcotic;

(3) endangering the safety of another by handling or using a firearm or other deadly weapon in a negligent manner; or

(4) discharging a firearm within one hundred fifty yards of a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons, without the permission of the owner or lessees thereof.

B. The provisions of Paragraphs (1), (3) and (4) of Subsection A of this section shall not apply to a peace officer or other public employee who is required or authorized by law to carry or use a firearm in the course of his employment and who carries, handles, uses or discharges a firearm while lawfully engaged in carrying out the duties of his office or employment.

C. The exceptions from criminal liability provided for in Subsection B of this section shall not preclude or affect civil liability for the same conduct.

Whoever commits negligent use of a deadly weapon is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-3, enacted by Laws 1963, ch. 303, § 7-3; 1977, ch. 266, § 1; 1979, ch. 79, § 1; 1993, ch. 139, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "a dwelling or building, not including abandoned or vacated buildings on public lands during hunting seasons" for "an inhabited dwelling or building" in Subsection A(4) and inserted "of this section" in Subsection C.

Subsection A(2) is not unconstitutionally vague. A person of ordinary intelligence would understand what conduct is prohibited by the statute: having a firearm nearby, readily capable of being put into action or service, while under the influence of alcohol. The statute plainly does not require that the intoxicated person actually use or intend to use the firearm. *State v. Rivera*, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

Possession of firearms by intoxicated persons presents a clear danger to the public. The state constitution does not support a right to engage in this type of behavior. Therefore, the defendant's conviction for negligent use of a deadly weapon did not violate his right to bear arms under the state constitution, since there was evidence that he was intoxicated, he pointed the gun at another person, and he appeared to be loading the gun. *State v. Rivera*, 115 N.M. 424, 853 P.2d 126 (Ct. App. 1993).

"Negligent" defined. - "Negligent" in Subsection C hereof (now Subsection A (3)) means omitting to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or

doing something which a prudent and reasonable man would not do. State v. Grubbs, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Criminal negligence is not negligence referred to in Subsection C (now Subsection A (3) of this section). State v. Grubbs, 85 N.M. 365, 512 P.2d 693 (Ct. App. 1973).

Meaning of "inhabited house". - An "inhabited house" was a house which, at time of discharge of deadly weapon, was occupied by persons as a dwelling. State v. Adams, 24 N.M. 239, 173 P. 857 (1918) (decided prior to 1993 amendment).

Evidence of frame of mind. - Evidence of conduct at and subsequent to commission of crime of unlawfully discharging a firearm in a settlement was competent to show frame of mind of defendant. State v. Bustillos, 36 N.M. 30, 7 P.2d 296 (1932).

Application of former law to assault with intent to murder. - Laws 1907, ch. 36, § 20 (former 40-17-5, 1953 Comp.), prescribing penalty for drawing or discharging firearm in settlement or public place had no application to an assault with intent to commit murder. State v. Rogers, 31 N.M. 485, 247 P. 828 (1926).

Instruction required in homicide case. - In homicide prosecution where one of defendant's theories was involuntary manslaughter, and record was replete with testimony that defendant was drunk while he rode around in automobile with deceased and witness holding and handling sawed-off shotgun, court's refusal to instruct the jury that negligent use of a weapon while under influence of an intoxicant was a petty misdemeanor left jury without a guide to determine whether this was a killing while in the commission of a misdemeanor, and was reversible error. State v. Durham, 83 N.M. 350, 491 P.2d 1161 (Ct. App. 1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Weapons and Firearms § 29.

Liability of private citizen or his employer for injury or damage to third person resulting from firing of shots at fleeing criminal, 29 A.L.R.4th 144.

Handgun manufacturer's or seller's liability for injuries caused to another by use of gun in committing crime, 44 A.L.R.4th 595.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

94 C.J.S. Weapons § 20.

30-7-5. Dangerous use of explosives.

Dangerous use of explosives consists of maliciously exploding, attempting to explode or placing any explosive with the intent to injure, intimidate or terrify another, or to damage another's property.

Whoever commits dangerous use of explosives is guilty of a third degree felony.

History: 1953 Comp., § 40A-7-4, enacted by Laws 1963, ch. 303, § 7-4.

ANNOTATIONS

Construction of former law. - A "water tank" was a "building" within meaning of Laws 1923, ch. 115, § 2 (former 40-15-3, 1953 Comp.), prescribing penalty for malicious use of explosives. *State v. Ornelas*, 42 N.M. 17, 74 P.2d 723 (1937).

Merger with crime of arson. - The crime of dangerous use of explosives merges into a conviction for arson. *State v. Rodriguez*, 113 N.M. 767, 833 P.2d 244 (Ct. App.), cert. denied, 113 N.M. 636, 830 P.2d 553 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Explosions and Explosives §§ 221 to 225.

35 C.J.S. Explosives §§ 12, 13.

30-7-6. Negligent use of explosives.

Negligent use of explosives consists of negligently exploding, attempting to explode or placing any explosive in such a manner as to result in injury to another or to property of another, or in the probability of such injury.

Whoever commits negligent use of explosives is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-5, enacted by Laws 1963, ch. 303, § 7-5.

ANNOTATIONS

Cross-references. - For excavation damage to pipelines and underground utility lines, see 62-14-1 NMSA 1978 et seq.

30-7-7. Unlawful sale, possession or transportation of explosives.

Unlawful sale, possession or transportation of explosives consists of:

A. knowingly selling or possessing any explosive or causing such explosive to be transported without having plainly marked in large letters in a conspicuous place on the box or package containing such explosive the name and explosive character thereof and the date of manufacture. For the purpose of this subsection, the term "explosive" is as defined in Section 2 [30-7-18 NMSA 1978] of the Explosives Act, but shall not include:

(1) explosive materials in medicine and medicinal agents in the forms prescribed by the official United States pharmacopoeia or the national formulary;

(2) small arms ammunition and components thereof;

(3) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches and friction primers intended to be used solely for sporting, recreational or cultural purposes as defined in Section 921(a)(16) [§ 921(a)(4)] of Title 18 of the United States Code, or in antique devices as exempted from the term "destructive device" in Section 921(a)(4) [§ 921(a)(16)] of Title 18 of the United States Code; or

(4) explosive materials transported in compliance with the regulations of the United States department of transportation and agencies thereof; or

B. knowingly transporting or taking any explosive upon or into any vehicle belonging to a common carrier transporting passengers. For the purpose of this subsection, the term "explosives" is as defined in Section 2 of the Explosives Act, but shall not include:

(1) explosive materials in medicines and medicinal agents in the forms prescribed by the official United States pharmacopoeia or the national formulary;

(2) small arms ammunition or components thereof; or

(3) explosive materials transported in compliance with the regulations of the United States department of transportation and agencies thereof.

Whoever commits unlawful sale, possession or transportation of explosives as set forth in Subsection A of this section is guilty of a petty misdemeanor.

Whoever commits unlawful transportation of explosives as set forth in Subsection B of this section is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-7-6, enacted by Laws 1963, ch. 303, § 7-6; 1981, ch. 246, § 7.

ANNOTATIONS

Cross-references. - For possession of deadly weapon or explosive by prisoner, see 30-22-16 NMSA 1978.

Compiler's note. - The reference to 18 U.S.C. § 921(a)(16) in Subsection A(3) seems incorrect, as that section deals with antique devices. Section 921(a)(4) of 18 U.S.C. deals with devices used for sporting, recreational or cultural purposes.

The reference to 18 U.S.C. § 921(a)(4) in Subsection A(3) seems incorrect, as that section deals with the definition of "destructive devices." Section 921(a)(16) of 18 U.S.C. deals with antique devices.

Constitutionality of former law. - Former statute (Laws 1923, ch. 115), by penalizing, in one section, certain methods of transportation of explosives, and, in another section, the handling of explosives maliciously, in certain places, was not unconstitutional as embracing more than one subject. *State v. Ornelas*, 42 N.M. 17, 74 P.2d 723 (1937).

Applicability under former law. - Under former 40-15-1 and 40-15-2, 1953 Comp., relating to marking of explosives and transporting same on passenger cars, no restrictions were pronounced which would be applicable to movement of explosives by individuals or agencies of the state government. 1957-58 Op. Att'y Gen. No. 57-42.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Explosions and Explosives §§ 228 to 233.

35 C.J.S. Explosives § 12.

30-7-8. Unlawful possession of switchblades.

Unlawful possession of switchblades consists of any person, either manufacturing, causing to be manufactured, possessing, displaying, offering, selling, lending, giving away or purchasing any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife, or any knife having a blade which opens or falls or is ejected into position by the force of gravity or by any outward or centrifugal thrust or movement.

Whoever commits unlawful possession of switchblades is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-7-7, enacted by Laws 1963, ch. 303, § 7-7.

ANNOTATIONS

Constitutionality - The terms of this section have specific meanings and can be defined unambiguously. Giving those words their ordinary meanings results in a reasonable and practical construction. Therefore, the statute is not void for vagueness. *State v. Riddall*, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

"Butterfly knife" included within the term "switchblade". - In determining whether a "butterfly knife" constitutes a switchblade, it is of no legal significance that a combination of gravity and centrifugal force is required. The phrase "any outward or centrifugal thrust or movement" suggests a legislative intent to include knives that require a combination of forces to operate. In this case, the words used and the intended purpose of the provision in which the words are contained indicate that the legislature intended to

include a "butterfly knife" within the term "switchblade knife". State v. Riddall, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

Demonstration of switchblade to jury held proper. - Where a defendant was charged with unlawful possession of a switchblade, the trial court did not err in permitting a demonstration of how the knife worked. The issue for the jury in this case was how the knife could be opened. Therefore, the officer's demonstration was properly allowed over the objection made at trial. State v. Riddall, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

Sufficiency of evidence. - Where a defendant was charged with carrying a concealed deadly weapon, the prosecution was not required to prove that the knife could actually be used to inflict great bodily harm; the prosecution needed to prove only that a butterfly knife was a switchblade. Thus there was sufficient evidence that the knife carried by defendant was a switchblade as defined in 30-7-8 NMSA 1978. State v. Riddall, 112 N.M. 78, 811 P.2d 576 (Ct. App. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of state statute proscribing possession or carrying of knife, 47 A.L.R.4th 651.

30-7-9. Firearms; sale and purchase.

Residents of states contiguous to New Mexico may purchase firearms in New Mexico. Residents of New Mexico may purchase firearms in states contiguous to New Mexico.

History: 1953 Comp., § 40A-7-8, enacted by Laws 1969, ch. 122, § 1.

30-7-10. Short title.

Sections 30-7-10 through 30-7-15 NMSA 1978 may be cited as the "Bus Passenger Safety Act."

History: 1978 Comp., § 30-7-10, enacted by Laws 1979, ch. 376, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute, 81 A.L.R.4th 745.

30-7-11. Definitions.

As used in the Bus Passenger Safety Act [30-7-10 to 30-7-15 NMSA 1978]:

A. "bus transportation company" or "company" means any person, groups of persons or corporation providing for-hire transportation to passengers or cargo by bus upon the highways in New Mexico. The term also includes buses owned or operated by or for

local public bodies, school districts, municipalities and by public corporations, boards and commissions; and

B. "bus" means any passenger bus, coach or other motor vehicle having a seating capacity of not less than fifteen passengers operated by a bus transportation company when used for the purpose of carrying passengers or cargo for hire.

History: 1978 Comp., § 30-7-11, enacted by Laws 1979, ch. 376, § 2.

30-7-12. Prohibitions; penalties.

A. It is unlawful to seize or exercise control of a bus by force or violence or by threat of force or violence. Whoever violates the provisions of this subsection is guilty of a third degree felony.

B. It is unlawful to intimidate, threaten or assault any driver, attendant, guard or passenger of a bus with the intent of seizing or exercising control of a bus. Whoever violates the provisions of this subsection is guilty of a fourth degree felony.

History: 1978 Comp., § 30-7-12, enacted by Laws 1979, ch. 376, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 A.L.R.4th 1127.

30-7-13. Carrying weapons prohibited.

A. It is unlawful for any person without prior approval from the company to board or attempt to board a bus while in possession of a firearm or other deadly weapon upon his person or effects and readily accessible to him while on the bus. Any person who violates the provisions of this subsection is guilty of a misdemeanor.

B. Subsection A of this section does not apply to duly elected or appointed law enforcement officers or commercial security personnel in the lawful discharge of their duties.

History: 1978 Comp., § 30-7-13, enacted by Laws 1979, ch. 376, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of statute or ordinance specifically criminalizing passenger misconduct on public transportation, 78 A.L.R.4th 1127.

30-7-14. Weapon detection.

A bus transportation company may employ any reasonable means, including mechanical, electronic or x-ray devices to detect concealed weapons, explosives or other hazardous material in baggage or upon the person of a passenger. The company may take possession of any concealed weapon, explosive or other hazardous material discovered and shall turn such items over to law enforcement officers.

History: 1978 Comp., § 30-7-14, enacted by Laws 1979, ch. 376, § 5.

30-7-15. Weapons; transporting.

Any person wishing to transport a firearm or other deadly weapon on a bus may do so only in accordance with regulations established by the company; provided that any firearm or deadly weapon must be transported in a compartment which is not accessible to passengers while the bus is moving.

History: 1978 Comp., § 30-7-15, enacted by Laws 1979, ch. 376, § 6.

30-7-16. Firearms or destructive devices; receipt, transportation or possession by a felon; penalty.

A. It is unlawful for a felon to receive, transport or possess any firearm or destructive device in this state.

B. Any person violating the provisions of this section shall be guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978].

C. As used in this section:

(1) "destructive devices" means:

(a) any explosive, incendiary or poison gas:

1) bomb;

2) grenade;

3) rocket having a propellant charge of more than four ounces;

4) missile having an explosive or incendiary charge of more than one-quarter ounce;

5) mine; or

6) similar device; and

(b) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which is generally recognized as particularly suitable for sporting purposes; and any combination of parts either designed or intended for use in converting any device into a destructive device as defined in Paragraphs (1) and (2) and from which a destructive device may be readily assembled.

The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon or any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety or similar device;

(2) "felon" means a person who has been convicted in the preceding ten years by a court of the United States or of any state or political subdivision thereof to a sentence of death or one or more years imprisonment and has not been pardoned of the conviction by the appropriate authority; and

(3) "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosion; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer. "Firearm" includes any handgun, rifle or shotgun.

History: Laws 1981, ch. 225, § 1; 1987, ch. 202, § 1.

ANNOTATIONS

The 1987 amendment, effective June 19, 1987, inserted "or destructive devices" in the catchline and "or destructive device" in Subsection A; substituted "fourth degree felony" for "misdemeanor" in Subsection B; and, in Subsection C, added present Paragraph (1) and redesignated former Paragraphs (1) and (2) as present Paragraphs (2) and (3).

Compiler's note. - The reference to "Paragraphs (1) and (2)" in Subsection C(1)(b) seems incorrect, as Paragraph (2) defines "felon." The apparent intended reference is to Paragraph (1) and the last undesignated paragraph of Subsection C(1).

No preemption by federal firearms act. - Although federal law excludes antique firearms from the proscription of receipt of firearms by certain convicted felons while this section does not, this section is not preempted by the federal law. *State v. Haddenham*, 110 N.M. 149, 793 P.2d 279 (Ct. App. 1990).

The defense of duress is available against the charge of felon in possession of a firearm only when no reasonable alternatives are available - a reasonable felon would

resort to possession of a firearm only when committing the offense is the only reasonable alternative. *State v. Castrillo*, 112 N.M. 766, 819 P.2d 1324 (1991).

District court properly refused to submit the defense of duress to the jury, where defendant, a convicted felon, could have contacted the police, or simply avoided his estranged wife after she smashed his car windshield, but instead he chose to arm himself by purchasing a handgun. *State v. Castrillo*, 112 N.M. 766, 819 P.2d 1324 (1991).

No exception for self-defense. - This statute does not exclude from its operation felons who are defending themselves. *State v. Calvillo*, 110 N.M. 114, 792 P.2d 1157 (Ct. App. 1990).

Construed with 31-18-17 NMSA 1978. - Where defendants were convicted of the charge of felon in possession of a firearm contrary to 30-7-16 NMSA 1978, and the defendants were also sentenced as habitual offenders in accordance with 31-18-17 NMSA 1978, the trial court erred in sentencing the defendants as habitual offenders when the same prior felony convictions were relied upon to convict the defendants of the underlying offense of felon in possession of a firearm. *State v. Haddenham*, 110 N.M. 149, 793 P.2d 279 (Ct. App. 1990).

Restoration of firearms privileges. - Firearm privileges are automatically restored when a person successfully completes the period of a deferred sentence. 1988 Op. Att'y Gen. No. 88-03.

Partial pardon by governor limiting right to use firearm. - The governor has the power under the New Mexico Constitution to grant a partial pardon conferring the right to vote and hold public office while denying the right to possess a firearm. 1992 Op. Att'y Gen. No. 92-09.

Use of prior felony. - The state was not prevented from using distinct felonies obtained in the same judgment and sentence for the separate purposes of enhancement under the felon in possession statute and the general habitual offender statute. *State v. Calvillo*, 112 N.M. 140, 812 P.2d 794 (Ct. App. 1991).

Unsubstantiated reference to drug dealer thus gun owner inappropriate. - Repeated references to defendant as a known drug dealer when the state lacked sufficient evidence to convict defendant of possession or distribution of illegal drugs, and instead relied on unsubstantiated hearsay to convince the jury defendant was a "known drug dealer" so, ipso facto, the shotgun must belong to him is prohibited and should be excluded. *State v. Rael*, 117 N.M. 539, 873 P.2d 285 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 79 Am. Jur. 2d Weapons and Firearms § 24.

Propriety of using single prior felony conviction as basis for offense of possessing weapon by convicted felon and to enhance sentence, 37 A.L.R.4th 1168.

Sufficiency of evidence as to nature of firearm in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms, 37 A.L.R.4th 1179.

Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

What amounts to "control" under state statute making it illegal for felon to have possession or control of firearm or other dangerous weapon, 66 A.L.R.4th 1240.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

94 C.J.S. Weapons § 2.

30-7-17. Short title.

Sections 1 through 6 [30-7-17 to 30-7-22 NMSA 1978] of this act may be cited as the "Explosives Act."

History: Laws 1981, ch. 246, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Explosions and Explosives §§ 214 to 237.

35 C.J.S. Explosives § 12.

30-7-18. Definitions.

As used in the Explosives Act [30-7-17 to 30-7-22 NMSA 1978]:

A. "explosive" means any chemical compound or mixture or device, the primary or common purpose of which is to explode and includes but is not limited to dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters; and

B. "explosive device" or "incendiary device" means:

(1) any explosive bomb, grenade, missile or similar device;

(2) any device or mechanism used or created to start a fire or explosion with or without a timing mechanism except cigarette lighters and matches; or

(3) any incendiary bomb or grenade, fire bomb or similar device or any device which includes a flammable liquid or compound and a wick or igniting agent composed of any material which is capable of igniting the flammable liquid or compound.

History: Laws 1981, ch. 246, § 2; 1990, ch. 74, § 1.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, in Subsection B, substituted " 'explosive device' " for " 'explosive' " at the beginning, deleted "dynamite and all other forms of high explosives" at the beginning and "or" at the end of Paragraph (1), added "except cigarette lighters and matches" at the end of Paragraph (2), and made a minor stylistic change in Paragraph (3).

30-7-19. Possession of explosives.

A. Possession of explosives consists of knowingly possessing, manufacturing or transporting any explosive and either intending to use the explosive in the commission of any felony or knowing or reasonably believing that another intends to use the explosive to commit any felony.

B. Any person who commits possession of explosives is guilty of a fourth degree felony.

History: Laws 1981, ch. 246, § 3; 1990, ch. 74, § 2.

ANNOTATIONS

The 1990 amendment, effective May 16, 1990, deleted "or explosive or incendiary device" following "explosives" in the catchline and in Subsections A and B and, in Subsection A, inserted "knowingly", deleted "or any explosive or incendiary device, including any combination of parts from which such device may be made" following "any explosive", deleted "or device or combination of parts thereof " following "the explosive" in two places, and made minor stylistic changes.

30-7-19.1. Possession of explosive device or incendiary device.

A. Possession of an explosive device or incendiary device consists of knowingly possessing, manufacturing or transporting any explosive device or incendiary device or complete combination of parts thereof necessary to make an explosive device or incendiary device. This subsection shall not apply to any fireworks as defined in Section 60-2C-2 NMSA 1978 or any lawfully acquired household, commercial, industrial or sporting device or compound included in the definition of explosive device or incendiary device in Section 30-7-18 NMSA 1978 that has legitimate and lawful commercial,

industrial or sporting purposes or that is lawfully possessed under Section 30-7-7 NMSA 1978.

B. Any person who commits possession of an explosive device or incendiary device is guilty of a fourth degree felony.

History: 1978 Comp., § 30-7-19.1, enacted by Laws 1990, ch. 74, § 3.

30-7-20. Facsimile or hoax bomb or explosive.

Any person who intentionally gives, mails, sends or causes to be sent any false or facsimile bomb or explosive to another person or places or causes to be placed at any location any false or facsimile bomb or explosive, with the intent that any other person thinks it is a real bomb or explosive, is guilty of a fourth degree felony.

History: Laws 1981, ch. 246, § 4.

30-7-21. False report.

A. False report consists of knowingly conveying or causing to be conveyed to any police agency or fire department a false report concerning a fire or explosion or the placement of any explosives or explosive or incendiary device or any other destructive substance and includes, but is not limited to, setting off a fire alarm.

B. Any person who commits false report which causes death or great bodily harm to another is guilty of a fourth degree felony, but if such death or great bodily harm is not caused, the person is guilty of a misdemeanor.

History: Laws 1981, ch. 246, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

30-7-22. Interference with bomb or fire control.

A. Interference with bomb or fire control consists of:

(1) intentionally interfering with the proper functioning of a fire alarm system;

(2) intentionally interfering with the lawful efforts of a fireman or police officer to control or extinguish a fire or to secure the safety of any object reasonably believed to be a bomb, explosive or incendiary device; or

(3) intentionally interfering with the lawful efforts of a fireman or police officer to preserve for investigation or investigate the scene of a fire or explosion to determine its cause.

B. Any person who commits interference with bomb or fire control is guilty of a misdemeanor.

History: Laws 1981, ch. 246, § 6.

ANNOTATIONS

Severability clauses. - Laws 1981, ch. 246, § 9, provides for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of statutes or ordinances imposing civil or criminal penalties on alarm system users, installers, or servicers for false alarms, 17 A.L.R.5th 825.

ARTICLE 8 NUISANCES

30-8-1. Public nuisance.

A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either:

A. injurious to public health, safety, morals or welfare; or

B. interferes with the exercise and enjoyment of public rights, including the right to use public property.

Whoever commits a public nuisance for which the act or penalty is not otherwise prescribed by law is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-1, enacted by Laws 1963, ch. 303, § 8-1.

ANNOTATIONS

Cross-references. - For polluting of water being public nuisance, see 30-8-2 NMSA 1978.

For provisions on abatement of public nuisance, see 30-8-8 NMSA 1978.

For conduct offensive to public well-being, see 30-8-12 NMSA 1978.

For house of prostitution being public nuisance, see 30-9-8 NMSA 1978.

For gambling and gambling houses being public nuisance, see 30-19-8 NMSA 1978.

For provision making forest fire burning without proper precaution a public nuisance, see 30-32-1 NMSA 1978.

Nuisance must affect group of people. - A public nuisance must affect a considerable number of people or an entire community or neighborhood. *Environmental Imp. Div. v. Bloomfield Irrigation Dist.*, 108 N.M. 691, 778 P.2d 438 (Ct. App. 1989).

Acts of municipality under governmental authority. - In the absence of a showing of fraud, collusion, or illegality, a city's constitutional and statutory authority to construct public highways and bridges constitutes a valid defense to a claim of nuisance per se. *City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991).

Acts which the law authorized to be done, if carried out and maintained in the manner authorized by law, where a public entity acts under its governmental authority, do not constitute public nuisances per se. *City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991).

Absent a showing that a project is, or will be, conducted or maintained in a manner contrary to law, a city is lawfully empowered to initiate and construct such project, and the project is not subject to abatement as a public nuisance per se, because the construction, operation, and maintenance of a highway or bridge in a lawful manner does not constitute a public nuisance. *City of Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991).

Contamination of underground water. - Where a sewage treatment facility is operated by a city in a manner which results in the contamination of the underground water to such a degree that it is offensive or dangerous for human consumption or use, is injurious to public health, safety and welfare and interferes with the exercise and enjoyment of public rights, including the right to use public property, the city has created a public nuisance within the meaning of this section. Relief in the nature of a mandatory injunction requiring abatement of the nuisance by ordering the city to extend its waterlines to residencies in and outside its limits free of hookup charges would not be a "donation" in violation of N.M. Const., art. IX, § 14. *State ex rel. New Mexico Water Quality Control Comm'n v. City of Hobbs*, 86 N.M. 444, 525 P.2d 371 (1974).

Launching rockets. - Construction and launching of rockets without adequate supervision and without adequate safeguards being provided to protect the persons involved as well as other persons and property which could be harmed by such a dangerous mechanism would be a public nuisance under this section. 1961-62 Op. Att'y Gen. No. 61-134.

Entrance to house. - "Stoop" or concrete platform 14 1/2 inches off ground located outside back door of premises which was only means of entrance and exit was not a public nuisance as defined by statute, nor a private nuisance. *Jellison v. Gleason*, 77 N.M. 445, 423 P.2d 876 (1967).

Illegal sale of alcoholic beverages is not a statutory nuisance per se nor is it a common law nuisance per se. *State v. Davis*, 65 N.M. 128, 333 P.2d 613 (1958).

Law reviews. - For note, "The Availability of the Affirmative Defenses of Assumption of Risk and the 'Sale Defense' Against Common Law Public Nuisance Actions; *United States v. Hooker Chemicals & Plastics Corp.*," see *Nat. Resources J.* 941 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 58 Am. Jur. 2d Nuisances §§ 35, 36, 403, 404.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another to subject him to the operation of a statute providing for the abatement of nuisances or prescribing a pecuniary penalty therefor, 12 A.L.R. 431, 121 A.L.R. 642.

Computer as nuisance, 45 A.L.R.4th 1212.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 A.L.R.4th 530.

Legal aspects of speed bumps, 60 A.L.R.4th 1249.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Preemption, by provisions of Clean Air Act (42 USCS §§ 7401 et seq.), of federal common law of nuisance in area of air pollution, 61 A.L.R. Fed. 859.

66 C.J.S. Nuisances §§ 2, 159.

30-8-2. Polluting water.

Polluting water consists of knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use. Polluting water constitutes a public nuisance.

For the purpose of this section, "body of water" means any public river or its tributary, stream, lake, pond, reservoir, acequia, canal, ditch, spring, well or declared or known ground waters.

Whoever commits polluting water for which the act or penalty is not otherwise prescribed by law is guilty of a misdemeanor.

History: 1953 Comp., § 40A-8-2, enacted by Laws 1963, ch. 303, § 8-2; 1993, ch. 291, § 19.

ANNOTATIONS

Cross-references. - For Water Quality Act, relating to water pollution, see 74-6-1 NMSA 1978 et seq.

The 1993 amendment, effective June 18, 1993, inserted "for which the act or penalty is not otherwise prescribed by law" in the last paragraph and made a minor stylistic change.

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 134, 135.

Liability for injury to property occasioned by oil, water or the like, flowing from well, 19 A.L.R.2d 1025.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

93 C.J.S. Waters § 57.

30-8-3. Refuse defined.

Refuse means any article or substance:

A. which is commonly discarded as waste; or

B. which, if discarded on the ground, will create or contribute to an unsanitary, offensive or unsightly condition.

Refuse includes, but is not limited to, the following items or classes of items: waste food; waste paper and paper products; cans, bottles or other containers; junked household furnishings and equipment; junked parts or bodies of automobiles and other metallic junk or scrap; portions or carcasses of dead animals; and collections of ashes, dirt, yard trimmings or other rubbish.

History: 1953 Comp., § 40A-8-3, enacted by Laws 1963, ch. 303, § 8-3.

30-8-4. Littering.

A. Littering consists of discarding refuse:

(1) on public property in any manner other than by placing the refuse in a receptacle provided for the purpose by the responsible governmental authorities, or otherwise in accordance with lawful direction; or

(2) on private property not owned or lawfully occupied or controlled by the person, except with the consent of the owner, lessee or occupant thereof.

B. Whoever commits littering is guilty of a petty misdemeanor. The use of uniform traffic citations is authorized for the enforcement of this section. The court may to the extent permitted by law, as a condition to suspension of any other penalty provided by law, require a person who commits littering to pick up and remove from any public place or any private property, with prior permission of the legal owner, any litter deposited thereon.

C. Any jail sentence imposed pursuant to Subsection B of this section may be suspended, in the discretion of the magistrate or judge, upon conditions that the offender assist in litter clean-up in the jurisdiction for a period not to exceed the length of the suspended sentence.

History: 1953 Comp., § 40A-8-4, enacted by Laws 1963, ch. 303, § 8-4; 1975, ch. 199, § 1; 1977, ch. 79, § 1; 1981, ch. 256, § 1.

ANNOTATIONS

Cross-references. - For municipal refuse collection and disposal, see 3-48-1 NMSA 1978 et seq.

For provisions relating to uniform traffic citations, see 66-8-128 NMSA 1978 et seq.

30-8-5. Enforcement.

The state game commission may designate trained employees of the commission vested with police powers to enforce the provisions of Section 30-8-4 NMSA 1978. In addition, members of the state police, county sheriffs and their deputies, police officers and those employees of the state park and recreation commission [state park and recreation division of the energy, minerals, and natural resources department] vested with police powers shall enforce the provisions of that section.

History: 1953 Comp., § 40A-8-4.1, enacted by Laws 1975, ch. 199, § 2.

ANNOTATIONS

Bracketed material. - The bracketed reference to the state park and recreation division of the energy, minerals and natural resources department was inserted by the compiler. Laws 1977, ch. 254, § 4, abolishes the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act. Laws 1987, ch. 234 repeals the provisions relating to the natural resources department and creates the energy, minerals, and natural resources department, including the state park and recreation division. See 9-5A-1 NMSA 1978 et seq. The bracketed material was not enacted by the legislature and is not a part of the law.

30-8-6. Posting; notice to public.

The state highway department and the state park and recreation commission [state park and recreation division of the natural resources department] shall post in areas under their control pertinent portions of Section 30-8-4 NMSA 1978 and pleas for the public to take their refuse with them and to dispose of it properly.

History: 1953 Comp., § 40A-8-4.2, enacted by Laws 1975, ch. 199, § 3.

ANNOTATIONS

State park and recreation division. - For abolishment of the state park and recreation commission and construction of references thereto to mean the state park and recreation division of the natural resources department, see note under 30-8-5 NMSA 1978.

30-8-7. Public education.

The state game commission, the state highway department, the state park and recreation commission [state park and recreation division of the natural resources department] and the environmental improvement agency [department of environment] are encouraged to institute public education programs through the news media in order to inform the public of the litter problem in New Mexico and of individual efforts that can be made to assist in the abatement of the problem. In addition, these agencies are authorized to work with industry organizations in a joint antilitter campaign so that additional effect may be given to the antilitter effort in New Mexico.

History: 1953 Comp., § 40A-8-4.3, enacted by Laws 1975, ch. 199, § 4.

ANNOTATIONS

Bracketed material. - The bracketed reference to the state park and recreation division of the energy, minerals and natural resources department was inserted by the compiler. Laws 1977, ch. 254, § 4, abolishes the parks and recreation commission. Section 3 of that act established the natural resources department, consisting of several divisions, including the state park and recreation division, which was created by § 11 of the act.

Laws 1987, ch. 234 repeals the provisions relating to the natural resources department and creates the energy, minerals, and natural resources department, including the state park and recreation division. See 9-5A-1 NMSA 1978 et seq. The bracketed material was not enacted by the legislature and is not a part of the law.

30-8-8. Abatement of a public nuisance.

A. Except as herein provided, an action for the abatement of a public nuisance shall be governed by the general rules of civil procedure.

B. A civil action to abate a public nuisance may be brought, by verified complaint in the name of the state without cost, by any public officer or private citizen, in the district court of the county where the public nuisance exists, against any person, corporation or association of persons who shall create, perform or maintain a public nuisance.

C. When judgment is against the defendant in an action to abate a public nuisance, he shall be adjudged to pay all court costs and a reasonable fee for the complainant's attorney, when the suit is not prosecuted exclusively by the attorney general or a district attorney.

History: 1953 Comp., § 40A-8-5, enacted by Laws 1963, ch. 303, § 8-5.

ANNOTATIONS

Cross-references. - For admissibility of evidence in proceedings hereunder, see 30-9-7 NMSA 1978.

For control of contagious diseases and dangerous conditions by health authorities, see 24-1-15 to 24-1-19, 24-1-21 NMSA 1978.

For procedure in seeking injunction, see Rules 1-065 and 1-066 SCRA 1986.

Statute provides alternative means for abating noxious odors. - Where air quality standards or regulations have not been established as to what constitutes "air pollution" and thus no violation of the Air Quality Control Act (74-2-1 to 74-2-17 NMSA 1978) or regulations and standards is apparent, the public nuisance law may provide an alternative means for the environmental improvement division to abate noxious odors. 1978 Op. Att'y Gen. No. 78-12.

Purpose of former law. - Laws 1921, ch. 90 (40-34-15, 1953 Comp. et seq.) providing for abatement by injunction of places of lewdness, assignation or prostitution, was intended to supplement Laws 1921, ch. 69 (former 40-34-1, 1953 Comp., et seq.) prohibiting prostitution, as "red light abatement laws." State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Meaning of "lewdness" in former law. - "Lewdness" as used in 40-34-1 to 40-34-21, 1953 Comp., providing for abatement of nuisance connected with lewdness, assignation or prostitution, did not apply to showing of motion pictures in regular business establishment; it was intended by the legislature to be limited to acts in connection with "assignation" or "prostitution," and if dissociated from "assignation or prostitution" would have been too vague and indefinite to comply with the due process of law requirements of the fourteenth amendment. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Injunction authorized. - Injunctive relief could be employed to protect the public health, morals, safety and welfare from irreparable injury by a public nuisance. State ex rel. Marron v. Compere, 44 N.M. 414, 103 P.2d 273 (1940).

Crime not enjoined as such. - Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. State v. Robertson, 63 N.M. 74, 313 P.2d 342 (1957).

Motion picture. - Injunction of motion picture as nuisance because of "lewdness" would be in the nature of censorship and prior restraint. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Bond as enforcement device. - A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant from using, occupying or maintaining a certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. State v. Robertson, 63 N.M. 74, 313 P.2d 342 (1957).

Proceeding under former law criminal in nature. - Former statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that lewdness, assignation or prostitution existed was criminal in nature and the complaint was an action in the nature of a criminal proceeding. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Civil action. - Action brought under general equity powers for protection of public morals is a civil action. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Standing to sue for pollution abatement. - Action brought by attorney general and certain private citizens for injunction to abate alleged public nuisance caused by emissions from coal-burning power plant should have been dismissed in trial court since

environmental improvement agency (now the department of environment) had primary jurisdiction over pollution control and means were available to compel agency to perform its duties, should it fail to do so. *State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 85 N.M. 165, 510 P.2d 98 (1973).

Sufficiency of complaint. - Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. *State v. Robertson*, 63 N.M. 74, 313 P.2d 342 (1957).

Injunction under general equity powers of court to protect public morals could not be had where complaint was brought under statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that "lewdness, assignation or prostitution" existed there. *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957).

Recovery of pecuniary damages is not provided by this section. Thus, a private plaintiff's attempt to recover pecuniary damages for the pollution of his groundwater must fail. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838 (D.N.M. 1994).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 *Nat. Resources J.* 653 (1969).

For note, "*Gabaldon v. Sanchez: New Developments in the Law of Nuisance, Negligence and Trespass*," see 9 *N.M.L. Rev.* 367 (1979).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 58 *Am. Jur. 2d Nuisances* §§ 229 to 267.

Carwash as nuisance, 4 *A.L.R.4th* 1308.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 *A.L.R.4th* 456.

Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 *A.L.R.4th* 395.

Business interruption, without physical damage, as actionable, 65 *A.L.R.4th* 1126.

What constitutes special injury that entitles private party to maintain action based on public nuisance - modern cases, 71 *A.L.R.4th* 13.

66 *C.J.S. Nuisances* §§ 102 to 110.

30-8-8.1. Abatement of house of prostitution.

A. When the public nuisance sought to be abated under the provisions of Section 30-8-8 NMSA 1978 is a house of prostitution, as defined in Section 30-9-8 NMSA 1978, in addition to injunctive relief, the remedies and presumptions provided in this section apply.

B. For the purposes of this section and Section 30-8-8 NMSA 1978, two or more convictions of any person or persons occurring at least one week apart within a period of one year for violation of either Section 30-9-2 or 30-9-3 NMSA 1978 arising out of conduct engaged in at the place described in an abatement action creates a presumption that the place is a house of prostitution. However, this presumption shall not arise unless the person against whom the abatement action is brought is shown to have had actual knowledge or to have received written notice from law enforcement officials of the convictions upon which the presumption is based. The knowledge must have been acquired or the notice given no more than thirty days after the date of the convictions. For the purpose of this section the "date of the convictions" is the date upon which a plea of guilty or nolo contendere or a judgment of guilty entered in the case charging the crime is final and unappealable.

C. If, in an abatement action brought under Section 30-8-8 NMSA 1978, a binding admission is made by the defendant or the court concludes that a house of prostitution exists at the location alleged, the court may, as part of its judgment:

(1) direct the removal from the house of prostitution all movable personal property used in conducting the house of prostitution and shall direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; and

(2) order the closing of the house of prostitution for a period of one year and prohibit any person entering it except under conditions specified in the order.

D. If a judgement entered under the provisions of Subsection C of this section includes the provisions of Paragraph (2) of that subsection, the court shall include in its judgment a provision for permitting the owner of the premises ordered closed to take possession of them if he files a bond with sureties to be approved by the court in an amount equal to the full value of the property conditioned upon his promise to abate the nuisance immediately and prevent the reoccurrence of the nuisance for one year thereafter.

History: 1978 Comp., § 30-8-8.1, enacted by Laws 1989, ch. 114, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Disorderly Houses §§ 40 to 48.

27 C.J.S. Disorderly Houses § 18.

30-8-9. Abandonment of dangerous containers.

Abandonment of dangerous containers consists of any person:

A. abandoning, discarding or keeping in any place accessible to children, any refrigerator, icebox, freezer, airtight container, cabinet or similar container, of a capacity of one and one-half cubic feet or more, which is no longer in use, without having the attached doors, hinges, lids or latches removed or without sealing the doors or other entrances so as to make it impossible for anyone to be imprisoned therein; or

B. who, being the owner, lessee or manager of any premises, knowingly permits any abandoned or discarded refrigerator, icebox, freezer, airtight container, cabinet or similar container of a capacity of one and one-half cubic feet or more, and which remains upon such premises in a condition whereby a child may be imprisoned therein.

Whoever commits abandonment of dangerous containers is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-6, enacted by Laws 1963, ch. 303, § 8-6.

30-8-10. Placing injurious substance on highways.

Placing injurious substances on highways consists of any person throwing, depositing or placing any glass, bottles, nails, tacks, hoops, wire, cans or any other material or substances upon any public highway, which cause or which are likely to cause injury to any person, animal or vehicle traveling upon such public highway.

Whoever commits placing injurious substances on highways is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-7, enacted by Laws 1963, ch. 303, § 8-7.

ANNOTATIONS

Cross-references. - For improper placing of wires on highways, see 67-8-13 and 67-8-14 NMSA 1978.

For Clean Highways Act, see 67-15-1 to 67-15-4 NMSA 1978.

30-8-11. Illegal prescribing of medicine.

Illegal prescribing of medicine consists of any physician or other person, while under the influence of any alcoholic beverage or narcotic, prescribing or compounding for any other person, any poison, drug or medicine.

Whoever commits illegal prescribing of medicine while under the influence of any alcoholic beverage or narcotic is guilty of a misdemeanor.

History: 1953 Comp., § 40A-8-8, enacted by Laws 1963, ch. 303, § 8-8.

30-8-12. Conduct offensive to public well-being.

Conduct offensive to public well-being consists of any person:

- A. who is the owner or tenant in possession of any premises located within any incorporated municipality, permitting any privy or cesspool upon the premises owned or occupied by him, to become a menace to public health or constitutes [to constitute] a condition offensive to the public;
- B. erecting a carbon black plant closer than five miles from the limits of any incorporated municipality;
- C. erecting any slaughterhouse or place for the slaughter of animals within one mile from the limits of any incorporated municipality, without the written consent of the governing body of such municipality;
- D. spitting upon or in any public building, store, church, house, school or other building in which persons frequently congregate, or upon or in any public carrier, public sidewalk or roadway; or
- E. conducting or participating in any physical or mental endurance contest for a period longer than twenty-four hours or conducting or participating in any such endurance contest within any period of one hundred sixty-eight hours [sic]; provided this subsection shall not apply to any athletic contest of schools, colleges or universities of the state.

Whoever commits conduct offensive to public well-being is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-9, enacted by Laws 1963, ch. 303, § 8-9.

ANNOTATIONS

Cross-references. - For public nuisances in general, see 30-8-1 NMSA 1978.

For abatement of public nuisance, see 30-8-8 NMSA 1978.

For licensing of butcher, slaughterer, etc. by New Mexico livestock board, see 77-17-1 NMSA 1978 et seq.

For restrictions on proximity of slaughterhouse to residence, see 77-17-8 NMSA 1978.

Purpose of restrictions on endurance contests. - Laws 1941, ch. 49, § 1 (former 40-35-24, 1953 Comp.) prohibited contests which put the human machine to a test to determine the maximum length of time it could engage in a contest without being

eliminated because of physical or mental inability to carry on. The evil sought to be remedied was a public exhibition of endurance to the point of undue suffering or cruelty, detrimental to the physical or mental well-being of the participants or the emotions of the spectators. State ex rel. Adams v. Crowder, 46 N.M. 20, 120 P.2d 428 (1941).

Meaning of "endurance contest". - The endurance contest which the legislature had in mind in enacting Laws 1941, ch. 49, § 1 (former 40-35-24, 1953 Comp.) was a continuous and everlasting chess game, bridge game, foot race, bicycle race, "walkathon" or other contest or game of like nature where a contestant or player is eliminated because he is so physically or mentally weary that he lacks physical or mental stamina to continue in the game and not because of his opponent's superior skill. State ex rel. Adams v. Crowder, 46 N.M. 20, 120 P.2d 428 (1941).

30-8-13. Unlawfully permitting livestock upon public highways.

A. Unlawfully permitting livestock upon public highways consists of any owner or custodian of livestock negligently permitting his livestock to run at large upon any part of a public highway which is fenced on both sides.

B. Every owner or custodian of livestock shall exercise diligence to keep his livestock off the state public fenced highways, and shall promptly report to the state highway department any damage or disrepair discovered of fences maintained by the department adjoining his property. The state highway department shall:

(1) unless it makes a fact determination that no livestock can enter the highway from a portion left unfenced, construct, inspect regularly and maintain fences along all highways under its jurisdiction which are constructed or improved from time to time after the effective date of this section, and in addition thereto provide cattle underpasses, water pipelines and cattle guards as may be necessary; and

(2) post proper signs along all highways under its jurisdiction which are not fenced on both sides and which are located adjacent to property containing livestock. The signs shall be located at intervals of not less than two miles along such unfenced highways and shall warn motorists that loose livestock may be encountered and that caution should be used.

C. Each board of county commissioners shall similarly fence or post signs along highways within its jurisdiction when the domestic livestock are deemed a hazard to public health and safety as may be determined by the county commissioners.

D. A motorist using unfenced roads or highways which have livestock warning signs shall use due care to avoid collisions with livestock.

E. Whoever commits unlawfully permitting livestock upon public highways is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-8-10, enacted by Laws 1963, ch. 303, § 8-10; 1966, ch. 44, § 1; 1967, ch. 180, § 1.

ANNOTATIONS

Cross-references. - For provision prohibiting riding or driving animals on highway in dark or permitting livestock upon fenced highway, and giving nonnegligent owners of livestock ranging in pastures through which unfenced highways pass immunity for damages occasioned by collisions with vehicles, see 66-7-363 NMSA 1978.

Construction. - Inasmuch as both this section and 66-7-363 NMSA 1978 now provide for negligence in permitting livestock to run at large or wander or graze upon fenced highway, they can both be read together. *Tapia v. McKenzie*, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971).

Purpose of section is to protect motoring public. *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966); *Fireman's Fund Ins. Co. v. Tucker*, 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980); *Roderick v. Lake*, 108 N.M. 696, 778 P.2d 443 (Ct. App. 1989).

Duty of department under section. - The Department has a duty to either construct fences along all public highways or, as an alternative to fencing, to afford protection to the motoring public in one of the following ways: make a fact determination that no livestock can enter the highway through portions left unfenced under Subsection B(1); place warning signs on unfenced highways under Subsection B(2); or enter agreements with owners or lessees of property where that owner or lessee assumes full responsibility for constructing and maintaining livestock fencing to prevent livestock from entering the highway under 30-8-14A NMSA 1978. *Madrid v. New Mexico State Hwy. Dep't*, 117 N.M. 171, 870 P.2d 133 (Ct. App. 1994).

Fence designed with gaps. - Under 30-8-13 and -14 NMSA 1978, the highway could be designed with gaps in the fences, provided that the design also include coverage for the gaps by one of the protective measures outlined in those sections. *Madrid v. New Mexico State Hwy. Dep't*, 117 N.M. 171, 870 P.2d 133 (Ct. App. 1994).

Highway department has responsibility for construction and maintenance of fences along state highways adjacent to property of cattle owners. *Fireman's Fund Ins. Co. v. Tucker*, 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980).

Duty is not owed to pedestrians. - The state highway department's only duty under the statute is to construct and maintain the fences in such a way as to prohibit livestock from entering the highway. This section does not contain any language that would place a duty on the department to construct and maintain the fences in order to prohibit pedestrians from crossing the road. *Lerma ex rel. Lerma v. State Hwy. Dep't*, 117 N.M. 781, 877 P.2d 1085 (1994).

Sovereign immunity not applicable to violation of section. - If the primary purpose of the highway fence is to keep the highway safe for the motoring public, rather than to keep trespassers off private land, then the effect of 41-4-11 NMSA 1978 is to lift the bar of sovereign immunity in suits against the highway department for alleged violations of this section. *Fireman's Fund Ins. Co. v. Tucker*, 95 N.M. 56, 618 P.2d 894 (Ct. App. 1980).

Herd not "at large". - Horses being herded along road by pickup and two mounted herdsman were not running "at large" or wandering or grazing on highway. *Knox v. Trujillo*, 72 N.M. 345, 383 P.2d 823 (1963).

Applicability. - Former 40-23-4, 1953 Comp., making it unlawful to negligently permit or allow livestock to run at large upon fenced highways, had no application to horses being driven along highway. *Knox v. Trujillo*, 72 N.M. 345, 383 P.2d 823 (1963).

Duty of livestock owner. - The owner of livestock has a duty to care for his property as a reasonable man, and he may be liable for injuries to motorists resulting from collisions with his animals due to his negligence in permitting them to be on the highway. *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966).

Reasonable care a jury question. - It is for the trier of the facts to determine whether the owner of the animal has used reasonable care to restrain his livestock. *Mitchell v. Ridgway*, 77 N.M. 249, 421 P.2d 778 (1966).

Negligence prerequisite to liability. - The basis of any liability on the part of defendant in wrongful death action where decedent collided with defendant's cow on highway and was killed would be negligence. *Tapia v. McKenzie*, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971).

In this state it is necessary that negligence be shown on the part of the owner of livestock running at large upon the public highways before liability will attach against him for damages or losses sustained by others by reason thereof. *Steed v. Roundy*, 342 F.2d 159 (10th Cir. 1965).

Negligence not shown. - Evidence that defendant's cow got onto highway by crossing a cattle guard in fence on north side of highway right-of-way did not show negligence on defendant's part, since the cattle guard and fence belonged to state highway department, and there was nothing to show that defendant knew or should have known that his cow could or would cross cattle guard. *Tapia v. McKenzie*, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973).

Since cow tracks along the south side of a highway right-of-way which permitted inference that cow with which plaintiff's decedent collided came through gate in south fence also gave rise to inference that cow crossed highway department cattle guard, crossing to south side on hard surface that would not show tracks, and then began wandering along south side, the proof was insufficient to support a finding of negligence

on part of defendant owner on the theory that the cow came through the south gate. *Tapia v. McKenzie*, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973).

Where plaintiff's car collided with defendant's horse on a highway, defendant was not liable where defendant had no knowledge of his horses being on the highway and neighbor's horse released defendant's horses by kicking their gate down. *Steed v. Roundy*, 342 F.2d 159 (10th Cir. 1965).

Res ipsa loquitur. - Plaintiff arguing *res ipsa loquitur* in wrongful death suit occasioned by collision of decedent with defendant's cow, failed to sustain burden of proving that case was of type which ordinarily does not occur in absence of negligence. *Tapia v. McKenzie*, 85 N.M. 567, 514 P.2d 618 (Ct. App. 1973).

Contributory negligence. - Actions of plaintiff owner of herd of 22 unbridled horses stopped by himself and two mounted horsemen at intersection preparatory to crossing road did not amount to negligence, nor did they proximately contribute to accident in which lumber truck negligently struck five horses, killing four of them. *Knox v. Trujillo*, 72 N.M. 345, 383 P.2d 823 (1963).

Summary judgment improper. - In wrongful death suit occasioned by decedent's collision with cow belonging to defendant which was on fenced highway at night, defendant was not entitled to summary judgment where he failed to make *prima facie* showing of lack of negligence on his part. *Tapia v. McKenzie*, 83 N.M. 116, 489 P.2d 181 (Ct. App. 1971).

Law reviews. - For comment on *Grubb v. Wolfe*, 75 N.M. 601, 408 P.2d 756 (1965), see 6 *Nat. Resources J.* 306 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Owner's liability, under legislation forbidding domestic animals to run at large on highways, as dependent on negligence, 34 *A.L.R.2d* 1285.

Liability of person, other than owner of animal or owner or operator of motor vehicle, for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 *A.L.R.4th* 132.

Liability of owner or operator of motor vehicle for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 21 *A.L.R.4th* 159.

Liability of owner of animal for damage to motor vehicle or injury to person riding therein resulting from collision with domestic animal at large in street or highway, 29 *A.L.R.4th* 431.

Liability for damage to motor vehicle or injury to person riding therein from collision with runaway horse, or horse left unattended or untied in street, 49 *A.L.R.4th* 653.

Liability of governmental entity for damage to motor vehicle or injury to person riding therein resulting from collision between vehicle and domestic animal at large in street or highway, 52 A.L.R.4th 1200.

Liability for killing or injuring, by motor vehicle, livestock or fowl on highway, 55 A.L.R.4th 822.

30-8-14. Highway department; agreements with owners or lessees of highway frontage; provisions.

A. Notwithstanding the responsibility of the highway department under the provisions of Section 30-8-13 NMSA 1978 to construct, inspect regularly and maintain fences along all highways under its jurisdiction, the highway department may enter into an agreement with an owner or lessee of property adjoining a public highway to keep a specified section of the highway frontage unfenced for use as roadside business; provided, however, that such owner or lessee, whoever is party to the agreement, shall agree:

(1) to assume full responsibility for constructing and maintaining livestock fencing on the property which he owns or leases in such a manner so as to prevent the entry of livestock onto the highway; and

(2) to be liable for any damage caused by livestock entering upon the public highway from his property if the property in question is not fenced or the fencing not maintained pursuant to the agreement with the highway department.

B. Nothing in this section shall preclude an owner or lessee who has entered into an agreement with the highway department pursuant to this section from also being subject to the penalties set out in Section 30-8-13 NMSA 1978.

History: 1953 Comp., § 40A-8-10.1, enacted by Laws 1975, ch. 283, § 1.

ANNOTATIONS

Duty of department under section. - The Department has a duty to either construct fences along all public highways or, as an alternative to fencing, to afford protection to the motoring public in one of the following ways: make a fact determination that no livestock can enter the highway through portions left unfenced under 30-8-13B(1); place warning signs on unfenced highways under 30-8-13B(2) NMSA 1978; or enter agreements with owners or lessees of property where that owner or lessee assumes full responsibility for constructing and maintaining livestock fencing to prevent livestock from entering the highway under Subsection A of this section. *Madrid v. New Mexico State Hwy. Dep't*, 117 N.M. 171, 870 P.2d 133 (Ct. App. 1994).

Fence designed with gaps. - Under 30-8-13 and -14 NMSA 1978, the highway could be designed with gaps in the fences, provided that the design also include coverage for

the gaps by one of the protective measures outlined by those sections. *Madrid v. New Mexico State Hwy. Dep't*, 117 N.M. 171, 870 P.2d 133 (Ct. App. 1994).

ARTICLE 9 SEXUAL OFFENSES

30-9-1. Enticement of child.

Enticement of child consists of:

A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [30-9-1 to 30-9-9 NMSA 1978] of the Criminal Code; or

B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

History: 1953 Comp., § 40A-9-10, enacted by Laws 1963, ch. 303, § 9-10.

ANNOTATIONS

Cross-references. - For sexual exploitation of children, see 30-6A-1 NMSA 1978 et seq.

For sexually oriented material harmful to minors, see 30-37-1 NMSA 1978 et seq.

Meaning of Article 9 of the Criminal Code. - The words "Article 9 of the Criminal Code" refer to Article 9 of Laws 1963, ch. 303, the unrepealed portions of which are compiled herein as 30-9-1 to 30-9-4 and 30-9-5 to 30-9-9 NMSA 1978.

"Enticement" means to incite or instigate, to allure, attract or lead astray; it indicates an intentional act. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Not lesser included offense of criminal sexual penetration. - The offense of enticement of a child is not a lesser included offense of criminal sexual penetration. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Meaning of former law not uncertain. - The words "for evil purposes" in Laws 1855-1856, p. 90 (40-39-9, 1953 Comp.), defining the crime of enticing away and seducing minor, were not so vague or indefinite in their meaning as to render uncertain what acts it was intended to penalize. *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915).

Possession of minor girl. - A man who had a minor girl in his possession for evil purposes was guilty, whether she had been enticed away or carried off by him. *State v. Martin*, 28 N.M. 489, 214 P. 575 (1923); *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915); *State v. Chitwood*, 28 N.M. 484, 214 P. 575 (1923).

Completion of offense in evil intent. - The gravamen of charge that defendant had a female minor in his possession for evil purposes, to wit: sexual intercourse, was the evil purpose and intent of the possession, so that the offense was complete from the instant the accused formed the evil intent and purpose of sexual intercourse, regardless of whether it ever came about. *State v. Phipps*, 47 N.M. 316, 142 P.2d 550 (1943).

Applicability of former law to parent. - Under 40-39-9, 1953 Comp., the person or persons who could be guilty of having a minor in their possession for evil purposes must be someone different than the parent, relation or guardian under whose care she must have been. *State v. Green*, 69 N.M. 43, 363 P.2d 1036 (1961).

Where prosecuting witness was in lawful care of defendant, her adoptive father, defendant's conviction under 40-39-9, 1953 Comp., for having her in his possession for evil purposes, to wit sexual intercourse, was reversed. *State v. Green*, 69 N.M. 43, 363 P.2d 1036 (1961).

Charging offense. - Where, in charging the offense, the words "for the purpose of unlawful sexual intercourse" were used, the quoted phrase did not describe an act of fornication only, since an act of sexual intercourse was lawful or unlawful according to the relation of the parties. *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915).

Conclusions of jury sustained. - Where jury had opportunity to see the witnesses, heard their testimony and concluded that sexual intercourse had taken place, conviction would be sustained even though it necessitated the rejection of the truth of some of the state's testimony in the case. *State v. Phipps*, 47 N.M. 316, 142 P.2d 550 (1943).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of statutes or ordinances regulating sexual performance by child, 21 A.L.R.4th 239.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

30-9-2. Prostitution.

Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.

As used in this section "sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent

and with any object of the genital or anal opening of another, whether or not there is any emission.

Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

History: 1953 Comp., § 40A-9-11, enacted by Laws 1963, ch. 303, § 9-11; 1981, ch. 233, § 1; 1989, ch. 132, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "a sexual act" for "sexual penetration" in the first and second paragraphs, and inserted "masturbation of another" in the second paragraph.

Constitutionality. - This section does not violate the equal protection clause of the fourteenth amendment of the United States constitution or the equal rights amendment of the New Mexico constitution. *State v. Sandoval*, 98 N.M. 417, 649 P.2d 485 (Ct. App. 1982).

Possession of woman for unlawful purposes. - The having in possession of a woman for purposes of unlawful sexual intercourse was criminal. *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915).

Indictment insufficient. - An indictment was insufficient if it failed to charge the appointment with the female and receiving her into the automobile, for the purposes of prostitution described in Laws 1929, ch. 69, § 1 (former 40-34-1, 1953 Comp.). *State v. Newman*, 29 N.M. 106, 219 P. 794 (1923).

Former laws supplementary. - Laws 1921, ch. 90 (40-34-15, 1953 Comp., et seq.) providing for abatement by injunction of places of lewdness, assignation or prostitution, was intended to supplement Laws 1921, ch. 69 (40-34-1, 1953 Comp., et seq.) prohibiting prostitution as "red light abatement laws." *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Prostitution §§ 1 to 30.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Laws prohibiting or regulating "escort services," "outcall entertainment" or similar services used to carry on prostitution, 15 A.L.R.5th 900.

73 C.J.S. Prostitution and Related Offenses §§ 2 to 20.

30-9-3. Patronizing prostitutes.

Patronizing prostitutes consists of:

A. entering or remaining in a house of prostitution or any other place where prostitution is practiced, encouraged or allowed with intent to engage in a sexual act with a prostitute; or

B. knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another.

As used in this section, "a sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or an anal opening of another whether or not there is any emission.

Whoever commits patronizing prostitutes is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

History: 1953 Comp., § 40A-9-12, enacted by Laws 1963, ch. 303, § 9-12; 1981, ch. 233, § 2; 1989, ch. 132, § 2.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "a sexual act" for "sexual penetration" throughout the section, in Subsection B inserted "or one believed by the offeror to be a prostitute", inserted "masturbation of another" in the next-to-last undesignated paragraph, and substituted "an anal" for "oral" in the next-to-last undesignated paragraph.

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

30-9-4. Promoting prostitution.

Promoting prostitution consists of any person, acting other than as a prostitute or patron of a prostitute:

A. knowingly establishing, owning, maintaining or managing a house of prostitution or a place where prostitution is practiced, encouraged or allowed, or participating in the establishment, ownership, maintenance or management thereof;

B. knowingly entering into any lease or rental agreement for any premises which a person partially or wholly owns or controls, knowing that such premises are intended for use as a house of prostitution or as a place where prostitution is practiced, encouraged or allowed;

C. knowingly procuring a prostitute for a house of prostitution or for a place where prostitution is practiced, encouraged or allowed;

D. knowingly inducing another to become a prostitute;

E. knowingly soliciting a patron for a prostitute or for a house of prostitution or for any place where prostitution is practiced, encouraged or allowed;

F. knowingly procuring a prostitute for a patron and receiving compensation therefor;

G. knowingly procuring transportation for, paying for the transportation of or transporting a person within the state with the intention of promoting that person's engaging in prostitution;

H. knowingly procuring through promises, threats, duress or fraud any person to come into the state or causing a person to leave the state for the purpose of prostitution; or

I. under pretense of marriage, knowingly detaining a person or taking a person into the state or causing a person to leave the state for the purpose of prostitution.

Whoever commits promoting prostitution is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-9-13, enacted by Laws 1963, ch. 303, § 9-13; 1981, ch. 233, § 3.

ANNOTATIONS

Cross-references. - For sexual exploitation of children by prostitution, see 30-6A-4 NMSA 1978.

Suspension of sentence set aside. - Substantial evidence that defendant permitted certain premises which were under her control to be used for purposes of prostitution, lewdness and assignation, supported judgment of trial court in setting aside order of suspension of one month jail sentence imposed for keeping a house of prostitution. State v. Snyder, 28 N.M. 387, 212 P. 736 (1923).

Indictment sufficient. - A count in which it was charged that defendant, on a certain day, at a certain place, did, unlawfully, set up and keep a house of prostitution in a certain town, within seven hundred feet of a certain theater, contrary to the form of the statute, sufficiently conformed with the statute (Laws 1901, ch. 84, § 1). Territory v. McGrath, 16 N.M. 202, 114 P. 364 (1911).

It was unnecessary to set forth in the indictment the names of persons permitted to use the premises unlawfully. *State v. Alston*, 28 N.M. 379, 212 P. 1031 (1923).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Disorderly Houses §§ 14, 19; 63A Am. Jur. 2d Prostitution §§ 7 to 9, 15 to 23.

Criminal responsibility of woman who connives or consents to her own transportation for immoral purposes, 84 A.L.R. 376.

Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 A.L.R.4th 1195.

Entrapment defense, availability in state court of defense where one accused of pandering denies participation in offense, 5 A.L.R.4th 1128.

Entrapment defense in sex offense prosecution, 12 A.L.R.4th 413.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

27 C.J.S. Disorderly Houses §§ 2 to 6; 73 C.J.S. Prostitution and Related Offenses §§ 4 to 13.

30-9-4.1. Accepting earnings of a prostitute.

Accepting the earnings of a prostitute consists of accepting, receiving, levying or appropriating money or anything of value, without consideration, from the proceeds of the earnings of a person engaged in prostitution with the knowledge that the person is engaged in prostitution and that the earnings are derived from engaging in prostitution, or knowingly owning or knowingly managing a house or other place where prostitution is practiced or allowed and living or deriving support or maintenance, in whole or in part, from the earnings or proceeds of a person engaged in prostitution at that house or place.

Whoever commits accepting the earnings of a prostitute is guilty of a fourth degree felony.

History: Laws 1981, ch. 233, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Prostitution §§ 24 to 26.

73 C.J.S. Prostitution §§ 17, 18.

30-9-5. Order for medical examination and treatment.

In addition to its general sentencing authority, the court may order any defendant convicted of prostitution or patronizing prostitutes to be examined for venereal disease and shall sentence any diseased defendant to submit to medical treatment until he is discharged from treatment as noninfectious. If the defendant is without funds to pay for medical treatment, it shall be provided by the state department of public health [department of health].

History: 1953 Comp., § 40A-9-14, enacted by Laws 1963, ch. 303, § 9-14.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler. Section 12-1-2, 1953 Comp. (Laws 1937, ch. 39, § 2), creating the state department of health, was repealed by Laws 1968, ch. 37, § 7. Laws 1968, ch. 37, § 3, (former 12-1-28, 1953 Comp.), transferred all powers, duties, etc. of the department of public health to the health and social services department, which department was abolished by Laws 1977, ch. 253, § 5. Section 4 of the 1977 act established the health and environment department, consisting of several divisions. Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

30-9-6. Testimony of witnesses to prostitution and lewdness.

In any investigation, proceeding, preliminary hearing or trial before any court, magistrate or grand jury concerning a violation of or an attempt to commit any crime in violation of Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article, no person shall be excused from giving testimony or producing documentary or other evidence material to such investigation, proceeding, preliminary hearing or trial on the ground that the testimony or evidence required of him is incriminating evidence; provided that, any person who is so subpoenaed and ordered to testify or produce evidence concerning such crimes shall be immune to prosecution or conviction for any violation of such crimes about which he may testify.

History: 1953 Comp., § 40A-9-15, enacted by Laws 1963, ch. 303, § 9-15.

ANNOTATIONS

Cross-references. - For protection against self-incrimination, see N.M. Const., art. II, § 15.

30-9-7. Evidence.

In any proceeding under Article 9 [30-9-1 to 30-9-9 NMSA 1978] or action to abate a public nuisance under Article 8 [30-8-1 to 30-8-4, 30-8-8 to 30-8-13 NMSA 1978], testimony about the following circumstances is admissible in evidence:

- A. the general reputation of the place;
- B. the reputation of the persons who reside in or frequent the place;
- C. the frequency, timing and length of visits by nonresidents; and
- D. prior convictions of the defendant or persons who reside in or frequent the place under Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article or Sections 40-34-1 through 40-34-5 New Mexico Statutes Annotated, 1953 Compilation, or of any other offense of like nature wherever committed.

History: 1953 Comp., § 40A-9-16, enacted by Laws 1963, ch. 303, § 9-16.

ANNOTATIONS

Cross-references. - For general rule on admissibility of evidence of other crimes, see Paragraph B of Rule 11-404 SCRA 1986.

Sections repealed. - Sections 40-34-1 to 40-34-5, 1953 Comp., relating to prostitution, which are referred to in Subsection D, were repealed by Laws 1963, ch. 303, § 30-1.

Proof not restricted. - Evidence by which an establishment might be proved a house of prostitution was not limited to a proof of facts mentioned in statute. *Territory v. McGrath*, 16 N.M. 202, 114 P. 364 (1911).

Admissibility of prior conviction. - Proof of a prior conviction for keeping a house of prostitution should have been restricted to a conviction previously had under the provisions of current act (Laws 1921, ch. 69) and not of a prior act. *State v. Snyder*, 28 N.M. 388, 212 P. 736 (1923).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Disorderly Houses §§ 29 to 32; 63A Am. Jur. 2d Prostitution § 28.

Admissibility, in prosecution for sexual offense, of evidence of other similar offense, 77 A.L.R.2d 841, 2 A.L.R.4th 330.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 A.L.R.4th 330.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

27 C.J.S. Disorderly Houses § 14 (1-5); 73 C.J.S. Prostitution and Related Offenses § 6.

30-9-8. House of prostitution; public nuisance.

As used in this section "house of prostitution" means a building, enclosure or place that is used for the purpose of prostitution as that crime is defined in Section 30-9-2 NMSA 1978. A house of prostitution is a public nuisance per se.

History: 1953 Comp., § 40A-9-17, enacted by Laws 1963, ch. 303, § 9-17; 1989, ch. 114, § 2.

ANNOTATIONS

Cross-references. - For abatement of public nuisance, see 30-8-8 NMSA 1978.

The 1989 amendment, effective March 28, 1989, added the first sentence.

Criminal proceeding. - Former statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that lewdness, assignation or prostitution existed was criminal in nature and the complaint was an action in the nature of a criminal proceeding. State ex rel. Murphy v. Morley, 63 N.M. 267, 317 P.2d 317 (1957).

Crime not enjoined as such. - Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. State v. Robertson, 63 N.M. 74, 313 P.2d 342 (1957).

Sufficiency of complaint. - Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. State v. Robertson, 63 N.M. 74, 313 P.2d 342 (1957).

Bond as enforcement device. - A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant, from using, occupying or maintaining a

certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. *State v. Robertson*, 63 N.M. 74, 313 P.2d 342 (1957).

Former laws supplementary. - Laws 1921, ch. 90 (40-34-15, 1953 Comp., et seq.), providing for abatement by injunction of places of lewdness, assignation or prostitution, and Laws 1921, ch. 69 (40-34-1, 1953 Comp., et seq.), prohibiting prostitution, were intended to supplement each other. *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

30-9-9. Remedy of lessor.

If the lessee of property has been convicted of using it as a house of prostitution, or if the property has been adjudged to constitute a public nuisance for that reason, the lease by which the property is held is voidable by the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

History: 1953 Comp., § 40A-9-18, enacted by Laws 1963, ch. 303, § 9-18.

ANNOTATIONS

Cross-references. - For provisions on forcible entry and unlawful detainer, see 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, see 47-8-1 NMSA 1978 et seq.

Recovery of rent barred. - Where building was leased with intent that it be used as a house of prostitution, and the house was so used, the lessor could not recover rent. *McRae v. Cassan*, 15 N.M. 496, 110 P. 574 (1910).

30-9-10. Definitions.

As used in Sections 30-9-10 through 30-9-16 NMSA 1978:

A. "force or coercion" means:

(1) the use of physical force or physical violence;

(2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;

(3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;

(4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or

(5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy;

Physical or verbal resistance of the victim is not an element of force or coercion.

B. "great mental anguish" means psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms;

C. "patient" means a person who seeks or obtains psychotherapy;

D. "personal injury" means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ;

E. "position of authority" means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child;

F. "psychotherapist" means a person who is or purports to be a:

(1) licensed physician who practices psychotherapy;

(2) licensed psychologist;

(3) licensed social worker;

(4) licensed nurse;

(5) counselor;

(6) substance abuse counselor;

(7) psychiatric technician;

(8) mental health worker;

(9) marriage and family therapist;

(10) hypnotherapist; or

(11) minister, priest, rabbi or other similar functionary of a religious organization acting in his role as a pastoral counselor;

G. "psychotherapy" means professional treatment or assessment of a mental or an emotional illness, symptom or condition; and

H. "spouse" means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce.

History: 1953 Comp., § 40A-9-20, enacted by Laws 1975, ch. 109, § 1; 1979, ch. 28, § 1; 1993, ch. 177, § 1.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, in Subsection A, substituted "contact" for "conduct" near the beginning of Paragraph (4), redesignated the former second sentence of Paragraph (4) as the second undesignated paragraph of the subsection, added Paragraph (5), making a related grammatical change, and made stylistic changes; and added present Subsections C, F, and G, making related subsection redesignations.

Phrase "unless the couple is living apart" not void for vagueness when construed and applied in the ordinary sense to mean a suspension of the marital relationship. *State v. Brecheisen*, 101 N.M. 38, 677 P.2d 1074 (Ct. App. 1984).

Evidence supported finding that defendant and his wife were living apart at the time of an alleged attack by defendant upon his wife, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Consensual sex between therapist and adult patient. - A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 112 N.M. 143, 812 P.2d 797 (Ct. App. 1991) (decided prior to 1993 amendment).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 A.L.R.3d 1227.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 A.L.R.3d 854.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 A.L.R.4th 1064.

30-9-11. Criminal sexual penetration.

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

D. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) on a child thirteen to sixteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(2) by the use of force or coercion that results in personal injury to the victim;

(3) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(4) in the commission of any other felony; or

(5) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony.

E. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

F. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration not defined in Subsections C through E of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than and not the spouse of that child.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-9-21, enacted by Laws 1975, ch. 109, § 2; 1987, ch. 203, § 1; 1991, ch. 26, § 1; 1993, ch. 177, § 2.

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I. GENERAL CONSIDERATION.

A. IN GENERAL.

Cross-references. - For assault with intent to commit a violent felony, see 30-3-3 NMSA 1978.

For sexual exploitation of children, see 30-6A-3 NMSA 1978.

For provision that testimony of a victim hereunder need not be corroborated, see 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, see 30-9-16 NMSA 1978.

The 1987 amendment, effective June 19, 1987, added Subsection D.

The 1991 amendment, effective June 14, 1991, deleted "other than one's spouse" following "person" in the first paragraph and substituted "and not the spouse of that child" for "the child" at the end of the first sentence in Subsection D.

The 1993 amendment, effective July 1, 1993, designated the formerly undesignated provisions as Subsection A; added present Subsection B; redesignated former Subsections A through D as Subsections C through F; and substituted "Subsections C through E" for "Subsection A, B, or C" in the first paragraph of Subsection F.

Exclusion of defendant from courtroom. - Defendant's exclusion from the courtroom while child testified created a substantial risk that the jury would assume that the trial court believed that the defendant had engaged in misconduct necessitating his absence from the courtroom. *State v. Rodriguez*, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992).

Defendant absent from trial voluntarily. - Factors articulated in *State v. Clements*, 108 N.M. 13, 765 P.2d 1195 (Ct. App. 1988), as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992).

Trial of co-defendants. - Whether separate trials are to be held for defendants jointly indicted for attempted forcible rape was a matter to be addressed to and resolved by the sound discretion of the trial court. *State v. Pope*, 78 N.M. 282, 430 P.2d 779 (Ct. App. 1967).

Defense of mistake of fact. - Twenty year-old defendant's conviction of fourth-degree criminal sexual penetration was reversed, where the trial court did not consider his defense of mistake of fact, which was based on evidence that he had asked the fifteen year-old victim her age and was told by her and another person that she was seventeen. *Perez v. State*, 111 N.M. 160, 803 P.2d 249 (1990).

Prosecutor's remarks held prejudicial. - The prosecutor made a legally incorrect statement of the law when he told the jury the crime for which the defendant was

charged (criminal sexual penetration) was less serious than committing the crime with a weapon, thus invading the province of the court to give instructions on the law. Because the evidence of defendant's guilt was less than overwhelming, it is fair to assume that the prosecutor's remarks had some prejudicial impact, substantial enough to require a new trial at the trial court's discretion. *State v. Gonzales*, 105 N.M. 238, 731 P.2d 381 (Ct. App. 1986).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For article, "Rape Law: The Need For Reform," see 5 N.M.L. Rev. 279 (1975).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Rape §§ 1 to 30; 70A Am. Jur. 2d Sodomy §§ 1 to 24.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904, 6 A.L.R.4th 1066.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy, 62 A.L.R.2d 1083.

Assault with intent to commit unnatural sex act upon minor as affected by the latter's consent, 65 A.L.R.2d 748.

Applicability of rape statute concerning children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Rape by fraud or impersonation, 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

Impotency as defense to charge of rape, attempt to commit rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

Statutory rape of female who is or has been married, 32 A.L.R.3d 1030.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 A.L.R.3d 907.

Consent as defense in prosecution for sodomy, 58 A.L.R.3d 636.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

Fact that rape victim's complaint or statement was made in response to question as affecting res gestae character, 80 A.L.R.3d 369.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 A.L.R.3d 1228.

Propriety of publishing identity of sexual assault victim, 86 A.L.R.3d 80.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of rape laws limited to protection of females only, 99 A.L.R.3d 129.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix, 2 A.L.R.4th 330.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Validity of statute making sodomy a criminal offense, 20 A.L.R.4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-New York Times cases, 57 A.L.R.4th 404.

Intercourse accomplished under pretext of medical treatment as rape, 65 A.L.R.4th 1064.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 A.L.R.4th 1147.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 A.L.R.5th 856.

75 C.J.S. Rape §§ 1 to 35; 81 C.J.S. Sodomy §§ 1 to 8.

B. CONSTITUTIONALITY.

Phrase "perpetrated by force or coercion" not vague. - Phrase "perpetrated by the use of force or coercion" in this section is not unconstitutionally vague since the crime is defined in terms of a result that defendant causes, and if a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result, that is, the crime. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Distinctions between degrees on basis of harm constitutional. - Determining the degree of a crime by the amount of the harm done to the victim does not make the statute unconstitutionally vague. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Section not void for vagueness. - Criminal sexual penetration could be committed by the use of force or coercion without the victim suffering personal injury as a result thereof and the distinction between second and third degree criminal sexual penetration based on personal injury to the victim is not void for vagueness as a matter of law. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990).

Former sodomy statute constitutional. - Former 40A-9-6, 1953 Comp., which embraced and proscribed sodomitic conduct even on the part of consenting adults was constitutionally valid. *State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976).

And not violative of right of privacy. - On attack by an inmate of penal institution against constitutionality of former sodomy statute on grounds that it violated right of privacy, nothing in the language of the act could reasonably be considered as violative of any constitutionally protected area, nor did the record disclose an unconstitutional application of the law in the particular instance. *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Standing to challenge constitutionality. - Defendant's claims that definitional distinctions which go to difference between first and second-degree criminal sexual penetration are unconstitutionally vague would not be considered by the appeals court when defendant was convicted of second-degree criminal sexual penetration. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Since defendant did not claim nor argue that he was a member of the class discriminated against by the former sodomy statute or that his rights had been impaired by application of the statute to him, he lacked standing to challenge the constitutionality of the act. *State v. Armstrong*, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85

N.M. 228, 511 P.2d 554 (1973), overruled, 88 N.M. 187, 539 P.2d 207 (1975); State v. Kasakoff, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972).

In prosecution for sodomy, where the state's evidence was that the act was committed by force and the defendant denied committing the act, defendant could not then argue that the incident was a consensual act between two adult persons and that the statute was unconstitutional as overbroad for prohibiting private consensual acts of adults. State v. Kasakoff, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972).

C. ELEMENTS OF OFFENSE.

Criminal sexual penetration is not continuing offense. Once the penetration is perpetrated, that criminal sexual penetration is a completed offense. State v. Ramirez, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978); State v. Corneau, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).

Penetration not essential. - Despite the heading "Criminal sexual penetration" for this section, the offense does not require penetration. State v. Delgado, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

"Anguish" as personal injury. - "Anguish" means "distress," and mental anguish is distress of the mind; if such results from the use of force or coercion it is personal injury under this statute. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Specific intent to rape was not element of the crime. State v. Ramirez, 84 N.M. 166, 500 P.2d 451 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

The wording of this section was not meant to impose the additional requirement of showing specific intent. The intent which must be present to perform the act satisfies the "intentional causing" provision in this section. State v. Keyonnie, 91 N.M. 146, 571 P.2d 413 (1977).

Voluntary drunkenness no defense. - Instruction that rape requires no specific intent and that voluntary drunkenness is neither excuse nor justification for crime of rape was correct. State v. Ramirez, 84 N.M. 166, 500 P.2d 451 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

Specific sexual intent not an element. - The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. State v. Pierce, 110 N.M. 76, 792 P.2d 408 (1990).

State was not required to prove motive or intent. State v. Alva, 18 N.M. 143, 134 P. 209 (1913).

"Perpetrated," in Subsection D, means accomplished, performed, committed. State v. Ramirez, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

Penetration must be intentional. - To prove criminal sexual penetration in the third degree, the state must establish that the penetration was intentional. *State v. Lucero*, N.M. , 884 P.2d 1175 (Ct. App. 1994).

Child under age of 13. - Causing a child under the age of 13 to engage in cunnilingus, even where there is no penetration, is sufficient to establish violation of this section. *State v. Orona*, 97 N.M. 232, 638 P.2d 1077 (1982).

Penetration and felony must be continuous transaction under Subsection D(4). - If a criminal sexual penetration occurs within the res gestae of a felony, Subsection D(4) is applicable, and for the sexual penetration to come within the res gestae, the felony and the sexual penetration must be part of one continuous transaction and closely connected in point of time, place and causal connection. *State v. Martinez*, 98 N.M. 27, 644 P.2d 541 (Ct. App. 1982).

Means of committing offense. - Former law defining rape did not embrace several distinct offenses, but merely defined the various means by which the same offense might be committed. *Territory v. Edie*, 6 N.M. 555, 30 P. 851 (1892), *aff'd*, 7 N.M. 183, 34 P. 46 (1893).

Coercion not element under Subsection F. - Subsection F does not include an element of force or coercion, and there is no basis for construing it to require nonconsent by the child as an element of the crime. 1988 Op. Att'y Gen. No. 88-69.

Intercourse with underage girl. - Rape could be perpetrated in any of the ways set out in the statutes and sexual intercourse with a girl with her consent constituted rape if she was less than 16 years of age. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Submission to request of authority figure is coercion if it is achieved through undue influence or affected by external forces. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Consensual sex between therapist and adult patient. - A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 112 N.M. 143, 812 P.2d 797 (Ct. App. 1991).

Intercourse accomplished under pretext of medical treatment as rape, 65 A.L.R.4th 1064.

Guilt of each participant. - A person engages in sexual intercourse, cunnilingus, fellatio, or anal intercourse if that person is one of the two persons required for the performance of the act. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

Statutory language genderless. - The genderless language used in the statute makes clear that the defendant can be either male or female. State v. Delgado, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

Defendant entitled to discovery of information relevant to element of mental anguish which the state has to prove. State v. Garcia, 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980).

And defendant may require complaining witness to undergo psychological examination. - When the mental condition of the victim is relevant because the state alleges the force or coercion resulted in mental anguish to the victim, defendant may require complaining witness to undergo a psychological examination, in order to adequately prepare his defense. State v. Garcia, 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980).

D. MULTIPLE CONVICTIONS OR PUNISHMENTS.

Offense of enticement of child is not lesser included offense of criminal sexual penetration. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Aggravated sodomy and murder not merged. - Homicide resulting from great bodily harm provided sufficient evidence for the jury to find aggravated sodomy and first-degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. State v. Melton, 90 N.M. 188, 561 P.2d 461 (1977).

Charges of kidnaping and second-degree criminal sexual penetration do not merge since the elements of the offense of second-degree criminal sexual penetration do not involve all of the elements of kidnaping. State v. Singleton, 102 N.M. 66, 691 P.2d 67 (Ct. App. 1984).

The fact that a kidnaping charge was used to raise a charge of criminal sexual penetration to a second-degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnaping statutes protect different social norms. State v. McGuire, 110 N.M. 304, 795 P.2d 996 (1990).

Under the facts of this case, the jury could have inferred from facts other than the rape itself that defendant intended to hold the victim against her will from the moment of the abduction. Since the conduct underlying the offenses is not the same, the double jeopardy clause does not prohibit multiple punishments in this case. State v. Ramos, 115 N.M. 718, 858 P.2d 94 (Ct. App. 1993).

Consecutive sentences for kidnaping and criminal sexual penetration. - Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnaping and the predicate felony of kidnaping with intent to hold for

service is, in general, permissible because the two crimes address different social norms. *State v. Tsethlikai*, 109 N.M. 371, 785 P.2d 282 (Ct. App. 1989).

Consecutive sentences for kidnaping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990).

No merger of aggravated burglary and criminal sexual penetration. - Since aggravated burglary (30-16-4 NMSA 1978) and criminal sexual penetration in the third degree (this section) each require proof of facts which the other does not and since neither offense necessarily involves the other, there is no double jeopardy violation and no merger of the offenses despite the fact that the same evidence may go toward proving both. *State v. Young*, 91 N.M. 647, 579 P.2d 179 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972, cert. denied, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Where there was evidence that the victim awoke and found the defendant on top of her and that the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. *State v. Archunde*, 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

Contributing to delinquency is separate offense. - Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. *State v. Walker*, 116 N.M. 546, 865 P.2d 1190 (1993).

Sentence and prison discipline for same offense. - Contention by inmates convicted of sodomy that sentence imposed by court amounted to double jeopardy because they had already been punished by prison officials for same offense was without merit. *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Multiple sentences improper. - Consecutive sentences of 45 to 50 years and 80 to 99 years imposed on defendant for convictions of assault with intent to commit rape and rape, respectively, were improper, since where charges arose out of the same transaction, were committed at the same time as part of a continuous act and were inspired by the same criminal intent which was an essential element of each offense, they were susceptible of only one punishment. *State v. Blackwell*, 76 N.M. 445, 415 P.2d 563 (1966).

Increasing sentence based on consideration of element of offense. - Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under Subsection D(2), and he contended that the trial court's consideration of the physical injury suffered by the victim in increasing the basic sentence pursuant to § 31-18-15.1 exposed him to double jeopardy, it was held that the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. *State v. Bernal*, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Aggravating factor improperly considered in sentencing. - While the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was error for the court to consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

Multiple penetrations. - Penetrations of separate orifices with the same object constitute separate offenses. Therefore, the acts of anal intercourse, sexual intercourse, and at least one instance of fellatio constitute separate offenses. *State v. Wilson*, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Single criminal intent of several acts. - Defendant's contention that "single criminal intent" doctrine should have been applied to four acts of sodomy which he was convicted of having performed on victim over period of one and one half to two hours was neither supported by sufficient evidence nor properly preserved for review. *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977).

This section cannot be said, as a matter of law, to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others. *Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991).

A case involving a single defendant tried on an indictment alleging multiple penetrations was remanded to the trial court with instructions to vacate 14 convictions and sentences for second-degree criminal sexual penetration and to resentence accordingly, where the evidence supported, at most, five convictions and sentences. *Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991).

Defense must raise "single criminal intent" doctrine at trial. *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977).

Double jeopardy. - Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

II. INDICTMENT AND INFORMATION.

Information not unconstitutionally vague. - Where information expressly stated age of minor rape victim, and that age was under 10 years, argument that the information was so vague and indefinite as to violate due process in that it stated an offense both under statute covering rape of female under or over 16 when resistance is overcome by force, and also under statute relating to rape of female child under 10, was without merit. *Gallegos v. Cox*, 358 F.2d 703 (10th Cir.), cert. denied, 385 U.S. 869, 87 S. Ct. 138, 17 L. Ed. 2d 97 (1966).

Notice sufficient. - The trial court did not deprive defendant of opportunity to be informed of charges against him by failing to require the state to specify precisely which of several acts of sodomy defendant was accused of having been accessory to, where the indictment and bill of particulars which were a part of the record identified the date, the approximate time and nature of the crimes alleged, the prosecutrix and the associates with whom defendant was alleged to have committed the crimes. *State v. Barnett*, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Lack of specificity not violative of double jeopardy. - The trial court's refusal to require that the state specify which act of sodomy the defendant was accessory to did not subject him to double jeopardy, on the basis of the argument that if he were indicted or informed against as accessory to a particular act of sodomy based on the same incident he could not point to his present conviction as precluding his trial on any particular act of sodomy, where he had not been indicted or informed against for another crime growing out of the same set of facts. *State v. Barnett*, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Separate counts of incest and criminal sexual penetration. - There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

Language of statute sufficient. - It was unnecessary to charge crime pursuant to the common law; an indictment in language of statute which in effect charged sexual

intercourse with a female under the age of fourteen was sufficient, use of the word "ravish" being unnecessary. State v. Alva, 18 N.M. 143, 134 P. 209 (1913).

Use of words "carnally know and abuse" in indictment surplusage. State v. Alva, 18 N.M. 143, 134 P. 209 (1913).

Charge of rape adequate. - An information "did, with force and arms in and upon the body of Agnes Vigil . . . unlawfully and feloniously make an assault, and did then and there wickedly and feloniously against her will . . . ravish and unlawfully know, contrary to the form of the statute . . ." was sufficient to charge rape and not merely an assault, notwithstanding the omission of any such words as "her the said Agnes Vigil" between the words "know" and "contrary." State v. Alarid, 40 N.M. 450, 62 P.2d 817 (1936).

Information failing to name statutory rape victim not fatally defective. State v. Roessler, 58 N.M. 102, 266 P.2d 351 (1954); Ex parte Kelley, 57 N.M. 161, 256 P.2d 211 (1953).

Assault with intent to rape. - An indictment charging that defendant unlawfully, violently and forcibly assaulted prosecutrix with intent to ravish was sufficient charge of assault with intent to rape. State v. Raulie, 35 N.M. 135, 290 P. 789 (1930).

Allegation of defendant's virility unnecessary. - It was unnecessary that indictment allege that defendant was over the age of fourteen or, being under that age, had the physical ability to commit the offense. State v. Ancheta, 20 N.M. 19, 145 P. 1086 (1915).

Information and bill construed together. - In determining whether acts alleged constituted offense of sodomy, the information and the bill of particulars are to be read together as a single instrument. State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967).

Overinclusive bill of particulars not binding. - Although bill of particulars alleged two acts of sodomy, namely, requiring victim to take into her mouth the defendant's sexual organ and the placing of defendant's sexual organ in the victim's anus, the state was not bound by the statement in the bill of particulars to prove acts of both types of sodomy on the part of the defendant, and failure to instruct that the state must prove both types of sodomy before a conviction would be justified did not require reversal. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Variance between information and instructions. - Jury instructions describing crime perpetrated by defendant as that of sexual intercourse with a female under sixteen years impaired no fundamental rights of defendant even though the crime was charged as "rape" in the information. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

III. EVIDENCE.

A. ADMISSIBILITY.

Subsequent beating irrelevant to determination of degree of offense. - Defendant's beating of the victim with a blunt instrument subsequent to intercourse was not considered in determining whether or not the offense of criminal sexual penetration was committed by force or coercion resulting in personal injury because this beating went to the aggravated battery conviction. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Out-of-court identification. - Where victim testified that rapist was in her presence for approximately an hour and 40 minutes and at the police station she described him with some specificity, action of police officer in showing victim the driver's license photograph which victim knew came from wallet she had taken from rapist's pocket and asking "is this the man" was not so suggestive as to bar evidence of victim's out-of-court identification, nor was in-court identification inadmissibly tainted because of it. *State v. Baldonado*, 82 N.M. 581, 484 P.2d 1291 (Ct. App. 1971).

The out-of-court photographic identification procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification where the photographs viewed by the victim were all of male caucasians of about the same age and hirsuteness as defendant. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Identification by child. - Testimony by witness that three-year old child said "this is the man" a half hour after attack upon her was properly admitted over objection that it was hearsay. *State v. Godwin*, 51 N.M. 65, 178 P.2d 584 (1947).

Victim's identification was not tainted by the fact that the case agent and the child's grandmother hugged the child after she indicated that she was sure of her identification of the defendant as her assailant. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Hypnotically enhanced testimony. - Post-hypnotic recollections, revived by the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or suggestibility. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

If the trial court's determination that the identifications were not "post-hypnotic recollections revived by hypnosis" is supported by substantial evidence, then the requirements established by *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981), were not triggered. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Where no details of the incident were mentioned during the hypnotic sessions; no information was sought from the child, nor details suggested, but the only suggestion made was that the child should remember; and there was independent, objective

verification of the facts presented by other witnesses, the child victim's in-court identification was not impermissibly tainted by the unproductive hypnotic session. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Testimony concerning rape trauma syndrome. - Record did not suggest that the danger of unfair prejudice so outweighed the probative value of a witness's testimony concerning rape trauma syndrome as to require reversal in the absence of an objection, where there was little likelihood that the jury viewed the testimony as a "diagnosis" that the victim had been raped. *State v. Barraza*, 110 N.M. 45, 791 P.2d 799 (Ct. App. 1990).

Foot tracks. - Nonexpert evidence as to identity of accused, derived from a comparison of foot tracks with other tracks known to be those of accused, was admissible. *State v. Ancheta*, 20 N.M. 19, 145 P. 1086 (1915).

Confession admissible. - Where defendant, believing that prosecutrix had told of his relations with her, put himself under the protection of a third person and admitted to such person that he had slept with the prosecutrix, the confession was purely voluntary and admissible. *State v. Whitener*, 25 N.M. 20, 175 P. 870 (1918).

Suppression of evidence of rape trauma syndrome. - An order suppressing a psychologist's testimony relating to rape trauma syndrome was affirmed, where it could not be said that the trial court's order was clearly against the logic and effect of the facts and circumstances, and where there was no request to limit the evidence rather than exclude it altogether. *State v. Bowman*, 104 N.M. 19, 715 P.2d 467 (Ct. App. 1986).

Ordinarily previous chastity of prosecuting witness is immaterial in a statutory rape case. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Prior relations corroborative of statutory rape. - Evidence tending to show more than one act of criminal intercourse between accused and prosecutrix was admissible to show the relation and familiarity of the parties, and was corroborative of prosecutrix' testimony concerning the particular act relied upon for a conviction of statutory rape. *State v. Whitener*, 25 N.M. 20, 175 P. 870 (1918).

Exclusion of evidence of prior rape and sexual conduct. - In prosecution for second-degree criminal sexual penetration where theory of defense was that of fabrication of the rape and consensual intercourse, trial court properly excluded evidence of prior rape of victim and victim's prior sexual conduct. *State v. Fish*, 101 N.M. 329, 681 P.2d 1106 (1984).

Previous intercourse admissible on issue of identity. - Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such condition. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Previous intercourse not admissible on issue of penetration. - Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, since the sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Defendant's occupation as a police officer. - Evidence of the defendant's status as a police officer was material and relevant to the issue of whether he committed criminal sexual penetration in the third degree using his status as a police officer to force the victim to engage in fellatio or perform other delinquent acts. *State v. Lucero*, N.M. , 884 P.2d 1175 (Ct. App. 1994).

B. INHERENT IMPROBABILITY.

Rule of inherent improbability. - Because of highly emotional and prejudicial elements present in cases of rape, supreme court has taken the position that over and above the substantial evidence rule applicable in appeals, it will review the evidence to determine whether or not it is so inherently improbable that, by conviction of the crime, a fundamental wrong has been done to defendant. *State v. Shouse*, 57 N.M. 701, 262 P.2d 984 (1953).

Where defendant in prosecution for rape of a child contended that evidence was too vague and insufficient to establish guilt of defendant, appellate court would only weigh the evidence in the scales of inherent probability, and where there was substantial evidence tending to sustain the jury's verdict, its determination would be conclusive. *State v. Till*, 78 N.M. 255, 430 P.2d 752 (1967), appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

Reversal since evidence improbable. - District court should, and supreme court would, examine the evidence in a rape case with great care to determine whether testimony of prosecuting witness was inherently improbable; and if so, in absence of some evidence of some fact unequivocally and unerringly pointing to the defendant's guilt, a conviction would not be permitted to stand. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Where there was absolutely no evidence corroborating the prosecuting witness, and her evidence was outside the domain of reasonable probability, and accused denied the offense, a verdict of guilty was set aside and a new trial ordered. *Mares v. Territory*, 10 N.M. 770, 65 P. 165 (1901).

In cases of common-law rape, where in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence is so inherently improbable as to be unsubstantial, unless there is other testimony which points unerringly to the defendant's guilt, an appellate court will not uphold a conviction. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert.

denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

Directed verdict. - Court was to instruct jury to find a verdict of not guilty on defendant's or its own motion when at the close of testimony in rape case insufficiently supported testimony of prosecuting witness was inherently improbable and a verdict based on it would constitute a miscarriage of justice. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Rape not inherently improbable. - Testimony of examining physician that he found no evidence of trauma or injury to the vagina; that such lack of trauma is unusual in a rape case; that he found no other physical indication on the prosecutrix or her clothes that a rape had occurred; and that he found sperm in the vagina but that they were all immotile did not render the testimony of the prosecutrix inherently improbable. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), rehearing denied, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Time element. - Where the prosecutrix testified that she was raped twice by defendant and forced to commit an act of sodomy within a period of approximately 30 minutes, and in addition, there was some conversation between the prosecutrix and defendant during this time, it could not be said as a matter of law that the events described could not in fact have occurred during the period stated. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), rehearing denied, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Initial denial of sodomy. - Prosecutrix' denial that act of sodomy had occurred in first written statement to police and failure to mention it in second statement to police or to examining doctor did not render her testimony inherently improbable, where she explained that her denial and her failure to mention the act were the result of her embarrassment about it. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

Unusual circumstances not inherently improbable. - The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction, and testimony which merely discloses unusual circumstances does not come within that category. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Rule inapplicable to sodomy. - The "inherently improbable" rule enunciated by the supreme court in *State v. Shouse*, 57 N.M. 701, 262 P.2d 984 (1953), a rape case, is not applicable in cases of sodomy. *State v. Kasakoff*, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972).

C. CORROBORATION UNDER FORMER LAW.

Bald charge insufficient. - In this jurisdiction, no corroboration of a prosecutrix by way of testimony of an independent character emanating from an outside source was required to sustain a conviction. But the bald charge of a woman against a man in that regard, unsupported and uncorroborated by facts and circumstances pointing to guilt of accused, was insufficient to meet requirement that verdict be supported by substantial evidence. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973); *State v. Armijo*, 25 N.M. 666, 187 P. 553 (1920).

Surrounding facts as corroboration. - Testimony of prosecutrix required no corroboration except that surrounding facts and circumstances must have tended to establish truth of her testimony, but it need not have been evidence of an independent character, disconnected from her testimony. *State v. Ellison*, 19 N.M. 428, 144 P. 10 (1914).

Other witnesses not required. - Corroboration of prosecutrix' testimony by other witnesses as to particular acts constituting offense of rape was not required and an instruction to that effect would correctly state the law. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Corroboration in victim's complaint to mother. - In prosecution for rape, testimony of prosecuting witness was corroborated by proof of complaint made to her mother of the outrage committed upon her. *Territory v. Edie*, 6 N.M. 555, 30 P. 851 (1892), aff'd, 7 N.M. 183, 34 P. 46 (1893).

Defendant's own actions corroborative. - Defendant's actions both preceding and following rape, including rather severely injuring nose and lip of prosecutrix, making of threats on way home, and fleeing even before any report was made to the police pointed unerringly to his guilt, and constituted corroborating circumstances of the truth of prosecutrix' story. *State v. Ramirez*, 70 N.M. 54, 369 P.2d 973 (1962).

Corroboration rule in rape cases was not applicable to sodomy. - See *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), rehearing denied, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Corroboration rule not applicable to statutory rape. - In prosecutions for statutory rape, where consent was immaterial and force was not used, corroboration was not essential to a conviction, and it had only to be determined that the testimony of the prosecuting witness was not inherently improbable. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Corroboration was not required in cases of statutory rape because the usual concomitant facts present in common-law rape, such as torn and disarranged clothing, wounds or bruises, outcries, etc., neither necessarily nor ordinarily appear. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Uncorroborated testimony of child. - The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. State v. Trujillo, 60 N.M. 277, 291 P.2d 315 (1955).

In statutory sex offenses against a young victim corroboration of the claim that the defendant is the guilty party is not necessary where the evidence of guilt is substantial. State v. Montoya, 62 N.M. 173, 306 P.2d 1095 (1957).

Independent of statute, a man could be convicted of rape upon the uncorroborated evidence of a strumpet or a girl under the age of ten years. State v. Ellison, 19 N.M. 428, 144 P. 10 (1914).

Instruction properly refused. - As no corroboration of prosecutrix was necessary to uphold conviction, a requested instruction on subject of corroboration, contrary to the rule, was properly refused. State v. Whitener, 25 N.M. 20, 175 P. 870 (1918).

Absence of corroboration. - In rape prosecution, where prosecutrix was not corroborated, evidence was insufficient, for want of such corroboration, to sustain conviction. State v. Clevenger, 27 N.M. 466, 202 P. 687 (1921).

In cases of common-law rape, in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence might be so inherently improbable as to be unsubstantial, and would not uphold a conviction. State v. Shults, 43 N.M. 71, 85 P.2d 591 (1938), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

D. SUFFICIENCY.

Jury's function. - It is the jury's function in a rape case to judge the credibility of the witnesses and the weight to be given their testimony. State v. White, 77 N.M. 488, 424 P.2d 402 (1967).

The jury was to determine how much incriminating circumstances were weakened by contrary characterizations, more or less plausible, or by other facts having an opposite tendency in the evidence. State v. Godwin, 51 N.M. 65, 178 P.2d 584 (1947).

Victim's age for jury. - Whether prosecutrix was under the age of consent was a jury question. State v. Whitener, 25 N.M. 20, 175 P. 870 (1918).

Proof of penetration. - Proof of penetration alone was sufficient to establish the crime of statutory rape. State v. Harbert, 20 N.M. 179, 147 P. 280 (1915).

Penetration provable from circumstances. - Proof of penetration was essential to conviction of having carnally known and abused a minor child, but it was not necessary

that it be proved by direct evidence; it might be established by circumstantial evidence. State v. Godwin, 51 N.M. 65, 178 P.2d 584 (1947).

Opportunity and physical condition. - Proof of carnal knowledge could be adequately shown by fact that opportunity for sexual intercourse existed and that physical condition of the child showed abuse. State v. Godwin, 51 N.M. 65, 178 P.2d 584 (1947).

Evidence of penetration sufficient. - Testimony of doctor who examined victim, a minor child under the age of 13, in the evening of the day of alleged act of sodomy, that there had been a penetration into boy's anus, along with child's testimony as to the assault and as to the pain experienced by him as a result thereof, was sufficient evidence of penetration for jury's consideration. State v. Mase, 75 N.M. 542, 407 P.2d 874 (1965).

Evidence sufficient to sustain conviction. - The prosecutrix' testimony, which was not inherently improbable and which was corroborated by facts and circumstances, pointed unerringly to defendant and was sufficient evidence to sustain the conviction. State v. Boyd, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

When evidence as a whole left no doubt as to fact of intercourse and penetration, it was sufficient, even though if certain questions addressed to complaining witness with their answers alone were considered, there might have been some doubt as to sufficiency of proof. State v. Alva, 18 N.M. 143, 134 P. 209 (1913).

Appellate court found no ground to disturb verdict of guilty where after sifting from any recitation of facts made to support claim that 11 year old prosecutrix' testimony was inherently improbable, all facts and inferences which verdict resolves against defendant, there remains testimony of a substantial character sufficient to support the conviction. State v. Trujillo, 60 N.M. 277, 291 P.2d 315 (1955).

Rape established. - Where the evidence establishes that defendant had sexual intercourse with a female without her consent and by forcibly overcoming her resistance, this was rape, regardless of the age of the victim. State v. Garcia, 78 N.M. 136, 429 P.2d 334 (1967).

Conviction for rape not barred by facts also establishing statutory rape. State v. Garcia, 78 N.M. 136, 429 P.2d 334 (1967).

Rape of child. - In prosecution for rape of child, statement of 9 year old prosecutrix and testimony of examining doctor expressing opinion that child had undergone sexual intercourse as late as the day charged constituted substantial evidence and met test of inherent probability. State v. Till, 78 N.M. 255, 430 P.2d 752 (1967), appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

When testimony of prosecuting witness, a child of between twelve and thirteen, was convincing, was not inherently improbable, was unshaken by cross-examination and was corroborated by the mother, and, up to a certain point, by defendant, it was sufficient to sustain a conviction of statutory rape. *State v. Keener*, 43 N.M. 94, 85 P.2d 748 (1938).

Spouses living apart. - Evidence supported finding that defendant and his wife were living apart at the time of the attack, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Attempted sodomy. - Acts of defendant constituted an active effort to consummate crime of sodomy and were more than mere preparation, where in addition to his announced intention to "screw" 16 year old victim, defendant beat victim until he passed out and removed victim's clothes, during course of which events the fly on defendant's pants was open. *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972).

IV. DEFENSES.

A. CONSENT.

Absence of consent not element of criminal sexual penetration. - Although absence of consent was an element of the rape statute, which has now been repealed, absence of consent is not an element of the crime of criminal sexual penetration as defined by the legislature. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976); *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Nor of statutory rape. - Under former law, where intercourse was with a girl under age of 16 the state need have proved only that defendant indulged in intercourse with her, regardless of question of her consent. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

But required for rape. - Under former law, where victim was over age of consent, it was necessary to prove intercourse against her will. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

As was resistance. - To constitute the crime of rape of one over the age of consent, there must be resistance, and it must be forcibly overcome; it was not sufficient that the carnal act was violently accomplished, or that it was without her consent. *Mares v. Territory*, 10 N.M. 770, 65 P. 165 (1901).

Amount of resistance required of victim depended upon the facts of the particular case. Resistance may be overcome by fear induced by threats as by physical violence. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

Violent injury indicative of adequate resistance. - Less than satisfactory evidence of resistance would not warrant reversal of rape conviction where the physical violence done to the prosecutrix and her resultant injuries therefrom tend to show that further resistance would have been of no avail and perhaps would have resulted in more serious injuries to her. State v. Ramirez, 70 N.M. 54, 369 P.2d 973 (1962).

Threats overcoming resistance. - Fact that threats by which prosecutrix' resistance had been overcome were made by someone other than the defendant was immaterial. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Consent inconsistent with evidence. - Evidence that prosecutrix' clothes were torn, that she suffered a scratch or cut on the side of her head which bled during the preliminary hearing, that immediately after the assault various witnesses noticed red welts or marks, on prosecutrix' throat and that her bedroom was in disarray, was inconsistent with sexual intercourse by consent. State v. White, 77 N.M. 488, 424 P.2d 402 (1967).

B. IMPOTENCY.

Application of former law. - If evidence showed that defendant was under the age of fourteen years, and failed to show that he was physically able to commit the act, Laws 1887, ch. 24, § 2, relating to the defense of impotency where perpetrator of rape was under fourteen, would apply. State v. Ancheta, 20 N.M. 19, 145 P. 1086 (1915).

Assault with intent to rape. - Impotency could be shown but was not a complete defense to charge of assault with intent to rape. State v. Ballamah, 28 N.M. 212, 210 P. 391 (1922).

V. SODOMY.

Force was not element of crime of sodomy under former law. Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Consent no defense. - Under former law, consent of both parties to the act of sodomy did not constitute a defense to that crime. Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Emission was not necessary element of crime of sodomy. State v. Massey, 58 N.M. 115, 266 P.2d 359 (1954).

Each act distinct. - Since under former 40A-9-6, 1953 Comp., "any penetration" could complete the crime of sodomy, on its face the statute clearly allowed prosecution for different kinds or acts of sodomy. State v. Elliott, 89 N.M. 756, 557 P.2d 1105 (1977).

Cunnilingus and fellatio. - Under former 40A-9-6, 1953 Comp., sodomy included a taking into the mouth "the sexual organ of any other person"; the statute was not limited

to the sexual organ of the male, "any other person" including both male and female. State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967).

Where former statute (Laws 1876, ch. 34, § 1) provided a penalty for crime of sodomy, but did not define the term, the common-law definition would apply; hence, sexual copulation per os or fellatio, was not included in the offense of sodomy. Bennett v. Abram, 57 N.M. 28, 253 P.2d 316 (1953)(discharging petitioners in habeas corpus proceeding where they pleaded guilty to charge of sodomy without proper advice as to nature of the crime).

Aiding and abetting shown. - It was not necessary that the state prove that defendant aided and abetted a particular act of sodomy, as his presence at the scene and active participation in the criminal conduct being undertaken, in such a way as to encourage the commission of the charged offenses, was enough to constitute aiding and abetting. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

VI. INSTRUCTIONS.

Essential elements of crime. - A jury must be instructed on the essential elements of the crime charged, and failure so to do is fundamental error because the error is jurisdictional and thus not harmless. State v. Kendall, 90 N.M. 236, 561 P.2d 935 (Ct. App.), rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977), (holding that under the circumstances an instruction that victim must not be defendant's spouse, was not necessary).

Instruction in language of statute. - An instruction which set forth the elements of the crime of second degree criminal sexual penetration in the language of the statute was sufficient, and there was no error in failing to instruct on absence of the victim's consent. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Reading of statute permissible. - In prosecution for rape though there was no evidence tending to show that the prosecuting witness, through idiocy, imbecility or unsoundness of mind, either temporary or permanent, was incapable of giving consent, it was not error for the court, in its instructions, to read the entire section to the jury. Territory v. Edie, 6 N.M. 555, 30 P. 851 (1892), aff'd, 7 N.M. 183, 34 P. 46 (1893).

Instruction constituting constructive amendment of information. - Jury instruction which allowed for conviction based on digital penetration occurring prior to the enactment of this section constituted a constructive amendment of the information which required reversal. Hunter v. New Mexico, 916 F.2d 595 (10th Cir. 1990), cert. denied, 500 U.S. 909, 111 S. Ct. 1693, 114 L. Ed. 2d 87 (1991).

Instruction on personal injury. - In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at 30-9-10C NMSA 1978, and also gave the statutory definition of great bodily harm at 30-1-12A NMSA 1978 in the instruction on first-degree criminal sexual penetration, the lack of

additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect, and since he did not do so, he could not complain of the lack of additional definition of the term. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Failure to give charge of offense in third degree. - Failure to give defendant's tendered charge on criminal sexual penetration in the third degree was reversible error at his trial for false imprisonment and criminal sexual penetration in the second degree, where the jury could find from the evidence that the sexual intercourse occurred by coercion or force, but without the requisite elements of false imprisonment as an independent felony. *State v. Corneau*, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).

Victim other than spouse. - Where there was no evidence whatsoever that the victim raped, sodomized and killed was the spouse of the defendant, failure to instruct the jury that it must find that the victim was not defendant's wife in the rape conviction was not a jurisdictional error. *State v. Melton*, 90 N.M. 188, 561 P.2d 461 (1977).

Reversal of defendant's conviction of criminal sexual penetration because of trial court's failure to instruct that jury must find that victim was other than defendant's spouse was improper under facts of the case, and defendant was properly convicted of criminal sexual penetration. *Kendall v. State*, 90 N.M. 191, 561 P.2d 464 (1977).

Lesser included offenses. - In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Any variance between the victim's testimony at trial and her testimony before the grand jury was insufficient to require an instruction on a lesser included offense, where defendant's own testimony that he had no contact of any sort with the victim negated the possibility that such an instruction might have been warranted. *Chavez v. Kerby*, 848 F.2d 1101 (10th Cir. 1988).

Lesser included offenses and alibi. - Because the defendant offered the defense of an alibi, he was not entitled to a lesser-included offense instruction on the ground that the jury might have rejected the part of the complainant's testimony regarding the use of a gun. *State v. Wilson*, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Charge on third degree not warranted. - Where there was no evidence tending to establish that the criminal sexual penetration was committed by force or coercion without resultant personal injury, since the only evidence was that defendant used force which resulted in personal injury, beating the victim with his fists, twisting her breasts and pulling her hair immediately prior to sexual intercourse, there was no evidence

supporting an instruction on third degree criminal sexual penetration. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Instruction on consent properly refused. - Where a review of the record and a thorough examination of the prosecutrix' testimony does not ever raise a slight inference of consent on part of victim, it was not error for trial court to deny defendant's requested instruction on consent as a defense. State v. Armstrong, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973), overruled, 88 N.M. 187, 539 P.2d 207 (1975).

Requested instruction on lesser offense properly refused when no supporting evidence. - Where there is no view of the evidence adduced which would support the jury in finding the defendant guilty of third-degree criminal sexual penetration which would not also require the jury to find him guilty of second-degree criminal sexual penetration, a requested instruction on the lesser offense is properly refused. State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

Charge on probability unnecessary. - It was not erroneous in rape case to refuse instructions calling for jury's consideration of reasonable probability of testimony of prosecuting witness where jury was instructed that they must find beyond a reasonable doubt that defendant committed the offense charged before they could return verdict of guilty. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

Circumstantial evidence. - There was no error in court's refusal to give the usual stock instruction relating to circumstantial evidence where the state did not rely upon circumstantial evidence to prove its case in prosecution for sodomy involving two juveniles. State v. Frederick, 74 N.M. 42, 390 P.2d 281 (1964).

Impotency. - Where certain statements and testimony of defendant were only evidence of impotency, and no request for instruction on defense of impotency was tendered, it was not fundamental error on trial court's part to fail to instruct on its own motion on the defense, in view of confession and statements made by defendant admitting the act giving rise to the statutory rape prosecution. State v. Johnson, 64 N.M. 83, 324 P.2d 781 (1958).

30-9-12. Criminal sexual contact.

A. Criminal sexual contact is the unlawful and intentional touching of or application of force, without consent, to the unclothed intimate parts of another who has reached his eighteenth birthday, or intentionally causing another who has reached his eighteenth birthday to touch one's intimate parts.

B. Criminal sexual contact does not include touching by a psychotherapist on his patient that is:

(1) inadvertent;

(2) casual social contact not intended to be sexual in nature; or

(3) generally recognized by mental health professionals as being a legitimate element of psychotherapy.

C. Criminal sexual contact in the fourth degree consists of all criminal sexual contact perpetrated:

(1) by the use of force or coercion that results in personal injury to the victim;

(2) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons; or

(3) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

D. Criminal sexual contact is a misdemeanor when perpetrated with the use of force or coercion.

E. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

History: 1953 Comp., § 40A-9-22, enacted by Laws 1975, ch. 109, § 3; 1981, ch. 8, § 1; 1991, ch. 26, § 2; 1993, ch. 177, § 3.

ANNOTATIONS

Cross-references. - For provision that testimony of victim hereunder need not be corroborated, see 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, see 30-9-16 NMSA 1978.

The 1991 amendment, effective June 14, 1991, designated the formerly undesignated first paragraph as present Subsection A and redesignated former Subsections A and B as present Subsections B and C and, in present Subsection A, substituted "unlawful and intentional" for "intentionally" and deleted "and someone other than one's spouse" following "birthday" in two places in the first sentence and made a minor stylistic change in the second sentence.

The 1993 amendment, effective July 1, 1993, deleted the former second sentence of Subsection A, which defined "intimate parts"; added present Subsections B and E, redesignating the succeeding subsections accordingly; and made stylistic changes in Subsections A, C, and E.

Legislative intent. - The legislative intent in defining "intimate parts" with a listing of five separate protected areas was to protect the victim from intrusions to each enumerated part; separate punishments are sustainable where evidence shows distinctly separate touchings of different parts. *State v. Williams*, 105 N.M. 214, 730 P.2d 1196 (Ct. App. 1986).

Statutory enumeration of different aggravating factors, or alternative methods of committing fourth degree criminal sexual contact, does not evince a legislative intent to authorize multiple punishments for the same act; where alternative methods of committing criminal sexual contact are submitted to the jury, the accused may be found guilty of only one offense. *State v. Williams*, 105 N.M. 214, 730 P.2d 1196 (Ct. App. 1986).

Section compared with 30-9-11 NMSA 1978. - This section is a general statute prohibiting a touching of intimate parts, whereas 30-9-11 NMSA 1978 is a specific statute which prohibits a touching of the penis with the lips or tongue. Section 30-9-11 NMSA rather than this section was the applicable statute in a prosecution for fellatio because the specific statute prevails over the general statute. *State v. Gabaldon*, 92 N.M. 93, 582 P.2d 1306 (Ct. App. 1978).

"Groin" defined. - Not having defined "groin" in this section as it read prior to 1993 amendment, and nothing to the contrary appearing, the legislature is presumed to use the common meaning of "groin," which is the fold or depression marking the line between the lower part of the abdomen and the thigh; also, the region of this line. *State v. Doe*, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

Evidence sufficient to sustain conviction. - A touching of the upper, inner thigh is a touching in the region of the line between the lower part of the abdomen and the thigh; the touching is a touching of the groin and, therefore, sufficient evidence to sustain a conviction of criminal sexual contact. *State v. Doe*, 93 N.M. 206, 598 P.2d 1166 (Ct. App. 1979).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Assault and Battery §§ 24 to 30, 41, 42, 55, 67, 106, 119, 156, 229.

Indecent proposal to woman as assault, 12 A.L.R.2d 971.

Sexual nature of physical contact as aggravating offense of assault and battery, 63 A.L.R.3d 225.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

30-9-13. Criminal sexual contact of a minor.

Criminal sexual contact of a minor is the unlawful and intentional touching or applying force to the intimate parts of a minor or the unlawful and intentional causing a minor to touch one's intimate parts. For the purposes of this section, "intimate parts" means the primary genital area, groin, buttocks, anus or breast.

A. Criminal sexual contact of a minor in the third degree consists of all criminal sexual contact of a minor perpetrated:

(1) on a child under thirteen years of age; or

(2) on a child thirteen to eighteen years of age when:

(a) the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(b) the perpetrator uses force or coercion which results in personal injury to the child;

(c) the perpetrator uses force or coercion and is aided or abetted by one or more persons; or

(d) the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual contact in the third degree is guilty of a third degree felony.

B. Criminal sexual contact of a minor in the fourth degree consists of all criminal sexual contact, not defined in Subsection A of this section, of a child thirteen to eighteen years of age perpetrated with force or coercion. Whoever commits criminal sexual contact in the fourth degree is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-9-23, enacted by Laws 1975, ch. 109, § 4; 1987, ch. 203, § 2; 1991, ch. 26, § 3.

ANNOTATIONS

Cross-references. - For sexual exploitation of children, see 30-6A-3 NMSA 1978.

For provision that testimony of victim hereunder need not be corroborated, see 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, see 30-9-16 NMSA 1978.

The 1987 amendment, effective June 19, 1987, inserted "not defined in Subsection A of this section" in the first paragraph of Subsection B.

The 1991 amendment, effective June 14, 1991, rewrote the first sentence which read "Criminal sexual contact of a minor is unlawfully and intentionally touching or applying force to the intimate parts of a minor other than one's spouse, or unlawfully and intentionally causing a minor other than one's spouse, to touch one's intimate parts"; in Paragraph (2) of Subsection A, substituted "the perpetrator uses" for "by the use of" at the beginning of subparagraphs (b) and (c) and made related stylistic changes; and made a stylistic change in the second sentence of the section.

Not vague or overbroad. - The statutory crime of criminal sexual contact of a minor is not unconstitutionally vague. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990); *State v. Scott*, 113 N.M. 525, 828 P.2d 958 (Ct. App. 1991), cert. quashed, 113 N.M. 524, 828 P.2d 957 (1992).

Former statute constitutional. - Former 40A-9-9, 1953 Comp., defining sexual assault to include "indecent handling or touching" of a person under the age of 16, when considered in light of statute as a whole, was sufficiently precise when measured by common understanding to give adequate warning of the denounced conduct and to

meet constitutional standards of certainty. *State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Specific intent not an element. - The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990).

Unlawfulness as an element. - By defining criminal sexual contact of a minor as "unlawfully and intentionally" touching a child's intimate parts, the legislature properly intended that the state must establish the unlawfulness of the touching as a distinct element of the offense. *State v. Osborne*, 111 N.M. 654, 808 P.2d 624 (1991).

Contributing to delinquency of a minor is separate offense. - The legislature intended for the crimes of criminal sexual contact of a minor and contributing to the delinquency of a minor to be separate crimes, punishable separately even when unitary conduct violates both statutes. Therefore, convictions under both statutes do not violate double jeopardy principles. *State v. Trevino*, 116 N.M. 528, 865 P.2d 1172 (1993).

Sufficiency of notice of crime charged. - Where a child was charged with unlawfully and intentionally touching or applying force to the intimate parts of his sister, and the charging document contained not only a time frame, but the name of the alleged victim, the child was given adequate notice to enable him to prepare a defense and to assure that any conviction or acquittal would be res judicata against a subsequent prosecution for the same offense. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

Construction of former law. - Words "indecent handling or touching" in former 40A-9-9, 1953 Comp., relating to sexual assault, when considered in context would mean such handling or touching as the common sense of society would regard as improper and morally indelicate. *State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Statements part of res gestae. - In prosecution for sexual assault upon four year old female child, statements made by victim within 45 minutes after awaking, crying and scared, upon being discovered in bed with defendant, could be seen as contemporaneous with shocked condition and as spontaneous utterances, and were properly admitted under the res gestae exception to the hearsay rule. *State v. Apodaca*, 80 N.M. 244, 453 P.2d 764 (Ct. App. 1969).

Similar prior acts. - Admission into evidence of prior sexual acts between defendant and prosecuting witness similar to those charged in conviction for indecent handling and touching of girl under age of 16 was not an abuse of trial court's discretion as a matter of law. *State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

In a prosecution for criminal sexual contact with a minor, the admission of evidence of prior "bad" acts, including uncharged sexual battery dating back to the victim's early

childhood, was not error. The evidence corroborated the victim's testimony and placed the charged acts in context. The evidence of defendant's treatment of the victim was relevant to the issue of credibility and not merely offered to show defendant's character and propensity to commit the crime. *State v. Landers*, 115 N.M. 514, 853 P.2d 1270 (Ct. App. 1993).

Physical evidence is not required to support a conviction under this section. *State v. Landers*, 115 N.M. 514, 853 P.2d 1270 (Ct. App. 1993).

Child's testimony sufficient. - The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Corroboration was not essential to conviction in a prosecution for indecent handling and touching of a minor under 18 years of age. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Use of a position of authority to coerce sexual contact may be proven inferentially and although the position of employer in and of itself does not necessarily establish the use of that position as coercion, where there exists sufficient connection between the employment and the sexual contact, the jury can appropriately infer that the employer used coercion. *State v. Trevino*, 113 N.M. 804, 833 P.2d 1170 (Ct. App.), *aff'd sub nom. State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Instruction on time limitation properly refused. - Where time limitation was not an essential element of the offenses of contributing to the delinquency of a minor and criminal sexual contact of a minor, no error was committed by the court's failure to instruct the jury on time limitations in connection with the charges at issue. *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990).

Instruction on intoxication improperly refused. - Where trial court by instruction fixed specific intent as an essential ingredient of offense charged, sexual assault of female under the age of 16, refusal to instruct on defense of intoxication was reversible error. *State v. Rayos*, 77 N.M. 204, 420 P.2d 314 (1967).

No instruction on touchings' lawfulness absent evidence. - Although the defendant contended that all touching of the victim was colorably lawful, there was no evidence from which the jury could infer that the particular touchings that the state sought to prove were lawful. The only way to view the defendant's evidence was that he did not touch the victim whatsoever in the manner the state alleged and that all of his other touchings were lawful. Because the defendant did not allege that the particular touchings forming the basis for the charges were lawful, the issue of the lawfulness of those touchings was not at issue, and the trial court's failure to give a lawfulness instruction was not fundamental error. *State v. Landers*, 115 N.M. 514, 853 P.2d 1270 (Ct. App. 1993).

Evidence sufficient to support conviction. - Father's conviction on two counts of criminal sexual contact of a minor was supported by substantial evidence, including the testimony of the child and a therapist who interviewed the child. *State v. Newman*, 109 N.M. 263, 784 P.2d 1006 (Ct. App. 1989).

Evidence was sufficient to demonstrate that defendant coerced a 16-year old boy to submit to sexual contact by using his position as employer, where defendant, who had hired the boy to help repair appliances, closed the doors and windows when the boy indicated a desire to leave after defendant made sexual advances. *State v. Corbin*, 111 N.M. 707, 809 P.2d 57 (Ct. App. 1991).

Jury could infer coercion resulted from the employment relationship. First, the sexual contact took place on a job site owned by defendant, who had sole supervisory control not only over the premises but also over the victim. Second, defendant assigned victim to a small ticket booth where all of the incidents of sexual contact took place. *State v. Trevino*, 113 N.M. 804, 833 P.2d 1170 (Ct. App.), *aff'd sub nom. State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 A.L.R.3d 8.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity, 90 A.L.R.3d 1286.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

6A C.J.S. Assault and Battery § 123.

30-9-14. Indecent exposure.

Indecent exposure consists of a person knowingly and intentionally exposing his primary genital area to public view. Primary genital area means the mons pubis, penis, testicles, mons veneris, vulva or vagina.

Whoever commits indecent exposure before a child under the age of thirteen is guilty of a misdemeanor.

Whoever commits indecent exposure before a person thirteen years of age or older is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-9-24, enacted by Laws 1975, ch. 109, § 5.

ANNOTATIONS

Cross-references. - For provision that testimony of victim hereunder need not be corroborated, see 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, see 30-9-16 NMSA 1978.

Vehicle on public street as "public view". - The cab of a pickup truck parked on a public street in daylight hours is open to the public view and the actions of a defendant in calling an 11 year-old girl to a window on the pretext of asking directions consequently fall within the meaning of indecent exposure under this section. *State v. Artrip*, 112 N.M. 87, 811 P.2d 585 (Ct. App. 1991).

No exposure to "public view". - The defendant, who deliberately displayed his genital area before a minor child in the household wherein he was living, did not indecently expose himself to "public view" as proscribed by this section. *State v. Romero*, 103 N.M. 532, 710 P.2d 99 (Ct. App. 1985); *State v. Henderson*, 116 N.M. 537, 865 P.2d 1181 (1993).

Prosecutrix' prior sexual conduct. - In prosecution for indecent exposure before female child under 18, where questions asked of prosecutrix on cross-examination relating to specific prior acts of sexual misconduct were allowed by the trial court on theory that they were an attack upon her credibility, the permitting or limiting of extent of such questioning was well within discretion of the court. *State v. McKinzie*, 72 N.M. 23, 380 P.2d 177 (1963).

Contributing to delinquency of a minor is separate offense. - An element of indecent exposure is that the defendant's acts take place in "public view;" there is no such element in contributing to delinquency of a minor, and the trial court's refusal to

give the instruction as a lesser included offense was proper. State v. Henderson, 116 N.M. 537, 865 P.2d 1181 (1993).

In prosecution for indecent exposure before female child under age of 18, question to defendant's wife regarding a prior second-degree rape charge filed against her husband, posed after she testified that his sexual morality had never been called into question, related only to the character of defendant, which he himself had placed in issue by taking the stand, and claimed prejudice was unavailing to him. State v. McKinzie, 72 N.M. 23, 380 P.2d 177 (1963).

Cross-examination prejudicial. - It was an abuse of discretion for trial court to permit the cross-examination of defendant in prosecution for indecent demonstration or exposure in presence of female under 16, to be conducted to the extent and in the manner disclosed by the record, where for purpose of attacking defendant's credibility the prosecutor asked about specified lewd acts with his young daughter, describing the acts, unnecessarily repeating his questions, framing his interrogations as assertions and challenging defendant's denials, with result that defendant was denied a fair trial. State v. Hargrove, 81 N.M. 145, 464 P.2d 564 (Ct. App. 1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Lewdness, Indecency and Obscenity §§ 2, 17, 18.

Criminal offense predicated upon indecent exposure, 93 A.L.R. 996, 94 A.L.R.2d 1353.

Topless or bottomless dancing or similar conduct as offense, 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

Indecent exposure: what is "person", 63 A.L.R.4th 1040.

30-9-14.1. Indecent dancing.

Indecent dancing consists of a person knowingly and intentionally exposing his intimate parts to public view while dancing or performing in a licensed liquor establishment. "Intimate parts" means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, "female breast" means the areola, and "exposing" does not include any act in which the intimate part is covered by any nontransparent material.

Whoever commits indecent dancing is guilty of a petty misdemeanor.

A liquor licensee, his transferee or their lessee or agent who allows indecent dancing on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act.

History: 1978 Comp., § 30-9-14.1, enacted by Laws 1979, ch. 403, § 1; 1981, ch. 41, § 1.

ANNOTATIONS

Liquor Control Act. - See 60-3A-1 NMSA 1978 and notes thereto.

Constitutionality. - The state's regulatory power under the twenty-first amendment outweighs any first amendment interest in nude dancing and therefore this section is constitutional insofar as it applies to the prohibition of indecent dancing in licensed liquor establishments. *Nall v. Baca*, 95 N.M. 783, 626 P.2d 1280 (1980).

Law reviews. - For note, "Constitutional Law - Regulating Nude Dancing in Liquor Establishments - The Preferred Position of the Twenty-First Amendment - *Nall v. Baca*," see 12 N.M.L. Rev. 611 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Topless or bottomless dancing or similar conduct as offense, 49 A.L.R.3d 1084.

What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

30-9-14.2. Indecent waitering.

Indecent waitering consists of a person knowingly and intentionally exposing his intimate parts to public view while serving beverage or food in a licensed liquor establishment. "Intimate parts" means the mons pubis, penis, testicles, mons veneris, vulva, female breast or vagina. As used in this section, "female breast" means the areola and "exposing" does not include any act in which the intimate part is covered by any nontransparent material.

Whoever commits indecent waitering is guilty of a petty misdemeanor.

A liquor licensee or his lessee or agent who allows indecent waitering on the licensed premises is guilty of a petty misdemeanor and his license may be suspended or revoked pursuant to the provisions of the Liquor Control Act.

History: 1978 Comp., § 30-9-14.2, enacted by Laws 1979, ch. 403, § 2; 1981, ch. 41, § 2.

ANNOTATIONS

Liquor Control Act. - See 60-3A-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - What constitutes "public place" within meaning of statutes prohibiting commission of sexual act in public place, 96 A.L.R.3d 692.

67 C.J.S. Obscenity § 5.

30-9-15. Corroboration.

The testimony of a victim need not be corroborated in prosecutions under Sections 2 through 5 [30-9-11 to 30-9-14 NMSA 1978] of this act and such testimony shall be entitled to the same weight as the testimony of victims of other crimes under the Criminal Code.

History: 1953 Comp., § 40A-9-25, enacted by Laws 1975, ch. 109, § 6.

ANNOTATIONS

Corroboration formerly. - For case law requiring corroboration prior to enactment of this section, see notes under 30-9-11 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Rape §§ 94 to 99; 70A Am. Jur. 2d Sodomy §§ 70 to 76.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Modern status of rule regarding necessity for corroboration of victim's testimony in prosecution for sexual offense, 31 A.L.R.4th 120.

75 C.J.S. Rape § 78.

30-9-16. Testimony; limitations; in camera hearing.

A. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of the victim's past sexual conduct, opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct, shall not be admitted unless, and only to the extent that the court finds that, the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

B. As a matter of substantive right, in prosecutions pursuant to the provisions of Sections 30-9-11 through 30-9-15 NMSA 1978, evidence of a patient's psychological history, emotional condition or diagnosis obtained by an accused psychotherapist during the course of psychotherapy shall not be admitted unless, and only to the extent that, the court finds that the evidence is material and relevant to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

C. If the evidence referred to in Subsection A or B of this section is proposed to be offered, the defendant shall file a written motion prior to trial. The court shall hear the pretrial motion prior to trial at an in camera hearing to determine whether the evidence is admissible pursuant to the provisions of Subsection A or B of this section. If new information, which the defendant proposes to offer pursuant to the provisions of Subsection A or B of this section, is discovered prior to or during the trial, the judge shall order an in camera hearing to determine whether the proposed evidence is admissible. If the proposed evidence is deemed admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted.

History: 1953 Comp., § 40A-9-26, enacted by Laws 1975, ch. 109, § 7; 1993, ch. 177, § 4.

ANNOTATIONS

The 1993 amendment, effective July 1, 1993, substituted "30-9-11 through 30-9-15 NMSA 1978" for "2 through 6 of this act" near the beginning of Subsection A; added present Subsection B, redesignating former Subsection B as present Subsection C; in Subsection C, inserted "referred to in Subsection A or B of this section" in the first sentence, inserted "or B" in the second and third sentences, and deleted "under Subsection A of this section" from the end of the third sentence; and made stylistic changes throughout Subsections A and C.

Severability clauses. - Laws 1975, ch. 109, § 9, provides for the severability of the act if any part or application thereof is held invalid.

Section is not unconstitutional on its face. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The fact that this section attempts to regulate practice and procedure in district courts in regard to a victim's past sexual conduct does not mean that the legislation is unconstitutional in that it violates the provisions for separation of governmental power. State v. Herrera, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

This section was intended to encourage reporting of rapes by minimizing intrusive inquiry into the personal affairs of the victim. State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

Section protects victim against unwarranted invasions of her privacy. - In addition to its effect in insulating the jury from prejudicial material, this section serves to protect the victim of the crime against unwarranted invasions of her privacy. State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

The statute is designed to minimize intrusive inquiry into a rape complainant's private life. *State v. Ramos*, 115 N.M. 718, 858 P.2d 94 (Ct. App. 1993).

Section not in conflict with rules. - The procedures in this section do not conflict, but rather are consistent, with Rule 36, N.M.R. Crim. P. (now see Rule 5-603), regarding pretrial hearings. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

The balancing approach to be applied in admitting evidence concerning past sexual conduct under this section does not conflict, but rather is consistent, with Rule 403, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Once a showing sufficient to raise an issue as to relevancy of past sexual conduct is made, the balancing test of this section and of Rule 403, N.M.R. Evid. (now see Rule 11-403) is to be applied in determining admissibility. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

There is no conflict between this section and Rule 405, N.M.R. Evid. (now see Rule 11-405), regarding methods of proving character, because the balancing approach of Rule 403, N.M.R. Evid. (now see Rule 11-403) is also applicable to evidence admissible under Rule 405, N.M.R. Evid. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Section is not limited to sex by consent; rather, its unlimited wording applies to all forms of past sexual conduct, so that a prior rape is past sexual conduct within the meaning of this section. *State v. Montoya*, 91 N.M. 752, 580 P.2d 973 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

Discretion of trial court. - In prosecution for indecent exposure before female child under 18, where questions asked of prosecutrix on cross-examination relating to specific acts of sexual misconduct were allowed by the court on theory that they were an attack upon her credibility, the permitting or limiting of extent of such questioning was well within discretion of the trial court. *State v. McKinzie*, 72 N.M. 23, 380 P.2d 177 (1963).

Limited psychiatric examination of victim permissible. - Insofar as a psychiatric examination probes the past sexual behavior of the victim, it is within the terms of this section. *State v. Romero*, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

Prior accusations of sexual misconduct. - In a prosecution for sexual misconduct, the trial court did not err in denying the defendant's request to call the victim's stepfather and the defendant's wife to testify that the victim had previously falsely accused the stepfather of sexual misconduct. *State v. Scott*, 113 N.M. 525, 828 P.2d 958 (Ct. App. 1991), cert. quashed, 113 N.M. 524, 828 P.2d 957 (1992).

Victim's past sexual conduct in itself indicates nothing concerning consent in particular case. *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978). See *State v. Romero*, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

Victim's virginity relevant if consent at issue. - Evidence of a victim's virginity is relevant in cases involving alleged forcible criminal sexual penetration where the consent of the victim is at issue. *State v. Singleton*, 102 N.M. 66, 691 P.2d 67 (Ct. App. 1984).

Previous chastity immaterial. - Ordinarily the previous chastity of prosecuting witness is immaterial in a statutory rape case. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Probative value of evidence of victim's past sexual activity must be weighed against its prejudicial effect, and its prejudicial effect is great. *State v. Romero*, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980).

The discretion of the trial court to exclude evidence of sexual conduct must be weighed against a criminal defendant's constitutional right to confront witnesses. *Manlove v. Sullivan*, 108 N.M. 471, 775 P.2d 237 (1989).

Evidence of a minor's past sexual history was properly excluded since that evidence was not relevant to the charge of contributing to the delinquency of a minor. *State v. Lucero*, N.M. , 884 P.2d 1175 (Ct. App. 1994).

Past conduct negating defendant's paternity. - Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such condition. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Issue of penetration. - Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, where sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Prior acts with defendant. - Admission into evidence of prior sexual acts between defendant and prosecuting witness similar to those charged in prosecution for indecent handling and touching of girl under age of 16 was not an abuse of trial court's discretion as matter of law. *State v. Minns*, 80 N.M. 269, 454 P.2d 355 (Ct. App.), cert. denied, 80 N.M. 234, 453 P.2d 597 (1969).

Trial court did not err in allowing a child-victim to testify about his sexual conduct with defendant while in California and before moving to New Mexico, where the California

episodes were relevant to the episodes in New Mexico. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Evidence of past sexual encounter of victim and third party. - Trial court acted within its discretion in suppressing evidence of a past sexual encounter of the victim and a third party during which the victim allegedly affixed the ropes found on the bed to restrain the third party in the course of consensual sexual activity, where such evidence was irrelevant to defendant's culpability for the crimes charged, advanced no legitimate defense, excuse, or justification for the crimes charged, and were likely to inject false issues and confuse the jury. *State v. Swafford*, 109 N.M. 132, 782 P.2d 385 (Ct. App. 1989).

Testimony offered for fabrication defense. - For testimony offered for a fabrication defense in a prosecution for kidnapping, criminal sexual prosecution, and aggravated assault, see *Manlove v. Tansy*, 981 F.2d 473 (10th Cir. 1992).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Evidence," see 11 N.M.L. Rev. 159 (1981).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Lewdness, Indecency and Obscenity §§ 34 to 38; 65 Am. Jur. 2d Rape §§ 82 to 87; 70A Am. Jur. 2d Sodomy §§ 54 to 57.

Evidence of complaint by victim of rape who is not a witness, 157 A.L.R. 1359.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 77 A.L.R.2d 841, 2 A.L.R.4th 330.

Validity and construction of constitution on statute authorizing exclusion of public in sex offense cases, 39 A.L.R.3d 852.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Admissibility of evidence of character or reputation of party in civil action for sexual assault on issues other than impeachment, 100 A.L.R.3d 569.

Constitutionality of "rape shield" statute restricting use of evidence of victim's sexual experiences, 1 A.L.R.4th 283.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that prosecuting witness threatened to make similar charges against other persons, 71 A.L.R.4th 448.

Impeachment or cross-examination of prosecuting witness in sexual offense trial by showing that similar charges were made against other persons, 71 A.L.R.4th 469.

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 A.L.R.4th 1076.

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

75 C.J.S. Rape §§ 63; 81 C.J.S. Sodomy § 10.

30-9-17. Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

A. In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, upon motion of the district attorney and after notice to the opposing counsel, the district court may, for a good cause shown, order the taking of a videotaped deposition of any alleged victim under the age of sixteen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the district attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner as permitted at trial under the provisions of Rule 611 of the New Mexico Rules of Evidence [Rule 11-611]. Any videotaped deposition taken under the provisions of this act [this section] shall be viewed and heard at the trial and entered into the record in lieu of the direct testimony of the alleged victim.

B. For the purposes of this section, "videotaped deposition" means the visual recording on a magnetic tape, together with the associated sound, of a witness testifying under oath in the course of a judicial proceeding, upon oral examination and where an opportunity is given for cross-examination in the presence of the defendant and intended to be played back upon the trial of the action in court.

C. The supreme court may adopt rules of procedure and evidence to govern and implement the provisions of this act.

D. The cost of such videotaping shall be paid by the state.

E. Videotapes which are a part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: 1953 Comp., § 40A-9-27, enacted by Laws 1978, ch. 98, § 1.

ANNOTATIONS

Defendant absent from trial voluntarily. - Factors articulated in *State v. Clements*, 108 N.M. 13, 765 P.2d 1195 (Ct. App. 1988), as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992).

Record insufficient to justify denial of right to confront victim. - Where a child was charged with criminal sexual contact with his sister, and, at trial, the victim testified in chambers with only counsel and the judge present and the accused observed the victim testify on a video monitor located in another room, the procedure was invalid without particularized findings of special harm to the particular child witness which are supported by substantial evidence, because the accused child's right of confrontation requires that he be permitted to confront each of the witnesses against him, including the child victim. *State v. Benny E.*, 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990).

Right of confrontation not denied. - In a prosecution for criminal sexual contact with a minor, use of the victim's videotaped deposition did not deny the defendant the right of confrontation: the defendant was not deprived of his right to fairly and fully cross-examine the child during the deposition, and the jury, which heard the child's testimony and viewed the child, via videotape, while she testified, had an adequate opportunity to observe the child's demeanor. *State v. Vigil*, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985).

Videotaping depositions of victims of sex crimes, while defendant was required to remain in a control room instead of the room in which the testimony was given, was consistent with this section and Rule 5-504, and no violation of defendant's right to confrontation occurred. *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App. 1988), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988), cert. denied, 489 U.S. 1097, 109 S. Ct. 1572, 103 L. Ed. 2d 938 (1989).

In a prosecution for sexual abuse, trial judge did not abuse his discretion in allowing the children to testify by way of depositions that were videotaped outside the presence of the defendant and then shown to the jury, as he made the requisite findings that the individualized harm which would otherwise result in the child victims outweighed the defendant's right to a face-to-face confrontation with his accusers. *State v. Fairweather*, 116 N.M. 456, 863 P.2d 1077 (1993).

Showing of traumatic effect. - Showing a traumatic effect upon the child is sufficient to render the child unavailable to testify. *Vigil v. Tansy*, 917 F.2d 1277 (10th Cir. 1990), cert. denied, 498 U.S. 1100, 111 S. Ct. 995, 112 L. Ed. 2d 1078 (1991).

Deposition need not be taken to charging paper on which defendant ultimately tried. - There is nothing in Rule 5-504 requiring a deposition to be taken pursuant to the charging paper upon which defendant is ultimately tried. A deposition may be taken pursuant to a complaint and then introduced at a trial on an indictment or information. *State v. Larson*, 107 N.M. 85, 752 P.2d 1101 (Ct. App. 1988).

Second deposition admitted into evidence. - While it appears that the procedure outlined in this section and Rule 5-504 contemplates only one deposition, at which defense counsel should be on notice that this is his chance to confront the victim, although defendant never alerted the trial court why, following a deposition, a new video deposition was necessary, and he never specifically informed the appellate court, with references to the record, why a new video deposition was necessary, it could not be said that the trial court erred in allowing defendant to take a second deposition and then allowing both the first and second videotaped depositions into evidence. *State v. Larson*, 107 N.M. 85, 752 P.2d 1101 (Ct. App. 1988).

Mistrial declared where tape inaudible at trial. - Where videotape of testimony of 11-year-old victim of alleged criminal sexual penetration was inaudible at trial and child was unavailable to testify in person because of illness and possible emotional harm, there existed a manifest necessity for declaring a mistrial so that double jeopardy did not bar defendant's retrial. *State v. Messier*, 101 N.M. 582, 686 P.2d 272 (Ct. App. 1984).

Consideration of whether evidence subject to public inspection. - Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Law reviews. - For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Closed-circuit television witness examination, 61 A.L.R.4th 1155.

30-9-18. Alleged victims who are under thirteen years of age; psychological evaluation.

In any prosecution for criminal sexual penetration or criminal sexual contact of a minor, if the alleged victim is under thirteen years of age, the court may hold an evidentiary hearing to determine whether to order a psychological evaluation of the alleged victim on the issue of competency as a witness. If the court determines that the issue of competency is in sufficient doubt that the court requires expert assistance, then the court may order a psychological evaluation of the alleged victim, provided however, that if a psychological evaluation is ordered it shall be conducted by only one psychologist or psychiatrist selected by the court who may be utilized by either or both parties; further provided that if the alleged victim has been evaluated on the issue of competency

during the course of investigation by a psychologist or psychiatrist selected in whole or in part by law enforcement officials, the psychological evaluation, if any, shall be conducted by a psychologist or psychiatrist selected by the court upon the recommendation of the defense.

History: Laws 1987, ch. 118, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Witnesses: child competency statutes, 60 A.L.R.4th 369.

ARTICLE 10 MARITAL AND FAMILIAL OFFENSES

30-10-1. Bigamy.

Bigamy consists of knowingly entering into a marriage by or with a person who has previously contracted one or more marriages which have not been dissolved by death, divorce or annulment. Both parties may be principals.

Whoever commits bigamy is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-10-1, enacted by Laws 1963, ch. 303, § 10-1.

ANNOTATIONS

Meaning clear. - The meaning of "bigamy" as used in Code 1915, § 1775 was universally understood, and no language could have been employed which would have made clearer the intention of the legislature. State v. Lindsey, 26 N.M. 526, 194 P. 877 (1921).

Indictment. - It was not necessary to allege knowledge or intention in an indictment for bigamy. State v. Lindsey, 26 N.M. 526, 194 P. 877 (1921).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 10 Am. Jur. 2d Bigamy §§ 1 to 5.

Common-law marriage, prosecution based on, 70 A.L.R. 1036.

Validation of marriage by death of former spouse, 95 A.L.R. 1292.

Mistake as to validity or effect of divorce as defense to, 56 A.L.R.2d 915.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

10 C.J.S. Bigamy §§ 1 to 6.

30-10-2. Unlawful cohabitation.

Unlawful cohabitation consists of persons who are not married to each other cohabiting together as man and wife.

Whoever commits unlawful cohabitation upon the first conviction shall only be warned by the judge to cease and desist such unlawful cohabitation.

Whoever persists in committing the crime of unlawful cohabitation after being warned is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-10-2, enacted by Laws 1963, ch. 303, § 10-2.

ANNOTATIONS

Cohabitation without marriage is contrary to public policy and declared a criminal offense. *Bivians v. Denk*, 98 N.M. 722, 652 P.2d 744 (Ct. App. 1982).

Law reviews. - For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

For article, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" see 2 N.M.L. Rev. 141 (1972).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Property rights arising from relationship of couple cohabiting without marriage, 3 A.L.R.4th 13.

Validity of statute making adultery and fornication criminal offense, 41 A.L.R.3d 1338.

30-10-3. Incest.

Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews.

Whoever commits incest is guilty of a third degree felony.

History: 1953 Comp., § 40A-10-3, enacted by Laws 1963, ch. 303, § 10-3.

ANNOTATIONS

Purpose of section. - This section is directed toward prohibiting sexual intercourse between specific relations within the blood line. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

The term "consanguinity" admits of only one plain meaning. It is the relationship by descent from the same stock or common ancestor, related by blood. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

Elements of offense. - The purpose of Laws 1917, ch. 50, § 1 (former 40-7-3, 1953 Comp.) was to prevent sexual intercourse between close relatives, and the free act of the one being tried, with knowledge of the relationship, was all that was required, it being immaterial that the same testimony would have sustained a conviction for rape. *State v. Hittson*, 57 N.M. 100, 254 P.2d 1063 (1953).

The free act of the one being tried, with knowledge of the relationship, is required to convict one of incest. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

Failure to instruct the jury that it had to find beyond a reasonable doubt that defendant had knowledge of the prohibited blood relationship was reversible error, where defendant's testimony that he believed he did not father his "adopted daughter" demonstrated that he did not concede that at the time they had intercourse he knew she was his biological daughter. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

Uncle/niece marriages. - New Mexico's public policy against incest did not preclude the district court from awarding a mother primary physical custody of her children, after taking into account her plans to marry her uncle, where that choice was in the best interests of the children, and mother and uncle intended to reside in California. *Leszinske v. Poole*, 110 N.M. 663, 798 P.2d 1049 (Ct. App. 1990).

Separate counts of incest and criminal sexual penetration. - There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

Polygraph test results. - In prosecution for incest, it was reversible error for trial court to admit into evidence the results of a polygraph test over objection of the defendant, despite the fact that defendant had signed a waiver agreeing to be bound by the results of the test. *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961).

Double jeopardy. - There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

Law reviews. - For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For article, "New Mexico's 1969 Criminal Abortion Law," see 10 Nat. Resources J. 591 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 41 Am. Jur. 2d Incest §§ 1 to 12.

Adoption, relationship created by, as within statute regarding incest, 151 A.L.R. 1146.

Consent as element of incest, 36 A.L.R.2d 1299.

Sexual intercourse between persons related by half blood as incest, 72 A.L.R.2d 706.

Prosecutrix in incest case as accomplice or victim, 74 A.L.R.2d 705.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Admissibility, in incest prosecution, of evidence of alleged victim's prior sexual acts with persons other than accused, 97 A.L.R.3d 967.

Crimes against spouse within exception permitting testimony by one spouse against other in criminal prosecution - modern state cases, 74 A.L.R.4th 223.

42 C.J.S. Incest §§ 2 to 6.

ARTICLE 11

CRIMES AGAINST REPUTATION

30-11-1. Libel.

Libel consists of making, writing, publishing, selling or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business or occupation of another, or which exposes another to hatred, contempt, ridicule, degradation or disgrace.

Whoever commits libel is guilty of a misdemeanor.

The word "malicious," as used in this article, signifies an act done with evil or mischievous design and it is not necessary to prove any special facts showing ill-feeling on the part of the person who is concerned in making, printing, publishing or circulating a libelous statement against the person injured thereby.

A. A person is the maker of a libel who originally contrived and either executed it himself by writing, printing, engraving or painting, or dictated, caused or procured it to be done by others.

B. A person is the publisher of a libel who either of his own will or by the persuasion or dictation, or at the solicitation or employment for hire of another, executes the same in any of the modes pointed out as constituting a libel; but if anyone by force or threats is compelled to execute such libel he is guilty of no crime.

C. A person is guilty of circulating a libel who, knowing its contents, either sells, distributes or gives, or who, with malicious design, reads or exhibits it to others.

D. The written, printed or published statement to come within the definition of libel must falsely convey the idea either:

(1) that the person to whom it refers has been guilty of some penal offenses;

(2) that he has been guilty of some act or omission which, though not a penal offense, is disgraceful to him as a member of society, and the natural consequence of which is to bring him into contempt among honorable persons;

(3) that he has some moral vice or physical defect or disease which renders him unfit for intercourse with respectable society, and as such should cause him to be generally avoided;

(4) that he is notoriously of bad or infamous character; or

(5) that any person in office or a candidate therefor is dishonest and therefore unworthy of such office, or that while in office he has been guilty of some malfeasance rendering him unworthy of the place.

E. It shall be sufficient to constitute the crime of libel if the natural consequence of the publication of the same is to injure the person defamed although no actual injury to his reputation need be proven.

F. No statement made in the course of a legislative or judicial proceeding, whether true or false, although made with intent to injure and for malicious purposes, comes within the definition of libel.

History: 1953 Comp., § 40A-11-1, enacted by Laws 1963, ch. 303, § 11-1.

ANNOTATIONS

Cross-references. - For constitutional provision guaranteeing freedom of speech and of the press, and making truth a defense in criminal prosecutions for libel, see N.M. Const., art. II, § 17.

For the Uniform Single Publication Act, see 41-7-1 to 41-7-5 NMSA 1978.

For defamation by radio and television, see 41-7-6 NMSA 1978.

Revival and constitutionality of former law. - Laws 1905, ch. 13, specifically revived Laws 1889, ch. 11, relating to criminal libel, after repealing an intermediate Act of 1893, ch. 14, and the fact that the passage of Laws 1905, ch. 13 did not conform to N.M. Const., art. IV, § 18, later adopted, relating to amendment of statutes, was immaterial, as the constitution had no retroactive effect. *State v. Elder*, 19 N.M. 393, 143 P. 482 (1914).

Truth as defense. - Laws 1889, ch. 11, § 22 conflicted with N.M. Const., art. II, § 17 and was repealed thereby insofar as the law limited the pleading and the giving in evidence of the truth as a defense in criminal libel suits. *State v. Elder*, 19 N.M. 393, 143 P. 482 (1914).

Definition of libel. - The statutory definition of libel governed where there was a statute on the subject, and it was immaterial whether the words alleged to be libelous were libelous per se. *State v. Elder*, 19 N.M. 393, 143 P. 482 (1914).

Statement involving matter of public concern. - This statute is unconstitutional insofar as it applies to a public statement involving a matter of public concern. Such statements can be subject to criminal penalty only if made with actual malice. *State v. Powell*, 114 N.M. 395, 839 P.2d 139 (Ct. App. 1992).

Charges libelous. - Charging a person in a newspaper with being "an unprincipled son," a "moral coward," "an imbecile" and "one who has about as much regard for the truth as an infidel has for the Bible," was libelous under Laws 1889, ch. 11, § 7 (former 40-27-8, 1953 Comp.). *State v. Elder*, 19 N.M. 393, 143 P. 482 (1914).

Article not privileged. - Where an alleged libelous article did not refer to the several branches of government, but to a particular assessor, it was not privileged under Laws 1889, ch. 11, § 17 (former 40-27-13, 1953 Comp.) making publications as to the government or its branches privileged. *State v. Ogden*, 20 N.M. 636, 151 P. 758 (1915).

Libelous report of court proceedings. - While a person might publish a correct account of the proceedings in a court of justice, yet if he discolored or garbled the account, or added comments and insinuations of his own against the character of the parties, it was libelous. *Henderson v. Dreyfus*, 26 N.M. 541, 191 P. 442 (1919).

Indictment sufficient. - An indictment which charged that the alleged defamatory matter was false was sufficient on demurrer, negative averments not being necessary. The indictment need not allege that if true the matters were not published with good motives or justifiable ends. *State v. Elder*, 19 N.M. 393, 143 P. 482 (1914).

Law reviews. - For article, "The Proposed New Mexico Criminal Code," see 1 Nat. Resources J. 122 (1961).

For note, "The Defenses of Fair Comment and Qualified Privilege," see 11 N.M.L. Rev. 243 (1981).

For note, "Libel Law - New Mexico Adopts an Ordinary Negligence Standard for Defamation of a Private Figure: Marchiondo v. Brown," see 13 N.M.L. Rev. 715 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Libel and Slander §§ 495 to 513.

Character of libel or slander for which criminal prosecution will lie, 19 A.L.R. 1470.

Words as criminal offense other than libel or slander, 48 A.L.R. 83.

Liability of partners or partnership for libel, 88 A.L.R.2d 474.

Liability of telegraph or telephone company for transmitting or permitting transmission of libelous or slanderous messages, 91 A.L.R.3d 1015.

Actionability of false newspaper report that plaintiff has been arrested, 93 A.L.R.3d 625.

Libel by newspaper headlines, 95 A.L.R.3d 660.

Liability of commercial printer for defamatory statement contained in matter printed for another, 16 A.L.R.4th 1372.

Libel and slander: attorneys' statements, to parties other than alleged defamed party or its agents, in course of extrajudicial investigation or preparation relating to pending or anticipated civil litigation as privileged, 23 A.L.R.4th 932.

Defamation: loss of employer's qualified privilege to publish employee's work record or qualification, 24 A.L.R.4th 144.

Criticism or disparagement of attorney's character, competence, or conduct as defamation, 46 A.L.R.4th 326.

Libel or slander: defamation by gestures or acts, 46 A.L.R.4th 403.

Validity of criminal defamation statutes, 68 A.L.R.4th 1014.

In personam jurisdiction, in libel and slander action, over nonresident who mailed allegedly defamatory letter from outside state, 83 A.L.R.4th 1006.

Who is "public figure" for purposes of defamation action, 19 A.L.R.5th 1.

53 C.J.S. Libel and Slander; Injurious Falsehood §§ 7 to 9.

ARTICLE 12

ABUSE OF PRIVACY

30-12-1. Interference with communications; exception.

Interference with communications consists of knowingly and without lawful authority:

A. displacing, removing, injuring or destroying any radio station, television tower, antenna or cable, telegraph or telephone line, wire, cable, pole or conduit belonging to another, or the material or property appurtenant thereto;

B. cutting, breaking, tapping or making any connection with any telegraph or telephone line, wire, cable or instrument belonging to or in the lawful possession or control of another, without the consent of such person owning, possessing or controlling such property;

C. reading, interrupting, taking or copying any message, communication or report intended for another by telegraph or telephone without the consent of a sender or intended recipient thereof;

D. preventing, obstructing or delaying the sending, transmitting, conveying or delivering in this state of any message, communication or report by or through telegraph or telephone; or

E. using any apparatus to do or cause to be done any of the acts hereinbefore mentioned or to aid, agree with, comply or conspire with any person to do or permit or cause to be done any of the acts hereinbefore mentioned.

Whoever commits interference with communications is guilty of a misdemeanor, unless such interference with communications is done:

(1) under a court order as provided in Sections 30-12-2 through 30-12-11 NMSA 1978;
or

(2) by an operator of a switchboard or an officer, employee or agent of any communication common carrier in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his services or to the protection of rights or property of the carrier of such communication; or

(3) by a person acting under color of law in the investigation of a crime, where such person is a party to the communication, or one of the parties to the communication has given prior consent to such interception, monitoring or recording of such communication.

History: 1953 Comp., § 40A-12-1, enacted by Laws 1963, ch. 303, § 12-1; 1973, ch. 369, § 1; 1979, ch. 191, § 1.

ANNOTATIONS

As to right of media access to judicial records, see *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Materials not subject to disclosure unless used as evidence. - Except those matters actually introduced into evidence or utilized in open court, materials intercepted pursuant to this article are not subject to disclosure. *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Legislature did not intend to expose every person with telephone extension to criminal liability who allowed someone else to listen to his conversation. *Robison v. Katz*, 94 N.M. 314, 610 P.2d 201 (Ct. App.), cert. denied, 94 N.M. 675, 615 P.2d 992 (1980).

Transmittal of face-to-face conversation. - Subsection C of this section pertains to telephone conversations or telegraph messages, and was not applicable to a face-to-face conversation transmitted to a listener by a device concealed on one of the participants in the conversation. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Voluntary conversation invites risk of recording and transmission. - One who voluntarily enters into a conversation with another takes the risk that the other person on the line may memorize, record or even transmit the conversation. *State v. Arnold*, 94 N.M. 385, 610 P.2d 1214 (Ct. App. 1979), rev'd on other grounds, 94 N.M. 381, 610 P.2d 1210 (1980).

Civil action permitted whether or not conviction achieved. - Section 30-12-11 NMSA 1978 provides a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use, such communications, without lawful authority to do so, regardless of whether that person has been convicted under this section. *Templin v. Mountain Bell Tel. Co.*, 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

Antecedent justification. - The United States supreme court has held that there must be antecedent justification to a court, governed by precise procedures and guidelines, before wiretapping is employed. 1970-71 Op. Att'y Gen. No. 71-37.

Law reviews. - For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 74 Am. Jur. 2d Telecommunications §§ 36, 207, 211, 213, 214, 217.

Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

Permissible warrantless surveillance, under state communications interception statute, by state or local law enforcement officer or one acting in concert with officer, 27 A.L.R.4th 449.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Intrusion by news-gathering entity as invasion of right of privacy, 69 A.L.R.4th 1059.

"Caller ID" system, allowing telephone call recipient to ascertain number of telephone from which call originated, as violation of right to privacy, wiretapping statute, or similar protections, 9 A.L.R.5th 553.

86 C.J.S. Telegraphs, Telephones, Radio and Television §§ 120, 122.

30-12-2. Grounds for order of interception.

An ex parte order for wiretapping, eavesdropping or the interception of any wire or oral communication may be issued by any judge of a district court upon application of the attorney general or a district attorney, stating that there is probable cause to believe that:

A. evidence may be obtained of the commission of:

(1) the crime of murder, kidnapping, extortion, robbery, trafficking or distribution of controlled substances or bribery of a witness;

(2) the crime of burglary, aggravated burglary, criminal sexual penetration, arson, mayhem, receiving stolen property or commercial gambling, if punishable by imprisonment for more than one year; or

(3) an organized criminal conspiracy to commit any of the aforementioned crimes; or

B. the communication, conversation or discussion is itself an element of any of the above specified crimes.

History: 1953 Comp., § 40A-12-1.1, enacted by Laws 1973, ch. 369, § 2; 1979, ch. 191, § 2.

ANNOTATIONS

Law reviews. - For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Permissible surveillance, under state communications interception statute, by person other than state or local law enforcement officer or one acting in concert with officer, 24 A.L.R.4th 1208.

30-12-3. Form of application.

Each application for wiretapping, eavesdropping or the interception of any wire or oral communication shall be made in writing upon oath or affirmation to a judge of a district court and shall state the applicant's authority to make such application. Each application shall include:

A. the identity of the investigative or law enforcement officer making the application and the officer authorizing the application;

B. a complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including:

(1) details as to the particular offense that has been, is being or is about to be committed;

(2) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted;

(3) a particular description of the type of communication sought to be intercepted; and

(4) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

C. a complete statement as to whether other investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or appear to be too dangerous;

D. a statement of the period of time for which the interception is required to be maintained; if the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter shall be required;

E. a complete statement of the facts concerning all previous applications known to the individuals authorizing and making the application, which were made to any judge for authorization to intercept or for approval of interceptions of wire or oral communications involving any of the same persons, facilities or places specified in the application and the action taken by the judge on each such application; and

F. where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

History: 1953 Comp., § 40A-12-1.2, enacted by Laws 1973, ch. 369, § 3.

30-12-4. Entry of order; determination.

Upon application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving wiretapping, eavesdropping or the interception of wire or oral communications within the district in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

A. there is probable cause for belief that a person is committing, has committed or is about to commit a particular offense enumerated in 30-12-2 NMSA 1978;

B. there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

C. normal investigative procedures have been tried and failed, or reasonably appear unlikely to succeed if tried, or appear to be too dangerous; and

D. there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted is being used or is about to be used in connection with the commission of such offense, or is leased to, listed in the name of or commonly used by the person alleged to be involved in the commission of the offense.

History: 1953 Comp., § 40A-12-1.3, enacted by Laws 1973, ch. 369, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - When do facts shown as probable cause for wiretap authorization under 18 USCS § 2518(3) become "stale," 68 A.L.R. Fed. 953.

30-12-5. Contents of order.

A. Each order authorizing or approving wiretapping, eavesdropping or interception of wire or oral communications shall specify:

(1) the identity, if known, of the person whose communications are to be intercepted;

(2) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;

(3) a particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates;

(4) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(5) the period of time during which such interception is authorized, including a statement as to whether the interception automatically terminates when the described communication has been first obtained.

B. An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

History: 1953 Comp., § 40A-12-1.4, enacted by Laws 1973, ch. 369, § 5.

30-12-6. Order; extension; requirements.

No order entered under this act [30-12-1 to 30-12-11 NMSA 1978] may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension, made in accordance with Section 30-12-3 NMSA 1978, and if the court makes the findings required by Section 30-12-4 NMSA 1978. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted, and in no event longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception under this act and shall terminate upon attainment of the authorized objective, or in any event within thirty days. Whenever an order authorizing interception is entered pursuant to this act, the order may require reports to be made to the judge who issued the order, showing what progress has been made toward achievement of the authorized objective and the need for continued interception. The reports shall be made at such times as the judge may require.

History: 1953 Comp., § 40A-12-1.5, enacted by Laws 1973, ch. 369, § 6.

ANNOTATIONS

Interception of nonrelevant conversations. - This section does not forbid interception of all nonrelevant conversations, but, like the federal statute, mandates the government to conduct the surveillance so as to minimize the interception of such conversations. Factors to be considered in determining whether the government acted reasonably in a given case may include, but are not limited to, the complexity of the criminal operation, whether the callers are using ambiguous or coded language, whether the applicable telephone is public or residential, the length of time of the wiretap and of the telephone calls, and the extent of judicial supervision. *State v. Manes*, 112 N.M. 161, 812 P.2d 1309 (Ct. App.), cert. denied, U.S. , 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

The defendant argued that the police, who wiretapped his phone, failed to properly minimize the interception of unauthorized communications, those involving his wife, mother, and children. To prevail, he had to show a pattern of interception of innocent conversations which developed over the period of the wiretap; it was insufficient if he merely identified particular calls which he contended should not have been intercepted. *State v. Manes*, 112 N.M. 161, 812 P.2d 1309 (Ct. App.), cert. denied, U.S. , 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

Law reviews. - For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

30-12-7. Method of recording communication; custody.

A. The contents of any wire or oral communication intercepted by any means authorized by this act [30-12-1 to 30-12-11 NMSA 1978] shall, if possible, be recorded on tape, wire or other comparable device. The recording shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon expiration of the period of the order or extension thereof, such recording shall be made available to the judge issuing the order and sealed under his directions. Custody of the recording shall be wherever the judge orders. A recording shall not be destroyed except upon the order of the judge, and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of this act. The presence of the seal, or a satisfactory explanation for the absence thereof, shall be prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived under this act.

B. Applications made and orders granted under this act shall be sealed by the judge and custody of them shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction, and shall not be destroyed except on order of the judge to whom presented, and in any event shall be kept for ten years.

C. Any violation of the provisions of this section may be punished as a contempt of court.

D. Within a reasonable time, but not later than ninety days after the filing of an application for an order of approval which is denied, or after the termination of the period of an order or extensions thereof, the judge to whom the application was presented shall cause to be served on the persons named in the order or the applications and on such other parties to intercepted communications as the judge may determine is in the interest of justice, notice of:

(1) the fact of the entry of the order or application;

(2) the date of the entry and the period of authorized, approved or disapproved interception or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. The judge, upon the filing of a motion, may, in his discretion, make available to any such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge the serving of the matter required by this subsection may be postponed.

History: 1953 Comp., § 40A-12-1.6, enacted by Laws 1973, ch. 369, § 7.

ANNOTATIONS

Cross-references. - For contempt of court, see 34-1-2 to 34-1-5 NMSA 1978.

Right of press to evidentiary materials arises when materials become public. - The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Procedure upon pretrial motion for disclosure of wiretap records. - A pretrial motion for disclosure of federal and state wiretap records, which claimed that a telephone call had been subject to surveillance, triggered the government's duty to affirm or deny the existence of such evidence, but since the government's denial was adequate and no evidence of an illegal surveillance beyond the unsupported allegations in the motion was presented, it was unnecessary to conduct a further hearing on the motion. *United States v. Alvallar*, 575 F.2d 1316 (10th Cir. 1978).

30-12-8. Use of contents as evidence; disclosure; motion to suppress.

A. The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a state court unless each party, not less than ten days before the trial, hearing or proceeding has been furnished with a copy of the court order and accompanying application, under which interception was authorized or approved. This

ten-day period may be waived by the court if it finds that it was not possible to furnish the party with such information ten days before the trial, hearing or proceeding, and that the party will not be prejudiced by the delay in receiving such information.

B. Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body or other authority of the state or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication on the grounds that:

(1) the communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(3) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing or proceeding unless there has been no opportunity to make such motion, or the person has not been aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall not be received as evidence. In addition to any other right of appeal, the state shall have the right to appeal from an order granting a motion to suppress made under this subsection, or to appeal the denial of an application for an order of approval, if the person making or authorizing the application shall certify to the judge granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order is entered and shall be diligently prosecuted.

History: 1953 Comp., § 40A-12-1.7, enacted by Laws 1973, ch. 369, § 8.

ANNOTATIONS

Cross-references. - For motion to suppress, see Rule 15-212 SCRA 1986.

Applicability. - Provisions of this section regulating admissibility of evidence authorized by court order were not applicable, even where there was no court order, to situation where overheard communication was a face-to-face conversation transmitted to a listener by concealed device. *State v. Hogervorst*, 90 N.M. 580, 566 P.2d 828 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Purpose of disclosure requirement. - The purpose of the timely disclosure provision is to afford an aggrieved party an opportunity to file a pretrial motion to suppress. *State v. Anderson*, 110 N.M. 382, 796 P.2d 603 (Ct. App. 1989).

Distinction between Subsections A and B. - Subsection A precludes the use of the evidence at a particular hearing or trial, unless the defendant has had an opportunity to

review the appropriate documents and to move to suppress the evidence. Subsection B precludes the use of such evidence at any proceeding involving the defendant. *State v. Anderson*, 110 N.M. 382, 796 P.2d 603 (Ct. App. 1989).

State delaying in providing information. - In determining whether the right to a speedy trial was violated by pre-indictment delay, where the preliminary hearing was continued because the state did not provide the defendant with wiretap information at least ten days prior to the hearing, as required by this section, this delay was weighed against the state. *State v. Manes*, 112 N.M. 161, 812 P.2d 1309 (Ct. App.), cert. denied, U.S. , 112 S. Ct. 381, 116 L. Ed. 2d 332 (1991).

Remedy for Subsection A violation. - The proper course of action for a court faced with a claim of violation of Subsection A is to decide whether the purposes of the statute have been or can be fulfilled so that the evidence can be used in the particular proceeding at issue, or whether the evidence should be excluded, but only from that proceeding. *State v. Anderson*, 110 N.M. 382, 796 P.2d 603 (Ct. App. 1989).

Right of press to evidentiary materials arises when materials become public. - The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Determination of whether evidence subject to public inspection. - Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. *State ex rel. Bingaman v. Brennan*, 98 N.M. 109, 645 P.2d 982 (1982).

Law reviews. - For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

30-12-9. Disclosure; when and by whom allowed.

A. Any investigative or law enforcement officer who, by any means authorized by this act [30-12-1 to 30-12-11 NMSA 1978], has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may:

(1) disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure; or

(2) use such contents to the extent such use is appropriate in the official performance of his official duties.

B. Any person who has received, by any means authorized by this act, any information concerning a wire or oral communication, or evidence derived therefrom, intercepted in

accordance with the provisions of this act, may disclose the contents of that communication or such derivative evidence while giving testimony in any criminal proceeding in any court of this state or in any grand jury proceeding.

History: 1953 Comp., § 40A-12-1.8, enacted by Laws 1973, ch. 369, § 9.

ANNOTATIONS

Right of press to copies of evidentiary material arises where materials become public. - The right of the press to copies of evidentiary materials does not arise until the materials become part of the public record or are played in open court. State ex rel. Bingaman v. Brennan, 98 N.M. 109, 645 P.2d 982 (1982).

30-12-10. Interception of privileged or unauthorized communications.

A. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act [30-12-1 to 30-12-11 NMSA 1978] shall lose its privileged character.

B. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized in this act, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof and evidence derived therefrom may be disclosed or used as provided in Subsection A of Section 30-12-9 NMSA 1978. Such contents and evidence derived therefrom may be used under Subsection B of Section 30-12-9 NMSA 1978 when authorized or approved by a judge of competent jurisdiction, when such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this act. Such application shall be made as soon as practicable.

History: 1953 Comp., § 40A-12-1.9, enacted by Laws 1973, ch. 369, § 10.

ANNOTATIONS

Determination of whether evidence subject to public inspection. - Any determination of whether items of evidence are properly subject to public inspection and copying must necessarily consider the likelihood of injury to parties not involved in the particular case at bar. State ex rel. Bingaman v. Brennan, 98 N.M. 109, 645 P.2d 982 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Propriety of governmental eavesdropping on communications between accused and his attorney, 44 A.L.R.4th 841.

30-12-11. Right of privacy; damages.

A. Any person whose wire or oral communication is intercepted, disclosed or used in violation of this act [30-12-1 to 30-12-11 NMSA 1978] shall:

(1) have a civil cause of action against any person who intercepts, discloses or uses, or procures any other person to intercept, disclose or use such communications; and

(2) be entitled to recover from any such person actual damages, but not less than liquidated damages computed at the rate of one hundred dollars (\$100) for each day of violation or one thousand dollars (\$1,000), whichever is higher; punitive damages; and a reasonable attorney's fee and other litigation costs reasonably incurred.

B. A good faith reliance on a court order or on the provisions of this act shall constitute a complete defense to any civil or criminal action.

C. Any communications common carrier which in good faith acts in reliance upon a court order or in compliance with any of the provisions of this act shall not be liable for any civil or criminal action.

History: 1953 Comp., § 40A-12-1.10, enacted by Laws 1973, ch. 369, § 11.

ANNOTATIONS

Severability clauses. - Laws 1973, ch. 369, § 12, provides for the severability of the act if any part or application thereof is held invalid.

"Any person who intercepts" construed. - The meaning of "any person who intercepts" includes persons who have participated in the steps necessary to effectuate an unauthorized interception of communications which results in the violation of an individual's privacy. *Templin v. Mountain Bell Tel. Co.*, 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

Civil action permitted whether or not conviction achieved. - The civil cause of action provided for in this section may be pursued regardless of whether the defendant has been convicted under 30-12-1 NMSA 1978. *Templin v. Mountain Bell Tel. Co.*, 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

Corporations as well as individuals may be liable in damages if they participate in setting up unauthorized interceptions of a customer's telephone communications. *Templin v. Mountain Bell Tel. Co.*, 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

Duty of telephone company. - A telephone company has a duty to obtain the valid consent of a customer before placing an extension of the customer's phone in another person's residence. *Templin v. Mountain Bell Tel. Co.*, 97 N.M. 699, 643 P.2d 263 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62A Am. Jur. 2d Privacy §§ 54, 254.

Limitation of actions: invasion of right of privacy, 33 A.L.R.4th 479.

Construction and application of state statutes authorizing civil cause of action by person whose wire or oral communication is intercepted, disclosed, or used in violation of statutes, 33 A.L.R.4th 506.

Eavesdropping on extension telephone as invasion of privacy, 49 A.L.R.4th 430.

Plaintiff's rights to punitive or multiple damages when cause of action renders both available, 2 A.L.R.5th 449.

Application to extension telephones of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.), pertaining to interception of wire communications, 58 A.L.R. Fed. 594.

30-12-12. Disturbing a marked burial ground.

Disturbing a marked burial ground consists of knowingly and willfully disturbing or removing the remains, or any part of them, or any funerary object, material object or associated artifact of any person interred in any church, churchyard, cemetery or marked burial ground or knowingly and willfully procuring or employing any other person to disturb or remove the remains, or any part of them, or any funerary object, material object or artifact associated with any person interred in any church, churchyard, cemetery or marked burial ground, other than pursuant to an order of the district court, the provisions of Section 24-14-23 NMSA 1978 or as otherwise specifically permitted by law. As used in this section "marked burial ground" means any interment visibly marked according to traditional or customary practice.

Whoever commits disturbing a marked burial ground is guilty of a fourth degree felony and shall be punished by a fine not to exceed five thousand dollars (\$5,000) or by imprisonment for a definite term of eighteen months or both.

History: 1953 Comp., § 40A-12-2, enacted by Laws 1963, ch. 303, § 12-2; 1989, ch. 267, § 3.

ANNOTATIONS

Cross-references. - For permit for disinterment and reinterment, see 24-14-23 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted "a marked burial ground" for "the remains of a dead person" in the catchline; in the first paragraph, substituted the present first sentence for "Disturbing the remains of a dead person consists of knowingly disturbing or removing the remains, or any part thereof, of any person permanently interred in any church, churchyard or cemetery, other than pursuant to an order of the district court", and added the second sentence; and substituted the present

language of the second paragraph for "Whoever commits disturbing the remains of a dead person is guilty of a misdemeanor."

This section is in pari materia with § 58-17-3 and should be construed with reference to the definition of "cemetery" supplied by § 58-17-3. 1987 Op. Att'y Gen. No. 87-31.

Property held not to be cemetery. - Private property discovered to contain human remains presumed to be soldiers killed in the battle of Glorieta on March 28, 1862, is not a cemetery within the meaning of this section so as to require the museum division of the office of cultural affairs to petition the district court prior to excavating the site and disinterring the remains pursuant to the Cultural Properties Act, §§ 18-6-1 through 18-6-7. 1987 Op. Att'y Gen. No. 87-31.

Necessary party to disinterment actions. - Since when a district court orders disinterment a legal interest of the health department (now the department of health) will of necessity be directly affected, the department is a necessary or indispensable party in disinterment actions brought in the district courts of this state. 1966 Op. Att'y Gen. No. 66-116.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22A Am. Jur. 2d Dead Bodies § 107.

Dead bodies: liability for improper manner of reinterment, 53 A.L.R.4th 394.

Liability for desecration of graves and tombstones, 77 A.L.R.4th 108.

25A C.J.S. Dead Bodies § 10.

30-12-13. Defacing tombs.

Defacing tombs consists of either:

A. intentionally defacing, breaking, destroying or removing any tomb, monument or gravestone erected to any deceased person or any memento, memorial or marker upon any place of burial of any human being or any ornamental plant, tree or shrub appertaining to the place of burial of any human being; or

B. intentionally marking, defacing, injuring, destroying or removing any fence, post, rail or wall of any cemetery or graveyard or erected within any cemetery or graveyard or any marker, memorial or funerary object upon any place of burial of any human being.

Whoever commits defacing a tomb is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year or both.

History: 1953 Comp., § 40A-12-3, enacted by Laws 1963, ch. 303, § 12-3; 1989, ch. 267, § 4.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, substituted "memorial or marker upon any place of burial of any human being" for "any memorial" in Subsection A, added all of the language of Subsection B beginning with "or any marker", and substituted all of the language of the undesignated last paragraph beginning with "misdemeanor" for "petty misdemeanor".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 14 Am. Jur. 2d Cemeteries § 44.

Liability for desecration of graves and tombstones, 77 A.L.R.4th 108.

14 C.J.S. Cemeteries §§ 34, 35.

30-12-14. Unlawful burial.

Unlawful burial consists of the using of any land or lands as a burial place of interment within fifty yards from either side of the bank or border of any stream, river or any body of water, by a person or persons, society of persons, order, corporation or corporations.

Whoever commits unlawful burial is guilty of a misdemeanor.

History: 1953 Comp., § 40A-12-4, enacted by Laws 1963, ch. 303, § 12-4.

ANNOTATIONS

Cross-references. - For burial of unclaimed dead, see 24-12-1 to 24-12-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 22A Am. Jur. 2d Dead Bodies § 46.

Liability of cemetery in connection with conducting or supervising burial services, 42 A.L.R.4th 1059.

25A C.J.S. Dead Bodies § 10.

ARTICLE 13 VIOLATION OF CIVIL RIGHTS

30-13-1. Disturbing lawful assembly.

Disturbing lawful assembly consists of:

A. disturbing any religious society or any member thereof when assembled or collected together in public worship; or

B. disturbing any meeting of the people assembled for any legal object.

Whoever commits disturbing lawful assembly is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-13-1, enacted by Laws 1963, ch. 303, § 13-1.

ANNOTATIONS

Due process. - The language of Subsection B of this section conveys a sufficiently definite warning of the conduct proscribed and is therefore not void for vagueness. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Intent of legislature. - Contention that legislature did not intend this section to apply to conduct formerly covered by 40-12-7, 1953 Comp., was incorrect. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Meaning of "disturbing". - Since the statutory word "disturbing" is not defined, its ordinary meaning was properly applied by the trial court in instruction that term "disturb" meant "to throw into disorder or confusion, to interrupt." *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Meaning of "meeting". - Subsection B of this section forbids the disturbance of any meeting of the people assembled for any legal object, that is, any gathering for business, social or other purposes if the object of the gathering is legal. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Basketball game as "meeting". - The people assembled to view a basketball game constituted a "meeting" within meaning of this section. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Players in basketball game were a meeting of people assembled for a lawful object. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Evidence sufficient. - Evidence that basketball game was delayed 35 to 40 minutes by necessity of removing debris and liquids from playing surface was substantial evidence that meeting of the players and meeting of the spectators to view the game were interrupted. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Evidence that the defendants threw objects when others also threw them, and also evidence from which community of intent could be reasonably inferred, was sufficient for the issue of aiding and abetting those who threw far enough so that objects landed on the playing surface of the courts to be submitted to the jury. *State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Aiding and abetting. - Although charged with disturbing meeting under this section, defendants could be convicted of aiding and abetting that disturbance. State v. Orzen, 83 N.M. 458, 493 P.2d 768 (Ct. App. 1972).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Disturbing Meetings §§ 1 to 11.

Conduct amounting to offense of disturbing religious meeting, 12 A.L.R. 650.

Prohibition or limitation on display of signs by employees as unfair labor practices, 86 A.L.R. Fed. 321.

27 C.J.S. Disturbance of Public Meetings § 1.

30-13-2. Denial of service by a utility.

Denial of service by a utility consists of any utility refusing to furnish service to another in the area served by such utility. Utility as used in this section is defined as any person furnishing to the public: water, power, telephone or gas. Provided such utility may lawfully refuse its services if:

A. the person to be served has not tendered an amount of money required for the expense of construction, if construction is necessary for furnishing the utilities; or

B. the person has not tendered the amount of money due for the use of such utilities.

Whoever commits denial of services by a utility is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-13-2, enacted by Laws 1963, ch. 303, § 13-2.

ANNOTATIONS

Section assumes that customer has right to demand service. 1969 Op. Att'y Gen. No. 69-81.

If a customer's installation has not passed or would not pass electrical inspection, he has no right to demand service of utility. 1969 Op. Att'y Gen. No. 69-81.

Duty to refuse service. - A utility has a positive duty to refuse service to a customer whose wiring is known by the utility to be in a dangerous or defective condition. 1969 Op. Att'y Gen. No. 69-81.

Defense to prosecution. - Compliance with rules of the public service commission permitting a public utility to immediately discontinue service in the event of a condition determined by the utility to be hazardous would be a defense to a criminal action upon a refusal to render electric service, but the burden would be upon the utility to produce

some evidence that the condition was actually hazardous and to prove the existence of the rule itself. 1969 Op. Att'y Gen. No. 69-81.

Disputed claim. - A public service corporation could not cut off a supply of water or electricity to enforce payment of a disputed claim. *Miller v. Roswell Gas & Elec. Co.*, 22 N.M. 594, 166 P. 1177 (1917).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Electricity, Gas and Steam §§ 110, 112, 113, 216, 217; 74 Am. Jur. 2d Telecommunications §§ 61, 62; 78 Am. Jur. 2d Waterworks and Water Companies § 15, 47 to 49.

Discontinuance: right of public utility to discontinue line or branch on ground that it is unprofitable, 10 A.L.R.2d 1121.

29 C.J.S. Electricity § 25; 38 C.J.S. Gas §§ 19 to 25; 86 C.J.S. Telegraphs, Telephones, Radio and Television §§ 65, 68, 69; 94 C.J.S. Waters §§ 278 to 280.

30-13-3. Blacklisting.

Blacklisting consists of an employer or his agent preventing or attempting to prevent a former employee from obtaining other employment.

Whoever commits blacklisting is guilty of a misdemeanor.

Upon request, an employer may give an accurate report or honest opinion of the qualifications and the performance of a former employee. An employer is defined as any person employing labor or the agent of such person.

History: 1953 Comp., § 40A-13-3, enacted by Laws 1963, ch. 303, § 13-3.

ANNOTATIONS

Cross-references. - For criminal libel, see 30-11-1 NMSA 1978.

For constitutional provision guaranteeing freedom of speech and of the press, and making truth a defense in criminal prosecutions for libel, see N.M. Const., art. II, § 17.

Union affiliation. - Workers could not be dismissed from employment because of their labor union affiliations. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1941).

Law reviews. - For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 48 Am. Jur. 2d Labor and Labor Relations § 669.

Blacklist, libel or slander, 66 A.L.R. 1499.

Publication of libel by blacklist for purpose of statute of limitation, 42 A.L.R.3d 807.

Federal pre-emption of whistleblower's state-law action for wrongful retaliation, 99 A.L.R. Fed. 775.

51 C.J.S. Labor Relations § 8; 30 C.J.S. Employer-Employee § 58.

30-13-4. Unlawful payment of wages in script.

Unlawful payment of wages in script consists of any person selling, giving or delivering, or in any manner issuing, directly or indirectly, to any person employed by him, and in payment for wages due, any script, draft, order or other evidence of indebtedness payable or redeemable otherwise than in lawful money of the United States.

Whoever commits unlawful payment of wages in script is guilty of a misdemeanor.

History: 1953 Comp., § 40A-13-4, enacted by Laws 1963, ch. 303, § 13-4.

ANNOTATIONS

Cross-references. - For payment of wages, see 50-4-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 48A Am. Jur. 2d Labor and Labor Relations § 4196 et seq.

51B C.J.S. Labor Relations § 1179.

30-13-5. Unlawful coercion of employees.

Unlawful coercion of employees consists of any person employing labor, or any agent of such employer, compelling or coercing, directly or indirectly, any employee to buy goods or trade with any particular store, business or person.

Whoever commits unlawful coercion of employees is guilty of a misdemeanor.

History: 1953 Comp., § 40A-13-5, enacted by Laws 1963, ch. 303, § 13-5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 C.J.S. Labor Relations § 9; 51B C.J.S. Labor Relations § 1009.

ARTICLE 14

TRESPASS

30-14-1. Criminal trespass.

A. Criminal trespass consists of unlawfully entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land. The provisions of this subsection do not apply if:

(1) the owner or person in control of the land has entered into an agreement with the department of game and fish granting access to the land to the general public for the purpose of taking any game animals, birds or fish by hunting or fishing; or

(2) a person is in possession of a landowner license given to him by the owner or person in control of the land that grants access to that particular private land for the purpose of taking any game animals, birds or fish by hunting or fishing.

B. Criminal trespass also consists of unlawfully entering or remaining upon the unposted lands of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof.

C. Criminal trespass also consists of unlawfully entering or remaining upon lands owned, operated or controlled by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian thereof.

D. Any person who enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, is guilty of a misdemeanor, and he shall be liable to the owner, lessee or person in lawful possession for civil damages in an amount equal to double the value of the damage to the property injured or destroyed.

E. Whoever commits criminal trespass is guilty of a misdemeanor. Additionally, any person who violates the provisions of Subsection A, B or C of this section, when in connection with hunting, fishing or trapping activity, shall have his hunting or fishing license revoked by the state game commission for a period of not less than three years, pursuant to the provisions of Section 17-3-34 NMSA 1978.

History: 1953 Comp., § 40A-14-1, enacted by Laws 1963, ch. 303, § 14-1; 1975, ch. 52, § 1; 1979, ch. 186, § 1; 1981, ch. 34, § 1; 1983, ch. 27, § 2; 1991, ch. 58, § 1.

ANNOTATIONS

Cross-references. - For criminal damage to property, see 30-15-1 NMSA 1978.

For detention or arrest of trespassers upon restricted areas, see 30-21-3 NMSA 1978.

For trespass on state lands, see 19-6-3 NMSA 1978 et seq.

For removal or destruction of plants near highway, see 76-8-1 NMSA 1978 et seq.

For traveler occupying enclosed land, see 77-14-1 NMSA 1978 et seq.

The 1983 amendment deleted "petty" preceding "misdemeanor" in Subsections C and D.

The 1991 amendment, effective July 1, 1991, added Subsection A; redesignated the subsequent subsections accordingly; in Subsection B inserted "also" and "unposted"; in Subsection D added the language beginning with "and he shall be liable"; and added the second sentence in Subsection E.

This section requires general criminal intent. State v. McCormack, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).

When one commits burglary of dwelling house one commits criminal trespass based on that entry. State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Unlawfully entering lands of another. - The only "act" involved in criminal trespass, as a lesser offense included within burglary of a dwelling house, is entry upon the lands of another, which requires a "malicious intent." State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Unlawful entry is entry not authorized by law, without excuse or justification. State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

"Lands," in Subsection B, includes buildings and fixtures and is synonymous with real property. State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Subsection B applies to federal government land. - Where land is owned and operated by the federal government as a proprietor, the state has sovereignty over the land, provided it does not interfere with the use of the federal government, and Subsection A applies. State v. McCormack, 100 N.M. 657, 674 P.2d 1117 (1984).

Damage to property not required to show malicious intent. - While damage to property would be evidence of malicious intent, such is not required inasmuch as malicious intent may be established by evidence of an intent to vex or annoy or do a wrongful act. State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Trespass in watermelon patch. - Trespass of group of boys on land occupied by another and stealing of watermelons thereon, with minor injury to fence, did not constitute a violation of former 40-47-12, 1953 Comp., relating to unlawful injury of

fence and crops, a felony, but rather, of former 40-47-5, 1953 Comp., relating to trespassing on improved land with intent to cut, take, etc., trees or crops growing there, a misdemeanor. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Injuring house. - An opening of four inches was sufficient to complete the offense of injuring house for purpose of entering and molesting occupant under Laws 1875-1876, ch. 9, § 2, former 40-47-19, 1953 Comp. *Territory v. Gallegos*, 17 N.M. 409, 130 P. 245 (1913).

Civil liability to injured trespasser. - As a matter of law the use of a gun by owner while stopping trespass or theft of watermelons by group of boys was not permissible, and when owner fired gun he became liable to injured boy. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Application to journalist not abridgement of rights. - Application of this section to a journalist who crossed a barricade at a federal government nuclear waste disposal plant did not abridge the first amendment right to peaceably assemble or the right of the press to gather and report news. *State v. McCormack*, 101 N.M. 349, 682 P.2d 742 (Ct. App. 1984).

Law reviews. - For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trespass §§ 162, 163, 167, 181, 182, 185.

Criminal offense of forcible detainer or trespass, where entry was peaceable, 49 A.L.R. 597.

Right to enter land to remove timber cut before revocation of license, 26 A.L.R.2d 1194.

Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Liability of private citizen, calling on police for assistance after disturbance or trespass, for false arrest by officer, 98 A.L.R.3d 542.

Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

87 C.J.S. Trespass §§ 144 to 147.

30-14-1.1. Types of trespass; injury to realty; civil damages.

A. Any person who enters and remains on the lands of another after having been requested to leave is guilty of a misdemeanor.

B. Any person who enters upon the lands of another when such lands are posted against trespass at every roadway or apparent way of access is guilty of a misdemeanor.

C. Any person who drives a vehicle upon the lands of another except through a roadway or other apparent way of access, when such lands are fenced in any manner, is guilty of a misdemeanor.

D. In the event any person enters upon the lands of another without prior permission and injures, damages or destroys any part of the realty or its improvements, including buildings, structures, trees, shrubs or other natural features, he shall be liable to the owner, lessee or person in lawful possession for damages in an amount equal to double the amount of the appraised value of the damage of the property injured or destroyed.

History: 1978 Comp., § 30-14-1.1, enacted by Laws 1979, ch. 186, § 2; 1983, ch. 27, § 3.

ANNOTATIONS

The 1983 amendment deleted "petty" preceding "misdemeanor" in Subsections A to C.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Trespass: state prosecution for unauthorized entry or occupation, for public demonstration purposes, of business, industrial, or utility premises, 41 A.L.R.4th 773.

Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805.

Tree or limb falls onto adjoining private property: personal injury and property damage liability, 54 A.L.R.4th 530.

Encroachment of trees, shrubbery, or other vegetation across boundary line, 65 A.L.R.4th 603.

Business interruption, without physical damage, as actionable, 65 A.L.R.4th 1126.

30-14-2. Consent required for key duplication [of educational institutions].

No person shall knowingly make or cause to be made any key or duplicate key for any building, laboratory, facility, room, dormitory, hall or any other structure, or part thereof,

owned or leased by the state, any political subdivision, or by the board of regents or other governing body of any college or university, which is supported wholly or in part by the state, without the prior written consent of the state, political subdivision, board of regents or other governing body.

History: 1953 Comp., § 40A-14-3, enacted by Laws 1965, ch. 115, § 1.

30-14-3. Penalty.

Any person who violates Section 1 [30-14-2 NMSA 1978] of this act is guilty of a misdemeanor.

History: 1953 Comp., § 40A-14-4, enacted by Laws 1965, ch. 115, § 2.

30-14-4. Wrongful use of public property; permit; penalties.

A. Wrongful use of public property consists of:

(1) knowingly entering any public property without permission of the lawful custodian or his representative when the public property is not open to the public;

(2) remaining in or occupying any public property after having been requested to leave by the lawful custodian, or his representative, who has determined that the public property is being used or occupied contrary to its intended or customary use or that the public property may be damaged or destroyed by the use; or

(3) depriving the general public of the intended or customary use of public property without a permit.

B. Permits to occupy or use public property may be obtained from the lawful custodian or his representative upon written application which:

(1) describes the public property to be occupied or used; and

(2) states the period of time during which the public property will be occupied or used. The applicant shall pay in advance a reasonable fee or charge for the use of the public property. The fee or charge shall be prescribed by the lawful custodian or his representative.

C. The lawful custodian or his representative may issue the permit if he believes that the use or occupation of the public property will not unreasonably interfere with the intended or customary use of the public property by the general public and that the use will not damage or destroy the public property.

D. Any person occupying or using public property under the authority of a permit shall submit to a search for firearms or other weapons and surrender any firearms or other weapons to any peace officer, who has jurisdiction, upon request.

E. As used in this section, "public property" means any public building, facility, structure or enclosure used for a public purpose or as a place of public gathering, owned or under the control of the state or one of its political subdivisions or a religious, charitable, educational or recreational association.

F. Any person who commits wrongful use of public property is guilty of a petty misdemeanor.

G. Any person who commits wrongful use of public property after having been requested to leave by the lawful custodian or his representative or any peace officer, who has jurisdiction, is guilty of a misdemeanor.

History: 1953 Comp., § 40A-14-5, enacted by Laws 1969, ch. 61, § 1.

ANNOTATIONS

Unconstitutional delegation of power. - Paragraph A(2) of this section, proscribing the act of remaining in or occupying any public property after having been requested to leave by the lawful custodian or his representative upon determination that the public property is being used or occupied contrary to its intended or customary use, is without sufficiently definite standards to be enforceable, and is thus an unconstitutional delegation of legislative power. *State v. Jaramillo*, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972).

Serious doubts on constitutionality. - Because of the many constitutional infirmities in this section, there are serious doubts as to whether it is a valid law. 1969 Op. Att'y Gen. No. 69-21.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

30-14-5. Repealed.

ANNOTATIONS

Repeals. - Laws 1979, ch. 186, § 4, repeals 30-14-5 NMSA 1978, relating to the short title of the Property Posting Act.

30-14-6. No trespassing notice; sign contents; posting; requirement; prescribing a penalty for wrongful posting of public lands.

A. The owner, lessee or person lawfully in possession of real property in New Mexico, except property owned by the state or federal government, desiring to prevent trespass or entry onto the real property shall post notices parallel to and along the exterior boundaries of the property to be posted, at each roadway or other way of access in conspicuous places, and if the property is not fenced, such notices shall be posted every five hundred feet along the exterior boundaries of such land.

B. The notices posted shall prohibit all persons from trespassing or entering upon the property, without permission of the owner, lessee, person in lawful possession or his agent. The notices shall:

(1) be printed legibly in English;

(2) be at least one hundred forty-four square inches in size;

(3) contain the name and address of the person under whose authority the property is posted or the name and address of the person who is authorized to grant permission to enter the property;

(4) be placed at each roadway or apparent way of access onto the property, in addition to the posting of the boundaries; and

(5) where applicable, state any specific prohibition that the posting is directed against, such as "no trespassing," "no hunting," "no fishing," "no digging" or any other specific prohibition.

C. Any person who posts public lands contrary to state or federal law or regulation [regulation] is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-14-7, enacted by Laws 1969, ch. 195, § 2; 1979, ch. 186, § 3.

30-14-7. Repealed.

ANNOTATIONS

Repeals. - Laws 1979, ch. 186, § 4, repeals 30-14-7 NMSA 1978, relating to penalties for trespassing and double damages for injury to realty. For present penalty and damages provisions, see 30-14-1.1 NMSA 1978.

30-14-8. Breaking and entering.

A. Breaking and entering consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any part of the vehicle, watercraft, aircraft, dwelling or other structure, or by the breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure.

B. Whoever commits breaking and entering is guilty of a fourth degree felony.

History: Laws 1981, ch. 34, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

ARTICLE 15 PROPERTY DAMAGE

30-15-1. Criminal damage to property.

Criminal damage to property consists of intentionally damaging any real or personal property of another without the consent of the owner of the property.

Whoever commits criminal damage to property is guilty of a petty misdemeanor, except that when the damage to the property amounts to more than one thousand dollars (\$1,000) he is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-15-1, enacted by Laws 1963, ch. 303, § 15-1.

ANNOTATIONS

Cross-references. - For polluting of water, see 30-8-2 NMSA 1978.

For destruction of cemetery property, see 30-12-13 NMSA 1978.

For criminal trespass, see 30-14-1 NMSA 1978.

For destruction of newspapers kept by county clerk, see 4-40-10 NMSA 1978.

For liability of parents for destruction of property by child, see 32A-2-27 NMSA 1978.

For flooding of highway, see 67-7-4 NMSA 1978.

For interference with or changing of water measuring devices, see 72-5-20 NMSA 1978.

For injury and interference with waterworks, see 72-8-1 and 72-8-3 NMSA 1978.

For interference with community ditches, see 73-2-64 NMSA 1978.

For injuring of survey marks, see 73-17-5 NMSA 1978.

For injuring of fence, see 77-16-10 NMSA 1978.

Defense of habitation. - Question whether force used by a person in defense of habitation exceeded what was reasonably necessary was for the jury to resolve upon appropriate instructions by the trial judge. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, gave householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

When one's home was attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants had, was not obliged to retreat but might pursue his adversaries until he found himself out of danger. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Resistance to commission of felony. - While no law countenanced wanton slaying, the protection and security of life being the most vital interest of society, the law of defense of habitation and the resistance to the commission of a felony thereon gave householder right to kill aggressor, if such killing was necessary or apparently necessary to prevent or repel the felonious aggression. *State v. Couch*, 52 N.M. 127, 193 P.2d 405 (1946).

Tort liability for injury to trespasser. - As a matter of law the use of a gun by owner while stopping trespass or theft of watermelons by group of boys was not permissible, and when owner fired gun he became liable to injured boy. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Sufficiency of evidence. - Evidence was sufficient to support an inference that damages were at least \$1,000. *State v. Haar*, 110 N.M. 517, 797 P.2d 306 (Ct. App.), cert. denied, 110 N.M. 330, 795 P.2d 1022 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 52 Am. Jur. 2d Malicious Mischief §§ 1 to 11.

Liability for injury to property occasioned by oil, water or the like flowing from well, 19 A.L.R.2d 1025.

Liability for damage to automobile left in parking lot or garage, 13 A.L.R.4th 442.

54 C.J.S. Malicious or Criminal Mischief or Damage to Property §§ 1 to 11.

30-15-1.1. Unauthorized graffiti on personal or real property.

A. Graffiti consists of intentionally and maliciously defacing any real or personal property of another with graffiti or other inscribed material inscribed with ink, paint, spray paint, crayon, charcoal or the use of any object without the consent or reasonable ground to believe there is consent of the owner of the property.

B. Whoever commits graffiti to real or personal property is guilty of a petty misdemeanor and may be required to perform a mandatory sixty hours of community service within a continuous four-month period immediately following his conviction and may be required to make restitution to the property owner for the cost of damages and restoration. If the damage to the property is greater than one thousand dollars (\$1,000), he is guilty of a fourth degree felony and may be required to perform a mandatory one hundred twenty hours of community service within a continuous six-month period immediately following his conviction and may be required to provide restitution to the property owner for the cost of damages and restoration as a condition of probation or following any term of incarceration as a condition of parole.

History: 1978 Comp., § 30-15-1.1, enacted by Laws 1990, ch. 36, § 1.

30-15-2. [Rocks, protected plants or trees within four hundred yards of highway.]

It is a petty misdemeanor to deface, without the written consent of the landowner, any rock, any plant defined in Section 76-8-1 NMSA 1978, or any dead or living tree within four hundred yards of any public highway.

History: 1953 Comp., § 40A-15-1.1, enacted by Laws 1971, ch. 3, § 1.

30-15-3. Damaging insured property.

Damaging insured property consists of intentionally damaging property which is insured with intent to defraud the insurance company into paying himself or another for such damage.

Whoever commits damaging insured property is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-15-2, enacted by Laws 1963, ch. 303, § 15-2.

ANNOTATIONS

Evidence of insurance. - Evidence that balance of fee for carrying out scheme to apparently burglarize and vandalize and then burn business was to be paid when insurance company paid for the supposed theft and vandalism, that undercover officer hired to carry out the scheme was told to be sure the burglar alarm was on or the company would refuse coverage and that conspirators stated the business was insured, was substantial evidence that the property to be damaged was insured and that the purpose of the conspiracy was to damage insured property. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Arson section not exclusive. - In conspiracy to damage business property by fire after making it appear to have been first burglarized and vandalized, where the conspiracy to burglarize and vandalize was directed to acts not covered by 30-17-5 NMSA 1978, the arson statute, that section did not act as a special provision prohibiting the prosecution of defendant under this section for the aspect of the conspiracy directed toward burglary and vandalism. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Single penalty for conspiracy to damage. - Where defendant was charged with one count of conspiracy to commit felony arson, and one count under this section, since scheme to damage business property by fire after making it appear to have been first burglarized and vandalized involved only one conspiracy, only one penalty could be imposed. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

30-15-4. Desecration of a church.

Desecration of a church consists of willfully, maliciously and intentionally defacing a church or any portion thereof.

Whoever commits desecration of a church is guilty of a misdemeanor, except that when the damage to the church amounts to more than one thousand dollars (\$1,000) he is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-15-3, enacted by Laws 1963, ch. 303, § 15-3; 1965, ch. 173, § 1.

ANNOTATIONS

Meaning of "church". - The sense in which "church" is used in this section is expressive of a place where persons regularly assemble for worship and is not limited to the Christian religion. State v. Vogenthaler, 89 N.M. 150, 548 P.2d 112 (Ct. App. 1976).

Contents not included. - Absent any legislative intent to the contrary, "church or any portion thereof" does not include the movable contents of the building. State v. Vogenthaler, 89 N.M. 150, 548 P.2d 112 (Ct. App. 1976).

No violation of establishment clause. - This section does not advance religion contrary to the first and fourteenth amendments of the United States constitution. State v. Vogenthaler, 89 N.M. 150, 548 P.2d 112 (Ct. App. 1976).

Equal protection not violated. - The differences in the elements of this section and 30-15-1 NMSA 1978 provide a rational basis for the difference in penalties imposed for damage amounting to less than \$1,000, in that violation of 30-15-1 NMSA 1978 requires only intentional damage, while this section involves willful, malicious and intentional defacement; therefore, this section does not violate equal protection. State v. Vogenthaler, 89 N.M. 150, 548 P.2d 112 (Ct. App. 1976).

Rational basis. - A rational basis for treating criminal damage to a church differently than criminal damage to other property is the role of religion in society as a whole. State v. Vogenthaler, 89 N.M. 150, 548 P.2d 112 (Ct. App. 1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of statute or ordinance prohibiting desecration of church, 90 A.L.R.3d 1119.

30-15-5. Damaging caves or caverns unlawful.

It shall be unlawful for any person, without prior permission of the federal, state or private land owner, to willfully or knowingly break, break off, crack, carve upon, write or otherwise mark upon, or in any manner destroy, mutilate, injure, deface, remove, displace, mar or harm any natural material found in any cave or cavern, such as stalactites, stalagmites, helictites, anthodites, gypsum flowers or needles, flowstone, draperies, columns, tufa dams, clay or mud formations or concretions, or other similar crystalline mineral formations or otherwise; to kill, harm or in any manner or degree disturb any plant or animal life found therein; to otherwise disturb or alter the natural conditions of such cave or cavern through the disposal therein of any solid or liquid materials such as refuse, food, containers or fuel of any nature, whether or not malice is intended; to disturb, excavate, remove, displace, mar or harm any archaeological artifacts found within a cave or cavern including petroglyphs, projectile points, human remains, rock or wood carvings or otherwise, pottery, basketry or any handwoven articles of any nature, or any pieces, fragments or parts of any of the such articles; or to break, force, tamper with, remove or otherwise disturb a lock, gate, door or other structure or obstruction designed to prevent entrance to a cave or cavern, without the permission of the owner thereof, whether or not entrance is gained. For purposes of this section, "cave" means any natural geologically formed void or cavity beneath the surface of the earth, not including any mine, tunnel, aqueduct or other manmade excavation, which is large enough to permit a person to enter.

History: Laws 1981, ch. 236, § 1.

30-15-6. Penalty.

Anyone violating the provisions of Section 1 [30-15-5 NMSA 1978] of this act shall be guilty of a misdemeanor.

History: Laws 1981, ch. 236, § 2.

ARTICLE 16

LARCENY

30-16-1. Larceny.

Larceny consists of the stealing of anything of value which belongs to another.

Whoever commits larceny when the value of the property stolen is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

Whoever commits larceny when the value of the property stolen is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

Whoever commits larceny when the value of the property stolen is over two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony.

Whoever commits larceny when the value of the property stolen is over two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

Whoever commits larceny when the value of the property stolen is over twenty thousand dollars (\$20,000) is guilty of a second degree felony.

Whoever commits larceny when the property of value stolen is livestock is guilty of a third degree felony regardless of its value.

Whoever commits larceny when the property of value stolen is a firearm is guilty of a fourth degree felony when its value is less than two thousand five hundred dollars (\$2,500).

History: 1953 Comp., § 40A-16-1, enacted by Laws 1963, ch. 303, § 16-1; 1969, ch. 171, § 1; 1979, ch. 118, § 1; 1987, ch. 121, § 1.

ANNOTATIONS

- I. General Consideration.
- II. Multiple Prosecutions or Punishments.
- III. Elements of Offense.

- IV. Indictment and Information.
- V. Evidence.
 - A. In General.
 - B. Larceny of Livestock.
 - C. Value.
 - D. Sufficiency.
- VI. Instructions.

I. GENERAL CONSIDERATION.

Cross-references. - For misdemeanor of injury to animals, see 30-18-2 NMSA 1978.

For sheriff's duty to search for stolen livestock, see 29-1-2 NMSA 1978.

For description of cattle in indictment, see 31-7-1 NMSA 1978.

For provision making disposal of livestock levied upon grand larceny, see 39-6-3 NMSA 1978.

For provision on recovery of lost or stolen property from junk dealers, see 57-7-4 NMSA 1978.

For possession of livestock by person accused of theft without bill of sale being prima facie evidence of illegal possession, see 77-9-21 NMSA 1978.

For livestock board inspector's duty to search for stolen livestock, see 77-9-33 NMSA 1978.

For failure of person killing cattle or sheep to show hide to inspector as evidence of larceny or receipt of stolen livestock, see 77-17-14 NMSA 1978.

The 1987 amendment, effective June 19, 1987, added the third paragraph, substituted "two hundred fifty dollars (\$250)" for "one hundred dollars (\$100)" in the fourth paragraph, and substituted "is over" for "exceeds" and "more than" for "over" in the fifth paragraph.

Larceny of livestock category constitutional. - The portion of larceny statute, which made it a felony to steal livestock regardless of its value, applied to all persons who steal livestock in the state of New Mexico, and did not constitute special legislation contrary to N.M. Const., art. IV, § 24, nor did it deny defendant equal protection under the law. *State v. Pacheco*, 81 N.M. 97, 463 P.2d 521 (Ct. App. 1969).

Punishment under former law. - The punishment of the crime of stealing mules by not less than 30 lashes on the bare back was not "cruel and inhuman" under the United States constitution. *Garcia v. Territory*, 1 N.M. 413 (1869).

Classification valid. - Classification found in former law, providing for punishment of all persons who skin or remove hide from carcass of neat cattle found dead without permission of owner, but exempting employees of railroad company when animal is killed by company, was entirely constitutional, and the law was not void for vagueness. State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953).

Restitution does not wipe out crime of larceny and does not deprive state of the right to prosecute for the crime. State v. Odom, 86 N.M. 761, 527 P.2d 802 (Ct. App. 1974).

Legislature to define crimes. - It cannot be gainsaid that the hide of neat cattle is a part of the animal and its removal from the carcass without permission of the owner and subsequent appropriation thereof constitutes theft; under former law the legislature said it shall constitute the crime of larceny, and it is no part of the duty of the courts to inquire into the wisdom, the policy or the justness of an act of the legislature. State v. Thompson, 57 N.M. 459, 260 P.2d 370 (1953).

Larceny of animals or property. - Laws 1884, ch. 47, § 15 (40-4-17, 1953 Comp.), relating to larceny of animals, did not conflict with Laws 1907, ch. 36, § 17 (40-45-1, 1953 Comp.) relating to larceny of property. State v. Graves, 21 N.M. 556, 157 P. 160 (1915).

Applicability of former law. - Where one who sold neat cattle, the property of another, was prosecuted under Laws 1921, ch. 204, § 1, (40-21-40, 1953 Comp., relating to sale of property without right) conviction could not stand, for Laws 1921, ch. 123, § 1 (40-4-17, 1953 Comp., relating, inter alia, to wrongful sale of livestock) applied specifically to such offense and should have been invoked. State v. Blevins, 40 N.M. 367, 60 P.2d 208 (1936), distinguished in State v. Chavez, 77 N.M. 79, 419 P.2d 456 (1966).

Former law not impliedly repealed. - In the passage of later crimes act, there was no intention to do away with Laws 1884, ch. 47, § 16, (40-4-18, 1953 Comp., making certain wrongful dispositions of livestock grand larceny) designed to effectuate a special purpose. Wilburn v. Territory, 10 N.M. 402, 62 P. 968 (1900).

Owner's consent to taking. - In order for an owner to consent to a theft, more than a passive assent to the taking is required. State v. Ontiveros, 111 N.M. 90, 801 P.2d 672 (Ct. App. 1990).

A person does not consent to his property being taken by purposely leaving it exposed, or failing to resist the taking, even though he may know that another intends to come and steal it. State v. Ontiveros, 111 N.M. 90, 801 P.2d 672 (Ct. App. 1990).

Pretended cooperation of an agent of an owner in effecting the theft from the owner is not consent. State v. Ontiveros, 111 N.M. 90, 801 P.2d 672 (Ct. App. 1990).

An owner's nonconsent to larceny may be established by the facts and circumstances in evidence. *State v. Ontiveros*, 111 N.M. 90, 801 P.2d 672 (Ct. App. 1990).

Sentence authorized. - Larceny of goods of value greater than \$10.00 from a store could be punished by imprisonment of from three to five years under Laws 1869-1870, ch. 26, §§ 1, 2, (40-45-6 and 40-45-7, 1953 Comp., relating to larceny from a house or building). *State v. Jones*, 34 N.M. 499, 285 P. 501 (1930).

A sentence of two years' confinement and a fine of \$1,000 was within the terms of Laws 1884, ch. 47, § 15, (40-4-17, 1953 Comp.) relating to larceny, embezzlement or killing of animals. *State v. Anaya*, 28 N.M. 283, 210 P. 567 (1922).

Authorized sentence unassailable. - Where defendant, who pleaded guilty to larceny of property worth over \$2500, a third-degree felony, was sentenced to the term authorized by law for a third-degree felony his assertion that codefendants were sentenced for a fourth-degree felony on the basis of "the same identical act" and that the state had reduced the charge against one codefendant to a fourth-degree felony provided no basis for post-conviction relief. *State v. Follis*, 81 N.M. 690, 472 P.2d 655 (Ct. App. 1970).

Ownership conclusively determined. - A defendant in a larceny case was, after conviction, barred from litigating the question of ownership of the stolen property with owner thereof as charged in the indictment. *Supulver v. Gilchrist & Dawson, Inc.*, 28 N.M. 339, 211 P. 595 (1922).

Evidence held sufficient to sustain a larceny conviction. - See *State v. Davis*, 97 N.M. 745, 643 P.2d 614 (Ct. App. 1982).

Tort liability to thief. - The rules of law governing the liability of appellee for shooting and wounding appellant while stopping a trespass or the theft of watermelons are the same whether the proceedings be civil or criminal. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Larceny §§ 1 to 43.

Should ownership of property be laid in the husband or the wife in an indictment for larceny, 2 A.L.R. 352.

Intent to convert property to one's own use or to the use of third person as element of larceny, 12 A.L.R. 804.

"Asportation" which will support charge of larceny, 19 A.L.R. 724, 144 A.L.R. 1383.

Appropriation of property after obtaining possession by fraud as larceny, 26 A.L.R. 381.

Assisting in transportation or disposal of property known to have been stolen as rendering one guilty of larceny, 29 A.L.R. 1031.

Individual criminal responsibility of officer or employee for larceny, through corporate act, of property of third person, 33 A.L.R. 787.

Larceny or embezzlement by one spouse of other's property, 55 A.L.R. 558.

"Larceny" within fidelity bond, 56 A.L.R. 967.

Sufficiency of verdict on conviction, which fails to state value of property, 79 A.L.R. 1180.

Dog as subject of larceny, 92 A.L.R. 212.

Larceny of gas, 113 A.L.R. 1282.

Distinction between larceny and embezzlement, 146 A.L.R. 532.

Gambling or lottery paraphernalia as subject of larceny, 51 A.L.R.2d 1396.

Relative rights, as between purchaser of chattel from one who previously bought it with stolen money, and victim of the theft, 62 A.L.R.2d 537.

Law as to cats, 73 A.L.R.2d 1032, 8 A.L.R.4th 1287, 55 A.L.R.4th 1080, 68 A.L.R.4th 823.

Carcass: stealing carcass as within statute making it larceny to steal cattle or livestock, 78 A.L.R.2d 1100.

Taking, and pledging or pawning, another's property as larceny, 82 A.L.R.2d 863.

Stolen money or property as subject of larceny, 89 A.L.R.2d 1435.

Entrapment or consent, 10 A.L.R.3d 1121.

Cotenant taking cotenancy property, 17 A.L.R.3d 1394.

Single or separate larceny predicated upon stealing property from different owners at same time, 37 A.L.R.3d 1407.

Rented vehicles: criminal liability in connection with rental of motor vehicles, 38 A.L.R.3d 949.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

Price tags: changing of price tags by patron of self-service store as criminal offense, 60 A.L.R.3d 1293.

Gambling: retaking of money lost at gambling as robbery or larceny, 71 A.L.R.3d 1156.

What constitutes larceny "from a person," 74 A.L.R.3d 271.

Criminal liability for wrongfully obtaining unemployment benefits, 80 A.L.R.3d 1280.

Instruction allowing presumption or inference of guilt from possession of recently stolen property as violation of defendant's privilege against self-incrimination, 88 A.L.R.3d 1178.

Applicability of best evidence rule to proof of ownership of allegedly stolen personal property in prosecution for theft, 94 A.L.R.3d 824.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of computer programs, files, or systems, 51 A.L.R.4th 971.

Cat as subject of larceny, 55 A.L.R.4th 1080.

What constitutes violation of 15 USCS § 714m(c), proscribing larceny or conversion of property owned by or pledged to commodity credit corporation, 109 A.L.R. Fed. 871.

52A C.J.S. Larceny §§ 1 to 29.

II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.

Larceny of several articles. - Under the "single larceny doctrine," as a matter of judicial policy, a taking of two or more articles of property from the same owner at the same time and place should be prosecuted as only one larceny, even though separate convictions would not be barred by double jeopardy. *State v. Boeglin*, 90 N.M. 93, 559 P.2d 1220 (Ct. App. 1977).

Nothing in the statutory language indicates that the legislature intended to create a separate offense for each taking of property belonging to different persons during a continuous episode. *State v. Brown*, 310 N.M. 631, 830 P.2d 183 (Ct. App. 1992).

Charge of larceny is necessarily included in charge of robbery. *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968).

Grand larceny and armed robbery merged. - Where the act of grand larceny was necessary to, or incidental to, the crime of armed robbery which the defendant committed, the offense of grand larceny was merged with the graver offense of armed robbery, and hence although the defendant was properly convicted of both armed robbery and grand larceny, he cannot be doubly punished for both of those crimes. *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961). See also *State v. Montano*, 69 N.M. 332, 367 P.2d 95 (1961).

No merger of larceny and burglary. - There is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. *State v. Deats*, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Elements of larceny and burglary differ. - Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary; hence, these two crimes do not merge, and defendant could be convicted of and sentenced for both crimes. *State v. McAfee*, 78 N.M. 108, 428 P.2d 647 (1967).

Assault and larceny separate offenses. - Assault with a deadly weapon, even though committed in connection with a larceny is a separate criminal act, as distinguished from a necessary ingredient of the crime of larceny, and, accordingly, there may be a conviction and punishment for both. *State v. Martinez*, 77 N.M. 745, 427 P.2d 260 (1967).

Unlawful taking of motor vehicle not included offense. - Violation of 64-9-4A, 1953 Comp. (now repealed), by unlawful taking of a motor vehicle, is not necessarily included in offense of larceny, since the criminal intent requisite for the crime of larceny is the intent to deprive the owner of his property permanently, while a violation of 64-9-4A, 1953 Comp. (now repealed), does not require this intent. *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968).

Receipt of stolen goods by thief himself. - A thief who holds on to stolen property cannot be guilty of receiving the stolen property because he cannot receive it from himself, nor can he violate the statute by retaining the stolen property because larceny

is a continuing offense; the thief's disposition of the property, however, is action separate from the larceny, and it is neither absurd nor unreasonable to hold that the thief violates 30-16-11 NMSA 1978 when he disposes of the property that he stole. *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976).

Asportation of stolen property. - Larceny was a continuing offense, and if property was stolen in one county and taken by the thief into another, he was guilty of a new caption and asportation in the latter county. *State v. McKinley*, 30 N.M. 54, 227 P. 757 (1924); *State v. Meeks*, 25 N.M. 231, 180 P. 295 (1919).

III. ELEMENTS OF OFFENSE.

Corpus delicti. - The corpus delicti of larceny is constituted of two elements: that the property was lost by the owner, and that it was lost by a felonious taking. *State v. Paris*, 76 N.M. 291, 414 P.2d 512 (1966); *State v. Buchanan*, 76 N.M. 141, 412 P.2d 565 (1966).

Ownership of another. - In cases of larceny and embezzlement, ownership of the property stolen or embezzled must be established in some person or entity capable of owning property. *State v. Parsons*, 23 N.M. 520, 169 P. 475 (1917).

Every larceny included a trespass to possession, which could not exist unless the property was in possession of person from whom it was charged to have been stolen. *State v. Curry*, 32 N.M. 219, 252 P. 994 (1927).

But particularity not essential. - Neither an allegation or proof of ownership in a particular person is an essential element of the offense of larceny, it being sufficient that the proof disclosed that property stolen belonged to one other than defendant. *State v. Ford*, 80 N.M. 649, 459 P.2d 353 (Ct. App. 1969).

Violence not an element. - Larceny, although an essential element of the offense of robbery, is distinguished primarily on the basis of the violence which precedes or accompanies the taking; robbery is a compound or aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. *State v. Wingate*, 87 N.M. 397, 534 P.2d 776 (Ct. App. 1975).

"Steal" connotes intent. - Under the statute using the term "steal," when that term is used in the instruction, it carries with it a meaning that the taking must have been with a felonious intent. *State v. Paris*, 76 N.M. 291, 414 P.2d 512 (1966).

Criminal intent. - Criminal intent was necessary under Laws 1884, ch. 47, § 15, (former 40-4-17, 1953 Comp.), relating to larceny of animals. *State v. Curry*, 32 N.M. 219, 252 P. 994 (1927).

Specific intent to permanently deprive requisite. - One of the essential elements of larceny is that of intent on the part of defendant to permanently deprive the owners of their property; hence, a taking of property by defendant with the intent of using it temporarily and then returning it would not constitute larceny. *State v. Parker*, 80 N.M. 551, 458 P.2d 803 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859 (1969).

As distinguished from wrongful taking of car. - Larceny includes the concept of criminal intent, and in addition, the intention to permanently deprive the owner of possession of his property, such intention to permanently deprive is not an essential element of 64-9-4A, 1953 Comp., prohibiting intentional taking of a motor vehicle without consent of the owner. *State v. Austin*, 80 N.M. 748, 461 P.2d 230 (Ct. App. 1969).

Or embezzlement. - A legislative intent to include the element of intent to permanently deprive the owner of his property in crime of embezzlement cannot be ascertained by comparing the embezzlement statute 30-16-8 NMSA 1978 with this section, because larceny is defined in terms of stealing and comparable language is not used in the embezzlement statute. *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

Larceny and embezzlement of livestock distinct. - Laws 1884, ch. 47, § 15 (former 40-4-17, 1953 Comp., relating to larceny, embezzlement, killing or wrongful purchase of livestock, and the like) embraced embezzlement and larceny as distinct offenses. *State v. Curry*, 32 N.M. 219, 252 P. 994 (1927).

Value of livestock immaterial. - Under former law, in prosecution for depriving owner of possession of certain sheep, value of the animals was not material, it did not need to be alleged and if alleged, did not need to be proved. *State v. Anaya*, 28 N.M. 283, 210 P. 567 (1922). See also *State v. Jaramillo*, 25 N.M. 228, 180 P. 286 (1919); *State v. Lucero*, 17 N.M. 484, 131 P. 491 (1913) (prosecutions for larceny of cattle).

Theft from employer. - Since the physical control exercised by an employee over property entrusted to him by his employer is merely custody and not possession, an employee takes the property from his employer's possession, and thereby commits a trespass, when he converts it; he is accordingly guilty of larceny, without regard to whether he entertained such intent at the time he acquired custody, or not. *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Aiding and abetting. - To be an aider and abettor in the crime of larceny one must share the criminal intent of the principal; there must be a community of purpose in the unlawful undertaking. *State v. Duran*, 86 N.M. 594, 526 P.2d 188 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Mistake as defense. - Sale of cattle under mistaken belief that it was one's own property was not an offense under C.L. 79, 1897 (40-4-17, 1953 Comp.). *State v. Roybal*, 20 N.M. 226, 147 P. 917 (1915).

Effect of intoxication on intent. - Voluntary intoxication alone is not a defense to a charge of larceny, but if a defendant claims he was so intoxicated as to be unable to form the necessary intent, the question of intent is a matter for the jury. *State v. Lucero*, 70 N.M. 268, 372 P.2d 837 (1962).

Restitution no bar to conviction. - Fact that defendant turned himself in to owner and worked to make restitution for theft, that owner told defendant he would have larceny charges against him dismissed and that this was not done, if true, provided no legal basis for withdrawal of guilty plea. *State v. Odom*, 86 N.M. 761, 527 P.2d 802 (Ct. App. 1974).

IV. INDICTMENT AND INFORMATION.

Allegation of ownership. - In indictment charging embezzlement it is essential to aver the felonious conversion of the property of another; unless the rule is modified by statute, the allegation must be as accurate as in an indictment for larceny, and in case of an association, facts must be averred to show that the association could own property in its name. *State v. Parsons*, 23 N.M. 520, 169 P. 475 (1917).

Laying ownership in representative. - Where owner of stolen mule was dead, indictment charging larceny was to lay the ownership in his representative and not in his estate. *Territory v. Valles*, 15 N.M. 228, 103 P. 984 (1909).

Deprivation of owner's possession understood. - Where indictment charged that defendant "then and there, unlawfully and feloniously did take, steal and knowingly drive away, etc." the animal in question, it was not necessary to further allege that the owner was thereby deprived of the immediate possession of the animal. *State v. Roberts*, 18 N.M. 480, 138 P. 208 (1914).

Describing stolen animal in indictment as a "cow" was sufficient. *Wilburn v. Territory*, 10 N.M. 402, 62 P. 968 (1900).

"One neat cattle" sufficiently descriptive. - The descriptive term, used in the indictment, for the larceny of "one neat cattle" being the same as that used in statute 79, 1897 C.L. (former 40-4-17, 1953 Comp.), was sufficient, as it commonly was applied to describe a beast of the bovine genus. *Territory v. Christman*, 9 N.M. 582, 58 P. 343 (1899).

Word "feloniously" unnecessary. - It was not necessary to use word "feloniously" in information charging larceny from house or other building, under Laws 1869-1870, ch. 26, §§ 1, 2 (former 40-45-6, 40-45-7, 1953 Comp.), to support sentence of three to five years. *State v. Jones*, 34 N.M. 499, 285 P. 501 (1930).

Allegation of knowledge. - The third crime defined by 79, 1897 C.L. (former 40-4-17, 1953 Comp.), of knowingly killing or otherwise depriving the owners of animals of their immediate possession, was a purely statutory one; use of word "knowingly" made

knowledge an element of the crime, and an indictment failing to allege it in words of statute or words of similar import failed to state the offense. *Territory v. Cortez*, 15 N.M. 92, 103 P. 264 (1909).

Allegation that defendant "committed crime of larceny" would be sufficient where the crime constituted both statutory grand larceny and common-law larceny. *State v. Shroyer*, 49 N.M. 196, 160 P.2d 444 (1945).

Information adequate. - Information charging grand larceny, particularized by referring to section relating to grand larceny, was sufficient where crime was covered by that section. *State v. Lucero*, 70 N.M. 268, 372 P.2d 837 (1962).

Particulars specified. - Where amendment of information which charged defendant with larceny of sheep apprised him of particulars he might have asked for in a bill of particulars, he suffered no injustice. *State v. Shroyer*, 49 N.M. 196, 160 P.2d 444 (1945).

Defendant entitled to more definite specification. - Where charge simply alleged that defendant did steal and carry away certain articles of personal property of a stated value and being the property of a named individual, and there was not a single word to indicate the nature or character of the property, the charge was too vague and indefinite upon which to deprive defendant of his liberty when he had sought a more definite specification of what constituted the personal property which he was charged with stealing. *State v. Campos*, 79 N.M. 611, 447 P.2d 20 (1968).

Charging in alternative. - An indictment under Laws 1884, ch. 47, § 15 (former 40-4-17, 1953 Comp.), relating to larceny, embezzlement or killing of animals, could charge that accused committed the crime in each of the specified ways, so long as they were not repugnant. *State v. McKinley*, 30 N.M. 54, 227 P. 757 (1924).

Some single offenses were of a nature to be committed by many means, and a count was not necessarily double which charged several of the means, if they were not repugnant. *Territory v. Harrington*, 17 N.M. 62, 121 P. 613 (1912). See also *Territory v. Eaton*, 13 N.M. 79, 79 P. 713 (1905).

Additional details surplusage. - Information charging defendant with stealing a washing machine belonging to a certain company, from the company warehouse, of the value of \$300, which used the term "grand larceny" and referred to the statutory section defining grand larceny, sufficiently charged defendant of the crime of grand larceny, and not larceny from a warehouse, as defendant contended; the additional averment that the machine was stolen from the company's warehouse was surplusage, its effect, if any, being merely to place an additional burden on the state in proving the case. *State v. Johnson*, 60 N.M. 57, 287 P.2d 247 (1955).

Variance not jurisdictional. - In conviction for burglary and larceny, variance between indictment and proof regarding name and address of victim was not jurisdictional and

was cured by jury's guilty verdict. *State v. Jaramillo*, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

"Criminal complaint" insufficient to confer jurisdiction. - Order revoking a suspended sentence given defendant on a plea of guilty to charges of burglary and grand larceny contained in a "criminal complaint" filed by sheriff must be reversed, as the defendant's sentence was imposed without jurisdiction in the court, due to lack of a proper charge against him. *State v. Chacon*, 62 N.M. 291, 309 P.2d 230 (1957).

Designation of crime in bond. - A recognizance which described the alleged offense against the principal as "having sold and thereby deprived the owner thereof of a horse, the same being the crime of larceny" sufficiently designated the crime to bind the sureties on the bond or recognizance. *Territory v. Minter*, 14 N.M. 6, 88 P. 1130 (1907).

V. EVIDENCE.

A. IN GENERAL.

Proof of venue. - Venue, like any other fact in a case, could be proven by circumstantial evidence. *State v. Lott*, 40 N.M. 147, 56 P.2d 1029 (1936); *State v. Mares*, 27 N.M. 212, 199 P. 111 (1921).

Inference of intent to steal. - An intent to steal was an element to be inferred by the jury from the facts and circumstances established upon the trial. Such an inference might be drawn from facts showing that property was taken in one county and driven through several others and kept for 10 or 12 days before it was found and retaken by its owner. *State v. McKinley*, 30 N.M. 54, 227 P. 757 (1924).

Exhibit relevant to intent. - Fifty foot cotton rope with pipe T's on one end taken from defendant's car, which was identified as device capable of being used in larceny of signal wire, was relevant and material to preparation and intent of defendant, even though there was no evidence that in fact the exhibit was so used. *State v. Hardison*, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

Extra-judicial statements inadmissible. - In prosecution for larceny of scrap metal, defendant's out-of-court statements to witness that codefendant had bought some junk and that he (defendant) was going to haul the junk were properly disallowed as self-serving, and were not admissible as part of *res gestae* since proffered testimony of witness did not show that they were contemporaneous with a shocked condition or were spontaneous. *State v. Hunt*, 83 N.M. 753, 497 P.2d 755 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

B. LARCENY OF LIVESTOCK.

Circumstantial evidence. - In prosecution for larceny of cattle, the corpus delicti could be proved by circumstantial evidence. *State v. Ortega*, 36 N.M. 57, 7 P.2d 943 (1932).

Direct evidence of nonconsent of the owner to the killing of an animal was not required as a matter of law, and such nonconsent could be shown by circumstantial evidence. *State v. Parry*, 26 N.M. 469, 194 P. 864 (1920).

Establishing animal's identity. - It was equally as competent to establish the identity of a stolen animal by a brand as by its color or by any distinguishing mark. *Territory v. Valles*, 15 N.M. 228, 103 P. 984 (1909).

Proof of ownership. - Where indictment alleged that animal unlawfully killed was the property of copartners, it was necessary to prove the ownership as laid in the indictment beyond a reasonable doubt. *Territory v. Sais*, 15 N.M. 171, 103 P. 980 (1909).

When brand required as evidence. - Only when the evidence of ownership of animals depended upon a brand was it necessary to introduce a certified copy of the recorded brand in evidence. *State v. Meeks*, 25 N.M. 231, 180 P. 295 (1919).

Brand not conclusive. - In prosecution for larceny of a steer, the brand was but prima facie evidence of ownership, and did not prevent prosecution from introducing other evidence of true ownership of animal at time of offense. *Chavez v. Territory*, 6 N.M. 455, 30 P. 903 (1892).

Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendants owned the animal, under statute providing that registration in brand book under seal of the cattle sanitary board constituted prima facie proof that person owning the recorded brand was owner of animal branded with such brand. *State v. Reed*, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Disposal of meat as part of res gestae. - In prosecution for larceny of cattle, evidence as to hogs eating beef at ranch of a defendant was properly admitted as part of res gestae. *Territory v. Leslie*, 15 N.M. 240, 106 P. 378 (1910).

Prima facie case. - In prosecution for larceny of cattle, proof of ownership in alleged owner, that the cattle were stolen, that shortly thereafter they were found near the ranch of defendant, bearing his brand, freshly put on, and that he then claimed to own them, was sufficient prima facie proof of an unlawful taking and asportation, and made a prima facie case of larceny, although other cattle of the owner grazed in the same locality where the stolen cattle were found. *State v. Liston*, 27 N.M. 500, 202 P. 696 (1921).

In prosecution for larceny of mule, testimony tending to establish identity of mule, ownership by named person as administrator, and possession of mule by defendant was enough to make out a prima facie case of guilt. *Territory v. Valles*, 15 N.M. 228, 103 P. 984 (1909).

Offense established. - Where a drover, driving an animal which did not belong to him, claimed to have purchased it, the facts constituted an offense under Laws 1884, ch. 47, § 15 (former 40-4-17, 1953 Comp.). State v. Rucker, 22 N.M. 275, 161 P. 337 (1916).

Evidence of discovery of two calves belonging to others in weaning pen of ranch on which the defendant was foreman, along with other circumstances, afforded adequate support for larceny conviction. State v. Compton, 57 N.M. 227, 257 P.2d 915 (1953).

Conviction justified. - Possession of hide, ears and hoofs of heifer stolen from ranch, and their concealment, together with other circumstances, justified conviction for the theft. State v. Lott, 40 N.M. 147, 56 P.2d 1029 (1936).

C. VALUE.

Testimony of owner admissible. - An owner's testimony regarding the value of an item stolen is admissible and sufficient to withstand a motion for a directed verdict based on lack of evidence of value. State v. Romero, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975).

Store owner's calculations. - Testimony of store owner in the form of direct evidence of items taken and their value, based upon his own knowledge and a calculation of the value of the items stolen by determining how many items were in the bins before the theft and how many were left, was substantial evidence as to the value of the goods stolen. State v. Landlee, 85 N.M. 726, 516 P.2d 697 (Ct. App. 1973).

Cost of television set. - Evidence that stolen television set was purchased new in March or April prior to the December it was stolen, that the purchase price was \$750 and that it was "working all right" before it was stolen, was substantial evidence of value, and further, as defendant elicited this information on cross-examination, he was not in a position to complain about it. State v. Phillips, 83 N.M. 5, 487 P.2d 915 (Ct. App. 1971).

Value of checks. - Defendant was not entitled to an instruction on fourth-degree larceny as a lesser included offense of third-degree larceny on the grounds that the \$3,200 in checks he stole were neither endorsed nor stamped and therefore worthless. The value of a check, in the absence of proof to show a lesser value, is measured by what the owner of the check could expect to receive for the check at the time of the theft, i.e. the check's face value. Gallegos v. State, 113 N.M. 339, 825 P.2d 1249 (1992).

Market value. - Testimony of expert witnesses that a fair market value of stolen scrap metal was in excess of \$100 constituted substantial evidence to support conviction of defendants for larceny of property worth over \$100. State v. Hunt, 83 N.M. 753, 497 P.2d 755 (Ct. App.), cert. denied, 83 N.M. 740, 497 P.2d 742 (1972).

Cost or replacement value distinguished. - In prosecution for larceny of a plow, where jury was instructed to determine market value thereof, jury was not warranted in considering its cost or replacement value. *State v. Gallegos*, 63 N.M. 57, 312 P.2d 1067 (1957).

Evidence sufficient. - Testimony that part of the item stolen, if it was considered as scrap, was worth \$30, that its replacement cost was \$110 and that its market value was \$170 to \$180 was sufficient for a conviction under this statute for larceny of an item in excess of \$100 but less than \$2500. *State v. Landlee*, 85 N.M. 449, 513 P.2d 186 (Ct. App. 1973).

D. SUFFICIENCY.

Identification adequate. - Where victim and witness of robbery perpetrated by two masked men described, on the night of the robbery, the robber and the clothes he was wearing, and at trial identified clothes found in defendant's apartment and defendant himself on basis of his posture, size and stoop, there was sufficient evidence to establish that defendant was one of the men involved in the robbery. *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961). See also *State v. Montano*, 69 N.M. 332, 367 P.2d 95 (1961).

Exclusion of every reasonable hypothesis save guilt. - Circumstantial evidence of defendant's aiding or abetting larceny was substantial and did not fail to exclude every reasonable hypothesis other than defendant's guilt, where he changed positions in car containing stolen property and helped reload a television set which fell off the roof of the vehicle, which actions excluded the defense hypothesis that defendant was asleep and knew nothing about the larceny. *State v. Phillips*, 83 N.M. 5, 487 P.2d 915 (Ct. App. 1971).

In prosecution for larceny of signal wire, tracks from car belonging to codefendant and along line of cut wire, which were shown to match those made by defendant's boots, along with unexplained flight from the scene and removal of some cut wire about 100 feet in the direction of the car excluded every reasonable hypothesis other than guilt. *State v. Hardison*, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

"Exclusive" possession. - If the unexplained possession of stolen property found in defendant's apartment was within his "exclusive" possession, that circumstance coupled with other culpatory and incriminating circumstances is sufficient to sustain conviction of larceny. *State v. Flores*, 76 N.M. 134, 412 P.2d 560 (1966).

The "exclusive" possession which creates an inference of guilt does not mean that the possession must be separate from all others provided there is other evidence to connect the defendant with the offense. *State v. Flores*, 76 N.M. 134, 412 P.2d 560 (1966).

Proof of ownership. - In prosecuting larceny, the state need not prove ownership in a particular person; proof that the property belonged to someone other than the defendant is sufficient. *State v. Brown*, 310 N.M. 631, 830 P.2d 183 (Ct. App. 1992).

Sale of property. - While something more than possession alone must be shown to establish corpus delicti of larceny, where ring owned by woman was relinquished by her to jailer when she was confined in jail in which defendant was a trustee and defendant had the ring in his possession afterwards and sold it to another, the corpus delicti of larceny was established by circumstantial evidence. *State v. Buchanan*, 76 N.M. 141, 412 P.2d 565 (1966).

Evidence that defendant employee took property belonging to corporate owner from the business where it had been repaired, sold the property to a third person and retained the proceeds of the sale, and that defendant had no authority either to obtain possession of the property or to sell it, was evidence of an unlawful taking with the requisite intent. *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Taking money from lounge constituted larceny even where the person defendant took the money from was employed at the lounge, had custody of the money, and consented to the taking of the money, since the money belonged to the owner, not the employee and even if the employee had turned the money over to the defendant willingly, she had no authority to do so. *State v. Rhea*, 86 N.M. 291, 523 P.2d 26 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. See *State v. Peterson*, 103 N.M. App. 638, 711 P.2d 915 (1985), cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

Evidence insufficient. - Evidence that smooth soled tracks were found between area where wire was being larcenously cut and car belonging to one defendant, and that woman within the car was wearing smooth soled moccasins, where no attempt to match moccasins to tracks was made, was insufficient to exclude every reasonable hypothesis other than her guilt. *State v. Hardison*, 81 N.M. 430, 467 P.2d 1002 (Ct. App. 1970).

Where proof relied upon to establish defendant's guilt of breaking and entering and larceny was purely circumstantial and not incompatible with innocence on any rational theory, or incapable of explanation on any reasonable hypothesis, it was error for the court not to have directed a verdict of acquittal at the close of the state's case. *State v. Campos*, 79 N.M. 611, 447 P.2d 20 (1968).

Insufficient evidence that value of stolen property over \$2500. - See *State v. Seward*, 104 N.M. 548, 724 P.2d 756 (Ct. App. 1986).

VI. INSTRUCTIONS.

Error in time period charged harmless. - Where crime of grand larceny was charged as having been committed on February 15, 1953, the information charging theft of a washing machine over the value of \$20.00 was filed January 4, 1954, and meanwhile the statute defining the crime was amended on June 12, 1935, by substituting \$50.00 in lieu of \$20.00, fact that the court's instructions permitted jury to find that the offense had occurred on February 18, 1953, or at any time within the three years next preceding the date the information was filed was harmless, as the evidence conclusively showed that the offense had occurred prior to the effective date of the amendment, and moreover, the error was waived. *State v. Johnson*, 60 N.M. 57, 287 P.2d 247 (1955).

Incorrect identification of victim not fundamental error. - Instructions to which defendant in prosecution for burglary and larceny made no objection, incorrectly setting forth the name and address of the victim, did not constitute fundamental error. *State v. Jaramillo*, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Charge on circumstantial evidence proper. - Instruction on circumstantial evidence concerning the stealing and unlawful branding of a bull calf was not erroneous because of inclusion of statement "that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." *State v. Reed*, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Cumulative instruction. - The court was not required to give instruction on circumstantial evidence which was cumulative. *State v. Reed*, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Instruction on larceny by employee incorrect. - Defendant's requested instruction which told the jury that if the defendant was an employee of the corporate owner and as such had the right to have the possession of the equipment in question, then even though he sold said equipment without authority, he was not guilty of larceny, was an incorrect statement of the law because it failed to recognize that defendant's physical control of the equipment was no more than custody on behalf of an employer who retained possession. *State v. Robertson*, 90 N.M. 382, 563 P.2d 1175 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Larceny as included offense. - Because robbery is an aggravated larceny, so that larceny is necessarily included within the offense of robbery, defendant had the right to have instructions on larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish that offense. *State v. Wingate*, 87 N.M. 397, 534 P.2d 776 (Ct. App. 1975).

30-16-2. Robbery.

Robbery consists of the theft of anything of value from the person of another or from the immediate control of another, by use or threatened use of force or violence.

Whoever commits robbery is guilty of a third degree felony.

Whoever commits robbery while armed with a deadly weapon is, for the first offense, guilty of a second degree felony and, for second and subsequent offenses, is guilty of a first degree felony.

History: 1953 Comp., § 40A-16-2, enacted by Laws 1963, ch. 303, § 16-2; 1973, ch. 178, § 1.

ANNOTATIONS

- I. General Consideration.
- II. Multiple Prosecutions or Punishments.
- III. Elements of Offense.
- IV. Indictment and Information.
- V. Evidence.
 - A. In General.
 - B. Sufficiency.
- VI. Instructions.
- VII. Subsequent Armed Robbery Offenses.

I. GENERAL CONSIDERATION.

Cross-references. - For definition of deadly weapon, see 30-1-12 NMSA 1978.

For aggravated assault, see 30-3-2 NMSA 1978.

For assault with intent to commit a violent felony, see 30-3-3 NMSA 1978.

Crime of violence. - The district court properly included defendant's state robbery conviction as a violent felony under 18 U.S.C. § 924, the Armed Career Criminal Act. *United States v. Lujan*, 9 F.3d 890 (10th Cir. 1993).

Increased penalty provision strictly construed. - A more severe punishment on conviction for a second offense is deemed highly penal and therefore must be strictly construed. *State v. Garcia*, 91 N.M. 664, 579 P.2d 790 (1978).

Enhanced sentence not double jeopardy. - Validly increasing a defendant's sentence after conviction according to the provisions of the enhancement statute does not amount to double jeopardy. *State v. Stout*, 96 N.M. 29, 627 P.2d 871 (1981).

Sentencing statutes not conflicting. - Former section 31-18-4 NMSA 1978 does not conflict with this section in providing that the first year of the statutory sentence for a

felony, other than a capital felony, in commission of which a firearm was used, shall not be suspended; the two statutes are in harmony, each expressing a separate legislative intent. *State v. Wilkins*, 88 N.M. 116, 537 P.2d 1012 (Ct. App.), cert. denied, 88 N.M. 319, 540 P.2d 249 (1975).

Even though this section provides an increased penalty for second or subsequent armed robberies, it does not conflict with the Habitual Offender Statute, 31-18-5 NMSA 1978 (now repealed), which applies only to a current felony "not otherwise punishable by death or life imprisonment," since second or subsequent armed robberies are punishable by life imprisonment. *State v. Roland*, 90 N.M. 520, 565 P.2d 1037 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Habitual Offender Statute, 31-18-5 NMSA 1978 (now repealed), does not apply to second or subsequent armed robberies. *State v. Roland*, 90 N.M. 520, 565 P.2d 1037 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Intent of provision. - The fact that the defendant was convicted in one criminal proceeding of two armed robberies charged under separate counts of one indictment was not sufficient to invoke the increased penalty provision of this section, which is intended to serve as a warning to first offenders and to provide increased punishment for those who persist in violations of the law after having been formally convicted. *State v. Garcia*, 91 N.M. 664, 579 P.2d 790 (1978).

When enhanced penalty proper. - Any armed robbery offense committed subsequent to a conviction for armed robbery is a first degree felony calling for the enhanced penalty contemplated by this section. *State v. Garcia*, 91 N.M. 664, 579 P.2d 790 (1978).

Pretrial notice of enhanced sentence not required. - The state is not required to give a defendant notice before trial on the substantive offense that enhancement may be sought after conviction. By filing a pleading seeking to enhance the defendant's sentence after conviction, the state complies with due process requirements. *State v. Stout*, 96 N.M. 29, 627 P.2d 871 (1981).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For comment, "Definitive Sentencing in New Mexico: The 1977 Criminal Sentencing Act," see 9 N.M.L. Rev. 131 (1978-79).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For note, "Search and Seizure - Automobile Inventory Search Exception to the Fourth Amendment Expanded by State v. Williams," see 13 N.M.L. Rev. 689 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 67 Am. Jur. 2d Robbery §§ 1 to 9.

Taking property from the person by stealth as robbery, 8 A.L.R. 359.

What constitutes attempt to commit robbery, 55 A.L.R. 714.

Other robberies, admissibility of evidence of, 42 A.L.R.2d 854.

Gambling or lottery paraphernalia as subject of robbery, 51 A.L.R.2d 1396.

Stolen money or property as subject of robbery, 89 A.L.R.2d 1435.

Purse snatching as robbery or theft, 42 A.L.R.3d 1381.

Robbery by means of toy or simulated gun or pistol, 81 A.L.R.3d 1006.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 A.L.R.3d 1309.

Use of force or intimidation in retaining property or in attempting to escape, rather than in taking property, as element of robbery, 93 A.L.R.3d 643.

Pocket or clasp knife as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide, 100 A.L.R.3d 287.

Coercion, compulsion, or duress as defense to charge of robbery, larceny, or related crime, 1 A.L.R.4th 481.

Dog as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 7 A.L.R.4th 607.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

"Intimidation" as element of bank robbery under 18 USCS § 2113(a), 63 A.L.R. Fed. 430.

77 C.J.S. Robbery § 1 et seq.

II. MULTIPLE PROSECUTIONS OR PUNISHMENTS.

Single or multiple thefts. - Where property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act. State v. Allen, 59 N.M. 139, 280 P.2d 298 (1955).

Question for jury. - Whether acts of defendant and companions in stealing victim's vodka and later returning, whipping victim and stealing money, constituted two offenses or only one was a question of fact for the jury under instructions to disregard testimony of more than one taking if they found the takings constituted separate offenses. State v. Allen, 59 N.M. 139, 280 P.2d 298 (1955).

Two convictions for one conspiracy unconstitutional. - Because the defendant robbed two different victims but only one conspiracy to commit the robberies existed, it was violation of double jeopardy to convict the defendant for two conspiracies, as he was punished twice for the same offense. State v. Jackson, 116 N.M. 130, 860 P.2d 772 (Ct. App. 1993).

Charge of larceny is necessarily included in charge of robbery. State v. Eckles, 79 N.M. 138, 441 P.2d 36 (1968).

Crimes of aggravated assault and robbery must merge, as the operative elements of the two are the same. State v. Maes, 100 N.M. 78, 665 P.2d 1169 (Ct. App. 1983).

First degree murder and robbery are not same offense. Because the first degree murder statute requires proof of an unlawful killing which this section does not, and this section requires proof of the taking of another's property, which the first degree murder statute does not, the offenses are not the same even though it is necessary to prove the underlying felony in order to convict the defendant of first degree murder; therefore, a defendant is not being subjected to double punishment and consecutive sentences are proper. State v. Stephens, 93 N.M. 458, 601 P.2d 428 (1979).

Grand larceny and armed robbery merged. - Where the act of grand larceny was necessary to, or incidental to, the crime of armed robbery which the defendant committed, the offense of grand larceny was merged with the graver offense of armed robbery, and hence although the defendant was properly convicted of both armed robbery and grand larceny, he could not be doubly punished for both of those crimes.

State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961). See also State v. Montano, 69 N.M. 332, 367 P.2d 95 (1961).

Offense of receiving stolen property cannot be included within armed robbery. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

No bar to subsequent prosecution. - The facts necessary to sustain a conviction of receiving stolen property could not possibly sustain a conviction of armed robbery, which is essential to make a prior conviction a bar to a subsequent prosecution and conviction for a greater offense. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

The fact that defendant pleaded guilty, or at least indicated his guilt and was thereupon convicted of receiving stolen property, which property later turned out to be a portion of the property taken by him in the armed robbery, in no way clothed him with immunity from being charged, tried and convicted of the far more serious offense of which he was guilty. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Plaintiff who was convicted in a justice of the peace court (now replaced by magistrate courts) of petty misdemeanor of receiving stolen property, and was later convicted in the district court of the second-degree felony of armed robbery, was not placed in double jeopardy, and the state was not barred or estopped from prosecuting and convicting him for the armed robbery. State v. Gleason, 80 N.M. 382, 456 P.2d 215 (Ct. App. 1969).

No bar to dual punishments. - The offenses of receiving stolen property and armed robbery fail to fall within the prohibition against punishment for more than one offense because the criminal intent essential to the felony of armed robbery is not an essential element of the petty misdemeanor of receiving stolen property. State v. Mares, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Merger with aggravated battery. - Aggravated battery merges with a robbery offense where the defendant's intent to take a victim's purse includes an intent to injure the victim. State v. Gammil, 108 N.M. 208, 769 P.2d 1299 (Ct. App. 1989).

Offense of aggravated battery did not merge with armed robbery. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Aggravated battery does not constitute lesser included offense. - The concept of lesser included offenses is not involved in a prosecution for armed robbery and aggravated battery because either offense can be committed without committing the other offense. State v. Sandoval, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Elements of aggravated battery and armed robbery differ. - Since taking the victim's purse was a fact required to be proved under the armed robbery charge, but not under

the aggravated battery charge, and application of force was a fact required to be proved under the aggravated battery charge, while threatened use of force would be acceptable proof under the armed robbery charge, the elements of the two crimes were not the same. *State v. Sandoval*, 90 N.M. 260, 561 P.2d 1353 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Sentences for robbery and aggravated burglary proper. - Since theft is a necessary element of robbery but it is not necessarily involved in aggravated burglary, which requires only the element of intent to commit felony or theft, while an unauthorized entry is an element of aggravated burglary but not of robbery, the crimes did not involve the same elements, and therefore, defendant could be sentenced for each of these crimes. *State v. Ranne*, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Consecutive sentences for armed robbery and false imprisonment were proper; since the elements of the two crimes are dissimilar and the evidence required to establish each crime is independent, it was clear the crimes did not merge even when considered in light of the facts. *State v. Moore*, 109 N.M. 119, 782 P.2d 91 (Ct. App. 1989); *State v. Ibarra*, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993).

Robbery of money and unlawful taking of vehicle not merged. - Unlawful taking of a vehicle in violation of 64-9-4A, 1953 Comp., was not a necessary ingredient of offense of robbery of money by use or threatened use of force and violence; hence, defendant committed two separate and distinct criminal offenses, and the fact that they were committed on the same day, or even that one succeeded the other as part of one episode of criminal activity, did not cause them to merge. *State v. Eckles*, 79 N.M. 138, 441 P.2d 36 (1968).

III. ELEMENTS OF OFFENSE.

Criminal intent. - Theft is an element of the crime of robbery and it includes the concept of criminal intent. *State v. Nelson*, 83 N.M. 269, 490 P.2d 1242 (Ct. App.), cert. denied, 83 N.M. 259, 490 P.2d 1232 (1971).

Intent to steal. - A specific criminal intent, the intent to steal, is an essential element of the crime of robbery, and the use or threatened use of force or violence does not eliminate such an intent as an element of that crime. *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

Element of "carrying away" may be satisfied without actual possession. - The instant that a cashier, under coercion from the defendant, removes money from a cash register, the element of "carrying away" the money is satisfied, even though the defendant is apprehended prior to his actually taking possession of the money. *State v. Williams*, 97 N.M. 634, 642 P.2d 1093 (1982), cert. denied, 459 U.S. 845, 103 S. Ct. 101, 74 L. Ed. 2d 91 (1982).

Larceny plus force. - The presence of violence, actual or constructive, is an essential ingredient of robbery, but not of larceny, so that robbery is a compound or aggravated larceny, composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. *State v. Wingate*, 87 N.M. 397, 534 P.2d 776 (Ct. App. 1975).

Use or threatened use of force is essential element of robbery under this section. *State v. Martinez*, 85 N.M. 468, 513 P.2d 402 (Ct. App. 1973).

Force or intimidation is gist of offense under this section. *State v. Sanchez*, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967).

Amount or degree of force is not determinative factor in establishing the use of force in robbery. *State v. Martinez*, 85 N.M. 468, 513 P.2d 402 (Ct. App. 1973); *State v. Segura*, 81 N.M. 673, 472 P.2d 387 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Compulsion the issue. - Where force is charged under this section, the issue is not how much force was used, but whether the force was sufficient to compel the victim to part with his property. *State v. Sanchez*, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967).

Under this section the force or fear must be the moving cause inducing the victim to part unwillingly with his property. *State v. Sanchez*, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967).

The use or threatened use of force or violence is not, in and by itself, sufficient to sustain a conviction for robbery; it must be the lever by which the thing of value is separated from the person or immediate control of another. *State v. Baca*, 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971). See also *State v. Martinez*, 85 N.M. 468, 513 P.2d 402 (Ct. App. 1973).

Force used for mere escape not sufficient. - Under the facts of the present case, the victim's money was removed and separated from his person by stealth, and the defendant's use of a weapon only after the money was separated from the victim was merely an action to hold victim at bay as he escaped from the motel. The use of force to retain property or to facilitate escape does not satisfy the force element necessary for the crime of robbery. Thus, there was insufficient evidence to support the defendant's conviction for armed robbery. *State v. Lewis*, 116 N.M. 849, 867 P.2d 1231 (Ct. App. 1993).

Intimidating reasonable man. - Under this section where fear or intimidation is charged, it is necessary to show that the circumstances were such as to cause a reasonable man to apprehend danger and that he could be reasonably expected to give up his property in order to protect himself. *State v. Sanchez*, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967).

Assault and putting in fear. - It was not necessary that the assault be "with force and violence," if it was done by "assault and putting in fear." Territory v. Abeita, 1 N.M. 545 (1873).

Armed robbery is not offense distinct from robbery; the offense is robbery whether or not armed, and whether or not one is an accessory; "armed robbery" is a way to commit "robbery" and, if done in that way, the penalty is greater but the basic offense remains robbery. State v. Roque, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Degree of force a jury issue. - The question of whether or not the snatching of the purse from the victim was accompanied by sufficient force to constitute robbery is a factual determination, within the province of the jury's discretion. State v. Clokey, 89 N.M. 453, 553 P.2d 1260 (1976).

Gun as deadly weapon. - There was no room for argument that gun with which defendant was armed when he committed assault and robbery was not a dangerous weapon, whether loaded or unloaded. State v. Montano, 69 N.M. 332, 367 P.2d 95 (1961).

Dangerous weapon. - A deadly weapon was a dangerous weapon, within meaning of Laws 1921, ch. 20, § 1 (40-42-2 1953 Comp.), prescribing penalty for robbery while armed with dangerous weapon. State v. Walden, 41 N.M. 418, 70 P.2d 149 (1937).

Ownership. - Laws 1921, ch. 20, § 1 (40-42-2, 1953 Comp.), prescribing penalty for robbery while armed with dangerous weapon, did not require that ownership of property be in the person from whom it was taken. State v. Powers, 37 N.M. 595, 26 P.2d 230 (1933).

The crime of robbery requires that the property taken be in the immediate control of another; however, the property need not be owned by the person from whom it was taken. State v. Kenny, 112 N.M. 642, 818 P.2d 420 (Ct. App. 1991).

IV. INDICTMENT AND INFORMATION.

Reference to statute sufficient. - Indictment charging defendant with "robbery while armed with a deadly weapon contrary to 40A-16-2 [30-16-2 NMSA 1978]" was not deficient for failure to include phrase "by use or threatened use of violence" since such phrase was contained in the definition of, and was included in the word, robbery, and since an indictment was sufficient if it identified the crime charged by reference to the statute establishing the offense. State v. Walsh, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969).

Alternative charges. - Charge of both robbery and armed robbery in indictment was not duplicious because all that was charged was that the one robbery was committed in two ways, namely, robbery without specification of the means and robbery by firearm,

and such was not duplicity, but alternative pleading. *State v. Roque*, 91 N.M. 7, 569 P.2d 417 (Ct. App.), cert. denied, 91 N.M. 4, 569 P.2d 414 (1977).

Bill of particulars. - Defendant's motive for bill of particulars should have been granted, furnishing name and type of store where the robbery allegedly occurred, whether a safe, vault or other depository was involved and the name of the person or persons allegedly intimidated or threatened, and failure to grant motion was reversible error. *State v. Graves*, 73 N.M. 79, 385 P.2d 635 (1963).

V. EVIDENCE.

A. IN GENERAL.

Statement by defendant. - Testimony that defendant said, "I was going to do something but I was too scared," while hearsay, was admitted without objection and, therefore, was competent in robbery prosecution. *State v. Baca*, 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971).

Defendant's pecuniary condition. - In prosecution for robbery while armed with dangerous weapon under Laws 1921, ch. 20, § 1 evidence of accused's pecuniary condition, on the question of motive, was properly excluded. *State v. Tapia*, 41 N.M. 616, 72 P.2d 1087 (1937).

Other crime. - In prosecution for aggravated burglary, armed robbery and rape it was proper to go into details of another rape some five blocks away about an hour later, in order to establish both characteristic conduct and possession of knife and flashlight involved in first crime. *State v. Lopez*, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

In armed robbery prosecution, reference in defendant's statement to two other offenses committed in a continuous sequence immediately preceding robbery, in light of alibi defense and identity issue was properly not deleted. *State v. Stout*, 82 N.M. 455, 483 P.2d 510 (Ct. App. 1971).

Polygraph test results. - Where armed robbery was committed in daylight in victim's home and took about 20 minutes, throughout which time victim was in presence of the perpetrator, and victim identified defendant as that person, admission into evidence of polygraph test results as per stipulation of the defense, without objection at trial, was not a denial of a fair trial or due process. *State v. Chavez*, 80 N.M. 786, 461 P.2d 919 (Ct. App. 1969).

Exhibits admissible. - There was no abuse of discretion on part of trial judge in admitting into evidence moneybags and contents stolen by robbers, along with jacket the same color as one worn by one robber and pistol which would match general description of robbery weapon, which items were found in car driven by defendant

which he and companion abandoned, and checks stolen at same time, which were on person of companion. State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct. App. 1970).

Defense argument that items of stolen property were not shown to have been in possession of defendants went to the weight to be accorded this evidence and not its admissibility, where evidence indicated that defendants had possession of the property in cafe and attempted to destroy or conceal it. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct. App. 1970).

Absence of alibi witness. - Where defendant in trial for armed robbery proceeded to trial without objection, knowing that alibi witness was not present, without applying for writ of attachment or other process to secure her presence, and during hearing upon motion for new trial, trial court heard witness' testimony and concluded it was not probable that a different result would have been reached had her testimony been produced at trial, it could not be said that court abused its discretion in refusing to grant a new trial. State v. Milton, 80 N.M. 727, 460 P.2d 257 (Ct. App. 1969).

B. SUFFICIENCY.

Circumstantial evidence. - Circumstantial evidence may suffice to establish the corpus delicti, and it may also suffice as proof of the identity of the perpetrator of a crime. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct. App. 1970).

Corpus delicti plus identity of robber. - Proof sufficient to sustain a conviction of the crime of robbery involves proof of two distinct propositions, namely, the theft of something of value from the person of another or from the immediate control of another by use or threatened use of force or violence, and that such theft was done by the person or persons charged; in other words, proof of the corpus delicti and the identity of the accused. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct. App. 1970).

Corpus delicti proven. - Corpus delicti in prosecution for armed robbery was sufficiently proven by testimony of complaining witness that he was the victim of a robbery by some person armed with a dangerous weapon. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

Identification adequate. - Where victim and witness of robbery perpetrated by two masked men described, on the night of the robbery, the robber and the clothes he was wearing, and at trial identified clothes found in defendant's apartment and defendant himself on basis of his posture, size and stoop, there was sufficient evidence to establish that defendant was one of the men involved in the robbery. State v. Quintana, 69 N.M. 51, 364 P.2d 120 (1961). See also State v. Montano, 69 N.M. 332, 367 P.2d 95 (1961).

Where the victim positively identified the defendant, this testimony, alone, was held sufficient to sustain the conviction. State v. Hunt, 83 N.M. 546, 494 P.2d 624 (Ct. App. 1972).

Exact role of defendant immaterial. - Although evidence as to which of the robbers took the change was sparse and conflicting, this did not matter as the jury was instructed on aiding and abetting and the evidence was substantial that defendant was at least an aider and abettor of the robbery of the change. State v. Urban, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974).

Mere presence insufficient. - If proof disclosed only presence of defendant at scene of robbery it would not support a conviction. State v. Santillanes, 81 N.M. 185, 464 P.2d 915 (Ct. App. 1970).

Where state did not contend that defendant and his companions entered service station with any thought or intention of committing a crime, and acts relating to alleged robbery commenced after defendant had been shot and placed in his car, defendant could only have committed robbery as accessory or as aider and abettor and only if the record showed that defendant shared the criminal intent and purpose of the principals, mere presence without some outward manifestation of approval being insufficient. State v. Salazar, 78 N.M. 329, 431 P.2d 62 (1967).

Defendant's participation not shown. - Evidence was insufficient to support verdict against individual who remained in back seat of car while two companions got out and beat and robbed person who had been given a ride, where there was no showing of a community of purpose to accomplish the crime, or any acts, words, signs or motions that would evince a design to encourage, incite or approve of the crime. State v. Lucero, 63 N.M. 80, 313 P.2d 1052 (1957).

Driver of get-away car. - Testimony that complaining witness was beaten and robbed by two individuals with whom he had been riding, while driver of the car kept the motor running, saw what occurred and drove the getaway car was sufficient to find driver guilty as a principal. State v. Lucero, 63 N.M. 80, 313 P.2d 1052 (1957).

Verdict of attempted armed robbery was supported by substantial evidence where defendant was driver of car stationed outside liquor store and lounge awaiting commission of armed robbery by others, one of whom had pulled gun on manager and told him to lie down behind counter when robbery was abandoned after witness walked into store and started screaming. State v. Paul, 83 N.M. 619, 495 P.2d 797 (Ct. App. 1972).

Firing at police. - Shooting by defendant at police who were pursuing car in which he and robber were passengers which was fleeing scene of crime was evidence that defendant approved the robbery and shared the robber's criminal intent, and was sufficient to sustain armed robbery conviction. State v. O'Dell, 85 N.M. 536, 514 P.2d 55 (Ct. App. 1973).

Exclusive possession of stolen property. - Articles stolen from store by robbers which were found a short time later in front seat of car driven by defendant constituted evidence which would support conclusion that defendant was in exclusive possession of the property, despite fact that another person accompanied defendant in the car. State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct. App. 1970).

Possession insufficient absent other facts. - Although recently stolen property found in exclusive possession of defendant will not alone support a verdict of guilt, circumstances of flight, apprehension only minutes after robbery a short distance from scene of crime, and finding of clothing in car driven by defendant fitting description of eye witnesses, constituted sufficient circumstance of guilt in addition to possession of property stolen to support verdict. State v. Beachum, 82 N.M. 204, 477 P.2d 1019 (Ct. App. 1970).

In prosecution under former law for "extraordinary burglary," where the jury was instructed that defendant should be acquitted unless he was found to be involved in a common scheme or design to commit the crime and that his possession of some of the fruits of the crime might be considered only after his participation in the robbery or his involvement in such a scheme was determined, and where the only evidence connecting defendant with the crime was possession of part of the stolen money, the jury either convicted without substantial evidence or contrary to the court's instructions. State v. Wallis, 34 N.M. 454, 283 P. 906 (1929).

Codefendant's use of weapon. - Where several defendants were prosecuted for robbery, all tried as principals, proof that one was armed with dangerous weapon was sufficient to satisfy allegation of the information that all were so armed, and allegation that dangerous weapon was held in hands of one defendant was surplusage. State v. Kimbell, 35 N.M. 101, 290 P. 792 (1930).

Deadly character of weapon not established. - In prosecution for robbery while armed with a deadly weapon, where defendant was convicted as an accessory, evidence that other man raised a tire tool, the size, length or weight of which was not described, over service station attendant's head "like a threat," without more, was insufficient for a determination that tire tool was capable of producing death or great bodily harm or a weapon with which dangerous wounds could be inflicted. State v. Gonzales, 85 N.M. 780, 517 P.2d 1306 (Ct. App. 1973).

Surprise not equivalent to force. - The defendant's motion for a directed verdict, questioning the sufficiency of the evidence for a conviction of armed robbery, should have been sustained, where witness only testified that he had been taken by surprise and not that by force or fear he had been induced to part with anything of value. State v. Baca, 83 N.M. 184, 489 P.2d 1182 (Ct. App. 1971).

Jostling victim. - Evidence of jostling or causing the victim to fall as property is taken is a sufficient showing to establish the use of force. State v. Martinez, 85 N.M. 468, 513 P.2d 402 (Ct. App. 1973).

Evidence sufficient. - Circumstantial evidence, sufficient to sustain the defendant's conviction for robbery, included evidence placing defendant and his distinctly colored car at the service station on the afternoon before the robbery, evidence that the robber departed the scene in this car after the robbery, the description of the robber given by a witness and defendant's own statement against his interest. *State v. Milton*, 86 N.M. 639, 526 P.2d 436 (Ct. App. 1974).

Where defendant had told witnesses before and after the murder that he was going to rob/had robbed someone and no money was found on murdered victim but there was evidence that victim had money, there was sufficient evidence introduced for jury to find that defendant committed armed robbery. *State v. Montoya*, 101 N.M. 424, 684 P.2d 510 (1984).

Evidence was sufficient to support defendant's conviction as an accessory to armed robbery, where his confession, found to be voluntary, was corroborated by other evidence at trial. *Church v. Sullivan*, 942 F.2d 1501 (10th Cir. 1991).

Evidence that defendants intruded into husband and wife's home, beat and kicked the husband, and dragged both of them into a closet prior to absconding with money and jewelry, sufficed for a conviction for robbery. *State v. Ibarra*, 116 N.M. 486, 864 P.2d 302 (Ct. App. 1993).

Credibility and weight of evidence for jury. - Where although the evidence concerning armed robbery was conflicting it substantially supported the verdict, the credibility of the witnesses and the weight to be given their testimony was for the jury to determine. *State v. Valles*, 83 N.M. 541, 494 P.2d 619 (Ct. App. 1972).

Whether defendant had gun in her hand as testified to by robbery victim was for the jury to resolve. *State v. Encee*, 79 N.M. 23, 439 P.2d 240 (Ct. App. 1968).

VI. INSTRUCTIONS.

Instructions substantially following language of statute was sufficient. *State v. Lopez*, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

More clarity possible. - Court of appeals held that while an instruction in robbery prosecution on the requisite intent to steal would have been a clearer statement as to that element, an instruction in the language of the statute was legally sufficient. *State v. Puga*, 85 N.M. 204, 510 P.2d 1075 (Ct. App. 1973).

Use or threat of violence. - Since "use or threatened use of force or violence" is an essential element of this crime, a failure to instruct on this essential element is reversible error. *State v. Walsh*, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969).

Putting victim in fear. - Instruction requiring acquittal if jury believed that defendant did not with force and violence take the property would have been erroneous since jury might have been satisfied that there was an "assault and putting in fear," which with other essential ingredients of the offense was all that was requisite for a conviction. Territory v. Abeita, 1 N.M. 545 (1873).

Intent adequately covered. - Defendant's argument that since he was charged with being accessory to an attempted armed robbery and where there was no evidence of a demand for money or goods, he was entitled to a specific intent instruction within the general intent instruction was without merit where a separate instruction on attempt was given as well as an instruction on armed robbery setting out requirement of specific intent. State v. Paul, 83 N.M. 619, 495 P.2d 797 (Ct. App. 1972).

Train hold-up. - The phrase "holding up," when used in instructions in relation to an attack upon a train, meant the forcible detention of a train with intent to commit a robbery or some other felony. Territory v. McGinnis, 10 N.M. 269, 61 P. 208 (1900), overruled on other grounds State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966).

Fruits of crime. - Since a determination by jury that defendant had in his possession the fruits of the crime does not justify a finding of guilt unless there is evidence of other circumstances connecting the defendant with the offense, the jury should also be instructed as to the requirement of proof by the state of other circumstances by which the defendant is linked to the crime charged. State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963).

Possession of unidentified money. - The court in its instructions in burglary case, must explain to the jury the rules of law with respect to possession of unidentified money, so that the jury will have a guide in making its determination of what weight, if any, is to be given to this type of evidence; the jury must be satisfied beyond a reasonable doubt that the defendant had in his possession the actual fruits of the crime, or a part thereof. State v. Graves, 73 N.M. 79, 385 P.2d 635 (1963).

Entrapment. - Where there was no evidence that informer who drove getaway car either persuaded or induced defendant to commit armed robbery, defendant was not entitled to instruction on entrapment. State v. Sweat, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972).

Instruction on larceny required. - Because robbery is an aggravated larceny, larceny is necessarily included within the offense of robbery, so that defendant had the right to have instructions on the lesser included offenses of larceny submitted to the jury, since there was evidence from several defense witnesses which tended to establish larceny. State v. Wingate, 87 N.M. 397, 534 P.2d 776 (Ct. App. 1975).

Charge on lesser offense not supported. - Where testimony of victim did not give rise to any other conclusion than that defendant committed the robbery while armed, defendant was not entitled to have the jury instructed on the lesser offenses because

there was no evidence to establish them. State v. Sweat, 84 N.M. 122, 500 P.2d 207 (Ct. App. 1972).

Directing verdict. - In a prosecution for unarmed robbery, a motion for a directed verdict is to be determined by viewing the evidence in the light most favorable to the state. State v. Sanchez, 78 N.M. 284, 430 P.2d 781 (Ct. App. 1967).

Self-defense instruction refused since defendant entered store with weapon, prepared to rob. - Where a murder defendant entered a store with a weapon, prepared to commit armed robbery if the circumstances permitted it, such facts can only reasonably point to the commission of a felony in a situation which is, of itself, "inherently or foreseeably dangerous to human life," and a self-defense instruction is properly refused. State v. Chavez, 99 N.M. 609, 661 P.2d 887 (1983).

VII. SUBSEQUENT ARMED ROBBERY OFFENSES.

Prior armed robbery not also used with habitual offender statute. - A prior armed robbery conviction may not be used for enhancement under both this section and the habitual offender provision; accordingly, in the case of a defendant who has one prior burglary, one prior armed robbery, and one current armed robbery, the sentence for the current offense, discounting any reduction for mitigating circumstances, should be that for a second armed robbery plus a one-year enhancement for the prior burglary under the habitual offender statute. State v. Keith, 102 N.M. 462, 697 P.2d 145 (Ct. App. 1985).

30-16-3. Burglary.

Burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with the intent to commit any felony or theft therein.

A. Any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of a third degree felony.

B. Any person who, without authorization, enters any vehicle, watercraft, aircraft or other structure, movable or immovable, with intent to commit any felony or theft therein is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-3, enacted by Laws 1963, ch. 303, § 16-3; 1971, ch. 58, § 1.

ANNOTATIONS

- I. General Consideration.
- II. Multiple Prosecutions.
- III. Elements of Offense.

IV. Indictment and Information.

A. In General.

B. Variance.

V. Evidence.

A. In General.

B. Admissibility.

C. Sufficiency.

VI. Instructions.

I. GENERAL CONSIDERATION.

Cross-references. - For assault with intent to commit burglary, see 30-3-3 NMSA 1978.

For instruction on the essential elements of burglary, see UJI 14-1630.

For instruction on aiding or abetting as accessory to crime other than attempt and felony murder, see UJI 14-2822.

Purpose to protect possessory rights. - The statutory offense of burglary is one against the security of property, and its purpose is to protect possessory rights. *State v. Sanchez*, 105 N.M. 619, 735 P.2d 536 (Ct. App.), cert. denied, 105 N.M. 618, 735 P.2d 536 (1987).

Legislative consolidation intended. - A comparison of this section and the statutes concerning burglary and unlawful entry that existed prior to 1963 (40-9-1, 40-9-6, 40-9-7, 40-9-10, 1953 Comp.) indicates that the new section is a consolidation of the old statutes and does not evidence an intention of the legislature to exclude from the crime of burglary unauthorized entries to structures other than dwellings. *State v. Gonzales*, 78 N.M. 218, 430 P.2d 376 (1967).

Common law expanded. - Section 40-9-6, 1953 Comp., defines the offense of burglary so as to expand the common-law definition of that offense to include the breaking and entering of offices, shops and warehouses. *Martinez v. United States*, 295 F.2d 426 (10th Cir. 1961).

Crime of violence. - The offense defined under this section of breaking and entering a dwelling house or other building with intent to commit a felony therein was a crime of violence for purposes of former 15 U.S.C. § 902(e) relating to the transporting of a firearm in interstate commerce after conviction of a crime of violence. *Martinez v. United States*, 295 F.2d 426 (10th Cir. 1961).

The district court properly included defendant's state burglary conviction as a violent felony under 18 U.S.C. § 924, the Armed Career Criminal Act. *United States v. Lujan*, 9 F.3d 890 (10th Cir. 1993).

Prosecution of Indians limited. - Where a federal statute limiting the definition and punishment of burglary by an Indian within Indian country to the laws of the several states in force at the time of its enactment, and there was no law of New Mexico in effect at that time defining a crime of burglary as it was charged in the information, defendant's motion to dismiss the information was sustained. *United States v. Gomez*, 250 F. Supp. 535 (D.N.M. 1966).

Applicability of former law. - Former law which provided that one entering "any car of any corporation formed under the provisions of this act" with intent to steal should be guilty of burglary, did not apply where the burglary occurred in a car of a corporation formed under an earlier act, although Laws 1878, ch. 3, § 1 (63-2-13 NMSA 1978) conferred all the powers, privileges, and exemptions of corporations formed under Laws 1878, ch. 1 on railroad corporations organized under the prior general corporation act, since the protection of a burglary statute was not a privilege. *Territory v. Stokes*, 2 N.M. 161 (1881).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12 N.M.L. Rev. 271 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Burglary §§ 1 to 14.

Opening closed but unlocked door as breaking which will sustain charge of burglary or breaking and entering, 23 A.L.R. 112.

Burglary without breaking, 23 A.L.R. 288.

Outbuilding or the like as part of "dwelling house," 43 A.L.R.2d 831.

Gambling or lottery paraphernalia as subject of burglary, 51 A.L.R.2d 1396.

Night, sufficiency of showing that burglary was committed at, 82 A.L.R.2d 643.

Entry through partly opened door or window as burglary, 70 A.L.R.3d 881.

Maintainability of burglary charge, where entry into building is made with consent, 58 A.L.R.4th 335.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Burglary, breaking, or entering of motor vehicle, 72 A.L.R.4th 710.

Minor's entry into home of parent as sufficient to sustain burglary charge, 17 A.L.R.5th 111.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 A.L.R.5th 125.

12A C.J.S. Burglary §§ 1 to 38.

II. MULTIPLE PROSECUTIONS.

Several burglaries. - The burglary of several businesses in one building at approximately the same time constitutes not one offense, but several, and a defendant may be prosecuted for all such offenses. State v. Ortega, 86 N.M. 350, 524 P.2d 522 (Ct. App. 1974).

When one commits burglary of dwelling house one commits criminal trespass based on that entry. State v. Ruiz, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Two crimes shown. - Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. State v. Watkins, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Larceny and burglary not merged. - Prosecution for burglary and larceny arising out of the same event does not constitute double jeopardy since there is no merger when an accused is charged with both burglary and larceny though the charges stem from one transaction or event. State v. Deats, 82 N.M. 711, 487 P.2d 139 (Ct. App. 1971).

Since stealing is a necessary element of larceny but is not a necessary element of burglary, larceny is not necessarily involved in a burglary, and the two crimes do not merge, hence, defendant could be convicted of and sentenced for both crimes. State v. McAfee, 78 N.M. 108, 428 P.2d 647 (1967).

Possession of burglary tools is not necessarily involved in burglary. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Burglary and possession of burglary tools does not merge. - The crime of possession of burglary tools does not merge with the crime of burglary, and hence defendant's sentence for each of these crimes did not constitute double punishment. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

As the "overt act" required in the General Attempt Statute 30-28-1 NMSA 1978 did not necessarily involve possession of burglary tools. The crime of attempt to commit a felony of burglary did not merge with the crime of possession of burglary tools, and hence, defendant's sentence for each of these crimes did not constitute double punishment. State v. Everitt, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Convictions for burglary and receiving improper. - The state cannot convict a person under one indictment or information of receiving stolen property, and then subsequently convict him under another indictment or information of burglary, if the burglary conviction is dependent upon a theft by him of the same property, and he is shown to have been the person who actually took and asported the property during the burglarious entry. State v. Gleason, 80 N.M. 382, 456 P.2d 215 (Ct. App. 1969).

"Disposal" shown. - Where the record supported the conclusion that the defendant "disposed of " property which he may have also stolen, as the theft and disposal were different acts, the principle that one who is a thief cannot be convicted of "receiving" the property he stole because the theft and receipt are the same act was inapplicable. State v. Mitchell, 86 N.M. 343, 524 P.2d 206 (Ct. App. 1974).

III. ELEMENTS OF OFFENSE.

Burglary is an offense against the security of the building, and when that security is breached by the penetration of an instrument into the building there has been an entry within the meaning of this statute. State v. Tixier, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

Although New Mexico no longer defines burglary in terms of a "breaking," the offense of burglary remains an offense against the security of the property which is entered. State v. Ortiz, 92 N.M. 166, 584 P.2d 1306 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

In establishing a burglary, any penetration, however slight, of the interior space is sufficient to constitute entry. State v. Reynolds, 111 N.M. 263, 804 P.2d 1082 (Ct. App. 1990).

Unlawful entry of building in nighttime constitutes "burglary," the punishment being dependent upon the degree of the offense. Miller v. Cox, 67 N.M. 414, 356 P.2d 231 (1960).

Breaking not required. - The requirement of a "breaking" is no longer included in New Mexico's statutory definition of burglary, which is not concerned with distinctions

between evidence of breaking as opposed to evidence of entering. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

Formerly breaking and entry essential. - Under former law, evidence had to show there was both a breaking and an entry to warrant conviction for burglary. *State v. Grubaugh*, 54 N.M. 272, 221 P.2d 1055 (1950).

Entry plus intent. - The crime of burglary is complete when the defendant makes an unauthorized entry with intent to commit any felony or theft. *State v. Madrid*, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972); *State v. Gutierrez*, 82 N.M. 578, 484 P.2d 1288 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

The crime of burglary is complete when there is an unauthorized entry with the intent to commit a felony or theft in the vehicle or structure entered. *State v. Wilkerson*, 83 N.M. 770, 497 P.2d 981 (Ct. App. 1972); *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969); *State v. Ford*, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

In order to prove the crime of burglary, it is required to prove unlawful entry of a structure with the necessary intent. *State v. Hinojos*, 78 N.M. 32, 427 P.2d 683 (Ct. App. 1967).

The mere entry of an occupied dwelling house in the nighttime with intent to commit larceny is burglary. *State v. Ocanas*, 61 N.M. 484, 303 P.2d 390 (1956).

Unauthorized entry required. - A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time, open to the public or the actor is licensed or privileged to enter. *State v. Sanchez*, 105 N.M. 619, 735 P.2d 536 (Ct. App.), cert. denied, 105 N.M. 618, 735 P.2d 536 (1987).

Burden on state to prove unauthorized entry. - It is not necessary that every person who could consent to entry testifies that consent was given as the burden on the state is to prove unauthorized entry beyond a reasonable doubt. *State v. Mireles*, 82 N.M. 453, 483 P.2d 508 (Ct. App. 1971).

Types of unauthorized entry. - A trespassory entry would be an unauthorized entry, as would an entry without consent or on the basis of an unauthorized consent. *State v. Ortiz*, 92 N.M. 166, 584 P.2d 1306 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Entry by fraud, deceit or pretense, whether characterized as trespassory, without consent or without authorized consent, is an unauthorized entry, similar to the constructive "breaking" at common law. *State v. Ortiz*, 92 N.M. 166, 584 P.2d 1306 (Ct. App.), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Burglary of vehicle separate offense from taking or tampering. - The offense of burglary of a motor vehicle requires an unauthorized entry. Unauthorized entry is not an element of either unlawful taking of a vehicle, 66-3-504 NMSA 1978, or tampering with a vehicle, 66-3-506 NMSA 1978. This difference in the elements of the offenses is sufficient ground to reject the defendant's contention that the statutes are the same and that he should not be charged with the more general burglary charge. *State v. Hernandez*, 116 N.M. 562, 865 P.2d 1206 (Ct. App. 1993).

Penetration by instrument. - Evidence of a break-in by use of an instrument which penetrates into the building is evidence of entry into the building, and the sufficiency of this evidence is not destroyed by a failure to prove that the instrument was used to steal something from the building or to commit another felony. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

Unoccupied structure still "dwelling house". - A structure, even if unoccupied for a year, does not lose its character as a "dwelling house" for purposes of Subsection A, unless there is evidence that the last tenant has abandoned the structure with no intention of returning. *State v. Ervin*, 96 N.M. 366, 630 P.2d 765 (Ct. App. 1981).

Attached garage with no opening to house was part of dwelling house within the meaning of this section because the garage was a part of the habitation, directly contiguous to and a functioning part of the residence. *State v. Lara*, 92 N.M. 274, 587 P.2d 52 (Ct. App.), cert. denied, 92 N.M. 260, 586 P.2d 1089 (1978).

"Other structure" construed literally. - Under this section the legislature intended the term "other structure" to be construed in its literal sense and that it not be limited by the specific language preceding it. *State v. Gonzales*, 78 N.M. 218, 430 P.2d 376 (1967).

Food store included. - Under this section ejusdem generis is resorted to merely as an aid in determining legislative intent and does not foreclose the inclusion of a food store within the term "other structure." *State v. Gonzales*, 78 N.M. 218, 430 P.2d 376 (1967).

Entry into soft drink vending machine. - The term "structure" as set forth in this section does not include the unauthorized entry into a soft drink vending machine located outside a building or other structure with intent to commit a felony or theft within. *State v. Bybee*, 109 N.M. 44, 781 P.2d 316 (Ct. App. 1989).

Entering open store. - A person who enters a store open to the public with intent to shoplift or commit larceny is not guilty of burglary. *State v. Rogers*, 83 N.M. 676, 496 P.2d 169 (Ct. App. 1972).

Entry into inner door. - Where there is lawful entry into a building, an unauthorized entry into an inner door of any unit with the necessary intent may be prosecuted for burglary. *State v. Ortega*, 86 N.M. 350, 524 P.2d 522 (Ct. App. 1974).

Reaching into bed of pickup truck with the intent to commit a felony may constitute a burglary within the meaning of this section. *State v. Rodriguez*, 101 N.M. 192, 679 P.2d 1290 (Ct. App. 1984).

Post office box deemed "structure". - A post office box was a "structure" within the meaning of this section. The separately secured area that constituted the structure was the area consisting of the mail sorting room and the post office boxes, the backs of which opened into the sorting room. *State v. Gregory*, 117 N.M. 104, 869 P.2d 292 (Ct. App. 1993).

Identity of place. - The identity of the place burglarized was an essential element of crime denounced by Laws 1853-1854, p. 100, §§ 11 (40-9-6, 1953 Comp., relating to breaking and entering into places other than dwellings). *State v. Salazar*, 42 N.M. 308, 77 P.2d 633 (1938).

Intent to commit felony under burglary statute includes general criminal intent. - When one intends to commit a felony or theft under the burglary statute, one also has the general criminal intent of purposely doing an act even though he may not know the act is unlawful. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Specific intent to commit felony or theft is essential element of the state's case to be proved beyond a reasonable doubt, the gravamen of the offense of burglary being the intent with which the structure is entered. *State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 305, 551 P.2d 1352 (1976); *State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

The phrase "or any other felony," in former 40-9-6, 1953 Comp., dealing with crime of breaking and entering into places other than dwellings, was indicative that this section of the statute only applied to a breaking and entering with intent to commit a felony. 1955-56 Op. Att'y Gen. No. 6115.

Intent to steal vehicle sufficient. - An intent to steal the car is an intent to commit a theft "therein." Theft of the car itself may be an offense committed within the vehicle. If one intends to commit in a car acts that accomplish the crime, then one intends to commit the crime in the car. Theft of a car can be accomplished from within the vehicle. *State v. Hernandez*, 116 N.M. 562, 865 P.2d 1206 (Ct. App. 1993).

Intent measured at time of entry. - A specific intent to commit a felony must exist and may be measured at the time of the claimed unauthorized entry into the home of the prosecutrix. *State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 305, 551 P.2d 1352 (1976).

Entry without intent not burglary. - Absent any proof that entry had been made with an intent to commit a felony, the act of prying a lock did not constitute burglary. *State v. Grubaugh*, 54 N.M. 272, 221 P.2d 1055 (1950).

Intoxication may be shown to negative existence of required intent in a prosecution for burglary, and where defendant claims absence of intent due to intoxication, the issue of intent is for the jury. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Voluntary intoxication is not a defense to a charge of larceny unless defendant was so intoxicated as to be unable to form the necessary intent. *State v. Lucero*, 70 N.M. 268, 372 P.2d 837 (1962).

Burglary requires that entry be with the specific intent to commit a felony or theft; intoxication may be shown to negate this specific intent. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

Burglary does not depend upon actions after the entry, the crime being complete when there is an unauthorized entry with the intent to commit a felony or theft. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

Stealing is not a necessary element of burglary. *State v. Ford*, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

Proof of theft unnecessary. - When entry is accomplished with intent to steal it is not a required element of proof to show that any property was actually taken. *State v. Ortega*, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

To prove burglary, the state was not required to prove either that defendant stole something or ownership of any articles stolen. *State v. Gutierrez*, 484 P.2d 1288 (Ct. App.), cert. denied, 82 N.M. 562, 484 P.2d 1272 (1971).

Possession of stolen property immaterial. - Proof that property was actually taken is not necessary nor is proof of possession of a stolen item. *State v. Wilkerson*, 83 N.M. 770, 497 P.2d 981 (Ct. App. 1972).

To prove burglary, the state was not required to prove defendant's possession of stolen articles. *State v. Ford*, 81 N.M. 556, 469 P.2d 535 (Ct. App. 1970).

The state is not required to prove dominion, control or possession. *State v. Hinojos*, 78 N.M. 32, 427 P.2d 683 (Ct. App. 1967).

Possession of tools immaterial. - Although burglary tools are admissible in evidence in a prosecution for burglary, it is not necessary to have burglary tools in one's possession to violate this section. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

IV. INDICTMENT AND INFORMATION.

A. IN GENERAL.

Accessory prosecuted as principal. - Although defendant never entered burglarized building, he was an aider and abettor as defined in 41-6-34, 1953 Comp., and therefore a principal, or he was an accessory as defined in 30-1-13 NMSA 1978 and could therefore be prosecuted as a principal. State v. Riley, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

Allegation of ownership unnecessary. - An allegation or proof of ownership of a building or structure, the subject of a burglary charge, is unnecessary. State v. Flores, 82 N.M. 480, 483 P.2d 1320 (Ct. App. 1971).

Ownership for identification. - This section clearly does not require that ownership of the building or structure entered be alleged, nor is such allegation necessary to charge the offense. Accordingly, except as a means of identification, an allegation or proof of ownership of a building or structure the subject of a burglary charge is unnecessary. State v. Ford, 80 N.M. 649, 459 P.2d 353 (Ct. App. 1969).

Model and license of burglarized vehicle. - Where the essential elements of the crime of burglary of an automobile were established, the model and license of the vehicle were surplusage in the indictment which did not need to be proved, and failure to do so did not constitute reversible error. State v. Newman, 83 N.M. 165, 489 P.2d 673 (Ct. App. 1971).

Value of property. - Under 40-9-6, 1953 Comp., prescribing penalties for breaking and entering into places other than dwelling with intent to commit murder, rape, robbery, larceny or any felony, term "larceny" was not limited to "grand larceny" under 40-45-2, 1953 Comp., and since stealing property of any value was a felony, a value over \$50.00 did not have to be specified in the information nor proved in a charge of attempt. State v. Serrano, 74 N.M. 412, 394 P.2d 262 (1964).

Charge sufficient. - Charge that defendant "burglarized" an outhouse belonging to a named individual in the nighttime was sufficient to invoke the jurisdiction of the court in that it charged a public offense. State v. Mares, 61 N.M. 46, 294 P.2d 284 (1956).

B. VARIANCE.

Material variance between places charged and proved. - Where proof identified burglarized shop as that of Joe Howard, and indictment charged burglary of "the Harvey Cleaners," and there was no showing of identity, there was a material variance. State v. Salazar, 42 N.M. 308, 77 P.2d 633 (1938).

Variance not jurisdictional. - Variance between indictment and proof regarding name and address of party and place burglarized was not jurisdictional because it can be cured by verdict of the jury. State v. Jaramillo, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Nature of building. - An indictment was not defective for calling a building where goods were sold a "shop," though witnesses at the trial called it a "store." State v. Padilla, 18 N.M. 573, 139 P. 143 (1914).

Raising variance. - Variance between charge and proof regarding nature of building burglarized could not be raised for the first time by motion in arrest of judgment or motion for a new trial. State v. Mares, 61 N.M. 46, 294 P.2d 284 (1956).

V. EVIDENCE.

A. IN GENERAL.

Ordinarily, burglary must be proved by circumstantial evidence sufficient to submit the issue to the jury, since such an offense can rarely be proved by witnesses who saw and recognized a defendant in the act of making an unauthorized entry with intent to commit a theft. State v. Johnson, 84 N.M. 29, 498 P.2d 1372 (Ct. App. 1972).

Exclusion of every reasonable hypothesis save guilt. - To support a conviction testimony must do more than raise a strong suspicion of guilt as the evidence and reasonable inferences that flow therefrom must exclude every reasonable hypothesis other than the guilt of the defendant. State v. Heim, 83 N.M. 260, 490 P.2d 1233 (Ct. App. 1971).

Where circumstances alone are relied upon by the prosecution, the circumstances must be such as to apply exclusively to defendant, and such as are reconcilable with no other hypothesis than defendant's guilt. State v. Montano, 83 N.M. 523, 494 P.2d 185 (Ct. App. 1972).

Specific intent to commit theft may be proven by inference from established facts and circumstances. State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

Breaking and entering justifies inference. - In the absence of inconsistent circumstances, proof of unlawful breaking and entry into a building which contains personal property that could be the subject of larceny gives rise to an inference that will sustain a conviction of burglary, grounded in human experience, which justifies the assumption that the unlawful entry was not purposeless, and, in the absence of other proof, indicates theft as the most likely purpose. State v. Ortega, 79 N.M. 707, 448 P.2d 813 (Ct. App. 1968).

Presence plus inferences. - Although presence alone is insufficient to sustain a conviction for burglary when the facts and reasonable inferences therefrom show much more than mere presence, there is substantial evidence to support the conviction. State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971).

Unauthorized presence in vehicle. - A jury might reasonably infer from a defendant's unauthorized presence in a vehicle that he had the necessary intent to commit a felony or theft therein. State v. Wilkerson, 83 N.M. 770, 497 P.2d 981 (Ct. App. 1972).

Possession of stolen property not enough. - Recently stolen property found in the possession of a defendant will not alone support a conclusion of guilt unless there is evidence of other circumstances connecting the defendant with the crime charged. State v. Heim, 83 N.M. 260, 490 P.2d 1233 (Ct. App. 1971).

Facts pointing unerringly to guilt. - Where the facts and circumstances do not unerringly point to defendant's guilt of burglary and do not establish inferentially or otherwise that defendant's entry was unauthorized, the judgment and sentence must be reversed. State v. Slade, 78 N.M. 581, 434 P.2d 700 (Ct. App. 1967).

Establishing aiding and abetting. - Aiding and abetting a burglary is established by evidence of a community of purpose or a shared criminal intent in the unlawful undertaking, such that by any of the means of communicating thought defendant incited, encouraged or instigated commission of the offense or made it known that commission of an offense already undertaken had aider's support or approval. State v. Gonzales, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

B. ADMISSIBILITY.

Evidence of dominion, control or possession of stolen property is admissible on the questions of entry and intent. State v. Hinojos, 78 N.M. 32, 427 P.2d 683 (Ct. App. 1967).

Evidence of dominion, control or possession of stolen property is admissible on the question of intent. State v. Montano, 83 N.M. 523, 494 P.2d 185 (Ct. App. 1972).

Discovery of weapons relevant. - Where defendant was convicted of burglary as accessory, argument that testimony concerning weapons found in defendant's car after his arrest was irrelevant to issues raised by indictment was without merit. State v. Gunzelman, 85 N.M. 535, 514 P.2d 54 (Ct. App. 1973).

Proving unauthorized entry. - New Mexico does not restrict the method of proving unauthorized entry and it may be proved by circumstantial evidence. State v. Mireles, 82 N.M. 453, 483 P.2d 508 (Ct. App. 1971).

C. SUFFICIENCY.

Inference of intent permissible. - Evidence that a store's burglary alarm system was triggered, that police officers responded within a minute after being called, that there was a four-by-eight-inch hole in a garage door near the opening mechanism, that defendant was found hiding in tires outside the building near the door, that the piece of

door which had been removed in making the hole was found in the same area and that the store had been closed at 5:30 p.m., while the alarm went off shortly after 10:00 p.m. permitted an inference that defendant intended to commit a felony or theft inside the store. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

Fact that victim's house was broken into, that defendant helped carry items away over four foot fence in back of house, that he was recognized by the victim's neighbor while carrying some of the stolen items, that some items were concealed and that defendant fled when discovered, although subsequently returning to the vicinity of the victim's house, was evidence sufficient to sustain an inference of criminal intent. *State v. Peden*, 85 N.M. 363, 512 P.2d 691 (Ct. App. 1973).

Where defendant's companion completed crime of burglary by an unauthorized entry with the necessary intent, and defendant knew this fact, was present and participated, his intent could be inferred from his acts. *State v. Riley*, 82 N.M. 298, 480 P.2d 693 (Ct. App. 1971).

Where defendant was caught in a public schoolhouse on a Sunday afternoon by two police officers and upon being searched for weapons several items taken from desk or storage cabinet in principal's office were discovered, the evidence substantially supported a reasonable inference of defendant's intent to commit a theft in the schoolhouse which he had entered without authorization. *State v. Lujan*, 82 N.M. 95, 476 P.2d 65 (Ct. App. 1970).

Breaking of window indicative of intent. - Jury, after they found that defendant shattered the grocery store window, validly inferred that window was broken in an attempt to enter and unlawfully take property from inside the store, and that he acted with criminal intent. *State v. Serrano*, 74 N.M. 412, 394 P.2d 262 (1964).

Intent absent. - Testimony by the prosecutrix that she engaged in sexual intercourse with defendant, along with his acquittal on rape charge, suggests that jury found that the sexual intercourse took place with consent of the prosecutrix and that defendant did not enter her home with intent to commit rape, and thus the evidence was insufficient to sustain a conviction for burglary. *State v. Elliott*, 88 N.M. 187, 539 P.2d 207 (Ct. App. 1975), rev'd on other grounds, 89 N.M. 305, 551 P.2d 1352 (1976).

Proof beyond reasonable doubt. - Where unlawful entry and a description of items stolen were proven beyond a reasonable doubt, this was sufficient to sustain the conviction under this statute. *State v. Baca*, 86 N.M. 144, 520 P.2d 872 (Ct. App. 1974).

Guilt as only reasonable hypothesis. - Defendant's flight when officers arrived indicated consciousness of guilt, and together with fact that he came to store with intent of breaking in and gave a false name when arrested, absent an explanation of his reasons or motive, permitted an inference of guilt, excluding every other reasonable hypothesis. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

In prosecution for burglary, larceny and unlawful taking of a vehicle, evidence of the time factors, distances, observations of defendants, locations and possession of stolen goods pointed unerringly to defendants and excluded every reasonable hypothesis other than guilt. *State v. Sanchez*, 82 N.M. 585, 484 P.2d 1295 (Ct. App. 1971).

Defendant's hypothesis that actual burglar had been frightened away by appearance of defendant since there was no evidence introduced concerning fingerprints, defendant was not wearing gloves and officers found nothing on defendant classified as burglar tools, was not reasonable in the light of the jury verdict which necessarily determined that defendant was inside burglarized apartment, and in light of undisputed evidence of a torn screen, open door and "mess" inside the apartment. *State v. Madrid*, 83 N.M. 603, 495 P.2d 383 (Ct. App. 1972).

Unauthorized entry established. - Circumstantial evidence may be used to establish an unauthorized entry, and evidence showing that defendant and companions went to liquor store with intent to break in, taking a sledgehammer, that windows were broken, that the men fled the scene and that bottles of liquor were missing, pointed unerringly to an unauthorized entry. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Slight penetration sufficient. - Evidence that an unidentified instrument penetrated one-half inch inside a building was sufficient evidence of entry to sustain a burglary conviction, since any penetration, however slight, of the interior space is sufficient. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987 (Ct. App. 1976).

Evidence supporting conviction. - Evidence that a fingerprint lifted from a coke machine which had been broken into during a burglary was the same as that on defendant's fingerprint card, on the basis of a ten point comparison taken from defendant under controlled circumstances, and that although gas station operator testified that his son had access to key to machine he also stated that to his knowledge his son never opened it, was sufficient to support conviction. *State v. Douglas*, 86 N.M. 665, 526 P.2d 807 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974).

Where store manager testified that he had checked the building just before he left the previous evening and that it was securely locked, that a window found broken shortly after defendant's apprehension had not been broken the evening before and that no one, including the defendant, was authorized to enter the store after closing time, and evidence showed that defendant, seen near the store in the early morning when all the businesses were closed, ran when a police officer attempted to stop him for questioning, dropped two bags which contained merchandise from the store, evidence was sufficient, albeit circumstantial, for the jury to infer that defendant committed burglary. *State v. Lauderdale*, 85 N.M. 157, 509 P.2d 1352 (Ct. App.), cert. denied, 85 N.M. 144, 509 P.2d 1339 (1973).

Evidence, including positive identification of defendant and testimony as to his presence in cab of burglarized pick-up, along with business papers kept in truck which were found

on the ground near the pick-up and in the alley near which the defendant was apprehended, sustained burglary conviction. State v. Wilkerson, 83 N.M. 770, 497 P.2d 981 (Ct. App. 1972).

Where evidence was clear that the residence had been entered with an intent to commit theft as various items of personal property had been stolen and homeowner testified that to gain entrance the window would have had to be forced open, presence of defendant's prints on inside portion of the window was sufficient to point to defendant as the one who entered the house and stole the property. State v. Mireles, 82 N.M. 453, 483 P.2d 508 (Ct. App. 1971).

Evidence is sufficient to support a defendant's burglary conviction where the defendant, a security guard and associate member of a club, makes an unauthorized entry into the club after closing hours by breaking the club's door, then breaking into a bar cabinet and slot machine. State v. Carter, 93 N.M. 500, 601 P.2d 733 (Ct. App.), cert. denied, 93 N.M. 683, 604 P.2d 821 (1979).

Circumstantial evidence sufficient. - Facts regarding the defendants' actions and the surrounding circumstances provided sufficient evidence from which a jury could infer that defendants intended to break into a building and commit a theft therein. State v. Jennings, 102 N.M. 89, 691 P.2d 882 (Ct. App. 1984).

Unexplained possession with other circumstances. - While unexplained possession of goods belonging to another does not raise presumption that a larceny has been committed and that the possessor is a thief, additional evidence being necessary to establish the corpus delicti, nevertheless additional evidence, consisting of the fact that a robbery had been committed, the early hour of the morning, the lack of identification, the giving of a false name and defendant's statement that he was on his way home which was in the southwest quadrant of the city when he was walking north, was sufficient to sustain a conviction for burglary. State v. Rivera, 85 N.M. 723, 516 P.2d 694 (Ct. App. 1973).

Evidence that defendant possessed recently stolen property which he acquired by theft, together with evidence of defendant's presence at the scene near the time of the crime with a person who knew the precise location of the property, permitted the inference that defendant stole the guns during an unauthorized entry of owner's residence, and was sufficient to sustain his conviction for burglary. State v. Jordan, 88 N.M. 230, 539 P.2d 620 (Ct. App. 1975).

Evidence, though partly circumstantial, supported conviction for burglary, where soda pop of kind and amount stolen was found in possession of defendant near the place where pop had been stolen, defendant had prevailed upon acquaintances to take him to the vicinity of the storage shed for the purpose of getting some pop, when being investigated defendant admitted the theft, and a footprint similar to defendant's was found in the burglarized shed. State v. Waits, 76 N.M. 630, 417 P.2d 439 (1966).

Aiding and abetting shown. - Although defendant's witness testified that defendant was unaware that witness was removing stereo tape deck from automobile, where evidence showed that defendant and witness looked into another car before witness broke into the burglarized car and that defendant leaned on the door of the burglarized car and was "looking both ways as if observing for something," this evidence was sufficient to sustain defendant's conviction as an aider and abettor under this section. *State v. Sandoval*, 83 N.M. 599, 495 P.2d 379 (Ct. App. 1972).

Evidence insufficient. - Although similarity between footprints, and tire prints, along with defendant's locations, actions and statements, created a suspicion that he committed the offense charged, it could not be said that there were not other reasonable hypotheses which permitted of his innocence and hence circumstantial evidence solely relied upon by state, failed to meet the standard required. *State v. Seal*, 75 N.M. 608, 409 P.2d 128 (1965); *State v. Waits*, 76 N.M. 630, 417 P.2d 439 (1966); *State v. Sharp*, 78 N.M. 221, 430 P.2d 378 (1967); *State v. Williamson*, 78 N.M. 751, 438 P.2d 161, cert. denied, 393 U.S. 891, 89 S. Ct. 212, 31 L. Ed. 2d 170 (1968); *Nance v. State*, 80 N.M. 123, 452 P.2d 192 (Ct. App. 1969).

Where at best the state showed that defendant had constructive possession of certain stolen jewelry by virtue of occupying along with another individual the same room in which it was found, but there was no evidence showing or tending to show that he had knowledge, control or voice in the power of disposal of the jewelry, evidence was insufficient to permit issue of defendant's guilt on burglary charge to go to the jury. *State v. Romero*, 67 N.M. 82, 352 P.2d 781 (1960).

Raising insufficiency of evidence. - On appeal from denial of post-conviction relief, petitioner's contentions that he should not have been charged with and convicted of aggravated burglary, that the state failed to prove criminal intent and that he was intoxicated at the time of the offense and could not have had the requisite intent, not having been raised on direct appeal, did not provide a basis for post-conviction relief. *Andrada v. State*, 83 N.M. 393, 492 P.2d 1010 (Ct. App. 1971).

Where in a prosecution for burglary the question of sufficiency of the evidence was not presented to the trial, defendant could not demand a review of the evidence as a matter of right, but in case at hand appellate court would examine the record to determine if fundamental error was committed. *State v. Sedillo*, 81 N.M. 47, 462 P.2d 632 (Ct. App.), cert. denied, 81 N.M. 40, 462 P.2d 625 (1969).

VI. INSTRUCTIONS.

Instruction on specific intent required. - Since the crime of burglary is a crime requiring a specific mens rea, an instruction on specific intent or specific mens rea is required. *State v. Gunzleman*, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Failure to give instruction concerning criminal intent is jurisdictional and may be raised for the first time on appeal. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Language of statute adequate. - Since this section defines the element of intent constituting the crime of burglary, an instruction which follows the language of the statute adequately instructs the jury on the specific criminal intent required. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Instruction that any person who, without authorization, enters a dwelling house with intent to commit any felony or theft therein is guilty of burglary of a dwelling house was sufficient on the element of criminal intent. *State v. Baca*, 85 N.M. 55, 508 P.2d 1352 (Ct. App. 1973).

Additional instruction on general criminal intent was unnecessary in prosecution for burglary as a person is presumed to intend the logical consequences of his actions. *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), overruled on other grounds, *State v. Orosco*, 113 N.M. 780, 833 P.2d 1146 (1992).

Intoxication instruction properly refused. - Requested instruction telling jury to acquit defendant if he "did not have the intent to commit the unlawful act of burglary as a result of intoxication" was properly refused because of its wording, which would have required jury to accept, as a fact, the matter of intoxication which was for the jury to decide. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Presumption of innocence adequately covered. - In prosecution for burglary, where instructions were given on the presumption of innocence and the burden of proof, court's refusal to instruct that there was no presumption that defendant was an accessory and that he did not have the burden of proving that he was not an accessory was not error. *State v. Gunzelman*, 85 N.M. 535, 514 P.2d 54 (Ct. App. 1973).

Submission of lesser offense unnecessary. - Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and not being an included offense, trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

Instruction on accomplice's testimony. - In trial for burglary, instruction that an accused may be convicted upon the testimony of an accomplice, even though it is uncorroborated, was proper. *State v. Baca*, 508 P.2d 1352 (Ct. App. 1973).

Instruction misstating victim's name and address. - Error in instruction misstating name and address of burglary victim, to which defendant did not object, was not preserved for review and did not constitute fundamental error. *State v. Jaramillo*, 85 N.M. 19, 508 P.2d 1316 (Ct. App.), cert. denied, 85 N.M. 5, 508 P.2d 1302, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 236 (1973).

Failure to request instruction. - Counsel's failure to request an instruction to the effect that intoxication would relieve the defendant of criminal responsibility if he were unable to form the criminal intent required for the commission of the crime of burglary may have been no more than bad strategy on the part of counsel, so that it could not be said, as a matter of law, that representation was so inadequate as to deprive him of his constitutional right to effective assistance of counsel. *State v. Samora*, 82 N.M. 252, 479 P.2d 532 (Ct. App. 1970).

30-16-4. Aggravated burglary.

Aggravated burglary consists of the unauthorized entry of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, with intent to commit any felony or theft therein and the person either:

A. is armed with a deadly weapon;

B. after entering, arms himself with a deadly weapon;

C. commits a battery upon any person while in such place, or in entering or leaving such place.

Whoever commits aggravated burglary is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-4, enacted by Laws 1963, ch. 303, § 16-4.

ANNOTATIONS

Cross-references. - For definition of deadly weapon, see 30-1-12 NMSA 1978.

For battery, see 30-3-4 NMSA 1978.

For instruction as to essential elements of aggravated burglary, see UJI 14-1632.

Legislative intent to deter firearm possession during crime. - The adoption of several statutes, one classifying aggravated burglary as a second degree felony, and the other specifying that simple burglary is a fourth-degree felony, evinces a clear legislative intention to deter the commission of burglaries and the possession of firearms during such crimes. *State v. Luna*, 99 N.M. 76, 653 P.2d 1222 (Ct. App. 1982).

Crucial factor in crime of aggravated burglary is whether the defendant has the intent to commit a felony on entering the dwelling, not whether the felony was actually committed, as the intent does not have to be consummated. State v. Castro, 92 N.M. 585, 592 P.2d 185 (Ct. App.), cert. denied, 92 N.M. 621, 593 P.2d 62 (1979).

Meaning of "deadly weapon". - Deadly weapons shall be construed to mean any kind or class of pistol or gun, whether loaded or unloaded. State v. Montano, 69 N.M. 332, 367 P.2d 95 (1961).

Theft is not a necessary element of aggravated burglary, which requires only the element of intent to commit any felony or theft. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Elements of robbery and aggravated burglary are not the same, and therefore, defendant could be sentenced for each of these crimes. State v. Ranne, 80 N.M. 188, 453 P.2d 209 (Ct. App. 1969).

Aggravated burglary and sex offense separate crimes. - Since aggravated burglary and criminal sexual penetration in the third degree (30-9-11 NMSA 1978) each require proof of facts which the other does not and since neither offense necessarily involves the other, there would be no double jeopardy violation and no merger of the offenses despite the fact that the same evidence may go toward proving both. State v. Young, 91 N.M. 647, 579 P.2d 179 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Where the victim awoke and found the defendant on top of her and the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. State v. Archunde, 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

Indictment adequate. - Indictment employing the name given the offense by statute and specifically referring to the section and subsection of the statute which created the offense sufficiently charged crime of aggravated burglary, despite failure to allege an entry with intent to commit a felony or theft. State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Unauthorized entry. - An allegation or proof of ownership of a building or structure, the subject of a burglary charge, is unnecessary. State v. Flores, 82 N.M. 480, 483 P.2d 1320 (Ct. App. 1971).

Intent to steal vehicle sufficient. - Breaking into a car with the intent to steal the car qualifies as an intent to commit a theft "therein." State v. Griffin, 116 N.M. 689, 866 P.2d 1156 (1993).

Corroboration of use of gun. - In prosecution for aggravated burglary and aggravated battery testimony by victim that he was struck by defendant with a gun on and about his face was corroborated by fact that he recognized the gun in question, by defendant's testimony that he threw the gun away after leaving the scene and by photographs of victim showing facial cuts and abrasions; furthermore, corroboration was not required. State v. Tafoya, 80 N.M. 494, 458 P.2d 98 (Ct. App. 1969).

Possession of unloaded firearm sufficient. - Subsection B is violated by a person who in the commission of a burglary becomes armed with an unloaded firearm. Whether a defendant is in actual possession of a firearm within the contemplation of Subsection B or possesses the requisite intent to commit a felony may, however, present a factual issue to be determined by the trier of fact. State v. Luna, 99 N.M. 76, 653 P.2d 1222 (Ct. App. 1982).

Collateral offenses admissible. - Testimony of victim and corroborating witness as to an assault on the same night and in same vicinity as the crimes of aggravated burglary and aggravated battery for which defendant was on trial, offered upon issue of identity, was admissible as an exception to rule prohibiting evidence of collateral offenses. State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

In prosecution for aggravated burglary, armed robbery and rape, testimony of victim raped an hour after initial crime about five blocks away was admissible in order to establish characteristic conduct and defendant's possession of knife and flashlight which figured in first crime. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Conflicting evidence for jury. - Although based on certain deception tests (polygraph, sodium amytol and hypnosis) the experts considered defendant truthful in his denial, the testimony of the complaining witness presented on issue of fact for the jury, and defendant was not entitled to a directed verdict on charges of aggravated battery and aggravated burglary. State v. Turner, 81 N.M. 450, 468 P.2d 421 (Ct. App.), cert. denied, 81 N.M. 506, 469 P.2d 151 (1970).

Intent established. - Where defendant made an unauthorized entry into an apartment, armed with a knife, and began to kiss and fondle the female occupant who was asleep, the evidence was sufficient to establish that defendant's intent upon entry was to commit an aggravated assault, and therefore he was guilty of aggravated burglary. State v. Mata, 86 N.M. 548, 525 P.2d 908 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Instructions which substantially follow language of the statute are sufficient. State v. Lopez, 80 N.M. 599, 458 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 607, 458 P.2d 859, 398 U.S. 942, 90 S. Ct. 1860, 26 L. Ed. 2d 279 (1970).

Charge of lesser offense not warranted. - Offense of unlawfully carrying a deadly weapon is neither a degree of burglary, nor the higher degree of aggravated burglary, and not being an included offense, trial court did not err in refusing to submit to the jury the offense of unlawfully carrying a deadly weapon as a lesser included offense. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

Breaking-and-entering, lesser-included offense instruction rejected since no evidence to support. - Where defendant was charged with aggravated burglary, his tendered instruction on lesser-included offense of breaking and entering was properly rejected because there was no evidence to support the commission of the lesser offense. *State v. Smith*, 104 N.M. 729, 726 P.2d 883 (Ct. App. 1986).

Insanity defense. - Trial court committed reversible error in refusing to instruct on defense of insanity, where expert medical testimony regarding defendant's heroin addiction injected reasonable doubt as to his mental illness at the time of the burglary. *State v. Flores*, 82 N.M. 480, 483 P.2d 1320 (Ct. App. 1971).

Juror present for police investigation. - Conviction for entering a dwelling with intent to commit a felony while armed with a deadly weapon should be reversed, where after verdict fact came to light that following commission of the crime and on the same day one juror was present in the dwelling in question with the complaining witness while two police officers who testified at trial sought latent fingerprints, on basis of which defendant was convicted. *Mares v. State*, 83 N.M. 225, 490 P.2d 667 (1971).

Sufficient evidence to support conviction, despite failure to preserve fingerprints or trace ownership of weapon. See *State v. Peterson*, 103 N.M. App. 638, 711 P.2d 915 (1985), cert. denied, 475 U.S. 1052, 106 S. Ct. 1279, 89 L. Ed. 2d 586 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Burglary § 27.

Walking cane as deadly or dangerous weapon for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 842.

Parts of the human body, other than feet, as deadly or dangerous weapons for purposes of statutes aggravating offenses such as assault and robbery, 8 A.L.R.4th 1268.

What is "building" or "house" within burglary or breaking and entering statute, 68 A.L.R.4th 425.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

12A C.J.S. Burglary §§ 6, 7.

30-16-5. Possession of burglary tools.

Possession of burglary tools consists of having in the person's possession a device or instrumentality designed or commonly used for the commission of burglary and under circumstances evincing an intent to use the same in the commission of burglary.

Whoever commits possession of burglary tools is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-5, enacted by Laws 1963, ch. 303, § 16-5.

ANNOTATIONS

This section is not void for vagueness, since it gives fair warning that possession of the type of instrument described in the statute, and under the circumstances described in the statute, is a crime. *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act is not void for indefiniteness and uncertainty under constitution. *State v. Lawson*, 59 N.M. 482, 286 P.2d 1076 (1955).

No unlawful delegation of power. - Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act does not constitute an unlawful delegation of legislative power to the judiciary to prescribe in each case a different offense. *State v. Lawson*, 59 N.M. 482, 286 P.2d 1076 (1955).

Title constitutionally adequate. - Since criminal intent is construed to be necessary element of crime of possession of burglary tools, act does not violate constitutional provision that the offense be encompassed in the title of the act. *State v. Lawson*, 59 N.M. 482, 286 P.2d 1076 (1955).

No merger with attempted burglary. - The crime of attempt to commit felony of burglary did not merge with the crime of possession of burglary tools, and hence, defendant's sentence for each of these crimes did not constitute double punishment. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

No merger with burglary. - The crime of possession of burglary tools does not merge with the crime of burglary. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Possession of burglary tools is not necessarily involved in burglary. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

What conduct prohibited. - This section gives notice that one is exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or

device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary. *State v. Najera*, 89 N.M. 522, 554 P.2d 983 (Ct. App. 1976).

Whether items commonly used for burglary is jury question. - The issue of whether items are commonly used for burglary is a factual one to be decided by the jury upon any competent evidence tending to show the nature and purpose of the tools. *State v. Jennings*, 102 N.M. 89, 691 P.2d 882 (Ct. App. 1984).

Criminal intent requisite. - Criminal intent is an element of crime of possession of burglary tools, and the phrase "under circumstances evincing an intent" is merely a directive that criminal intent may be shown by evidence of circumstances. *State v. Lawson*, 59 N.M. 482, 286 P.2d 1076 (1955).

Nature of possession. - This section does not require possession of burglary tools on the person of the defendant. *State v. Garcia*, 80 N.M. 247, 453 P.2d 767 (Ct. App. 1969).

Indictment sufficient. - Indictment charging offense by reference to the section or subsection creating the offense was sufficient, and trial court properly treated allegation as to possession on defendant's person as surplusage. *State v. Garcia*, 80 N.M. 247, 453 P.2d 767 (Ct. App. 1969).

Evidence sufficient. - Evidence that burglary tools were taken by police from possession of defendants, weapons being found in the truck occupied by them on night of the burglary, substantially supported finding that defendants were in possession of the tools. *State v. Garcia*, 80 N.M. 247, 453 P.2d 767 (Ct. App. 1969).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Burglary §§ 74 to 77.

Validity, construction and application of statute relating to burglars' tools, 33 A.L.R.3d 798.

12A C.J.S. Burglary §§ 43 to 48.

30-16-6. Fraud.

Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations.

Whoever commits fraud when the value of the property misappropriated or taken is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

Whoever commits fraud when the value of the property misappropriated or taken is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

Whoever commits fraud when the value of the property misappropriated or taken is over two hundred fifty dollars (\$250) but not more than twenty-five hundred dollars (\$2,500) is guilty of a fourth degree felony.

Whoever commits fraud when the property misappropriated or taken is a firearm is guilty of a fourth degree felony.

Whoever commits fraud when the value of the property misappropriated or taken is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

Whoever commits fraud when the value of the property misappropriated or taken exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-6, enacted by Laws 1963, ch. 303, § 16-6; 1979, ch. 119, § 1; 1987, ch. 121, § 2.

ANNOTATIONS

- I. General Consideration.
- II. Elements of Offense.
- III. Indictment and Information.
- IV. Evidence.
 - A. In General.
 - B. Sufficiency.
- V. Instructions.

I. GENERAL CONSIDERATION.

Cross-references. - For fraudulent practices in connection with offer, sale, or purchase of securities, see 58-13B-30 NMSA 1978.

The 1987 amendment, effective June 19, 1987, added the third paragraph, substituted "two hundred fifty dollars (\$250) for "one hundred dollars (\$100)" in the fourth paragraph, and substituted "is over" for "exceeds" in the sixth paragraph.

Section inapplicable to judicial proceedings. - If presentation of a false claim were made to a board constituting a court, proceedings before which would result in a judicial judgment or decree, there could be no prosecution for obtaining money for false

pretenses; the remedy would be a prosecution for perjury. *State v. Kelly*, 27 N.M. 412, 202 P. 524 (1921).

Conviction under general law improper. - Where one who sold one neat cattle, the property of another, was prosecuted under former law relating to sale of property without right, the conviction could not stand, for law relating to larceny, embezzlement or killing of domestic animals, applied specifically to that crime and should have been invoked. *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1936).

Jurisdiction. - Jurisdiction of prosecution for criminal false pretenses was in the county, district or state where the offense was consummated by the obtaining of the property, even though the inducing pretenses were made elsewhere and the consummation by delivery of the property was effected through the instrumentality of an innocent agent, without the personal presence of the principal. *State v. Faggard*, 25 N.M. 76, 177 P. 748 (1918).

Effect of Worthless Check Act. - This section and the Worthless Check Act (30-36-1 to 30-36-9 NMSA 1978) prohibit different offenses, and it is inappropriate to view the Worthless Check Act as an exception to this section. *State v. Higgins*, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).

Place of crime. - Fraud of which defendant was convicted occurred in New Mexico where defendant issued drafts of an insurance company drawn on a bank in Colorado in payment of false claims. *State v. Archuleta*, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Subsequent prosecutions not double jeopardy. - Dismissal of charge of passing forged instrument evidencing an indebtedness of a banking institution with intent to defraud for variance between allegation and proof, in that the instrument in question did not evidence an indebtedness of a bank, and subsequent prosecution for passing same forged bill of exchange with intent to defraud under the appropriate section, did not constitute double jeopardy as one information required proof of facts which the other did not. *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955).

Notice of lesser included offense. - Fraud over \$250 is a lesser and necessarily included offense of fraud over \$2,500, such that defendant was put on notice of the included offense when the state charged him with the greater offense. *State v. Montoya*, 116 N.M. 297, 861 P.2d 978 (Ct. App. 1993).

Prosecution for both fraud and making false public voucher permitted. - The double jeopardy clause does not prohibit the prosecution of an individual under both this section and 30-23-3 NMSA 1978. *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981).

Because the fraud statute does not require the making of a false voucher, and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

Alternative charging of fraud or embezzlement. - The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative, nor were the concepts of included offenses, same evidence or merger applicable. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Fraud and fraudulent securities practice separate offenses. - An analysis of the offense of fraud and the crime of fraudulent securities practice reveals that the two offenses have different elements; therefore, a defendant may be convicted and sentenced for both general fraud and securities fraud. *State v. Ross*, 104 N.M. 23, 715 P.2d 471 (Ct. App. 1986).

Convictions under this section and 58-11-65 NMSA 1978 improper. - Conviction under this section for fraud over \$2500 and conviction under 58-11-65 NMSA 1978 for false written statement for the purposes of obtaining credit union funds violated defendant's double jeopardy rights. *State v. Montoya*, 116 N.M. 297, 861 P.2d 978 (Ct. App. 1993).

Prosecution for violation of civil statute. - The question of whether a specific contractual provision is based on a valid statute or regulation is irrelevant in a criminal case for fraud. The prosecution here was directed at the alleged criminal fraud of each of the defendants rather than a civil action to enforce the contract. Under these circumstances, defendants' convictions for fraud were not invalid. *State v. Crews*, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 32 Am. Jur. 2d False Pretenses §§ 1 to 11.

Telephone conversation as false pretense, 8 A.L.R. 656.

Obtaining money for goods not intended to be delivered as false pretenses, 17 A.L.R. 199.

Presentation of and attempt to establish fraudulent claim against governmental agency, 21 A.L.R. 180.

Loans and renewals thereof, false pretenses, 24 A.L.R. 397, 52 A.L.R. 1167.

Illegal or fraudulent intent of prosecuting witness or person defrauded as defense, 95 A.L.R. 1249, 128 A.L.R. 1520.

Offense of obtaining property by false pretenses predicated upon transaction involving conditional sale, 134 A.L.R. 874.

Obtaining payment by debtor on valid indebtedness by false representation as criminal false pretenses, 20 A.L.R.2d 1266.

Encumbrance: false statement as to existing encumbrance on chattel in obtaining loan or credit as criminal false pretense, 53 A.L.R.2d 1215.

Intent: admissibility to establish fraudulent purpose or intent, in prosecution for obtaining or attempting to obtain money or property by false pretenses, of evidence of similar attempt on other occasions, 78 A.L.R.2d 1359.

"Merger" clause in written contract as precluding conviction for false pretenses based on earlier oral false representations, 94 A.L.R.2d 570.

Repairs: criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 A.L.R.2d 925.

Attempts to commit offenses of larceny by trick, confidence game, false pretenses and the like, 6 A.L.R.3d 241.

Admissibility in prosecution for obtaining money or property by fraud or false pretenses, of evidence of subsequent payments made by accused to victim, 10 A.L.R.3d 572.

Partner: embezzlement, larceny, false pretenses or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

Criminal liability under state laws in connection with application for, or receipt of, public welfare payments, 22 A.L.R.4th 534.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Fraud actions: right to recover for mental or emotional distress, 11 A.L.R.5th 88.

Criminal liability of pharmacy or pharmacist for welfare fraud in connection with supplying prescription drugs, 16 A.L.R.5th 390.

Use of fraud or trick as "constructive breaking" for purpose of burglary or breaking and entering offense. 17 A.L.R.5th 125.

35 C.J.S. False Pretenses §§ 1 to 28; 37 C.J.S. Fraud § 154.

II. ELEMENTS OF OFFENSE.

Fraud is complete once misappropriation or taking occurs by means stated in statute. State v. Thoreen, 91 N.M. 624, 578 P.2d 325 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

The act of fraud is complete at the time of the taking or misappropriation. Obtaining title is not necessary. State v. Higgins, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).

Meaning of false pretense. - A false pretense was such a fraudulent representation of an existing or past fact, by one who knew it not to be true, as was adapted to induce the person to whom it was made to part with something of value. State v. Tanner, 22 N.M. 493, 164 P. 821 (1917).

Former law not malum prohibitum. - Former 40-21-40, 1953 Comp., relating to the sale of property without right, was not intended by the legislature to be an offense of malum prohibitum, but rather, demanded the inclusion of intent as an element of the crime. State v. Craig, 70 N.M. 176, 372 P.2d 128 (1962).

Intent to cheat and defraud required. - To do an act fraudulently is to do it with intent to cheat and defraud; therefore, because an intent to cheat and defraud is required, this is a specific intent crime and the language of this section sets forth the requisite intent. State v. Dossier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Intent to defraud essential element of crime. - Intent to cheat and defraud was an essential and constituent element of offense prescribed under Laws 1882, ch. 20, § 1 (40-21-3, 1953 Comp.) relating to obtaining property with intent to cheat or defraud. State v. Ferguson, 56 N.M. 398, 244 P.2d 783 (1952).

Intent to defraud provable by inferences. - An essential element of fraud or embezzlement is intent, which is seldom provable by direct testimony, and must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Intent to defraud must exist at time of taking. - Contentions of defendant, convicted of embezzlement under 30-16-8 NMSA 1978, that this section specifically applied to his case was without merit, where facts showed that he sold a motorcycle to complaining

witness, who subsequently loaned it back to him, and thereafter although requested to do so defendant did not return the motorcycle but sold it to a third person, since there was no evidence of any fraudulent intent on the part of defendant when motorcycle was loaned to him by complaining witness. State v. Gregg, 83 N.M. 397, 492 P.2d 1260 (Ct. App. 1972), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Intent to defraud inferred from actions. - Where the defendant conveyed an interest in real property which she knew she did not possess, it can be reasonably inferred that the defendant intended to make false representations and intended to misappropriate the victims' money. State v. Martinez, 95 N.M. 795, 626 P.2d 1292 (Ct. App. 1979).

Silence may form basis for criminal misrepresentation, where the defendant has a legal duty to speak or where such silence is calculated to deceive. State v. Stettheimer, 94 N.M. 149, 607 P.2d 1167 (Ct. App. 1980).

Reliance necessary. - Under 40-21-1, 1953 Comp., relating to the obtaining of money under false pretenses, it was necessary that the prosecution establish that the victim relied on the false representation and surrendered her money to appellant on the strength of the false representation. State v. Jones, 73 N.M. 459, 389 P.2d 398 (1964).

Actual damage to victim is not element of fraud. - Although damages are essential to recover on a civil claim for fraud, monetary loss is not a requisite of a criminal conviction. State v. McCall, 101 N.M. 32, 677 P.2d 1068 (Ct. App. 1983), rev'd on other grounds, 101 N.M. 32, 677 P.2d 1068 (1984).

A criminal conviction for fraud does not require the victim suffer a pecuniary loss. Sufficient evidence was presented at trial of an intentional misappropriation or taking of something of value belonging to another by means of fraudulent conduct, practices or representations. Thus, the jury could have reasonably inferred defendants intentionally misappropriated funds invested by their partners and these funds were received due to misrepresentations. State v. Clifford, 117 N.M. 508, 873 P.2d 254 (1994).

Making false claim through agent. - Evidence that bank was instructed by defendant to submit items for payment established relation of principal and agent, and submission of bond for consideration and refunding necessarily constituted the false representation as to its legality and validity. State v. Kelly, 27 N.M. 412, 202 P. 524 (1921).

Repayment will not mitigate completed offense. - Once a misappropriation or taking occurs by means stated in this section, the crime of fraud is complete, and repayment will not mitigate the offense. State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

III. INDICTMENT AND INFORMATION.

Joinder appropriate. - Where the 12 counts of fraud charged were in the execution of a general fraudulent scheme, extending from September 1968 to January 1969, the

method of operation in each count was identical and in each instance it was the property of the same insurance company that was misappropriated or taken, the trial court's refusal to sever was proper. *State v. Archuleta*, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

Alternative charging permissible. - There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Allegation of ownership. - Indictment for false pretenses was to allege ownership of the property, unless there was some legal excuse for omitting such allegation. *State v. Faggard*, 25 N.M. 76, 177 P. 748 (1918); *Territory v. Hubbell*, 13 N.M. 579, 86 P. 747 (1906).

Degree of crime measured by value of property obtained. - The degree of crime under this section must be measured by the value of the property obtained by the defendant as a result of the deception, rather than the value of any property received by the victim. *State v. Martinez*, 95 N.M. 795, 626 P.2d 1292 (Ct. App. 1979).

Information adequate. - Amended information charging defendant with unlawfully obtaining money under false pretenses with intent to defraud, which enumerated the section defining the offense and fixing the penalty, was sufficient. *State v. Jones*, 73 N.M. 459, 389 P.2d 398 (1964).

Defective indictment. - An indictment for securing money by false pretense was fatally defective where it was alleged that the means employed were certain bogus bills of sale and a mortgage attached to a draft drawn on the defrauded party, but which failed to allege that draft was ever honored by such party, and money paid by such party on the faith of such representation. *State v. Faggard*, 25 N.M. 76, 177 P. 748 (1918).

Information fatally defective. - Failure to allege intent to cheat and defraud in information charging accused with obtaining money by false representations rendered the information fatally defective and any judgment based thereon became a nullity. *State v. Ferguson*, 56 N.M. 398, 244 P.2d 783 (1952).

Variance not material. - Even if there was a variance between amended information charging defendant with having obtained \$500 from named individual, while the proof showed that the \$500 check was drawn on the laundry and cleaner's account and signed by the named individual, one of the owners of the laundry, the variance if any was not such as would impair the substantial rights of defendant. *State v. Jones*, 73 N.M. 459, 389 P.2d 398 (1964).

IV. EVIDENCE.

A. IN GENERAL.

Related incidents admissible. - In the case of fraud, related incidents of accused's acts are admissible to establish motive, absence of mistake or accident, common scheme or plan or the identity of the person charged with various crimes. *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975).

Other acts evidencing intent. - The fact that defendant entered into many contracts which he failed to complete showed that either he was aware of the risks, that he was aware of his capabilities or that he could not have believed that he would complete the contracts, and so his proceeding to contract in spite of his awareness was evidence of his fraudulent intent. *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975).

Repayment will not mitigate completed offense. - Repayment of a loan obtained by fraud so that the lender suffered no damages is not a defense against a charge of fraud under this section. *State v. McCall*, 101 N.M. 32, 677 P.2d 1068, rev'd on other grounds, 101 N.M. 616, 686 P.2d 958 (1984).

Failure to return money. - Testimony showing a nonreturn of the money was proper to show the intent of defendant, charged with obtaining money under false pretenses. *State v. Jones*, 73 N.M. 459, 389 P.2d 398 (1964).

Proof of false pretenses. - False pretense could be established by conduct and acts as well as by written or spoken words. *State v. Kelly*, 27 N.M. 412, 202 P. 524 (1921).

Confession alone inadequate proof. - Proof that a crime of fraud was committed cannot be established solely by the extrajudicial confession of the accused. *State v. Dosier*, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Imputation of guilty knowledge. - Guilty knowledge of a brother of one accused of selling property belonging to another was not imputable to defendant. *State v. Hughes*, 43 N.M. 109, 86 P.2d 278 (1938).

When directed verdict appropriate. - Only where there are no reasonable inferences or sufficient surrounding circumstances establishing defendant's intent can it be said, as a matter of law, that a motion for a directed verdict should have been granted or that a charge should not have been presented to the jury. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Question for jury. - It was for the jury to decide whether defendant obtained the \$500 by fraud or converted to his own use the money with which he had been entrusted. State v. Ortiz, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Whether defendant received property as loan or for investment jury question. - In a trial for fraud and embezzlement where the evidence was conflicting, whether the money and checks given to the defendant were loans, as he claimed, or were for investments, as his alleged victims claimed, was for the jury to decide. State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Subsequent representations admissible to show intent. - Evidence of representations made to the victims after the defendant had obtained their money, which went into specific details of alleged investments, was properly admitted in defendant's trial for fraud since the evidence explained his "investment" representations and tended to show his intent. State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Evidence sufficient to convict. - See State v. Sanders, 117 N.M. 452, 872 P.2d 870 (1994).

B. SUFFICIENCY.

Misappropriation of drafts. - A charge of misappropriation of money may be established by showing that drafts or checks were misappropriated. State v. Archuleta, 82 N.M. 378, 482 P.2d 242 (Ct. App.), cert. denied, 82 N.M. 377, 482 P.2d 241 (1971).

False accounts. - Where defendant made out false accounts in the name of a plumber for work purportedly done on plumbing system of courthouse and submitted them to board of county commissioners, knowing that the work had not been done and securing the proceeds for himself, evidence was sufficient to support conviction of obtaining money under false pretenses. State v. Garcia, 57 N.M. 166, 256 P.2d 532 (1953).

Proof of value. - The defendant, who had opened an account, deposited a check he knew was not backed by sufficient funds, and wrote a number of checks, some of which were accepted by local businesses in exchange for merchandise, was improperly convicted of fraud. There was no testimony establishing the "false balance" ever had the values on which the jury was instructed. Proof of value is critical in a fraud prosecution. State v. Higgins, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).

Spurious claim to loan board. - False pretense could be predicated upon spurious claim presented to board of loan commissioners established to refund, pursuant to provision of Enabling Act, debts and obligations of the territory and its counties into state bonds. State v. Kelly, 27 N.M. 412, 202 P. 524 (1921).

Obtaining automobile through fraud. - Evidence substantially supported a finding that defendant obtained an automobile from victim motor company by means of fraudulent

conduct, practices or representations which were relied on by the company. State v. McKay, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

Victims' inability to specify alleged investment no help to defendant. - The fact that the victims did not know the type of investment their money was to be put into did not aid the defendant because the evidence showed that he had obtained the money by fraudulently representing that it would be invested. State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Fraudulent construction contract. - Evidence, viewed in the light most favorable to support the verdict, showing that the defendant entered into a contract with fraud victim to do certain construction work, which was not done, and that defendant even gave the victim a promissory note, evidencing an indebtedness, which was never paid, taken together with the evidence of other similar transactions, constituted substantial evidence to convict him of fraud. State v. McCallum, 87 N.M. 459, 535 P.2d 1085 (Ct. App.), cert. denied, 87 N.M. 457, 535 P.2d 1083 (1975).

Defrauding noninnocent victim. - One could be convicted of obtaining money by false representations whose part in a fraudulent scheme was to sell cases of cotton, which were represented to be cigarettes, to a victim, although the victim understood he was helping to defraud either owners or insurers. State v. Foster, 38 N.M. 540, 37 P.2d 541 (1934).

Fraudulent obtainment of loan may be basis for conviction of criminal fraud. State v. Stettheimer, 94 N.M. 149, 607 P.2d 1167 (Ct. App. 1980).

Evidence sufficient to sustain conviction of attempted fraud. - See State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

V. INSTRUCTIONS.

Definition of fraudulent conduct unnecessary. - Absent a clearly expressed legislative intent requiring otherwise, fraudulent conduct is to be given its usual, ordinary meaning, and hence, there was no jurisdictional error in failing to define fraudulent conduct in an instruction; if defendant desired the term to be defined, he should have submitted a requested instruction. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Instruction on victim's intelligence not required. - According to the majority view, statutes covering the crime of obtaining money under false pretenses were designed to protect not only the ordinarily wary and prudent, but also the ignorant, credulous and foolish; hence, trial court did not err in refusing to grant defendant's instruction to the effect that the jury had a right to consider the intelligence of the prosecuting witnesses. State v. Jones, 73 N.M. 459, 389 P.2d 398 (1964).

Instruction on gambling properly denied. - Requested instruction that if victim was gambling the defendants must be found not guilty of fraud was properly denied as this section does not exempt fraud perpetrated while gambling. State v. Dosier, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

30-16-7. Unlawful dealing in federal food coupons or WIC checks.

Unlawful dealing in federal food coupons or WIC checks consists of a person buying, selling, trading, bartering or possessing food coupons or WIC checks issued by the United States department of agriculture with the intent to obtain an economic benefit to which he is not entitled under the rules and regulations of the human services department pertaining to the food stamp program or of the health and environment department [department of health] pertaining to the special supplemental food program for women, infants and children.

Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over two hundred fifty dollars (\$250) but not more than twenty-five hundred dollars (\$2,500) is guilty of a fourth degree felony.

Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

Whoever commits unlawful dealing in federal food coupons or WIC checks when the value of the food coupons or WIC checks involved exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-6.1, enacted by Laws 1971, ch. 282, § 1; 1987, ch. 121, § 3.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA

1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

The 1987 amendment, effective June 19, 1987, added "or WIC checks" following "coupons" in several places throughout the section, substituted all of the language in the first paragraph following "regulations" for "of the health and social services department pertaining to the food stamp program," added the third and last paragraphs, substituted "two hundred fifty dollars (\$250)" for "one hundred dollars (\$100)" in the fourth paragraph, and substituted "is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000)" for "exceeds twenty-five hundred (\$2,500)" in the fifth paragraph.

Income support division. - The health and social services department has been abolished by Laws 1977, ch. 252, § 5. Section 4 of that act establishes the human services department, consisting of several divisions, including the income support division. By 27-2-10 NMSA 1978 this division is authorized to establish a food stamp program to carry out the federal Food Stamp Act. See 9-8-4 and 27-2-2 NMSA 1978.

30-16-8. Embezzlement.

Embezzlement consists of the embezzling or converting to his own use of anything of value, with which he has been entrusted, with fraudulent intent to deprive the owner thereof.

Whoever commits embezzlement when the value of the thing embezzled or converted is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

Whoever commits embezzlement when the value of the thing embezzled or converted is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

Whoever commits embezzlement when the value of the thing embezzled or converted is over two hundred fifty dollars (\$250) but not more than twenty-five hundred dollars (\$2,500) is guilty of a fourth degree felony.

Whoever commits embezzlement when the value of the thing embezzled or converted is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

Whoever commits embezzlement when the value of the thing embezzled or converted exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-7, enacted by Laws 1963, ch. 303, § 16-7; 1987, ch. 121, § 4.

ANNOTATIONS

- I. In General.
- II. Elements of Offense.
- III. Indictment and Information.
- IV. Evidence and Issues.

I. IN GENERAL.

Cross-references. - For embezzlement by county officers, see 4-44-32 NMSA 1978.

For appropriation of trade secrets, see 57-3A-1 et seq. NMSA 1978.

The 1987 amendment, effective June 19, 1987, added the third and last paragraphs, substituted "two hundred fifty dollars (\$250)" for "one hundred dollars (\$100)" in the fourth paragraph, while inserting "dollars" following "twenty-five hundred" in that same paragraph, and substituted "is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000)" for "exceeds twenty-five hundred dollars (\$2,500)" in the fifth paragraph.

The offense of embezzlement is a purely statutory crime and does not exist at common law. State v. Bryant, 99 N.M. 149, 655 P.2d 161 (Ct. App. 1982).

Unconstitutionality of former section. - Laws 1923, ch. 70, § 2, prescribing penalty for embezzlement, was so uncertain in its meaning, so vague and so indefinite that it deprived a person charged under it of due process of law as guaranteed under U.S. Const., Amend. XIV. State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948).

Effect of invalid repeal. - Where embezzlement statute (Code 1915, § 1543) was repealed by Laws 1923, ch. 70, to clear the way for operation of later law (Laws 1923, ch. 70, § 2) and the new act proved unconstitutional, the repeal provision was ineffective. State v. Prince, 52 N.M. 15, 189 P.2d 993 (1948).

Conviction as bar to further prosecution. - A conviction for embezzling a sum as county clerk and ex-officio clerk of the district court barred further prosecution for embezzling another sum as county clerk and ex-officio probate clerk where state was unable to show conversion of any particular sum at any particular time. State v. Romero, 33 N.M. 314, 267 P. 66 (1928).

Former act severable. - Although Laws 1923, ch. 70, § 2, was held unconstitutional and void because element of entrustment and fraudulent conversion were omitted therefrom, Section 1 of the act, compiled as 40-45-22, 1953 Comp., relating to embezzlement by public officials, could be separated from the invalid section and sustained. State v. Chavez, 58 N.M. 802, 277 P.2d 302 (1954).

Former law not violative of due process. - Laws 1923, ch. 70, § 1, (40-45-22, 1953 Comp.) relating to embezzlement of public funds by public officials, was not unconstitutional or void on account of uncertainty in meaning, vagueness or

indefiniteness or failure to define offense. *State v. Smith*, 62 N.M. 84, 304 P.2d 883 (1956).

Section 40-45-22, 1953 Comp., dealing with embezzlement of public funds, included essential elements of embezzlement, namely, entrustment and fraudulent conversion, and hence was not vague, uncertain or a denial of due process to one charged thereunder. *State v. Nolan*, 59 N.M. 437, 285 P.2d 798 (1955).

Exercise of police power. - Section 40-45-22, 1953 Comp., relating to embezzlement by public officials of public funds, was a proper exercise of the police power. *State v. Nolan*, 59 N.M. 437, 285 P.2d 798 (1955).

The state's legitimate interest in the protection of public funds may be expressed in penal sanctions the purpose of which is the prevention of certain manifest or anticipated evil, or the preservation of the public health, safety, morals or general welfare. *State v. Nolan*, 59 N.M. 437, 285 P.2d 798 (1955).

Presumption of embezzlement constitutional. - Provision in former law making existence of a shortage in the money or property for which public officials were accountable prima facie evidence of embezzlement did not violate constitutional rights of accused as there was a rational connection between the facts and the fact presumed, and the defendant was not precluded from presenting his defense to the presumed fact. *State v. Chavez*, 58 N.M. 802, 277 P.2d 302 (1954).

Defendant can be convicted of third-degree felony where series of takings totals more than \$2,500, although each individual taking is less, if the takings are associated with a single, sustained criminal intent. *State v. Pedroncelli*, 100 N.M. 678, 675 P.2d 127 (1984).

Child attempting to honor probation commitments. - If in refusing to purchase marijuana with money entrusted to him by a law enforcement officer, but instead keeping the money for himself, a child on probation was attempting to honor his probation commitments, affirming an order revoking probation based on charges of embezzlement would be inconsistent with the purposes of the Children's Code, since the child had not been aware that the person giving him the money was an undercover officer involved in a sting operation. *In re Danny R.*, 114 N.M. 315, 838 P.2d 469 (Ct. App. 1992).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Embezzlement §§ 1 to 7.

Variance between allegation and proof as to the capacity in which one charged with embezzlement received the property, 12 A.L.R. 603.

Individual criminal responsibility of officer or employee for embezzlement, through corporate act, of property of third person, 33 A.L.R. 787.

Embezzlement by one spouse of other's property, 55 A.L.R. 558.

"Embezzlement" within fidelity bond, 56 A.L.R. 967.

Misappropriation of executor, administrator, guardian or trustee as embezzlement, 75 A.L.R. 299.

Sufficiency of verdict on conviction, which fails to state value of property, 79 A.L.R. 1180.

Larceny and embezzlement distinguished, 146 A.L.R. 532.

Embezzlement by independent collector or collection agency working on commission or percentage, 56 A.L.R.2d 1156.

Criminal responsibility for embezzlement from corporation by stockholder owning entire beneficial interest, 83 A.L.R.2d 791.

Conversion by promoter of money paid for preincorporation subscription for stock shares as embezzlement, 84 A.L.R.2d 1100.

Drawing of check on bank account of employer payable to accused's creditor as constituting embezzlement, 88 A.L.R.2d 688.

Motor vehicles, criminal liability in connection with rental of, 38 A.L.R.3d 949.

Partner: embezzlement, larceny, false pretenses or allied criminal fraud by a partner, 82 A.L.R.3d 822.

Retailer's failure to pay to government sales or use tax funds as constituting larceny or embezzlement, 8 A.L.R.4th 1068.

Bank officer's or employee's misapplication of funds as state criminal offense, 34 A.L.R.4th 547.

Criminal liability for theft of, interference with, or unauthorized use of, computer programs, files, or systems, 51 A.L.R.4th 971.

Who is "officer, director, agent, or employee" of bank, or is "connected in any capacity" with bank and therefore subject to prosecution and punishment for misapplication of bank funds under 18 USCS § 656, 57 A.L.R. Fed. 537.

Bankruptcy: what constitutes embezzlement of funds giving rise to nondischargeable debt under 11 USCS § 523(a)(4), 99 A.L.R. Fed. 124.

29A C.J.S. Embezzlement § 1 et seq.

II. ELEMENTS OF OFFENSE.

Essential elements of embezzlement. - The essential elements of the offense of embezzlement are that the property belonged to someone other than the accused, that the accused occupied a designated fiduciary relationship, that the property came into his possession by reason of his employment or office, and that there was a fraudulent intent to deprive the owner of his property. 1953-54 Op. Att'y Gen. No. 6053.

An essential element of fraud or embezzlement is intent, which is seldom provable by direct testimony, and must be proved by the reasonable inferences shown by the evidence and the surrounding circumstances. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Embezzlement requires proof that defendant entertained specific intent to deprive owner of property. - Embezzlement is a crime which requires proof that at the time of the conversion of the property, the defendant entertained a specific intent to deprive the owner of the property. *State v. Gonzales*, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

"Entrust" defined. - "Entrust" means to commit or surrender to another with a certain confidence regarding his care, use or disposal of that which has been committed or surrendered. *State v. Stahl*, 93 N.M. 62, 596 P.2d 275 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

Intent to "permanently" deprive is not requisite element of embezzlement. *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

A legislative intent to include the element of intent to permanently deprive the owner of his property in the crime of embezzlement cannot be ascertained by comparing this section with the larceny statute (30-16-1 NMSA 1978), because larceny is defined in terms of stealing while comparable language is not used in the embezzlement statute. *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

Time of formation of intent. - It would not be fatal to conviction, resting on entrustment, that the fraudulent intent existed or was formed coincidentally with receipt of the money or property. *State v. Konviser*, 57 N.M. 418, 259 P.2d 785 (1953).

Persons capable of entrustment. - That one is an agent, servant or employee does not deny that "entrustment" may characterize the custody of money or property in his possession as such agent, servant or employee. *State v. Konviser*, 57 N.M. 418, 259 P.2d 785 (1953).

Money to be proved missing. - If money cannot be proved missing by reliable, competent testimony or documentary evidence, an embezzlement charge must be dropped. *State v. Konviser*, 57 N.M. 418, 259 P.2d 785 (1953).

Court trying embezzlement not concerned with amount owed victims. - In a trial for embezzlement, the court is not concerned with the amount owed to the victims by the defendant but with the amount converted in violation of this section. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Failure to pay on demand. - Proof of a demand and a failure to return the property may be evidence of embezzlement because such proof is material to the questions of conversion of the property and a fraudulent intent to deprive the owner of his property, but such a demand and failure to return is not a separate element of the crime. *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

A demand and failure to pay over the money was necessary, both by way of allegation and proof, before a public official could be convicted of embezzlement under Code 1915, § 1546. *State v. Davisson*, 28 N.M. 653, 217 P. 240 (1923), appeal dismissed, 267 U.S. 574, 45 S. Ct. 229, 69 L. Ed. 795 (1925).

Restitution does not prevent conviction for completed embezzlement. - Embezzlement is complete when the defendant converts the victim's checks, and restitution does not allow the embezzler to escape prosecution and conviction. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Value not jurisdictional. - Although information should have alleged value, jurisdiction does not depend upon the value of the property embezzled; value merely denotes the grade of the offense. *Roehm v. Woodruff*, 64 N.M. 278, 327 P.2d 339 (1958).

III. INDICTMENT AND INFORMATION.

Charging in alternative not double jeopardy. - The concept of double jeopardy was not involved in charging defendant with fraud or in the alternative embezzlement since the charges were in the alternative, nor were the concepts of included offenses, same evidence or merger applicable. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

And not unfair. - There was nothing unfair about charging the defendant in the alternative with fraud or embezzlement, particularly since the charges arose out of the same events and carried the same penalties, and defendant was furnished with a most detailed statement of fact including the complete district attorney's file, police reports and a citation of authorities the state was relying on in support of each of the alternative charges. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Indictment in exact language of statute was sufficiently specific to require no amplification. *State v. Probert*, 19 N.M. 13, 140 P. 1108 (1914).

Means or elements of offense. - There is no necessity to set forth means or elements of the statutory offense of embezzlement in an information. *Smith v. Abram*, 58 N.M. 404, 271 P.2d 1010 (1954).

Failure to meet demands. - Indictment was to charge that accused was not able to meet the demands of any person lawfully demanding the allegedly embezzled property. *Territory v. Abeyta*, 14 N.M. 56, 89 P. 254 (1907).

Allegation of value. - Where indictment described embezzlement as being of a certain number of dollars, it was not necessary to state further the value. *Territory v. Hale*, 13 N.M. 181, 81 P. 583 (1905).

Indictment was sufficient both as to description of money and value thereof where it alleged "having then and there in his possession the sum of . . . (a certain number of dollars), a better description of the kinds and character of which is to the grand jurors unknown." *Territory v. Hale*, 13 N.M. 181, 81 P. 583 (1905).

Since much property embezzled was never seen by the employer, it was not necessary to exactly describe it in indictment, and money need only have been described in the best way which the circumstances permitted, in the indictment and on trial. *Territory v. Maxwell*, 2 N.M. 250 (1882).

Allegation of ownership. - In indictment charging embezzlement it is essential to aver the felonious conversion of the property of another; unless the rule is modified by statute, the allegation must be as accurate as in an indictment for larceny, and in case of an association, facts must be averred to show that the association could own property in its name. *State v. Parsons*, 23 N.M. 520, 169 P. 475 (1917).

Indictment for embezzlement of fine. - On a prosecution against a justice of the peace (now replaced by magistrates) for embezzlement of a fine imposed, an indictment founded on 750, 1884 C.L. was not sufficient, as that section applied only to property received by one person to be carried and delivered to another person. The proper indictment should have been under 752, 1884 C.L. which governed embezzlement of public money. *Territory v. Heacock*, 5 N.M. 54, 20 P. 171 (1889).

Embezzlement by employee. - An indictment under Code 1915, § 1544 which did not allege that property embezzled came into possession of accused by virtue of his employment was not fatally defective. *State v. Hill*, 24 N.M. 344, 171 P. 790 (1918).

Embezzlement of sheep. - An indictment under Laws 1921, ch. 123, § 1 (40-4-17, 1953 Comp.) alleging that on a day certain the defendant, having been entrusted with certain number of sheep belonging to named person, embezzled and fraudulently

converted the same to his own use, stated an offense. *State v. Anaya*, 28 N.M. 283, 210 P. 567 (1922).

Citation of wrong section. - Petitioner was not deprived of liberty without due process of law nor denied equal protection of the law under this section merely because an information charging defendant with embezzlement incorrectly refers to a repealed section since the offense was otherwise sufficiently charged. *Smith v. Abram*, 58 N.M. 404, 271 P.2d 1010 (1954).

IV. EVIDENCE AND ISSUES.

Admissibility of related transactions. - Where the transactions are all of a series in common and interrelated scheme or plan or system, devised and executed by the accused for the one purpose of embezzling from his employer, then all of the related transactions may be received in evidence. *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Testimony of C.P.A. - In an embezzlement prosecution, a certified public accountant may testify as to his findings from an examination of books and records not in evidence and not produced at the trial. *State v. Schrader*, 64 N.M. 100, 324 P.2d 1025 (1958).

Factual question as to ownership of funds. - Where there was evidence that the victims gave checks to the defendant, knowing they had insufficient funds in the bank to cover the checks, on the defendant's representations that he wanted the checks to show to investors and that the checks would not be cashed, this evidence raised a factual question as to whether ownership of the funds represented by the checks passed or was intended to pass to defendant. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

No mistake-of-fact instruction unless employee believed he was authorized to expend employer's funds. - The defendant is not entitled to a mistake-of-fact instruction in a prosecution for embezzlement for using public funds belonging to his employer to pay for the travel expenses of his spouse, who is not employed by the same employer and who has not performed any public service, on the ground that he believed in good faith he was owed money by his employer, where there is no evidence that he in fact believed he possessed the legal authority to expend public funds for his spouse's travel. *State v. Gonzales*, 99 N.M. 734, 663 P.2d 710 (Ct. App.), cert. denied, 464 U.S. 855, 104 S. Ct. 173, 78 L. Ed. 2d 156 (1983).

Question of entrustment is a question of fact for the jury. - *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Jury to be instructed on ordinary meaning of term. - The usual, ordinary meaning of "entrusted" was applicable to this section, and defendant therefore was not entitled to an instruction defining entrustment as a designated fiduciary relationship. *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

Since defendant not entrusted with money, offense not embezzlement. - Although a defendant is in charge of an entire store, where the undisputed facts show that money in a drop-box is not committed or surrendered to the defendant's care, use or disposal, that the money is to be handled exclusively by the manager, and where the defendant is excluded from having anything to do with that money, his offense, as to taking the money in the drop-box, is larceny, not embezzlement, because he had not been entrusted with that money. *State v. Stahl*, 93 N.M. 62, 596 P.2d 275 (Ct. App.), cert. denied, 93 N.M. 8, 595 P.2d 1203 (1979).

Entrustment established. - Where defendant, for some five years, acted as executive secretary of state association and, in effect, operated the business transactions of the association, including the making of bank deposits and submitting reports to the board of directors, evidence supported the jury finding of entrustment of the money of the association. *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Fraud or embezzlement for jury. - It was for the jury to decide whether defendant obtained the \$500 by fraud or converted to his own use the money with which he had been entrusted. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Whether defendant received property as loan or for investment jury question. - In a trial for fraud and embezzlement where the evidence was conflicting, whether the money and checks given to the defendant were loans, as he claimed, or were for investments, as his alleged victims claimed, was for the jury to decide. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Evidence of amount owed victims not dispositive of case. - In a trial for a third-degree embezzlement felony, the fact that the victims eventually "lost" an amount less than \$2,500 was not dispositive, as there was substantial evidence that the defendant, with the requisite fraudulent intent, negotiated for his own use checks in the amount of \$3,900, which he had been entrusted to hold and not cash. *State v. Schifani*, 92 N.M. 127, 584 P.2d 174 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Sale of borrowed property. - Evidence that defendant sold a motorcycle to complaining witness, that subsequently, motorcycle was loaned back to defendant, and that although requested to do so, defendant did not return motorcycle but sold it to a third person established an embezzlement as defined in this section. *State v. Gregg*, 83 N.M. 397, 492 P.2d 1260 (Ct. App. 1972), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Evidence of intent inconsistent with innocence. - While evidence was circumstantial, once the jury determined that defendant who sold motorcycle to third party had already sold it to complaining witness, circumstantial evidence of intent was inconsistent with any reasonable theory of innocence. *State v. Gregg*, 83 N.M. 397, 492 P.2d 1260 (Ct. App. 1972), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Embezzlement of checks. - The state satisfied its burden as to the embezzlement when it showed that two checks were cashed and the other two were deposited in the defendant's personal checking account, and it made very little difference whether other funds were used, as defendant sought to imply, to make up the discrepancy; the embezzlement occurred at the moment of the cashing of the checks. *State v. Peke*, 70 N.M. 108, 371 P.2d 226, cert. denied, 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962).

Failure to account for fine. - A justice of the peace (now replaced by magistrates) could be indicted for the embezzlement of a fine imposed and collected for which he never accounted, either before or after expiration of his term of office. *Territory v. Heacock*, 5 N.M. 54, 20 P. 171 (1889).

No evidence to support attempt charge. - Evidence that defendant was loaned a car and hadn't returned it more than three days later, shows that he was guilty of embezzlement or no crime at all, and did not support an issue of "attempt." *State v. Moss*, 83 N.M. 42, 487 P.2d 1347 (Ct. App. 1971).

Breach of trust not embezzlement. - Defendant who was guilty of nothing more serious than a breach of trust could not be convicted for embezzlement. *Territory v. Eyles*, 16 N.M. 657, 119 P. 1127 (1911).

Unexplained comparison of computer printouts and defendant's records violates right of confrontation. - Defendant was denied her constitutional right of confrontation at her trial for embezzlement, where the only evidence of shortages attributable to her was obtained by an unexplained comparison of computer printouts with her own records and there was no evidence that the state's only witness understood how the printouts were prepared. *State v. Austin*, 104 N.M. 573, 725 P.2d 252 (Ct. App. 1985).

When directed verdict proper. - If there are reasonable inferences and sufficient circumstances then the issue of intent becomes a question of fact for the jury, and only where there are no reasonable inferences or sufficient surrounding circumstances can it be said, as a matter of law, that a motion for a directed verdict should have been granted or that a charge should not have been presented to the jury. *State v. Ortiz*, 90 N.M. 319, 563 P.2d 113 (Ct. App. 1977).

Circumstantial evidence supported store manager's conviction of embezzlement, where the state presented evidence of discrepancies between the daily sales reports and deposit slips indicating shortages on six days, and the facts relied upon by defendant were not uncontroverted and consisted of issues of credibility to be resolved by the jury as finders of fact. *State v. James*, 109 N.M. 278, 784 P.2d 1021 (Ct. App. 1989).

Jury instruction on single larceny doctrine appropriate. - Single larceny doctrine recognizes either that a taking at one time or place of property belonging to several people may constitute a single crime, or, that a series of takings from one owner may

also constitute a single crime and therefore these crimes cannot be separately punished. Since the facts and circumstances showed a series of acts that cannot be said as a matter of law to be either a single taking or separate takings, for a defendant to be separately convicted and sentenced for each taking, the state also had to show separate intent. Under the aforementioned circumstances, it is fundamental error for the trial court not to instruct the jury on the single criminal intent doctrine. State v. Brooks, 117 N.M. 750, 877 P.2d 557 (1994).

Mistake of fact instruction. - Since there was a question whether defendant rightfully applied certain construction payments to the balance allegedly due him by the plaintiff, defendant was entitled to an instruction on mistake of fact, the omission of which constituted reversible error. State v. Bunce, 116 N.M. 284, 861 P.2d 965 (1993).

Jury instruction on intent deficient. - Jury instruction which omitted the essential element of fraudulent intent required by this section was deficient, and required reversal of defendant's conviction for embezzlement. State v. Green, 116 N.M. 273, 861 P.2d 954 (1993).

Failure to instruct the jury on an essential element of embezzlement, fraudulent intent, is reversible error and can never be corrected by including the concept elsewhere in the instructions. State v. Clifford, 117 N.M. 508, 873 P.2d 254 (1994).

30-16-9. Extortion.

Extortion consists of the communication or transmission of any threat to another by any means whatsoever with intent thereby to wrongfully obtain anything of value or to wrongfully compel the person threatened to do or refrain from doing any act against his will.

Any of the following acts shall be sufficient to constitute a threat under this section:

- A. a threat to do an unlawful injury to the person or property of the person threatened or of another;
- B. a threat to accuse the person threatened, or another, of any crime;
- C. a threat to expose, or impute to the person threatened, or another, any deformity or disgrace;
- D. a threat to expose any secret affecting the person threatened, or another; or
- E. a threat to kidnap the person threatened or another.

Whoever commits extortion is guilty of a third degree felony.

History: 1953 Comp., § 40A-16-8, enacted by Laws 1963, ch. 303, § 16-8.

ANNOTATIONS

Language of section does not require showing of consented-to taking. State v. Barber, 93 N.M. 782, 606 P.2d 192 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Extortion is completed crime when defendant's threat is communicated to the victim with the requisite statutory intent. State v. Barber, 93 N.M. 782, 606 P.2d 192 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979); State v. Wheeler, 95 N.M. 378, 622 P.2d 283 (Ct. App. 1980).

"Threats" included in section. - This section includes both written and oral threats and also includes actions constituting threats. State v. Barber, 93 N.M. 782, 606 P.2d 192 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1979).

Allegation of nature of threat. - Indictment under Laws 1853-1854, p. 94 (former 40-46-1, 1953 Comp.) was insufficient where it simply charged that defendant threatened another, without alleging that such threat was to injure the person or property of another. State v. Strickland, 21 N.M. 411, 155 P. 719 (1916).

"Unlawful injury" as breach of contract is question for legislature. - Whether "unlawful injury" within the meaning of Subsection A encompasses a mere breach of contract is a question which the legislature may wish to clarify. State v. Ashley, 108 N.M. 343, 772 P.2d 377 (Ct. App. 1989).

The phrase "to wrongfully compel" refers to the manner in which the defendant compels an act, rather than the legitimacy of the defendant's objective. Rael v. Sullivan, 918 F.2d 874 (10th Cir. 1990), cert. denied, 499 U.S. 928, 111 S. Ct. 1328, 113 L. Ed. 2d 260 (1991).

Defendant's threat to close victim's health club unless victim gave defendant money to help him buy the building in which the club was operated was a threat of "unlawful injury" within the meaning of Subsection A because the act threatened was a tort. State v. Ashley, 108 N.M. 343, 772 P.2d 377 (Ct. App. 1989).

Law reviews. - For comment on Landavazo v. Credit Bureau, 72 N.M. 456, 384 P.2d 891 (1963), see 4 Nat. Resources J. 584 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31A Am. Jur. 2d Extortion, Blackmail and Threats §§ 1 to 6.

Extortion predicated upon statements or intimations regarding criminal liability in connection with attempt to collect or settle a claim which defendant believed to be valid, 135 A.L.R. 728.

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

35 C.J.S. Extortion §§ 1 to 6; 86 C.J.S. Threats and Unlawful Communications §§ 2 to 6.

30-16-10. Forgery.

Forgery consists of:

A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or

B. knowingly issuing or transferring a forged writing with intent to injure or defraud.

Whoever commits forgery is guilty of a third degree felony.

History: 1953 Comp., § 40A-16-9, enacted by Laws 1963, ch. 303, § 16-9.

ANNOTATIONS

Cross-references. - For forgery of credit card, see 30-16-31 NMSA 1978.

Phrase not unconstitutionally vague. - Phrase "legal efficacy" as applied in forgery statute to a writing is not so vague and uncertain in meaning as to offend constitutional requirements of certainty as it means an instrument which upon its face could be made the foundation of liability or an instrument good and valid for the purpose for which it was created. *State v. Cowley*, 79 N.M. 49, 439 P.2d 567 (Ct. App.), cert. denied, 79 N.M. 98, 440 P.2d 136 (1968).

Multiple prosecutions not double jeopardy. - Where charge of violation of former law relating to passing of forged evidence of debt of government, or of banking institution, was dismissed for variance on grounds that the forged instrument was not a document evidencing an indebtedness of a banking institution, and defendant was subsequently charged and convicted of passing the same forged bill of exchange with intent to defraud in violation of statute relating to uttering of forged document, his plea of double jeopardy was without merit as for double jeopardy, the test in determining whether the offenses charged are the same is whether the facts offered in support of one charge would sustain a conviction of the other, and if either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing. *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954), cert. denied, 348 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955). See also *Owens v. Swope*, 227 F.2d 796 (10th Cir.), cert. denied, 348 U.S. 917, 75 S. Ct. 399, 99 L. Ed. 719 (1955).

Conviction for same facts under different theories constituted double jeopardy. - Defendant's conviction on two separate counts of forgery on the same check, the only difference between the two counts being the theory of forgery charged, constituted double jeopardy. Although different subsections of this section provide for alternative

means of prosecution, the legislature intended only one conviction for each forgery related to the same facts involving the same check. *State v. Orgain*, 115 N.M. 123, 847 P.2d 1377 (Ct. App. 1993).

Elements of offense. - A forgery is completed when a defendant possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy; (2) physically delivers a forged writing; or (3) passes an interest in a forged writing. *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

"Issuing" and "transferring". - The terms "issuing" and "transferring" encompass a delivery to one who is a holder with the passing of interests from one to another. *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

A defendant may issue or transfer a forged writing either by a physical delivery of the forged instrument for action by a third party or by passing an interest in the forged instrument to a third party. *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

A defendant issues a forged writing when he or she knowingly physically delivers the false instrument, offers the false instrument, or otherwise makes the false instrument available for action. *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

A defendant transfers a forged writing when he or she knowingly conveys an interest contained in the false instrument. For instance, a stock certificate may be forged to indicate a false owner. *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Acceptance of a forged instrument is unnecessary to complete the crime of forgery. *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Gain or loss not required. - Forgery is complete when the false instrument is issued or transferred with the requisite intent, regardless of its acceptance. The forgery statute does not require that the defendant gain, or that the prospective victim experience a loss or injury to complete the crime. *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Former law inapplicable to genuine certificate. - Laws 1853-1854, p. 110, § 1 (40-20-1, 1953 Comp.) relating to forgery of public records and certain private documents, was a forgery statute and had no application to a genuine certificate, although the statements therein made were untrue. *Territory v. Gutierrez*, 13 N.M. 312, 84 P. 525 (1906).

One commits forgery when he makes up check (assuming the requisite knowledge and intent), whether he or someone else places a false signature on it. *State v. Saavedra*, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979).

Section requires intent to injure or defraud. State v. Thurman, 88 N.M. 31, 536 P.2d 1087 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Intent to injure in general sufficient. - General intent to injure or defraud was sufficient for conviction of forgery; it was not necessary to allege or prove intent to injure or defraud a particular person. State v. Smith, 32 N.M. 191, 252 P. 1003 (1927).

Actual injury not required. - For there to be an intent to defraud, an injury or loss need not have actually resulted and for such an intent it is immaterial that no one was in fact deceived, or that the defendant did not intend to or did not make any financial gain as it is sufficient if the intent was to defraud any person on whom the counterfeit is passed. State v. Nation, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

Circumstantial evidence of knowing forgery. - Where the state elicited circumstantial evidence of defendant's knowledge that the checks he cashed were forged, which included his failure to make arrangements to pay the merchant after being advised that the checks had not been honored, his prior felony conviction, and his admitted requesting false notations on the checks, which indicated they were given him by employers with whom the merchant was familiar, and that he did so in order to make the checks easier to cash, this was sufficient to support an inference that defendant knew the checks were forged. State v. Stallings, 104 N.M. 660, 725 P.2d 1228 (Ct. App. 1986).

The crime of forgery was completed when the false making of the signature with intent to injure or defraud had been accomplished, and an injury or loss need not actually have resulted. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Request for false notations. - Although the defendant admittedly told the maker of the checks to put false notations on them indicating that the defendant received the checks in the course of his employment, rather than for personal goods and services, which represented a misrepresentation upon the face of the checks that cast doubt on his general truthfulness and moral character, the notations did not support a logical inference that petitioner knew the checks were forged, since the purpose of the notations was to facilitate cashing the third-party checks, and they served the same purpose regardless of whether the checks were good or were forged. Stallings v. Tansy, 28 F.3d 1018 (10th Cir. 1994).

"Legal efficacy" of postdated checks. - Where the forged writing involved an endorsement made or attempted of the name of the payee, the checks, although postdated, upon their face possessed sufficient legal efficacy to defraud and were properly the subject of forgery. State v. Lopez, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, State v. Ruffins, 109 N.M. 668, 789 P.2d 616 (1990).

If defendant assumes name and identity of deceased person, goes into the military and obtains identification under his assumed name, uses the identification to open a

checking account, and then writes and signs checks under his assumed name and tenders them to various stores in return for valuable merchandise, such acts do not purport to be those of another and therefore forgery has not been committed. *State v. Cook*, 93 N.M. 91, 596 P.2d 860 (Ct. App. 1979).

Unauthorized alteration of instrument. - Unauthorized alteration of a genuine instrument, of the kind contemplated by the statute, with the requisite fraudulent intent, is forgery under this section. *State v. Cowley*, 79 N.M. 49, 439 P.2d 567 (Ct. App.), cert. denied, 79 N.M. 98, 440 P.2d 136 (1968).

Where defendant came into possession of a check validly signed (such that it was bearer paper) but not filled in, his unauthorized filling in of the blank spaces of the check was an alteration within the purview of the forgery statute. *State v. Smith*, 95 N.M. 432, 622 P.2d 1052 (Ct. App. 1981).

Alteration of invoice. - Unauthorized addition to the invoice of items not purchased by the customer and a change of the amount which the customer had directed to be charged to his account constituted an alteration of the instrument within forgery offense. *State v. Cowley*, 79 N.M. 49, 439 P.2d 567 (Ct. App.), cert. denied, 79 N.M. 98, 440 P.2d 136 (1968).

Evidence sufficient to find defendant signed checks. - Although the state did not offer a handwriting expert to match the signature on counterfeit traveller's checks with that of the defendant, the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant did sign several of the checks; the checks were counterfeit, a hotel room registration card for a room checked out to an accomplice in the fraud bore the defendant's signature; the defendant was identified by several of the store clerks involved as the person who had passed the counterfeit checks in purchasing items; and many of the items purchased were found in the room where the defendant stayed. *State v. Rotibi*, 117 N.M. 108, 869 P.2d 296 (Ct. App. 1994).

Physical act not always a transfer. - It is possible to have a physical act which is an attempt to transfer one's interest but to have such an attempt thwarted at some stage of perpetration. *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Presentation of check a complete transfer. - Where defendant presented a forged check to a bank teller for cashing, fact that the teller, somewhat suspicious, took the check to her supervisor, whereupon the police were called and defendant was arrested, did not convert the crime into an attempt, since the transfer of interest by the defendant had already occurred; the fact that defendant received nothing and that there was no injury or loss was immaterial. *State v. Linam*, 90 N.M. 729, 568 P.2d 255 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Proving forgery of check. - The court held that proof of forgery of a check need not include a showing that the drawee bank would not have honored it. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Lack of account or authority. - Evidence that the company attempted to be drawn on did not have an account with the drawee bank or that the person who signed the check was not authorized to sign checks on behalf of the corporation were not elements of proof prerequisite to defendant's conviction involving a false endorsement with intent to defraud. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Inference of nonauthorization warranted. - Representations that defendants were the persons named as payees of the checks made for the purpose of inducing the respective clerks to cash the checks, reasonably warranted the inference that defendants did not have the right to use the names of payees of the checks, and were not, in fact, such payees and that they did not have authority to endorse the checks in the names of payees. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Aiding and abetting check forgery. - The fact that defendant was not the person who passed an interest in forged checks did not preclude defendant's conviction under this section if the evidence of defendant's aiding and abetting of unidentified woman who actually passed the checks was sufficient. *State v. Martinez*, 85 N.M. 198, 510 P.2d 916 (Ct. App. 1973).

Mere presence not aiding and abetting. - The fact that defendant accompanied the forger of certain checks at the time that she cashed them was not sufficient to support a finding of aiding and abetting, for mere presence and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. *State v. Hermosillo*, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Endorsing and vouching for forged check. - To be an aider or abettor to a forgery, defendant must have shared an intent to injure or defraud, and where uncontradicted evidence was that defendant vouched for and endorsed check forged by unidentified companion, such evidence, although circumstantial, was sufficient to show such intent. *State v. Martinez*, 85 N.M. 198, 510 P.2d 916 (Ct. App. 1973).

Guilty knowledge not shown. - Where the woman who forged signature on certain checks testified that the defendant, who drove her to two different branches of a bank in a three-hour period to cash them, and deposited them in the bank's drawer and cylinder respectively, did not know that the checks were forged, and the only other fact upon which a finding of defendant's guilty knowledge could be based was his presence in a car next to the owners at the time the checks may have been stolen, the evidence did

not form a sufficient basis upon which to rest a conclusion of defendant's guilty knowledge. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Reasonable hypotheses of innocence. - Circumstantial evidence was insufficient to allow a finding that defendant aided forger by procuring checks for her because there were too many other explanations to account for her possession of the checks, so that the evidence was not incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Check forgery substantiated. - Despite discrepancies in testimony of certain witnesses, there was sufficient corroborated and uncontradicted testimony to substantiate verdict of guilty on three counts of check forgery. State v. Crouch, 75 N.M. 533, 407 P.2d 671 (1965).

No evidence of check forgery. - Where there was ample evidence that the maker of check cashed by defendant, which he claimed to have received in payment for three days of work, did not have an account in the bank on which it was drawn, but not one iota of evidence that check was a forgery, conviction of knowingly uttering a forged instrument with intent to defraud was reversed. State v. Bibbins, 66 N.M. 363, 348 P.2d 484 (1960).

Transfer of forged prescription. - Evidence that a physician's signature had been forged on one of his prescription blanks and that defendant presented this forged prescription to a pharmacist and obtained the drug identified in the prescription, was sufficient to show defendant knowingly transferred a forged prescription with an intent to injure or defraud. State v. Nation, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

Forging signature on assignment of title. - Falsely signing name of automobile owner to assignment of title and notarizing same, where evidence amply supported finding of intent to injure or defraud, constituted crime of forgery. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Endorsement of own name without authorization no forgery. - Where defendant endorsed or caused his name to be endorsed to a check, this was not a false endorsement, only an endorsement without authorization; and, thus, not forgery as defined in this section. State v. Deutsch, 103 N.M. 752, 713 P.2d 1008 (Ct. App. 1985), cert. denied, 476 U.S. 1183, 106 S. Ct. 2918, 91 L. Ed. 2d 547 (1986).

Intent to wrongfully deprive another. - Evidence was sufficient to support a finding of intent to wrongfully or fraudulently deprive another of a lawful right, interest or property, where car and false assignment were delivered to third-party purchaser who used same for at least nine days, vehicle was sold for less than worth and at private sale rather than public sale to which owner was entitled, and difference between amount owing and purchase price was not paid to owner; furthermore, even if it could be said that defendant, as secured party, legally took possession of car and was thus entitled to

dispose of it by private sale, still he failed to give reasonable notification of the time after which sale would be made, or to account for the surplus money received from the sale. State v. Weber, 76 N.M. 636, 417 P.2d 444 (1966).

Substantial evidence of intent required. - Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence, but this does not remove the obligation to examine the evidence to determine whether there was substantial evidence to support a finding of intent. State v. Hermosillo, 88 N.M. 424, 540 P.2d 1313 (Ct. App. 1975).

Admissibility of exhibits. - Envelope containing money found in defendant's possession shortly after cashing second of two forged checks tended to throw light on the transaction, and considered with the time and distance factors involved, circumstantially connected defendant with the criminal offense. State v. Belcher, 83 N.M. 130, 489 P.2d 410 (Ct. App. 1971).

Red plastic wallet identified by witnesses as belonging to defendant, containing identification card bearing the name of the payee named in two forged checks, which was found around the corner from business where second check was cashed, was admissible, despite weakness of evidence of chain of custody after it was found and as to whether the contents were in the same condition at trial as when found; doubt concerning the exhibit would go to the weight to be accorded it. State v. Belcher, 83 N.M. 130, 489 P.2d 410 (Ct. App. 1971).

Indictment sufficient. - An indictment for forgery, alleging that the act was unlawfully, falsely and feloniously done, sufficiently excluded authorization by the person whose act it purported to be. State v. Smith, 32 N.M. 191, 252 P. 1003 (1927).

Cashier's description of the contents of a forged check was sufficient proof, and the state's failure to introduce the forged check at trial did not preclude a conviction for forgery. State v. Ruffins, 109 N.M. 668, 789 P.2d 616 (1990).

Consecutive sentences proper. - Trial court did not err in imposing consecutive sentences on three counts of forgery, since the common law gave trial courts the discretion to make sentences consecutive or concurrent. State v. Crouch, 75 N.M. 533, 407 P.2d 671 (1965).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 36 Am. Jur. 2d Forgery §§ 1 to 26.

Genuine making of instrument for purpose of defrauding as constituting forgery, 41 A.L.R. 229, 46 A.L.R. 1529, 51 A.L.R. 568.

Invalid instrument as subject of forgery, 174 A.L.R. 1300.

Admissibility, in forgery prosecution, of other acts of forgery, 34 A.L.R.2d 777.

Use of fictitious or assumed name, 49 A.L.R.2d 852.

Alteration of figures indicating amount of check, bill, or note without change in written words, as forgery, 64 A.L.R.2d 1029.

Fees: amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying, 86 A.L.R.2d 1283.

Stolen money or property as subject of larceny or robbery, 89 A.L.R.2d 1435.

Credit charge or credit sales slip, signing of, 90 A.L.R.2d 822.

Procuring signature by fraud as forgery, 11 A.L.R.3d 1074.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

37 C.J.S. Forgery §§ 1 to 42.

30-16-11. Receiving stolen property; penalties.

A. Receiving stolen property means intentionally to receive, retain or dispose of stolen property knowing that it has been stolen or believing it has been stolen, unless the property is received, retained or disposed of with intent to restore it to the owner.

B. The requisite knowledge or belief that property has been stolen is presumed in the case of a dealer who:

(1) is found in possession or control of property stolen from two or more persons on separate occasions;

(2) acquires stolen property for a consideration which the dealer knows is far below the property's reasonable value. A dealer shall be presumed to know the fair market value of the property in which he deals; or

(3) is found in possession or control of five or more items of property stolen within one year prior to the time of the incident charged pursuant to this section.

C. For the purposes of this section:

(1) "dealer" means a person in the business of buying or selling goods or commercial merchandise; and

(2) "stolen property" means any property acquired by theft, larceny, fraud, embezzlement, robbery or armed robbery.

D. Whoever commits receiving stolen property when the value of the property is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

E. Whoever commits receiving stolen property when the value of the property is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

F. Whoever commits receiving stolen property when the value of the property is over two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony.

G. Whoever commits receiving stolen property when the value of the property is over two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

H. Whoever commits receiving stolen property when the value of the property exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

I. Whoever commits receiving stolen property when the property is a firearm is guilty of a fourth degree felony, when its value is less than two thousand five hundred dollars (\$2,500).

History: 1953 Comp., § 40A-16-11, enacted by Laws 1963, ch. 303, § 16-11; 1969, ch. 171, § 2; 1972, ch. 77, § 1; 1975, ch. 232, § 1; 1983, ch. 253, § 1; 1987, ch. 121, § 5.

ANNOTATIONS

- I. In General.
- II. Multiple Prosecutions.
- III. Elements of Offense.
- IV. Evidence.
- V. Procedure.

I. IN GENERAL.

Cross-references. - For failure to show proper authority, hides and pelts of cattle or sheep killed being evidence of larceny or receiving stolen property, see 77-17-14 NMSA 1978.

For evidentiary rule regarding presumptions in criminal cases, see Rule 11-303 SCRA 1986.

The 1983 amendment, effective June 17, 1983, in Subsection C, divided the formerly undivided language into an introductory paragraph and Paragraph (1), added "and" at the end of Paragraph (1) and added Paragraph (2).

The 1987 amendment, effective June 19, 1987, added present Subsections E and H, while redesignating former Subsections E, F and G as present Subsections F, G and I.

Validity. - Even if Subsection B renders this section partially invalid, as trial court had held, Subsection A is valid absent Subsection B. *State v. Elam*, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Section inapplicable to embezzled property. - In the absence of a statutory provision which expressly declares the offense of embezzlement to be embraced within the offense of larceny, the crime of receiving stolen property, knowing it to have been stolen, does not include property which was embezzled. *State v. Bryant*, 99 N.M. 149, 655 P.2d 161 (Ct. App. 1982).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Receiving and Transporting Stolen Property §§ 1 to 4.

Possession of recently stolen goods by one charged with receiving them as evidence on question of guilty knowledge, 68 A.L.R. 187.

Thief as accomplice of one charged with receiving stolen property, or vice versa, within rule requiring corroboration or cautionary instruction, 53 A.L.R.2d 817.

Receiving property stolen in another state or country as receiving stolen property, 67 A.L.R.2d 752.

Attempts to receive stolen property, 85 A.L.R.2d 259.

Indictment: sufficiency of description of stolen property in indictment or information for receiving it, 99 A.L.R.2d 813.

Public documents: receipt of public documents taken by another as receipt of stolen property, 57 A.L.R.3d 1211.

What constitutes "recently" stolen property within rule inferring guilt from unexplained possession of such property, 89 A.L.R.3d 1202.

Accomplice: receiver of stolen goods as accomplice of thief for purposes of corroboration, 74 A.L.R.3d 560.

What constitutes "constructive" possession of stolen property to establish requisite element of possession supporting offense of receiving stolen property, 30 A.L.R.4th 488.

Conviction of receiving stolen property, or related offenses, where stolen property previously placed under police control, 72 A.L.R.4th 838.

76 C.J.S. Receiving Stolen Goods § 1 et seq.

II. MULTIPLE PROSECUTIONS.

Receiving not included in armed robbery. - Offense of receiving stolen property cannot be included within the offense of armed robbery. *State v. Mares*, 79 N.M. 327, 442 P.2d 817 (Ct. App. 1968).

Prosecution for armed robbery not barred. - Plaintiff who was convicted in a justice of the peace court (now replaced by magistrate courts) of the petty misdemeanor of receiving stolen property, and was later convicted in the district court of the second-degree felony of armed robbery, was not placed in double jeopardy, nor was the state barred or estopped from prosecuting and convicting him for the armed robbery. *State v. Gleason*, 80 N.M. 382, 456 P.2d 215 (Ct. App. 1969).

Conviction for receiving as bar to burglary prosecution. - New Mexico cannot convict a person under one indictment or information of receiving stolen property, and then subsequently convict him under another indictment or information of burglary, if the burglary conviction is dependent upon a theft by him of the same property, and he is shown to have been the person who actually took and asported the property during the burglarious entry. *State v. Gleason*, 80 N.M. 382, 456 P.2d 215 (Ct. App. 1969).

Theft inconsistent with receiving. - The felonious receiving of stolen property, knowing the same to have been stolen, was a substantive offense, and distinct from larceny. Where evidence showed defendant guilty of the theft, he could not be convicted of feloniously receiving it. *Territory v. Graves*, 17 N.M. 241, 125 P. 604 (1912).

Disposition separate from larceny. - A thief who holds on to stolen property cannot violate this section by receiving the stolen property because he cannot receive it from himself, nor can the thief violate the statute by retaining the stolen property because

larceny is a continuing offense; the thief's disposition, however, is action separate from the larceny, and it is neither absurd nor unreasonable to hold that the thief violates this section when he disposes of the property that he stole. *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976).

Principle that one who is a thief cannot be convicted of "receiving" property he stole since the theft and receipt are the same act was inapplicable where defendant was convicted of "disposing of" property which he may also have stolen although he was acquitted of the theft. *State v. Mitchell*, 86 N.M. 343, 524 P.2d 206 (Ct. App. 1974).

Meaning of "disposing" shown by legislative history. - Since the legislature is presumed to have known the law when it added the "disposing" provision by the 1972 amendment, and is presumed to have intended to change it, so that, even if prior law prohibited conviction for both theft and disposing of the same property the legislative history supports the view that the law has been changed. *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976).

Simultaneous possession of stolen items owned by different individuals is a single act constituting one offense. *Sanchez v. State*, 97 N.M. 445, 640 P.2d 1325 (1982).

Property taken from more than one owner or at more than one time cannot be combined together into one count, thereby combining the values of the stolen items to increase the penalty. *Sanchez v. State*, 97 N.M. 445, 640 P.2d 1325 (1982).

The defendant may be charged with a separate count for each separate transaction of disposure. *Sanchez v. State*, 97 N.M. 445, 640 P.2d 1325 (1982).

Conviction for receipt back of property stolen. - If a thief steals property, turns that property over to someone and subsequently receives the property back from that person, a receiving conviction based on receipt of the stolen property by the thief would not be prohibited. *State v. Tapia*, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976).

Each separate "receiving" is a separate crime. *State v. Bell*, 90 N.M. 160, 560 P.2d 951 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

If defendant received the stolen pistol at a time different from the time that he received the other stolen properties, then there were two offenses for which two sentences would be imposed even though at the time of discovery defendant possessed all the stolen property involved. *State v. Bell*, 90 N.M. 160, 560 P.2d 951 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Dual prosecutions alleging different ownership of same property. - A former acquittal under an indictment for buying and receiving stolen property, charged to be the property of A, was no bar to a prosecution for buying and receiving the same property

charged to be the property of B. This was true where difference in name of owner of property was "railroad" and "railway." State v. Jacoby, 25 N.M. 224, 180 P. 462 (1919).

III. ELEMENTS OF OFFENSE.

Purpose. - An obvious purpose of this section was to inhibit the movement and disposition of stolen property, and the holding that the section applies to a thief who disposes of stolen property is consistent with that purpose. State v. Tapia, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976).

Purpose. - The purpose of Subsection B was not to create a separate crime where several items of property, including a firearm or firearms, were stolen or received together with other stolen property, but was to increase the penalty for the offense where a firearm was the subject of the theft or receiving of stolen property regardless of the value of the firearm. State v. Smith, 100 N.M. 352, 670 P.2d 963 (Ct. App. 1983).

Meaning of "dispose". - The ordinary meaning of the language "dispose of stolen property" is to transfer, relinquish or get rid of stolen property, which language does not show an intent to exclude the thief from the prohibition against disposing of stolen property. State v. Tapia, 89 N.M. 221, 549 P.2d 636 (Ct. App. 1976).

Several methods of committing offense. - Prior to 1972 amendment, this section provided four methods by which offense could be committed, namely, buying, procuring, receiving or concealing stolen property; proof of any one of these methods, coupled with requisite knowledge, was sufficient to sustain a conviction. State v. Carlton, 82 N.M. 537, 484 P.2d 757 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

This section contemplates that a person may commit "receiving stolen property" in one of three ways. The property may be "received," or the property may be "retained," or the property may be "disposed" of by a defendant. Proof of any one of these methods, coupled with the requisite knowledge, is sufficient to sustain a conviction. Sanchez v. State, 97 N.M. 445, 640 P.2d 1325 (1982).

Actual theft and knowledge thereof required. - To establish the crime of receiving and concealing stolen property it is incumbent upon the state to prove that the property in this case was stolen; and that the accused received the property with knowledge that they were stolen. State v. Zarafonitis, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

To constitute the crime of receiving stolen goods, it was essential that accused have knowledge that goods were stolen. State v. Floyd, 24 N.M. 31, 172 P. 188 (1918).

Specific intent is not an essential element of the crime of receiving stolen property. State v. Viscarra, 84 N.M. 217, 501 P.2d 261 (Ct. App. 1972).

"Dishonest intent" is not essential element. - "Dishonest intent" is not an element of the statutory crime of receiving stolen property. *State v. Viscarra*, 84 N.M. 217, 501 P.2d 261 (Ct. App. 1972).

Nature of presumption herein. - Rule 303(c), N.M.R. Evid. (now see Rule 11-302), abolishes "true" presumptions in criminal cases and puts the presumptions found in Subsection B of this section into the category of permissible inference, so that that subsection must be read to say that requisite knowledge or belief that property has been stolen may be, rather than is, presumed to exist upon proof of the basic facts. *State v. Jones*, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

IV. EVIDENCE.

Possession not inferred solely from access. - When persons other than the defendant had equal or greater access to the place where the illicit goods were discovered, possession may not be inferred solely from defendant's access. Something more is necessary to establish a link between the items and the defendant before the jury can properly infer that defendant could control the items. *State v. Sizemore*, 115 N.M. 753, 858 P.2d 420 (Ct. App. 1993).

Circumstantial evidence of guilty knowledge. - Guilty knowledge is rarely susceptible of direct and positive proof and generally can be established only through circumstantial evidence. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Unless a defendant admits knowledge of the fact that goods he has received are stolen, this knowledge, of necessity, must be established by circumstantial evidence. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Exclusion of reasonable hypotheses of innocence. - Where circumstantial evidence alone is relied upon for a conviction such evidence must be incompatible with the innocence of the accused upon any rational theory and incapable of explanation upon any reasonable hypothesis of the defendant's innocence. *State v. Zarafonetis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Mere presence insufficient. - Although defendant was present in the house where the stolen bits were found, his presence alone is insufficient evidence on which to base a conviction. *State v. Browder*, 83 N.M. 238, 490 P.2d 680 (Ct. App. 1971).

Mere possession insufficient. - Mere possession of recently stolen property is not sufficient to warrant conviction on a charge of receiving stolen property, but possession, if not satisfactorily explained, is a circumstance to be taken into consideration with all of the other facts and circumstances in the case in determining guilt or innocence. *State v.*

Follis, 67 N.M. 222, 354 P.2d 521 (1960); State v. Olloway, 95 N.M. 167, 619 P.2d 843 (Ct. App. 1980).

Although knowledge that the property is stolen may be circumstantially proved by unexplained possession, knowledge should not be inferred from possession or possession from knowledge without having some basis in fact for the initial inference. State v. Sizemore, 115 N.M. 753, 858 P.2d 420 (Ct. App. 1993).

Possession of stolen property is circumstance to be considered in determining whether the offense has been committed. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Evidence that a defendant was in possession of numerous items of recently stolen personal property, wrongfully taken from different owners at different times, gives rise to a reasonable inference that defendant knew the property was stolen. State v. Smith, 100 N.M. 352, 670 P.2d 963 (Ct. App. 1983).

False explanation of possession. - Any false explanation of possession of stolen property is a circumstance indicative of guilt. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Manner of purchase and sale. - Evidence that defendant had the stolen goods in his possession within a few days after the theft, and both purchased and sold them at prices disproportionately low in comparison with their value, directing that the check in payment of the goods be written so as to exclude his name from the transaction, met the test of substantiality and justified the inference that the goods were received by defendant with knowledge that they were stolen. State v. Zarafonetis, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

Concealment and falsifying. - Evidence that defendant used different names in operating his business, that he used an embosser to obliterate the seals on the stolen books and that he told different stories about his acquisition of the stolen property was sufficient, even apart from evidence of possession, to sustain a conviction under this section. State v. Elam, 86 N.M. 595, 526 P.2d 189 (Ct. App.), cert. denied, 86 N.M. 593, 526 P.2d 187 (1974).

Evidence of value. - Motel manager's testimony that he was familiar with the value of the television sets that are sold to motels and testified that a used set like the one involved was worth between \$150 and \$200 was competent and meets the substantial evidence test. State v. Williams, 83 N.M. 477, 493 P.2d 962 (Ct. App. 1972).

Facsimile of bill of sale. - Introduction of a photocopy of a bill of sale for an electric typewriter sold by defendant to a witness, the original of which was claimed to have been lost, was not error, despite fact that counsel for defendant speculated the original might have been signed "(owner's name) by (defendant)." State v. Chacon, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969).

Credibility and weight of evidence for jury. - The jury was not required to accept a suggested source of acquisition of television set, disregarding all the evidence which supported a finding that defendant knew the set was stolen, since it was for the jury to weigh the evidence and pass on the credibility of the witness. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Review of evidence on appeal. - In considering the question whether defendant knew property was stolen, the court will view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences in favor of the verdict of conviction of receiving and concealing stolen goods. *State v. Zarafonitis*, 81 N.M. 674, 472 P.2d 388 (Ct. App.), cert. denied, 81 N.M. 669, 472 P.2d 383 (1970).

V. PROCEDURE.

Venue proper. - Venue was properly laid in county where concealment of stolen riding equipment occurred. *State v. Carlton*, 82 N.M. 537, 484 P.2d 757 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

Allegation of ownership was essential in indictment for buying and receiving stolen property, and a departure in the proof from the allegation in the indictment was necessarily fatal to the proceedings. *State v. Jacoby*, 25 N.M. 224, 180 P. 462 (1919).

Allegation of source unnecessary. - It was not necessary that indictment set out from whom the stolen goods were received. *Territory v. Claypool*, 11 N.M. 568, 71 P. 463 (1903).

Charging in alternative. - An indictment which charged buying, receiving or concealing in the alternative, through the use of the word "or," was established by proof of any one of them, although they were charged in a single count. *Territory v. Neatherlin*, 13 N.M. 491, 85 P. 1044 (1906).

Indictment adequate. - Where the indictment charged defendant with receiving and concealing stolen property contrary to statutory provisions, further alleging that: "On diverse dates between March 20, 1965, and the 19th day of March, 1968 . . . [the defendant] did buy, procure, receive, or conceal things of value knowing the same to have been stolen or acquired by fraud or embezzlement" the indictment was in substantially the form prescribed by statute, and, insofar as form is concerned, no greater degree of conformity was required. *State v. Lindsey*, 81 N.M. 173, 464 P.2d 903 (Ct. App. 1969); 81 N.M. 140, 464 P.2d 559 (1970), cert. denied, 398 U.S. 904, 90 S. Ct. 1692, 26 L. Ed. 2d 62 (1970).

Unclear indictment to be dismissed. - Where the defendant cannot tell whether he is being charged with "receiving," "retaining" or "disposing" of stolen property, nor can it be determined whether the charges are being "stacked" to enhance the penalty, the

indictment is faulty and must be dismissed. *Sanchez v. State*, 97 N.M. 445, 640 P.2d 1325 (1982).

Effect of variance. - In prosecution for receiving and concealing stolen property, alleged variance between all the evidence and the indictment was not ground for acquittal, as court could at any time cause the indictment to be amended, nor did defense counsel's failure to object thereto establish his ineffectiveness. *State v. Chacon*, 80 N.M. 799, 461 P.2d 932 (Ct. App. 1969).

Use of conjunctive rather than disjunctive. - Where, through error, the information and the court's instructions defined the offense of buying, receiving or aiding in the concealment of stolen property conjunctively rather than disjunctively as in the statute, the defendant was not aided thereby since there was substantial evidence to show that he was guilty of all three offenses. *State v. Russell*, 37 N.M. 131, 19 P.2d 742 (1933).

Intent-to-return defense. - For the intent-to-return defense to apply, the stolen goods should never have been held for any purpose other than to return the goods to the owner. *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

The prospect of a reward does not defeat the intent-to-return defense. *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

The Uniform Jury Instructions do not preclude an instruction on the intent-to-return defense when appropriate. *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

Defendant was entitled to an instruction on the intent-to-return defense, where reasonable doubt could arise from the possibility that defendant's involvement consisted of only awareness of the burglary, knowledge of where the goods were being kept, use of reward money from an investigator to purchase the goods from those holding them, and delivery of the goods to the investigator. *State v. Lopez*, 109 N.M. 578, 787 P.2d 1261 (Ct. App. 1990).

Waiver of error in instruction. - Error committed by trial court in instructing the jury that requisite knowledge must rather than may be presumed upon proof of basic facts, which was not objected to, was waived and did not constitute fundamental error. *State v. Jones*, 88 N.M. 110, 537 P.2d 1006 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

30-16-12. Falsely representing self as incapacitated.

Falsely representing self as incapacitated consists of any person falsely representing himself to be blind, deaf, dumb, crippled or otherwise physically defective for the purpose of obtaining money or other thing of value.

Whoever commits falsely representing self as incapacitated is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-12, enacted by Laws 1963, ch. 303, § 16-12.

30-16-13. Cheating machine or device.

Cheating machine or device consists of any person, with intent to defraud, attempting to operate or causing to be operated any automatic vending machine, parking meter, coin-box telephone, or any machine or receptable [receptacle] designed to receive lawful money of the United States in connection with the sale, use or enjoyment of property or service, by means of any slug, or by any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device.

Whoever commits cheating machine or device is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-13, enacted by Laws 1963, ch. 303, § 16-13.

30-16-14. Failing to label secondhand watches.

Failing to label secondhand watches consists of any person or jeweler failing to identify or specify in any advertising or merchandise display of watches that the watches offered for sale have had any portion of their movements or cases repaired or replaced. Watches which have had the brand name, the name of the maker, the serial number, movement number or any other distinguishing number or identifying mark erased, defaced, removed, altered or covered shall for the purpose of this section be deemed to be secondhand.

For the purpose of this section, sufficient labeling shall consist of any notice affixed to the outside of a watch which clearly and legibly indicates the word "secondhand" printed thereon so that it can be read by a person of normal vision.

Whoever commits failing to label secondhand watches is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-14, enacted by Laws 1963, ch. 303, § 16-14; 1965, ch. 71, § 1.

30-16-15. Coercing the purchase of insurance from particular broker.

Coercing the purchase of insurance from particular broker consists of any person engaged in selling real or personal property, or the lending of money, requiring as a condition precedent to the sale, financing the purchase of such property or the lending of money, or the renewal of extension of any loan or mortgage, that the purchaser of

such property, or recipient of the financial assistance negotiate any policy of insurance or renewal thereof through a particular insurance company, agent, solicitor or broker.

Nothing in this section shall be construed to prevent the exercise by any person [of] the right to designate minimum standards as to the company, the terms and provisions of the policy and the adequacy of the coverage with respect to insurance on property pledged or mortgaged to such person.

Whoever commits coercing the purchase of insurance from particular broker is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-15, enacted by Laws 1963, ch. 303, § 16-15.

ANNOTATIONS

Debtor's executed contract, as condition precedent to loan, illegal. - Where an insurance creditor makes the execution of an insurance contract by the debtor a condition precedent to granting a loan, the contract is clearly illegal. *Capo v. Century Life Ins. Co.*, 94 N.M. 373, 610 P.2d 1202 (1980).

Contract not voided by violation. - Although requirement in loan agreement that borrowers purchase life insurance from named company as a condition precedent to the lending of money was illegal, directly contravening this section, that part of the contract was separable without materially affecting the remainder dealing with the note, mortgage and loan, which were not made unenforceable thereby. *Forrest Currell Lumber Co. v. Thomas*, 81 N.M. 161, 464 P.2d 891 (1970).

But refund required. - This section, prohibiting the coercing of the purchase of insurance from a particular broker, placed a penalty on the party coercing but not on the other; hence, amount obtained by insurance company through the illegal agreement should be returned to the insureds, even though the insurance company could not have avoided liability on its policies because of the illegality. *Forrest Currell Lumber Co. v. Thomas*, 81 N.M. 161, 464 P.2d 891 (1970).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 43 C.J.S. Innkeepers § 28.

30-16-16. Falsely obtaining services or accommodations; probable cause; immunity; penalty.

A. Falsely obtaining services or accommodations consists of any person obtaining service, food, entertainment or accommodations without paying with the intent to cheat or defraud the owner or person supplying such service, food, entertainment or accommodations.

B. Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the crime of falsely obtaining services or

accommodations as defined in this section. Any merchant, owner or proprietor who causes such an arrest shall not be criminally or civilly liable if he has actual knowledge that the person so arrested has committed the crime of falsely obtaining services or accommodations.

C. Whoever commits falsely obtaining services or accommodations when the value of the service, food, entertainment or accommodations furnished is:

- (1) less than one hundred dollars (\$100) is guilty of a petty misdemeanor;
- (2) more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor;
- (3) more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony;
- (4) more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony; and
- (5) more than twenty thousand dollars (\$20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-16, enacted by Laws 1963, ch. 303, § 16-16; 1981, ch. 254, § 1; 1987, ch. 121, § 6.

ANNOTATIONS

The 1987 amendment, effective June 19, 1987, redesignated former Subsections C(2) and C(3) as present Subsections C(3) and C(4), added present Subsections C(2) and C(5), substituted "two hundred fifty dollars (\$250) but not more" for "one hundred dollars (\$100) but less" in Subsection C(3), and inserted "but not more than twenty thousand dollars (\$20,000)" in Subsection C(4).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Modern status of rule that crime of false pretenses cannot be predicated upon present intention not to comply with promise or statement as to future act, 19 A.L.R.4th 959.

43 C.J.S. Innkeepers § 28.

30-16-17. Unlawful removal of effects.

Unlawful removal of effects consists of any person removing or causing to be removed any baggage or effects from any hotel, motel, trailer park, inn, rented dwelling or boardinghouse while there is a lien existing thereon for the proper charges due for fare or board furnished from such hotel, motel, trailer park, inn, rented dwelling or boardinghouse, and where the owner or person in possession of such baggage or effects is given actual notice of the fact of such lien, or where a notice of such lien has

been conspicuously posted upon the premises adjacent to such baggage or effects, giving notice of the fact of such lien and the amount thereof.

Whoever commits unlawful removal of effects is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-17, enacted by Laws 1963, ch. 303, § 16-17.

ANNOTATIONS

Cross-references. - For landlord's lien, see 48-3-5 NMSA 1978.

For enforcement of liens, see 48-3-13, 48-3-14 NMSA 1978.

For lien in favor of owners or operators of hotels, rooming houses, apartment houses, rental dwellings, auto courts, trailer courts or campgrounds, priority and enforcement of same and penalty for removal of property affected thereby, see 48-3-16 to 48-3-18 NMSA 1978.

30-16-18. Improper sale, disposal, removal or concealing of encumbered property.

Improper sale, disposal, removal or concealing of encumbered property consists of any person knowingly, and with intent to defraud, selling, transferring, removing or concealing, or in any manner disposing of, any personal property upon which a security interest, chattel mortgage or other lien or encumbrance has attached or been retained, without the written consent of the holder of such security interest, chattel mortgage, conditional sales contract, lien or encumbrance.

Any broker, dealer or any agent, buyer or seller who receives any remuneration whatsoever for transfer of equity or arranges the assumption of any loan on a mobile home or recreational vehicle which has a lien filed upon such vehicle with the motor vehicle division of the transportation department must obtain written consent from the lien holder approving transferee's assumption of transferor's obligation to the lien holder within ten days of such transaction before such transaction is entered into, provided that the lien holder's written consent shall not unreasonably be withheld. Failure to do so constitutes an improper sale, disposal or removal or concealment of encumbered property which is punishable as a petty misdemeanor.

Whoever commits improper sale, disposal, removal or concealing of encumbered property where the value of such property is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

Whoever commits improper sale, disposal, removal or concealing of encumbered property where the value of such property is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

Whoever commits improper sale, disposal, removal or concealing of encumbered property where the value of such property is over two hundred fifty dollars (\$250) but not more than twenty-five hundred dollars (\$2,500) is guilty of a fourth degree felony.

Whoever commits improper sale, disposal, removal or concealing of encumbered property where the value of such property is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

Whoever commits improper sale, disposal, removal or concealing of encumbered property where the value of such property exceeds twenty thousand [thousand] dollars (\$20,000) is guilty of a second degree felony.

History: 1953 Comp., § 40A-16-18, enacted by Laws 1963, ch. 303, § 16-18; 1977, ch. 281, § 1; 1987, ch. 121, § 7.

ANNOTATIONS

The 1987 amendment, effective June 19, 1987, substituted "motor vehicle division of the transportation department" for "New Mexico department of motor vehicles" in the first sentence of the second paragraph and "constitutes" for "will constitute" in the second sentence of that paragraph, added the present fourth and last paragraphs, substituted "two hundred fifty dollars (\$250)" for "one hundred dollars (\$100)" in the fifth paragraph, and substituted "is over twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000)" for "exceeds twenty-five hundred dollars (\$2,500)" in the sixth paragraph.

Validity of former law. - Laws 1929, ch. 46 (40-21-43 to 40-21-45, 1953 Comp.), prohibiting sale, encumbrance or concealment of property held under conditional sales contract, was not void for uncertainty since a person of ordinary intelligence could determine the legislative intent. *State v. Shedoudy*, 45 N.M. 516, 118 P.2d 280 (1941).

"Security interest" refers to encumbrance under Uniform Commercial Code. - By adding the reference "security interest," the legislature recognized a new type of encumbrance set out in the Uniform Commercial Code, 55-1-201(37) NMSA 1978. *State v. Woodward*, 100 N.M. 708, 675 P.2d 1007 (Ct. App. 1983).

Transfers from special account to operating account constituted larceny. - Under the terms of a "special deposit" agreement, funds deposited in a special account by the depositor were to be paid to the order of a third party, who held a security interest in the funds deposited in the account. The depositor's conduct in persuading the bank to make transfers from the special account to its operating account constituted larceny, theft and false pretenses under New Mexico law. *Wells Fargo Bus. Credit v. American Bank of Commerce*, 780 F.2d 871 (10th Cir. 1985).

"Conditional sales contract". - The term "conditional sales contract," as used in former law prohibiting sale, encumbrance or concealment of property held under a

conditional sales contract, meant all contracts intended to hold title to personal property in the former owner, possessor or grantor. *State v. Shedoudy*, 45 N.M. 516, 118 P.2d 280 (1941).

Oral conditional sales contracts not recognized. - Former law dealing with the crime of §1 unlawfully selling or disposing of personal property held under a conditional sales contract evinced a legislative understanding that conditional sales contracts are written instruments and that oral conditional sales contracts are not recognized under our law. *Allison v. Niehaus*, 44 N.M. 342, 102 P.2d 659 (1940).

Criminal intent. - While Laws 1929, ch. 46 (former 40-21-43 to 40-21-45, 1953 Comp.) did not specifically provide that the prohibited acts of a person, obtaining possession of personal property from its owner by a conditional sales contract and selling it without the consent of such owner, before securing title, be done with criminal intent, the act was manifestly designed to protect the interest of such owner, and the wrong inhered in delaying or defrauding him of his right to repossess his property if the conditional sales contract was breached by the buyer, and the specific conduct charged must have been actuated by such intent, to constitute a crime under the statute. *State v. Shedoudy*, 45 N.M. 516, 118 P.2d 280 (1941).

Criminal intent negated. - Where mortgagor removed mortgaged cattle to another state for grazing with oral consent on part of the mortgagee, mortgagor did not have the requisite criminal intent in thus moving the cattle to constitute offense of removing and concealing mortgaged cattle in violation of former law. *Howard v. Singleton*, 55 N.M. 8, 225 P.2d 697 (1950).

Removal and concealment after repossession. - Where the evidence showed that the title holder of an automobile had already repossessed it because of defendant's default at the time defendant took it from garage and concealed it, defendant's taking and concealment, without the consent and knowledge of the title holder, would constitute a crime, but not the crime of unlawfully taking, carrying away and concealing personal property possession of which was obtained under a conditional sales contract. *State v. Shedoudy*, 48 N.M. 354, 151 P.2d 57 (1944).

Failure to sell repossessed collateral not treated as election under 55-9-505 NMSA 1978. - Where a decrease in inventory constitutes a willful and malicious conversion of collateral and a violation of this section, failing to sell the repossessed collateral will not be treated as an election under 55-9-505 NMSA 1978 to retain the collateral in satisfaction of the obligation. *With v. Amador*, 596 F.2d 428 (10th Cir. 1979).

Sale of borrowed motorcycle. - Where defendant sold a motorcycle to the complaining witness, subsequently borrowed it back, and then sold it to a third person, he was guilty of embezzlement; this section would have been applicable if the jury had determined that dealings between the defendant and complaining witness amounted to a secured transaction, but jury necessarily determined they did not. *State v. Gregg*, 83

N.M. 397, 492 P.2d 1260 (Ct. App. 1972), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Argument on value improperly refused. - On charge that buyer under a conditional sales contract obtained possession of an automobile of a finance company and unlawfully took, carried away and concealed such automobile of the value of more than \$100 while its title was in such finance company and without its consent, it was error to refuse to permit accused's counsel to argue whether such value had been established by the evidence. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280 (1941).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15 Am. Jur. 2d Chattel Mortgages §§ 242, 243; 51 Am. Jur. 2d Liens § 60.

Conditional sale, offense of obtaining property by false pretenses predicated upon transaction involving, 134 A.L.R. 874.

Elements and proof of crime of improper sale, removal, concealment, or disposal of property subject to security interest under UCC, 48 A.L.R.4th 819.

77A C.J.S. Sales § 328 et seq.; 79 C.J.S. Supp. Secured Transactions, §§ 75 to 87.

30-16-19. [Shoplifting;] definitions.

As used in Sections 40A-16-19 through 40A-16-23 [40A-16-22] New Mexico Statutes Annotated, 1953 Compilation [30-16-19 to 30-16-23 NMSA 1978]:

A. "store" means a place where merchandise is sold or offered to the public for sale at retail;

B. "merchandise" means chattels of any type or description regardless of the value offered for sale in or about a store; and

C. "merchant" means any owner or proprietor of any store, or any agent, servant or employee of the owner or proprietor.

History: 1953 Comp., § 40A-16-19, enacted by Laws 1965, ch. 5, § 1.

ANNOTATIONS

Compiler's note. - The reference to "40A-16-19 through 40A-16-23 New Mexico Statutes Annotated, 1953 Compilation" apparently was intended to refer to the sections enacted by Laws 1965, ch. 5, which enacted only 40A-16-19 to 40A-16-22 and no 40A-16-23, 1953 Comp., compiled as 30-16-19, 30-16-20, 30-16-22 and 30-16-23 NMSA 1978. Laws 1967, ch. 230, § 1, subsequently added 40A-16-23, 1953 Comp., relating to a different subject matter and which was formerly compiled herein as 30-16-24 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

30-16-20. Crime of shoplifting created.

A. Shoplifting consists of any one or more of the following acts:

(1) willfully taking possession of any merchandise with the intention of converting it without paying for it;

(2) willfully concealing any merchandise with the intention of converting it without paying for it;

(3) willfully altering any label, price tag or marking upon any merchandise with the intention of depriving the merchant of all or some part of the value of it; or

(4) willfully transferring any merchandise from the container in or on which it is displayed to any other container with the intention of depriving the merchant of all or some part of the value of it.

B. Whoever commits shoplifting when the value of the merchandise shoplifted:

(1) is one hundred dollars (\$100) or less is guilty of a petty misdemeanor;

(2) is more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor;

(3) is more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony;

(4) is more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony; or

(5) is more than twenty thousand dollars (\$20,000) is guilty of a second degree felony.

C. Any individual charged with a violation of this section shall not be charged with a separate or additional offense arising out of the same transaction.

History: 1953 Comp., § 40A-16-20, enacted by Laws 1965, ch. 5, § 2; 1969, ch. 24, § 1; 1987, ch. 121, § 8.

ANNOTATIONS

The 1987 amendment, effective June 19, 1987, substituted "one hundred dollars (\$100) or less" for "not more than one hundred dollars (\$100)" in Subsection B(1), redesignated former Subsections B(2) and B(3) as present Subsections B(3) and B(4),

added present Subsections B(2) and B(5), substituted "two hundred fifty dollars (\$250)" for "one hundred dollars (\$100)" in Subsection B(3), and inserted "but not more than twenty thousand dollars (\$20,000)" in Subsection B(4).

Proof of market value. - In the absence of evidence that retail price of \$119.97 did not accurately reflect the value of the merchandise in the retail market, evidence of that price was sufficient for the jury to determine there was a market value of more than \$100, despite a showing that the wholesale price was only \$84.97. *State v. Richardson*, 89 N.M. 30, 546 P.2d 878 (Ct. App. 1976).

"Value" as "market value". - Although New Mexico's property crime statutes do not state how value is to be determined, the decisions have used the term "market value" as the test. *State v. Richardson*, 89 N.M. 30, 546 P.2d 878 (Ct. App. 1976).

"Market value" of merchandise does not include the New Mexico gross receipts tax for the purpose of fixing criminal penalties under this section. *Tunnell v. State*, 99 N.M. 446, 659 P.2d 898 (1983).

Tax not included in determining item's "value" unless included in price. - The amount of gross receipts tax which could have been imposed on a regular sale of merchandise cannot be included for purposes of determining the "value" of the shoplifted item under this section, unless the total advertised retail or actual market price of the merchandise which was shoplifted included the amount of New Mexico gross receipts tax applicable to that particular item of merchandise. *Tunnell v. State*, 99 N.M. 446, 659 P.2d 898 (1983).

Conspiracy does not arise out of same transaction as shoplifting. - A charge of conspiracy does not arise out of the same transaction which results in an indictment for shoplifting, and thus cannot be dismissed as in violation of a statute prohibiting the charging of separate or additional offense if it arises out of the same transaction, notwithstanding proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge. *State v. Leyba*, 93 N.M. 366, 600 P.2d 312 (Ct. App. 1979).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 50 Am. Jur. 2d Larceny § 50.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Validity, construction, and effect of statutes establishing shoplifting or its equivalent as separate criminal offense, 64 A.L.R.4th 1088.

52A C.J.S. Larceny § 1(5).

30-16-21. Civil liability of adult shoplifter; penalty.

Any person who has reached the age of majority and who has been convicted of shoplifting under Section 30-16-20 NMSA 1978, may be civilly liable for the retail value of the merchandise, punitive damages of not less than one hundred dollars (\$100) nor more than two hundred fifty dollars (\$250), costs of the suit and reasonable attorney's fees. However, the merchant shall not be entitled to recover damages for the retail value of any recovered undamaged merchandise.

History: 1953 Comp., § 40A-16-20.1, enacted by Laws 1977, ch. 104, § 1.

30-16-22. Presumptions created.

Any person who willfully conceals merchandise on his person or on the person of another or among his belongings or the belongings of another or on or outside the premises of the store shall be prima facie presumed to have concealed the merchandise with the intention of converting it without paying for it. If any merchandise is found concealed upon any person or among his belongings it shall be prima facie evidence of willful concealment.

History: 1953 Comp., § 40A-16-21, enacted by Laws 1965, ch. 5, § 3.

ANNOTATIONS

Cross-references. - For evidentiary rule regarding presumptions in criminal cases, see Rule 11-302 SCRA 1986.

Section subject to rule of evidence. - There being no statute providing otherwise, the provisions of this section are subject to Rule 303, N.M.R. Evid. (now see Rule 11-303). *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Instructions improper. - Instructions that one who willfully conceals merchandise on his person shall be "prima facie presumed" to have concealed it with intent of converting it without paying for it, and that concealment on one's person or his belongings is "prima facie evidence" of willful concealment, violated Rule 303(c), N.M.R. Evid. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Error not preserved. - Although instructions embodying the language of this section violated Rule 303(c), N.M.R. Evid., requiring instructions on presumptions to be couched in permissive and not mandatory terms, nevertheless since defendant only objected with a general claim that the instructions created an unconstitutional presumption, and did not alert the trial court to the issue under the evidentiary rule, the error would not be considered further. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

Willful concealment established. - Showing that defendant entered store which had just opened for the day with a blanket wrapped around him, went to the rack where the expensive rugs were kept and at the door was found to have a rug under his blanket, hidden and folded up, constituted sufficient evidence for a rational juror to find each of the inferred facts in this section beyond a reasonable doubt, and showed a willful concealment. *State v. Matamoros*, 89 N.M. 125, 547 P.2d 1167 (Ct. App. 1976).

30-16-23. Reasonable detention.

If any law enforcement officer, special officer or merchant has probable cause for believing that a person has willfully taken possession of any merchandise with the intention of converting it without paying for it, or has willfully concealed merchandise, and that he can recover the merchandise by detaining the person or taking him into custody, the law enforcement officer, special officer or merchant may, for the purpose of attempting to affect [effect] a recovery of the merchandise, take the person into custody and detain him in a reasonable manner for a reasonable time. Such taking into custody or detention shall not subject the officer or merchant to any criminal or civil liability.

Any law enforcement officer may arrest without warrant any person he has probable cause for believing has committed the crime of shoplifting. Any merchant who causes such an arrest shall not be criminally or civilly liable if he has probable cause for believing the person so arrested has committed the crime of shoplifting.

History: 1953 Comp., § 40A-16-22, enacted by Laws 1965, ch. 5, § 4.

ANNOTATIONS

Severability clauses. - Laws 1965, ch. 5, § 5, provides for the severability of the act if any part or application thereof is held invalid.

No reasonable cause to detain. - In suit for false imprisonment and defamation, where employee of self-service store testified that he saw one of two women plaintiffs who were shopping together remove the sticker from a box of merchandise and put the box in her purse, the women denied placing the box in the purse, and the box, absent its sticker price tag, was found some 15 feet away from its accustomed place after the release of plaintiffs by the police officers who had detained them, the women's denial placed the evidence as to probable or reasonable cause for believing the women were unlawfully taking goods held for sale into conflict, which conflict the trial court, sitting as trier of fact, with ample support, resolved in favor of the women plaintiffs. *Stienbaugh v. Payless Drug Store, Inc.*, 75 N.M. 118, 401 P.2d 104 (1965).

Defamatory statements in course of investigation. - Even assuming there had existed a privilege in pursuing investigation of supposed shoplifting, whether defamatory statement made by employee in presence of both employees and patrons of the store was made in the exercise of that privilege, was a question for the trier of facts. *Stienbaugh v. Payless Drug Store, Inc.*, 75 N.M. 118, 401 P.2d 104 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Defamation: actionability of accusation or imputation of shoplifting, 29 A.L.R.3d 961.

Rules or instructions: admissibility of defendant's rules or instructions for dealing with shoplifters, in action for false imprisonment or malicious prosecution, 31 A.L.R.3d 705.

False imprisonment action: construction and effect of statute providing for detention of suspected shoplifters by merchant or employee, 47 A.L.R.3d 998.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Liability of storekeeper for injury to customer arising out of pursuit of shoplifter, 14 A.L.R.4th 950.

Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 A.L.R.4th 165.

30-16-24. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 156, § 8 repeals 30-16-24 NMSA 1978, as enacted by Laws 1967, ch. 230, § 1, relating to appropriating trade secrets, effective June 16, 1989. For provisions of former section, see 1984 Replacement Pamphlet. For present comparable provisions, see Chapter 57, Article 3A NMSA 1978.

30-16-25. Credit cards; definitions.

As used in Sections 30-16-25 through 30-16-38 NMSA 1978:

A. "cardholder" means the person or organization identified on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer;

B. "credit card" means any instrument or device, whether known as a credit card, credit plate, charge card, or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining money, goods, services or anything else of value, either on credit, or in consideration of an undertaking or guarantee by the issuer of the payment of a check drawn by the cardholder;

C. "expired credit card" means a credit card which shows on its face that it is outdated;

D. "issuer" means the business organization or financial institution, or its duly authorized agent, which issues a credit card;

E. "participating party" means a business organization, or financial institution, other than the issuer, which acquires for value a sales slip or agreement;

F. "sales slip or agreement" means any writing evidencing a credit card transaction;

G. "merchant" means every person who is authorized by an issuer or a participating party to furnish money, goods, services or anything else of value upon presentation of a credit card by a cardholder;

H. "incomplete credit card" means a credit card upon which a part of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder, has not been stamped, embossed, imprinted or written on it;

I. "revoked credit card" means a credit card for which the permission to use has been suspended or terminated by the issuer, and notice thereof has been given to the cardholder; and

J. "anything of value" includes money, goods and services.

History: 1953 Comp., § 40A-16-24, enacted by Laws 1971, ch. 239, § 1.

ANNOTATIONS

Cross-references. - For fraudulently obtaining telecommunications services, see 30-33-12 to 30-33-14 NMSA 1978.

For Credit Card Act, see 56-4-1 to 56-4-4 NMSA 1978.

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-24, 1953 Comp., relating to definitions regarding credit cards, and Laws 1971, ch. 239, § 1, enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Credit card issuer's liability, under state laws, for wrongful billing, cancellation, dishonor, or disclosure, 53 A.L.R.4th 231.

30-16-26. Theft of a credit card by taking or retaining possession of card taken.

A person who takes a credit card from the person, possession, custody or control of another without the cardholder's consent, or who with knowledge that it has been so taken, acquires or possesses a credit card with the intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder, is guilty of a fourth degree felony. Taking a credit card without consent includes obtaining it by conduct defined or known as statutory larceny, common-law larceny by trespassory taking, common-law

larceny by trick, embezzlement or obtaining property by false pretense, false promise or extortion.

History: 1953 Comp., § 40A-16-25, enacted by Laws 1971, ch. 239, § 2.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-25, 1953 Comp., relating to false statements of financial condition, and Laws 1971, ch. 239, § 2, enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Criminal liability for unauthorized use of credit card, 24 A.L.R.3d 986.

30-16-27. Possession of a credit card stolen, lost, mislaid or delivered by mistake.

A person other than the issuer who receives or possesses a credit card that he knows or has reason to know to have been stolen, lost, mislaid or delivered under a mistake as to the identity or address of the cardholder, and who retains possession thereof with the intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder, is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-16-26, enacted by Laws 1971, ch. 239, § 3.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-26, 1953 Comp., relating to the fraudulent taking, receiving or transfer of a credit card, and Laws 1971, ch. 239, § 3, enacts the above section.

30-16-28. Fraudulent transfer or receipt of a credit card.

A person other than the issuer, or his authorized agent, who, with intent to defraud, transfers possession of a credit card to a person other than the person whose name appears thereon, or a person who with intent to defraud receives possession of a credit card issued in the name of a person other than himself from a person other than the issuer, or his authorized agent, is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-27, enacted by Laws 1971, ch. 239, § 4.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-27, 1953 Comp., relating to the fraudulent making or signing of a credit card, and Laws 1971, ch. 239, § 4, enacts the above section.

30-16-29. Fraudulent taking, receiving or transferring credit cards.

Any person who, with intent to defraud, receives, sells or transfers a credit card by making, directly or indirectly, any false statement of a material fact, either orally or in writing, respecting his identity or financial condition or that of any other person, firm or corporation, is guilty of a misdemeanor.

History: 1953 Comp., § 40A-16-29, enacted by Laws 1971, ch. 239, § 5.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-29, 1953 Comp., relating to fraudulent acts by a merchant, and Laws 1971, ch. 239, § 5, enacts the above section.

30-16-30. Dealing in credit cards of another.

Any person, other than the issuer, who possesses, receives, sells or transfers four or more credit cards, issued in a name or names other than his own in violation of Sections [Section] 30-16-26 or 30-16-27 or 30-16-28 or 30-16-29 NMSA 1978 is guilty of a third degree felony.

History: 1953 Comp., § 40A-16-30, enacted by Laws 1971, ch. 239, § 6.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-30, 1953 Comp., relating to possession of incomplete credit card or machinery, plates or other contrivance, and Laws 1971, ch. 239, § 6, enacts the above section.

30-16-31. Forgery of a credit card.

A person who, with intent to defraud a purported issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, makes or embosses a purported credit card, or alters such a credit card, without the consent of the issuer, is guilty of a fourth degree felony. A person "makes" a credit card when he makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or when he alters a credit card which was validly issued. A person "embosses" a credit card when, without the authorization of the named issuer, he completes a credit card by adding any other matter, other than the signature of a cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder.

History: 1953 Comp., § 40A-16-31, enacted by Laws 1971, ch. 239, § 7.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 239, § 15, repeals 40A-16-31, 1953 Comp., relating to obtaining a fraudulently acquired transportation ticket at a discount, and Laws 1971, ch. 239, § 7, enacts the above section.

30-16-32. Fraudulent signing of credit cards or sales slips or agreements.

Any person, other than a cardholder, or a person authorized by him, who, with intent to defraud, signs the name of another, or of a fictitious person, to a credit card or to a sales slip or agreement is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-32, enacted by Laws 1971, ch. 239, § 8.

ANNOTATIONS

Due process. - The phrase "signs the name of another" does not render this section unconstitutionally vague. *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Equal protection. - This section does not deprive a defendant of equal protection of the law. *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Contention that this section denies equal protection to those who sign the name of another to a credit card, sales slip or agreement because the class of people who use the credit card of another with the same name as theirs, and sign that name, which is both theirs and the cardholder's, are exempt from prosecution, was without merit. *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

This section is directed to prevention of fraud in connection with credit cards, sales slips or agreements and applies when a person with the requisite intent signs a name other than his own or the name of a fictitious person. *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

"Another" means "other than oneself." *State v. Sweat*, 84 N.M. 416, 504 P.2d 24 (Ct. App. 1972).

Each use separate offense. - This section punishes each fraudulent signature. This indicates that the legislature intended to punish each use of a credit card under 30-16-33 NMSA 1978, not the continuing possession and usage of one card. *State v. Salazar*, 98 N.M. 70, 644 P.2d 1059 (Ct. App. 1982).

30-16-33. Fraudulent use of credit cards.

A. A person is guilty of a fourth degree felony if, with intent to defraud, he uses, to obtain anything of value:

(1) a credit card obtained in violation of Sections 30-16-25 through 30-16-38 NMSA 1978; or

(2) a credit card which is invalid, expired or revoked; or

(3) a credit card while fraudulently representing that he is the cardholder named on the credit card, or an authorized agent or representative of the cardholder named on the credit card; or

(4) a credit card issued in the name of another without the consent of the person to whom the card has been issued.

B. If the value of all things of value obtained by any person from one or more merchants, an issuer or a participating party, in violation of this section, exceeds three hundred dollars (\$300) in any consecutive six months period, then the offense of the violator is a third degree felony.

History: 1953 Comp., § 40A-16-33, enacted by Laws 1971, ch. 239, § 9.

ANNOTATIONS

Each use separate offense. - Section 30-16-32 NMSA 1978 punishes each fraudulent signature. This indicates that the legislature intended to punish each use of a credit card under this section, not the continuing possession and usage of one card. *State v. Salazar*, 98 N.M. 70, 644 P.2d 1059 (Ct. App. 1982).

Consent. - Consent is not an essential element of the crime defined in Subdivision A(3) of this section. *State v. Lopez*, 85 N.M. 742, 516 P.2d 1125 (Ct. App. 1973).

Admissibility of related incident. - In prosecution for charging purchase on credit card belonging to another, admission of testimony of a subsequent attempt to charge additional purchases on the following day at the same store was not erroneous, as the second incident was strong evidence of defendant's intent and his plan, and the concurrence of time, place and modus operandi also tended to establish the identity of the accused. *State v. Lopez*, 85 N.M. 742, 516 P.2d 1125 (Ct. App. 1973).

Opinion evidence on intent. - It was error to allow store employee who dealt with defendant to express opinion on whether he had reason to believe that defendant intended to defraud the establishment, but considering the strong evidence in the record, this error was not prejudicial. *State v. Lopez*, 85 N.M. 742, 516 P.2d 1125 (Ct. App. 1973).

Arrest valid. - Where arresting officer had reasonable grounds to believe that person arrested had committed the crime of misusing an expired credit card, the arrest was valid. *Stone v. United States*, 385 F.2d 713 (10th Cir. 1967), cert. denied, 391 U.S. 966, 88 S. Ct. 2038, 20 L. Ed. 2d 880 (1968).

30-16-34. Fraudulent acts by merchants or their employees.

A. Any merchant or the employee of any merchant is guilty of a fourth degree felony if, with intent to defraud, he furnishes or allows to be furnished anything of value upon presentation of a credit card obtained or retained in violation of Sections 30-16-25 through 30-16-38 NMSA 1978, or fraudulently made or embossed, or fraudulently signed, or a credit card which he knows is invalid, expired or revoked, or a credit card presented by a person whom he knows is not the cardholder named on the credit card or an authorized agent or representative of the cardholder named on the credit card. If the value of anything furnished by a merchant, or by an employee of a merchant, in violation of this section exceeds three hundred dollars (\$300), in any consecutive six months period, then the offense is a third degree felony.

B. Any merchant or the employee of any merchant is guilty of a fourth degree felony if, with intent to defraud, he fails to furnish anything of value which he represents in writing to the issuer or to a participating party that he has furnished on a credit card or cards of the issuer. If the difference between the value of anything actually furnished to any person or persons and the value represented by the merchant to the issuer or participating party exceeds three hundred dollars (\$300) in any consecutive six months period, then the offense is a third degree felony.

History: 1953 Comp., § 40A-16-34, enacted by Laws 1971, ch. 239, § 10.

ANNOTATIONS

Falsifying invoice. - Charge that service station operator falsified an invoice covering a credit card transaction in order to reflect a sale which had not occurred was not within the scope of former credit card statute making it a misdemeanor to use another's card without his consent, and defendant was properly prosecuted under the forgery statute. *State v. Cowley*, 79 N.M. 49, 439 P.2d 567 (Ct. App.), cert. denied, 79 N.M. 98, 440 P.2d 136 (1968).

30-16-35. Possession of incomplete credit cards or machinery, plates or other contrivance.

A. Any person who possesses an incomplete credit card, with intent to defraud, is guilty of a misdemeanor. Possession of four or more incomplete credit cards, with intent to defraud, is a fourth degree felony.

B. Any person, who with intent to defraud, possesses machinery, plates or any other contrivance designed to reproduce instruments purporting to be credit cards of an issuer who has not consented to the preparation of such credit cards, is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-35, enacted by Laws 1971, ch. 239, § 11.

30-16-36. Receipt of property obtained in violation of act.

Any person who receives the money, goods, services or anything else of value obtained in violation of Section 30-16-33 NMSA 1978, and who knows or has reason to believe that it was so obtained, violates this section. The degree of the offense is determined as follows:

A. if the value of all things of value obtained from any person or persons in violation of this section is one hundred dollars (\$100) or less in any consecutive six months period, then the offense is a petty misdemeanor;

B. if the value of all things of value obtained from any person or persons in violation of this section is more than one hundred dollars (\$100) but less than three hundred dollars (\$300) in any consecutive six months period, then the offense is a fourth degree felony;

C. if the value of all things of value obtained from any person or persons in violation of this section is three hundred dollars (\$300) or more in any consecutive six months period, then the offense is a third degree felony.

History: 1953 Comp., § 40A-16-36, enacted by Laws 1971, ch. 239, § 12.

30-16-37. Obtaining fraudulently acquired transportation ticket at a discount.

Any person who obtains, at a discount price, a ticket issued by an airline, railroad, steamship or other transportation company, which ticket was acquired in violation of Section 30-16-33 NMSA 1978, without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it, shall be presumed to know that the ticket was acquired under circumstances constituting a violation of Section 30-16-33 NMSA 1978, and shall be guilty of a fourth degree felony.

History: 1953 Comp., § 40A-16-37, enacted by Laws 1971, ch. 239, § 13.

30-16-38. Applicability of other laws.

The provisions of Sections 30-16-25 through 30-16-38 NMSA 1978 shall not be construed to preclude the applicability of any other provision of the criminal law of this state or any municipality thereof that presently applies or may in the future apply to any transaction that violates the cited provisions, unless the other state or municipal law is inconsistent with the terms of the cited provisions.

History: 1953 Comp., § 40A-16-38, enacted by Laws 1971, ch. 239, § 14.

ANNOTATIONS

Severability clauses. - Laws 1971, ch. 239, § 16, provides for the severability of the act if any part or application thereof is held invalid.

30-16-39. Fraudulent acts to obtain or retain possession of rented or leased vehicle or other personal property; penalty.

Any person who rents or leases a vehicle or other personal property and obtains or retains possession of it by means of any false or fraudulent representation, fraudulent concealment, false pretense or personation, trick, artifice or device, including but not limited to a false representation as to his name, residence, employment or operator's license is guilty:

A. of a fourth degree felony if the property is a vehicle or has a value in excess of one hundred dollars (\$100); or

B. of a petty misdemeanor if the property is not a vehicle and has a value of one hundred dollars (\$100) or less.

History: 1953 Comp., § 40A-16-39, enacted by Laws 1972, ch. 23, § 1; 1979, ch. 251, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

30-16-40. Fraudulent refusal to return a leased vehicle or other personal property; penalty; presumption.

A. Any person who, after leasing a vehicle or other personal property under a written agreement which provides for the return of the vehicle or personal property to a particular place at a particular time and who, with intent to defraud the lessor of the vehicle or personal property, fails to return the vehicle or personal property to the place within the time specified, is guilty:

(1) of a fourth degree felony if the property is a vehicle or has a value in excess of one hundred dollars (\$100); or

(2) of a petty misdemeanor if the property is not a vehicle and has a value of one hundred dollars (\$100) or less.

B. Failure of the lessee to return the vehicle or personal property to the place specified within seventy-two hours after mailing to him by certified mail at his address shown on the leasing agreement of a written demand to return the vehicle or personal property

shall raise a rebuttable presumption that the failure to return the vehicle or personal property was with intent to defraud.

History: 1953 Comp., § 40A-16-40, enacted by Laws 1973, ch. 154, § 1; 1979, ch. 251, § 2.

ANNOTATIONS

Cross-references. - For evidentiary rule regarding presumptions in criminal cases, see Rule 11-302 SCRA 1986.

Repeals and reenactments. - Laws 1973, ch. 154, § 1, repealed former 40A-16-40, 1953 Comp., relating to refusal to return rented or leased vehicle after notice, and enacted a new 40A-16-40, 1953 comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. - State regulation of motor vehicle rental ("you-drive") business, 60 A.L.R.4th 784.

30-16-41 to 30-16-45. Repealed.

ANNOTATIONS

Repeals. - Laws 1991, ch. 112, § 10 repeals 30-16-41 to 30-16-45 NMSA 1978, as enacted by Laws 1974, ch. 89, §§ 1 and 2 and Laws 1975, ch. 335, § 2, and as amended by Laws 1975, ch. 335, § 1 and Laws 1983, ch. 301, § 2, relating to unauthorized recording and forfeitures, effective July 1, 1991. For provisions of former sections, see 1984 Replacement Pamphlet. For present comparable provisions, see ch. 30, art. 16B NMSA 1978.

30-16-46. Legislative finding.

The legislature finds that thefts of crude petroleum oil are a significant problem in this state, and that due to the fungible nature of the product and difficulty of identification and apprehension, extraordinary measures are necessary.

History: Laws 1981, ch. 257, § 1.

30-16-47. Documentation required.

A. Any person in possession of crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both for transportation by motor vehicle from or to storage, disposal, processing or refining must also possess specific documentation required by regulation of the oil conservation division of the energy and minerals department, hereinafter in this act [30-16-46 to 30-16-48 NMSA 1978] called "division," which substantiates his right to be in possession of the

estimated volume of crude petroleum oil carried in that vehicle. The regulation shall require the documentation to include:

- (1) the identity of the operator and the location of the lease from which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both, if it is purportedly being transported from a lease; and
- (2) the identity of the operator of and the location of the storage facility from which or to which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both is being transported; and
- (3) the identity of the operator of and the location of the disposal, processing or refining facility to which the crude petroleum oil or any sediment, water or brine produced in association with the production of oil or gas or both is being transported; and
- (4) the estimated percentage of crude petroleum oil in the sediment, water or brine produced in association with the production of oil or gas or both, which is being transported; or
- (5) the volume of crude petroleum oil being transported; and
- (6) any additional information the division finds necessary or convenient.

B. Any person who stores, processes, disposes of or refines any volume of crude petroleum oil must possess specific documentation as prescribed by regulation of the division which substantiates his right to be in possession of the volume of crude petroleum oil he possesses or in possession of an amount of crude petroleum oil which could reasonably justify the amount of processed or refined products produced by him from crude petroleum oil, and in his possession or sold by him.

History: Laws 1981, ch. 257, § 2.

30-16-48. Penalty; further investigation.

Any person who is found within any geographical area of the state designated by regulation of the division as a crude petroleum oil producing area, in possession of crude petroleum oil, sediment, water or brine produced in association with the production of oil or gas or both, which contains crude petroleum oil, and does not, on a reasonable request of any state police officer or other law enforcement officer as defined in Section 29-7-9 NMSA 1978, produce the required documentation for examination and inspection is guilty of a misdemeanor. If the documentation is produced but differs substantially from the load the transporter is carrying, or differs substantially from crude petroleum oil or processed or refined products produced by him from crude petroleum oil, and in his possession or sold by him, it shall be substantial evidence supporting further investigation by such officer or agent of possible theft of crude petroleum oil.

History: Laws 1981, ch. 257, § 3.

ANNOTATIONS

Compiler's note. - Section 29-7-9, referred to in this section, was repealed by Laws 1988, ch. 58, § 7. For present comparable provisions, see 29-7-7F NMSA 1978.

ARTICLE 16A COMPUTER CRIMES

(Repealed by Laws 1989, ch. 215, § 8.)

30-16A-1 to 30-16A-4. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 215, § 8 repeals 30-16A-1 to 30-16A-4 NMSA 1978, as enacted by Laws 1979, ch. 176, §§ 1 and 2 and as amended by Laws 1987, ch. 121, §§ 9 to 10, relating to computer crimes, effective June 16, 1989. For provisions of former sections, see 1984 Replacement Pamphlet and 1988 Cumulative Supplement. For present comparable provisions, see 30-45-1 NMSA 1978 et seq.

ARTICLE 16B UNAUTHORIZED RECORDING

30-16B-1. Short title.

Sections 1 through 9 [30-16B-1 to 30-16B-9 NMSA 1978] of this act may be cited as the "Unauthorized Recording Act".

History: Laws 1991, ch. 112, § 1.

30-16B-2. Definitions.

As used in the Unauthorized Recording Act [30-16B-1 to 30-16B-9 NMSA 1978]:

A. "audiovisual recording" means a recording on which images, including images accompanied by sound, are recorded or otherwise stored, including motion picture film, video cassette, video tape, video disc, other recording mediums or a copy that duplicates in whole or in part the original, but does not include recordings produced by an individual for personal use that are not commercially distributed for profit;

B. "fixed" means embodied in a recording or other tangible medium of expression, by or under the authority of the owner, so that the matter embodied is sufficiently permanent

or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration;

C. "live performance" means a recitation, rendering or playing of a series of images, musical, spoken or other sounds, or a combination of images and sounds;

D. "manufacturer" means any person who actually transfers or causes the transfer of a recording, or assembles and transfers any product containing any recording as a component thereof, but does not include the manufacturer of a cartridge or casing for a recording;

E. "owner" means a person who owns the sounds or images fixed in a master phonograph record, master disc, master tape, master film or other recording on which sound or image is or can be recorded and from which the transferred recorded sounds or images are directly or indirectly derived;

F. "person" means any individual, firm, partnership, corporation, association or other entity;

G. "recording" means a tangible medium on which sounds, images or both are recorded or otherwise stored, including an original phonograph record, disc, tape, audio cassette or videocassette, wire, film or other medium now existing or developed later on which sounds, images or both are or can be recorded or otherwise stored, or a copy or reproduction that duplicates in whole or in part the original;

H. "tangible medium of expression" means the material object on which sounds, images or a combination of both are fixed by any method now known or later developed, and from which the sounds, images or combination of both can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device; and

I. "transfer" means to duplicate a recording from one tangible medium of expression to another recording.

History: Laws 1991, ch. 112, § 2.

30-16B-3. Unauthorized recording; prohibited act; penalties.

A. It is unlawful for any person to:

(1) knowingly transfer for sale or cause to be transferred any recording with intent to sell it or cause it to be sold or use it or cause it to be used for commercial advantage or private financial gain without the consent of the owner;

(2) transport within this state, for commercial advantage or private financial gain, a recording with the knowledge that the sounds have been transferred without the consent of the owner; or

(3) advertise or offer for sale, sell, rent or cause the sale, resale or rental of, or possess for one or more of these purposes, any recording that the person knows has been transferred without the consent of the owner.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves one hundred or more unauthorized recordings embodying sound or seven or more audiovisual recordings during a one-hundred-eighty-day period, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves less than one hundred unauthorized recordings embodying sound or less than seven audiovisual recordings during a one-hundred-eighty-day period, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 1991, ch. 112, § 3.

30-16B-4. Required labeling; penalties.

A. It is unlawful for any person, for commercial advantage or private financial gain, to advertise, offer for sale or resale, sell, resell, lease or possess for any of these purposes, any recording that the person knows does not contain the true name of the manufacturer in a prominent place on the cover, jacket or label of the recording.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves one hundred or more unauthorized recordings embodying sound or seven or more audiovisual recordings during a one-hundred-eighty-day period, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves less than one hundred unauthorized recordings embodying sound or less than seven audiovisual recordings during a one-hundred-eighty-day period, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

History: Laws 1991, ch. 112, § 4.

30-16B-5. Unauthorized recording of live performances; penalties.

A. It is unlawful for any person, for commercial advantage or private financial gain to advertise, offer for sale, sell, rent, transport, cause the sale, resale, rental or transportation of or possess for one or more of these purposes a recording of a live performance that has been recorded or fixed without the consent of the owner.

B. Any person violating the provisions of Subsection A of this section:

(1) when the offense involves one hundred or more unauthorized recordings embodying sound or seven or more audiovisual recordings during a one-hundred-eighty-day period, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) when the offense involves less than one hundred unauthorized recordings embodying sound or less than seven audiovisual recordings during a one-hundred-eighty-day period, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978.

C. In the absence of a written agreement or law to the contrary, the performer of a live performance is presumed to own the rights to record or fix those sounds.

D. For the purposes of this section, a person who is authorized to maintain custody and control over business records that reflect whether the owner of the live performance consented to having the live performance recorded or fixed is a competent witness in a proceeding regarding the issue of consent.

History: Laws 1991, ch. 112, § 5.

30-16B-6. Exemptions.

The provisions of the Unauthorized Recording Act [30-16B-1 to 30-16B-9 NMSA 1978] do not apply to:

A. any radio or television broadcaster who transfers any recording as part of, or in connection with, a radio or television broadcast transmission or for archival preservation;

B. any recording defined as a public record of any court, legislative body or proceedings of a public body, whether or not a fee is charged or collected for copies; or

C. any person who transfers a recording for his personal use and who does not derive any commercial advantage or private financial gain from the transfer.

History: Laws 1991, ch. 112, § 6.

30-16B-7. Construction.

Nothing in the Unauthorized Recording Act [30-16B-1 to 30-16B-9 NMSA 1978] shall enlarge or diminish the rights of parties in private litigation.

History: Laws 1991, ch. 112, § 7.

30-16B-8. Forfeitures; property subject.

The following are subject to forfeiture:

- A. all equipment, devices or articles that have been produced, reproduced, manufactured, distributed, dispensed or acquired in violation of the Unauthorized Recording Act [30-16B-1 to 30-16B-9 NMSA 1978];
- B. all devices, materials, products and equipment of any kind that are used or intended for use in producing, reproducing, manufacturing, processing, delivering, importing or exporting any item set forth in, and in violation of, the Unauthorized Recording Act;
- C. all books, business records, materials and other data that are used, or intended for use, in violation of Section 3, 4 or 5 of the Unauthorized Recording Act; and
- D. money or negotiable instruments that are the fruit or instrumentality of the crime.

History: Laws 1991, ch. 112, § 8.

30-16B-9. Forfeiture; procedure.

- A. Property subject to forfeiture under the Unauthorized Recording Act [30-16B-1 to 30-16B-9 NMSA 1978] may be seized by any enforcement officer upon an order issued by the district court having jurisdiction.
- B. Seizure without such an order may be made if:
 - (1) the seizure is incident to an arrest or search under a valid search warrant or an inspection under an administrative inspection warrant;
 - (2) the property subject to seizure has been the subject of a prior judgment in favor of the state in an injunction or forfeiture proceeding based upon the Unauthorized Recording Act; or
 - (3) the enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of the Unauthorized Recording Act.
- C. In the event of seizure pursuant to Subsection A of this section, proceedings under Subsection D of this section and the Rules of Civil Procedure for the District Court shall be instituted promptly and not later than thirty days after seizure.
- D. Property taken or detained under this section shall not be subject to replevin but is deemed to be in the custody of the seizing police department or agency subject only to the orders and decrees of the district court. When property is seized under the Unauthorized Recording Act, the enforcement officer may:

(1) place the property under seal; or

(2) remove the property to a place designated by the court or head of the officer's department or agency for disposition in accordance with law.

E. When property is forfeited under the Unauthorized Recording Act, the seizing police department or agency shall:

(1) sell that which is not required to be destroyed by law and the proceeds shall revert to the general fund;

(2) take custody of the property for use by law enforcement agencies in the enforcement of the Unauthorized Recording Act for disposition in accordance with law; or

(3) forward property, the proceeds from the sale of which are not required to revert to the general fund, to the property control division of the general services department for disposition.

History: Laws 1991, ch. 112, § 9.

ARTICLE 17

FIRE

30-17-1. Improper handling of fire.

Improper handling of fire consists of:

A. setting fire, or causing or procuring a fire to be set to any inflammable vegetation or forest material, growing or being on the lands of another person and without the permission of the owner thereof;

B. allowing fire to escape or spread from the control of the person having charge thereof without using reasonable and proper precaution to prevent such fire from escaping or spreading;

C. burning any inflammable vegetation or forest material, whether upon his own land or that of another person, without using proper and reasonable precaution at all times to prevent the escape of such fire;

D. leaving any campfire burning and unattended upon the lands of another person; or

E. causing a fire to be started in any inflammable vegetation or forest material, growing or being upon the lands of another person, by means of any lighted cigar, cigarette, match or other manner, and leaving such fire unquenched.

Provided, nothing herein shall constitute improper handling of fire where the fire is a backfire set for the purpose of stopping the progress of a fire then actually burning.

Whoever commits improper handling of fire is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-17-1, enacted by Laws 1963, ch. 303, § 17-1.

ANNOTATIONS

Cross-references. - For arson, see 30-17-5, 30-17-6 NMSA 1978.

For provisions covering the lighting, leaving or failure to extinguish fires on state lands, see 19-6-1, 19-6-2 NMSA 1978.

Law reviews. - For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 Am. Jur. 2d Fires §§ 5, 6.

Liability of property owner for damages from spread of accidental fire originating on property, 17 A.L.R.5th 547.

36A C.J.S. Fires §§ 2, 3.

30-17-2. Use of an engine without spark arrester.

Use of an engine without spark arrester consists of using or operating any locomotive, logging engine, portable engine, traction engine or stationary engine using any combustible fuel when such engine is not provided with an adequate spark arrester kept in constant use and repair.

Escape of fire or live sparks from any engine shall be prima facie evidence that such engine has not been adequately equipped with a spark arrester in compliance with this section.

Whoever commits use of an engine without spark arrester is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-17-2, enacted by Laws 1963, ch. 303, § 17-2.

ANNOTATIONS

Cross-references. - For provisions authorizing counties to require railroads to maintain fireguards, see 63-3-25 to 63-3-27 NMSA 1978.

30-17-3. Repealed.

ANNOTATIONS

Repeals. - Laws 1981, ch. 246, § 8, repeals 30-17-3 NMSA 1978, relating to interference with fire controls, effective April 8, 1981.

30-17-4. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 346, § 13 repeals 30-17-4 NMSA 1978, effective February 1, 1990. For former provisions, see 1984 Replacement Pamphlet. For present comparable provisions, see 60-2C-1 NMSA 1978 et seq.

30-17-5. Arson and negligent arson.

A. Arson consists of maliciously or willfully starting a fire or causing an explosion with the purpose of destroying or damaging any building, occupied structure or property of another, or bridge, utility line, fence or sign; or with the purpose of destroying or damaging any property, whether the person's own or another's, to collect insurance for such loss.

(1) Whoever commits arson when the value of the thing destroyed or damaged is one hundred dollars (\$100) or less is guilty of a misdemeanor.

(2) Whoever commits arson when the value of the thing destroyed or damaged is over one hundred dollars (\$100) but not more than one thousand dollars (\$1,000) is guilty of a fourth degree felony.

(3) Whoever commits arson when the value of the thing destroyed or damaged exceeds one thousand dollars (\$1,000) is guilty of a third degree felony.

B. Negligent arson consists of recklessly starting a fire or causing an explosion, whether on the person's property or another's, and thereby directly causing the death or bodily injury of another; or damaging or destroying a building or occupied structure of another.

Whoever commits negligent arson is guilty of a fourth degree felony.

C. As used in this section, "occupied structure" includes a boat, trailer, car, airplane, structure or place adapted for the transportation or storage of property or for overnight accommodations of persons or for carrying on business therein, whether or not a person is actually present.

History: 1953 Comp., § 40A-17-5, enacted by Laws 1970, ch. 39, § 1.

ANNOTATIONS

Cross-references. - For petty misdemeanor of improper handling of fire, see 30-17-1 NMSA 1978.

For provisions covering the lighting, leaving or failure to extinguish fires on state lands, see 19-6-1, 19-6-2 NMSA 1978.

Repeals and reenactments. - Laws 1970, ch. 39, § 1, repeals 40A-17-5, 1953 Comp., and enacts the above section.

Former law invalid. - Former section defining arson, which did not require malice or intent to do wrongful act and could be used to punish innocent and beneficial destruction of property, was an unreasonable exercise of police power and was invalid. *State v. Dennis*, 80 N.M. 262, 454 P.2d 276 (Ct. App. 1969).

Negligent arson not lesser included offense of malicious arson. - Where defendant had not been formally charged with negligent arson, and that offense was not a lesser included offense of malicious arson, of which he was charged, defendant's conviction of negligent arson was subject to reversal. *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

Merger with crime of dangerous use of explosives. - The crime of dangerous use of explosives merges into a conviction for arson. *State v. Rodriguez*, 113 N.M. 767, 833 P.2d 244 (Ct. App.), cert. denied, 113 N.M. 636, 830 P.2d 553 (1992).

Destruction or damage of automobile by fire or explosion. - Section 64-9-6 D, 1953 Comp. (now repealed but similar to 66-3-506 NMSA 1978), was a general statute directed to destroying or damaging an automobile, whereas this section is a specific statute directed to destroying or damaging an automobile by fire or explosion, and is the applicable statute to charge one with arson of an automobile having a value in excess of \$1,000. *State v. Martinez*, 91 N.M. 804, 581 P.2d 1299 (Ct. App. 1978).

Merger of arson with crime of aggravated assault. - Conviction of arson requires proof of intent to damage property; conviction of aggravated assault requires proof of use of a deadly weapon to assault or strike at another. Convictions of arson and aggravated assault do not merge because they require proof of different facts and theories. *State v. Rodriguez*, 113 N.M. 767, 833 P.2d 244 (Ct. App.), cert. denied, 113 N.M. 636, 830 P.2d 553 (1992).

Conviction of accessory where principal unknown. - Circumstantial evidence that defendant aided and abetted arsonist, who was unknown, was sufficient to sustain conviction of defendant under this section. *State v. Atwood*, 83 N.M. 416, 492 P.2d 1279 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Aiding and abetting shown. - Evidence that defendant borrowed a water bottle when one was already at his business, purchased dynamite, fuse and caps for a friend "ready for them," caused these items to be left outside a motel room in Roswell where "the

party would pick it up," and was at the motel an hour later (after the material was left outside the motel room door) was sufficient to establish that he aided and abetted the arson at his place of business two hours after he was observed at the motel. *State v. Atwood*, 83 N.M. 416, 492 P.2d 1279 (Ct. App. 1971), cert. denied, 83 N.M. 395, 492 P.2d 1258 (1972).

Conspiracy to damage and burn insured business. - For a conspiracy to burn an insured business after making it appear to have been burglarized and vandalized, defendant could be prosecuted under both this section and 30-15-3 NMSA 1978, but only a single penalty could be validly imposed. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Where conspiracy to burglarize and vandalize an insured business prior to proposed arson was directed to acts not covered hereunder, this section did not function as a special provision prohibiting the prosecution of defendant under 30-15-3 NMSA 1978, for the aspect of the conspiracy directed toward the burglary and vandalism. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Conspiracy to commit arson outside state. - In a prosecution for conspiracy to burn defendant's own grain elevator in another state, it was necessary to prove that such burning was arson in the sister state. *State v. Henneman*, 40 N.M. 166, 56 P.2d 1130 (1936).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Arson and Related Offenses §§ 1 to 12.

Criminal responsibility of one cooperating in offense of arson which he is incapable of committing personally, 5 A.L.R. 783, 74 A.L.R. 1110, 131 A.L.R. 1322.

Ownership of property as affecting criminal liability for burning thereof, 17 A.L.R. 1168.

Evidence: admissibility, in prosecution for criminal burning of property, or for maintaining fire hazard, of evidence of other fires, 87 A.L.R.2d 891.

Single act affecting multiple victims as constituting multiple assaults or homicides, 8 A.L.R.4th 960.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

6A C.J.S. Arson §§ 1 to 22.

30-17-6. Aggravated arson.

Aggravated arson consists of the willful or malicious damaging by any explosive substance or the willful or malicious setting fire to any bridge, aircraft, watercraft, vehicle, pipeline, utility line, communication line or structure, railway structure, private or public building, dwelling or other structure, causing a person great bodily harm.

Whoever commits aggravated arson is guilty of a second degree felony.

History: 1953 Comp., § 40A-17-6, enacted by Laws 1963, ch. 303, § 17-6.

ANNOTATIONS

Cross-references. - For meaning of "great bodily harm," see 30-1-12 NMSA 1978.

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Vacancy or nonoccupancy of building as affecting its character as "dwelling" as regards arson, 44 A.L.R.2d 1456.

What constitutes "burning" to justify charge of arson, 28 A.L.R.4th 482.

Pyromania and the criminal law, 51 A.L.R.4th 1243.

ARTICLE 18 ANIMALS

30-18-1. Cruelty to animals.

Cruelty to animals consists of:

A. torturing, tormenting, depriving of necessary sustenance, cruelly beating, mutilating, cruelly killing or overdriving any animal;

B. unnecessarily failing to provide any animal with proper food or drink; or

C. cruelly driving or working any animal when such animal is unfit for labor.

Whoever commits cruelty to animals is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-18-1, enacted by Laws 1963, ch. 303, § 18-1.

ANNOTATIONS

Cross-references. - For dog fighting, see 30-18-9 NMSA 1978.

Meaning of "torture" and "torment". - The words "torture" and "torment" are commonly defined to include every act, omission or neglect whereby unjustified physical pain and suffering or death is caused or permitted. State v. Buford, 65 N.M. 51, 331 P.2d 1110 (1958).

Animals included. - No legislative intent appears to restrict the sanction of this section to any particular class of animals. 1963-64 Op. Att'y Gen. No. 64-86.

The language of former 40-4-3, 1953 Comp., seemed to apply only to brute creatures and work animals, and the history showed that it was passed in relation to other laws governing livestock. State v. Buford, 65 N.M. 51, 331 P.2d 1110 (1958).

Cockfighting. - Cruelty to animal statute (former 40-4-3, 1953 Comp.) was not passed with the intention of prohibiting such sports as cockfighting. State v. Buford, 65 N.M. 51, 331 P.2d 1110 (1958).

Cruel sport. - Placing of a live coon in a shallow barrel which is swiveled to rotate around a pole when pushed, with the object of finding which hound dog can pull the coon out of the barrel in the shortest time, constitutes cruelty to animals as defined in this section. 1963-64 Op. Att'y Gen. No. 64-86.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Animals §§ 27 to 29.

Applicability of state animal cruelty statute to medical or scientific experimentation employing animals, 42 A.L.R.4th 860.

What constitutes offense of cruelty to animals - modern cases, 6 A.L.R.5th 733.

3A C.J.S. Animals §§ 99 to 116.

30-18-2. Injury to animals.

Injury to animals consists of willfully and maliciously poisoning, killing or injuring any animal or domesticated fowl which is the property of another.

Whoever commits injury to animals is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-2, enacted by Laws 1963, ch. 303, § 18-2.

ANNOTATIONS

Cross-references. - For description of bovine animal in indictment, see 31-7-1 NMSA 1978.

Intent. - Laws 1919, ch. 82, § 1 (former 40-4-2, 1953 Comp.), relating to killing, injuring or attempting to poison an animal, required intent that poisoned food left exposed be taken and swallowed by animals, but one who placed such poisoned food in a pasture which was subsequently rented for grazing purposes was liable to lessee for negligence, regardless of statute. *Reif v. Morrison*, 44 N.M. 201, 100 P.2d 229 (1940); *State v. Anderson*, 40 N.M. 173, 56 P.2d 1134 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 3A C.J.S. Animals §§ 274 to 332.

30-18-2.1. Malicious slaughter of domestic canine animals.

Malicious slaughter of domestic canine animals consists of willfully and maliciously poisoning or killing any two or more domestic canine animals as part of a pattern of activity involving the slaughter of two or more domestic canine animals within a period of one month unless such animals are found on the property of the person killing them and constitute a threat or menace to human safety or to livestock, poultry or similar property or are killed in close proximity to a farm or ranch where they have killed or injured livestock, poultry or similar property.

Whoever commits malicious slaughter of domestic canine animals is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for a definite term less than one year or to the payment of a fine of not less than one thousand dollars (\$1,000) nor more than two thousand five hundred dollars (\$2,500) or to both such fine and imprisonment in the discretion of the judge.

History: 1978 Comp., § 30-18-2.1, enacted by Laws 1981, ch. 226, § 1.

30-18-3. Unlawful branding.

Unlawful branding consists of either:

A. branding, marking or causing to be branded or marked any animal, which is the property of another, with any brand not the brand of the owner of the animal;

B. defacing or obliterating any brand or mark upon any animal which is the property of another; or

C. using any brand unless said brand shall have been duly recorded in the office of the cattle sanitary board of New Mexico [New Mexico livestock board] or the sheep sanitary board of New Mexico [New Mexico livestock board], whichever is applicable, and the person holds a certificate from the cattle sanitary board [New Mexico livestock board] or the sheep sanitary board [New Mexico livestock board] certifying to the fact of such record.

Whoever commits unlawful branding is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-18-3, enacted by Laws 1963, ch. 303, § 18-3.

ANNOTATIONS

Cross-references. - For description of bovine animal in a criminal indictment, see 31-7-1 NMSA 1978.

For Livestock Code, see 77-2-1 NMSA 1978 et seq.

For provisions regarding the branding of animals, and penalties for violation thereof, see 77-9-1 NMSA 1978 et seq.

New Mexico livestock board. - Section 47-2-1, 1953 Comp., establishing the cattle sanitary board, and 47-8-2, 1953 Comp., establishing the sheep sanitary board and related sections, were repealed by Laws 1967, ch. 213, § 12. Section 77-2-2 NMSA 1978 creates the New Mexico livestock board, and provides that reference to the above-mentioned sanitary boards shall mean the livestock board.

Due process. - Subsection C is a reasonable exercise of the police power of New Mexico; in the light of its purpose, its application to innocent acts and the felony penalty it provides do not violate due process requirements. *State v. Vickery*, 85 N.M. 389, 512 P.2d 962 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Equal protection. - As 77-9-4 NMSA 1978 applies to branding requirements generally while Subsection C of this section applies specifically to the use of an unrecorded brand, one section does not provide a different penalty for the identical act prohibited by the other, and hence these sections do not violate the requirement of equal protection of the laws. *State v. Vickery*, 85 N.M. 389, 512 P.2d 962 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Purpose. - The purpose of Subsection C is to prevent a kind of theft peculiarly easy of commission and difficult of discovery and punishment, and to afford special protection to the important industry of stockraising. *State v. Vickery*, 85 N.M. 389, 512 P.2d 962 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973); *State v. Thompson*, 57 N.M. 459, 260 P.2d 370 (1953).

Criminal intent is not element of crime stated in Subsection C. *State v. Vickery*, 85 N.M. 389, 512 P.2d 962 (Ct. App.), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973).

Brand not proof of defendant's ownership. - Proof that calf bore defendant's brand in prosecution for stealing and branding the animal did not constitute prima facie evidence that defendant owned the animal under statute providing that registration in the brand book under seal of the cattle sanitary board (now New Mexico livestock board) constituted prima facie proof that person owning recorded brand was owner of animal branded with such brand. *State v. Reed*, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Indictment defective. - An indictment under Laws 1919, ch. 57, § 1 (former 40-4-15, 1953 Comp.), prohibiting branding of unmarked animals with mark not the recorded, kept up or running mark or brand of the user, was fatally defective if it failed to allege that the brand was placed upon an unbranded animal. State v. Lopez, 28 N.M. 216, 210 P. 567 (1922).

Instructions on circumstantial evidence. - Instruction on circumstantial evidence concerning the stealing and unlawful branding of a bull calf was not erroneous because of inclusion of statement "that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant." State v. Reed, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

The court was not required to give an instruction on circumstantial evidence which was cumulative. State v. Reed, 55 N.M. 231, 230 P.2d 966 (1951), cert. denied, 342 U.S. 932, 72 S. Ct. 374, 96 L. Ed. 694 (1952).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 3A C.J.S. Animals §§ 23 to 30.

30-18-4. Unlawful disposition of animal.

Unlawful disposition of animal consists of:

A. skinning or removing without the permission of the owner any part of the hide of any neat cattle found dead;

B. abandoning any livestock without giving reasonable notice to the owner, where the livestock has been entrusted by the owner to such person for the herding, care or safekeeping upon a contract for a valuable consideration;

C. taking any livestock for use or work, without the consent of the owner;

D. driving or leading any animal being the property of another from its usual range, without the consent of the owner;

E. contracting, selling or otherwise disposing of any animal, which a person has in his possession or under his control on shares or under contract, without the consent of the owner of such animal; or

F. knowingly buying, taking or receiving from any person having in his possession, or under his control, any animal on shares or under contract, without the consent of the owner of such animal.

Whoever commits unlawful disposition of animal is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-4, enacted by Laws 1963, ch. 303, § 18-4.

ANNOTATIONS

Cross-references. - For notification of intention to slaughter cattle, see 7-23-1, 7-23-2 NMSA 1978.

For description of bovine animal in indictment, see 31-7-1 NMSA 1978.

For provisions regarding butchers' licenses and regulations, see 77-17-1 NMSA 1978 et seq.

Former law valid. - Former law making the skinning of neat cattle found dead without the permission of the owner, larceny was not void on the theory that the acts prohibited had no relation to the crime of larceny; by the constitution of the state, the legislature is invested with plenary legislative power, and the defining of crime and prescribing of punishment therefor are legislative functions. *State v. Thompson*, 57 N.M. 459, 260 P.2d 370 (1953).

Former law not violative of equal protection. - Classification in former law providing for the punishment of all persons who skin or remove the hide from the carcass of neat cattle found dead without the permission of the owner, but exempting all employees of railroad companies so doing when the animal was killed by the railroad company, was entirely constitutional. *State v. Thompson*, 57 N.M. 459, 260 P.2d 370 (1953).

Purpose of former law. - Former act enacted by Laws 1884, ch. 47, in the opinion of the legislature, was needed to prevent a kind of theft peculiarly easy of commission and difficult of discovery and punishment, and to afford special protection to the important industry of stockraising. *State v. Thompson*, 57 N.M. 459, 260 P.2d 370 (1953).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 3A C.J.S. Animals §§ 119, 120.

30-18-5. Illegal confinement of animals.

Illegal confinement of animals consists of:

A. detaining for more than two (2) hours for the purpose of milking any cow, without the permission of the owner;

B. taking and detaining any bull for the purpose of improving livestock, without the consent of the owner;

C. intentionally separating offspring of livestock from the mother, unless branded. Provided that, when milk cows, which are actually used to furnish milk for household or dairy purposes, have calves, that are unbranded, such young animals may be separated from their mother and inclosed; or

D. confining, or in any manner interfering with the freedom of, or selling, or offering to sell, any freshly branded animal, unless such animal has been previously branded with an older and duly recorded brand for which the person has a legally executed bill of sale from the owner of such brand or unless such animals are with their mother, or unless such animals are the calves of milk cows when such cows are actually used to furnish milk for household purposes or for carrying on a dairy; but in every such case the person, firm or corporation, separating calves from their mother for either of these purposes shall, upon the demand of any sheriff, inspector or other officer, produce, in a reasonable time, the mother of each of such calves so that interested parties may ascertain if the cow does or does not claim and suckle such calf.

Whoever commits illegal confinement of animals is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-5, enacted by Laws 1963, ch. 303, § 18-5; 1965, ch. 3, § 1.

ANNOTATIONS

Former law unconstitutional. - Laws 1901, ch. 23, § 5 (40-4-33, 1953 Comp.), authorizing seizure and sale of animals under seven months of age when confined away from their mothers, was unconstitutional as authorizing the taking of property without due process of law, for the reason that it required no notice, actual or constructive, to the owner of such seizure and sale. Board of Comm'rs v. District Court, 29 N.M. 244, 223 P. 516 (1924); Lacey v. Lemmons, 22 N.M. 54, 159 P. 949 (1916).

Severability of prior act. - Laws 1889, ch. 66, § 4 (40-4-28, 1953 Comp.), prohibiting the detention of a bull for improving stock, was enforceable even though § 5 was unconstitutional. State v. Brooken, 19 N.M. 404, 143 P. 479 (1914).

Purpose of former law. - Laws 1901, ch. 23, (40-4-29 to 40-4-33, 1953 Comp.), relating to unlawful separation of calves from mother, was aimed to prevent the larceny of calves of neat cattle. State v. Blevins, 39 N.M. 532, 51 P.2d 599 (1935).

Indictment adequate. - An indictment under Laws 1901, ch. 23, § 1 (former 40-4-29, 1953 Comp.), prohibiting separation of calves under seven months old from their mothers, was valid, even though it did not directly and positively allege that calves were under seven months of age, it using the words "the said calves being then and there under seven months of age." State v. Brooken, 19 N.M. 404, 143 P. 479 (1914).

Evidence sufficient. - Evidence that calf was found chained in depression in defendant's pasture and that defendant's riding horse was seen close to such depression was sufficient to support conviction under Laws 1901, ch. 23, § 1 (former 40-4-29, 1953 Comp.). State v. Blevins, 39 N.M. 532, 51 P.2d 599 (1935).

Larceny of calves. - Evidence of two calves belonging to others in weaning pen of ranch on which the defendant was foreman, along with other circumstances, afforded

adequate support for larceny conviction. *State v. Compton*, 57 N.M. 227, 257 P.2d 915 (1953).

30-18-6. Transporting stolen livestock.

Transporting stolen livestock consists of knowingly transporting or carrying any stolen or unlawfully possessed livestock or any unlawfully possessed game animal, or any parts thereof.

Whoever commits transporting stolen livestock is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-18-6, enacted by Laws 1963, ch. 303, § 18-6.

ANNOTATIONS

Cross-references. - For penalties for violation of fish and game laws or regulations, see 17-2-10 NMSA 1978.

For seizure and disposition of game and vehicles under fish and game laws, see 17-2-19 NMSA 1978 et seq.

For prohibition against transporting game or fish taken from unlicensed parks or lakes, see 17-4-10 NMSA 1978.

For transportation of sheep, see 77-8-3 NMSA 1978 et seq.

For transportation of livestock, see 77-9-28 NMSA 1978 et seq.

For penalties for exporting animals without inspection, see 77-9-36 NMSA 1978.

For authority of officers to stop vehicles transporting livestock, see 77-9-46, 77-9-51 NMSA 1978.

30-18-7. Misrepresentation of pedigree.

Misrepresentation of pedigree consists of either the giving, obtaining, misrepresenting or exhibiting of any type of registry certificate or transfer certificate, pertaining to the pedigree registry of any animal, knowing such certificate to be false or misleading, or to have been secured by means of false pretenses or false representations.

Whoever commits misrepresentation of pedigree is guilty of a misdemeanor.

History: 1953 Comp., § 40A-18-7, enacted by Laws 1963, ch. 303, § 18-7.

30-18-8. [Killing unbranded cattle; killing, without bill of sale, cattle bearing brand of another person; penalty.]

Any person, firm or corporation, who shall kill or cause to be killed, for sale or use any unbranded neat cattle, or any cattle on which the brand has not peeled off and fully healed, unless such cattle shall have an older and duly recorded brand; or shall kill, or cause to be killed for sale or use any neat cattle having a brand not legally owned by such person, firm or corporation, without having taken a duly acknowledged bill of sale for the same from the owner thereof, shall be deemed guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-18-8, enacted by Laws 1965, ch. 7, § 1.

30-18-9. Dog fighting; penalty.

A. It is unlawful for any person to cause, sponsor, arrange, hold or participate in a fight between dogs for the purpose of monetary gain or entertainment. Participation in a fight between dogs for the purpose of monetary gain or entertainment consists of an adult knowingly:

(1) being present at such a fight without attempting to interfere with or stop such contest; or

(2) owning or equipping one of the participating dogs with knowledge of such contest.

B. It is unlawful to train, equip or sponsor a dog for the purpose of having it participate in a fight with another dog for monetary gain or entertainment.

C. Any person violating the provisions of Subsection A or B of this section is guilty of a fourth degree felony.

History: Laws 1981, ch. 30, § 1.

30-18-10. Exclusion.

Nothing in this act [30-18-9, 30-18-10 NMSA 1978] shall be construed to prohibit or make unlawful the taking of game animals, game birds or game fish by the use of dogs, provided the person so doing is licensed as provided by law and is using such dogs in a lawful manner.

History: Laws 1981, ch. 30, § 2.

ARTICLE 19 GAMBLING

30-19-1. Definitions relating to gambling.

As used in Article 19 of the Criminal Code:

A. "antique gambling device" means a gambling device twenty-five years of age or older and substantially in original condition, which is not used for gambling or commercially gambling, or located in a gambling place;

B. "bet" means a bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value specified in the agreement. A bet does not include:

(1) bona fide business transactions which are valid under the law of contracts, including, without limitation:

(a) contracts for the purchase or sale, at a future date, of securities or other commodities; and

(b) agreements to compensate for loss caused by the happening of the chance, including, without limitation, contracts for indemnity or guaranty and life or health and accident insurance;

(2) offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such contest;

(3) a lottery as defined in this section; or

(4) betting otherwise permitted by law;

C. "lottery" means an enterprise wherein, for a consideration, the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill. As used in this subsection, "consideration" means anything of pecuniary value required to be paid to the promoter in order to participate in such enterprise;

D. "gambling device" means a contrivance other than an antique gambling device which, for a consideration, affords the player an opportunity to obtain anything of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the device; and

E. "gambling place" means any building or tent, any vehicle, whether self-propelled or not, or any room within any of them, one of whose principal uses is:

(1) making and settling of bets;

(2) receiving, holding, recording or forwarding bets or offers to bet;

(3) conducting lotteries; or

(4) playing gambling devices.

History: 1953 Comp., § 40A-19-1, enacted by Laws 1963, ch. 303, § 19-1; 1965, ch. 37, § 1; 1985, ch. 108, § 1.

ANNOTATIONS

The 1985 amendment added Subsection A, redesignated former Subsections A, B, C, and D as present Subsections B, C, D, and E, respectively, and inserted "other than an antique gambling device" following "contrivance" near the beginning of Subsection D.

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Due process. - "Gambling device" is defined with acceptable clarity, given the legislative dilemma of drafting criminal statutes general enough to escape legalistic evasion while specific enough to give fair §1 warning of proscribed conduct. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

State statutes are not superseded by federal laws relating to lottery broadcasting; being a form of gambling, lotteries are primarily a matter of state interest and policy under the police power. 1963-64 Op. Att'y Gen. No. 63-141.

Since there is no indication of a congressional intent to reserve regulation of the broadcasting of lotteries to the federal government, states may regulate such broadcasts to the same extent as the broadcasting of other gambling information. 1963-64 Op. Att'y Gen. No. 63-141.

Meaning of "lottery". - A lottery was a game of hazard in which small sums of money were ventured for chance of obtaining a larger value in money or other articles, and the test employed for detecting a lottery was the presence of a prize, chance and consideration, the presence of all three compelling its characterization as such. *State v. Jones*, 44 N.M. 623, 107 P.2d 324 (1940).

A lottery has been defined as a plan which contains the elements of prize, chance and consideration. 1963-64 Op. Att'y Gen. No. 63-141.

Test employed. - The test employed for detecting a lottery is the presence of three elements, prize, chance and consideration. *State v. Jones*, 44 N.M. 623, 107 P.2d 324 (1940) 1965-66 Op. Att'y Gen. No. 65-196; 1959-60 Op. Att'y Gen. No. 60-5; 1955-56 Op. Att'y Gen. No. 6516, No. 6347, No. 6168.

Consideration present even without purchase from promoter. - The consideration necessary for a lottery may be present even where no purchase is required as a condition precedent to eligibility for a prize. 1963-64 Op. Att'y Gen. No. 63-141 (rendered before 1965 amendment).

Where a lottery plan involves increased traffic to the participating stores with a necessarily resultant increase in sales, therein lies the financial advantage to the promoter and thus consideration as defined in this section. 1963-64 Op. Att'y Gen. No. 63-141 (rendered before 1965 amendment).

Broadening of exclusions. - By the 1965 amendment to this section the legislature intended to liberalize or broaden the definition of activities that were not prohibited by law. 1964-65 Op. Att'y Gen. No. 65-196.

The definition of lottery was intended to broaden the exclusions for certain types of operations which were not basically an attempt to hazard a sum for the hope of a larger sum. 1969 Op. Att'y Gen. No. 69-60.

Substance of scheme important. - In analyzing an operation to determine whether or not it is a lottery, the court must look to the substance of the scheme as well as the form. 1969 Op. Att'y Gen. No. 69-60.

Activity primarily a lottery. - When a promoter charges more than the usual price of an innocent activity and advertises that prizes will be drawn by lot and awarded to the holder of the ticket for the activity then the activity is primarily a lottery. 1969 Op. Att'y Gen. No. 69-60.

Baseball pools. - Where tickets were sold in books of 120, to be sold at 10 cents each, entitling the holder to a \$9.00 prize from a lucky ticket containing the names of two ball teams making the high scores each day, there was a lottery, although the tickets themselves did not convey the information as to the prize. State v. Butler, 42 N.M. 271, 76 P.2d 1149 (1938).

"Bank Night" scheme. - Scheme operated under name "Bank Night" involved an element of "consideration" which together with elements of "prize" and "chance," constituted the scheme of a "lottery" under prior law. State v. Jones, 44 N.M. 623, 107 P.2d 324 (1940).

Drawing hotel room number. - Where plan was to assign numbers to each of the rooms of a motel, there being some 16 rooms, and as the rooms were filled in the course of the evening, to conduct a drawing, with the person occupying the room number corresponding with the number drawn from the hat to receive his room rent free for that night, the scheme constituted a lottery and was, therefore, illegal under former gambling laws. 1955-56 Op. Att'y Gen. No. 6347.

Store punch card. - Scheme whereby a punch card is given to each customer purchasing merchandise in a store or chain of stores, and each time the customer purchases items from the store, the dollar amount of the purchase is punched out on the card until the customer's purchases reach a certain total, at which point the large seal on the card is removed under which is found one of three dollar amounts representing the customer's prize, or in the alternative, some simple question the answer to which entitles the customer to a prize constituted a lottery under former gambling laws. 1959-60 Op. Att'y Gen. No. 60-5.

Nature of "pecuniary value" intended. - Pecuniary value must be paid over and above payment for a legal activity before the giving of a door prize at a legal activity is to be considered an illegal lottery. 1969 Op. Att'y Gen. No. 69-60.

Element of pecuniary consideration for the sole purpose of engaging in the gambling enterprise must be present. 1965-66 Op. Att'y Gen. No. 65-196.

Hazarding of small sum for larger. - The substance of paying something of pecuniary value in order to participate in the enterprise is that the small sum is hazarded in the hope of winning a larger sum. 1969 Op. Att'y Gen. No. 69-60.

No pecuniary value paid. - If one pays the normal going rate for a dinner or theater ticket or style show and a prize or prizes are given in conjunction with those legal activities, one has not paid to the promoter anything of pecuniary value in order to participate in the chance at the prize. 1969 Op. Att'y Gen. No. 69-60.

Drawing of numbered tickets of admission to the state fair, for a prize, in which those individuals who had purchased tickets would be entitled to participate, would be legal, since no consideration would be paid for the privilege of participating in the opportunity to win a prize. 1965-66 Op. Att'y Gen. No. 65-196.

Meaning of "gambling device". - No contrary intent appearing in the statute, the ordinary and usual meaning of the term "gambling devices" is to be used, that is, those devices which are normally associated with gambling. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Specific intent understood. - The narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling purpose, and use for entertainment alone would not subject the parties to prosecution under the gambling statutes. 1969 Op. Att'y Gen. No. 69-54.

Chance to win prize determinative. - If there was no opportunity to obtain anything of value when a gambling device was used for entertainment, then the item would not be a gambling device within the definition of this section. 1969 Op. Att'y Gen. No. 69-54.

Savings and loan promotion legal. - A savings and loan association may give every person who deposits a certain amount in a savings account a chance to win a four-day

all-expense-paid trip at a drawing without violating the New Mexico gambling laws. 1971 Op. Att'y Gen. No. 71-109.

Selling of souvenir tokens. - Where the element of chance is absent, slot machines converted into vending machines which will sell souvenir tokens do not fall within the definition of gambling device. 1972 Op. Att'y Gen. No. 72-39.

Extent of pari-mutuel exemption. - It was the intention of the legislature to exempt pari-mutuel betting from the general provisions of the gambling laws only when done by patrons who are physically present at the track; one who is not personally present at the track is not a patron thereof and does not come within the pari-mutuel exemption at 60-1-10 NMSA 1978. Schnoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968).

Section 60-1-10 NMSA 1978 legalizes pari-mutuel betting under fixed conditions, and declares that it shall not be construed as gambling. Patton v. Fortuna Corp., 68 N.M. 40, 357 P.2d 1090 (1960).

Off-track betting illegal. - The giving of money to defendant and his transporting it to the place of betting was inseparable from the act of placing the bet itself; to sanction such a procedure would permit a mode of gambling not allowed by the pari-mutuel statute. Schnoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968).

Illegal gambling contract unenforceable. - The public policy of New Mexico is to restrain and discourage gambling and must override the rule which prevents unjust enrichment, particularly where there is a choice between that which is considered to be for the benefit of the public at large as distinguished from any benefit to an individual litigant. Schnoor v. Griffin, 79 N.M. 86, 439 P.2d 922 (1968).

Applicability of gambling laws to Indians. - Where federal law is silent on gambling and state law prohibits it, and such gambling is carried on by Indians in Indian country, the gambling is illegal, with exclusive jurisdiction resting in the federal courts unless the gambling has already been punished by the tribal court. 1965-66 Op. Att'y Gen. No. 65-221.

Under the federal Assimilative Crimes Act, there would not be a conflict between federal and state laws on gambling if carried on in Indian country and gambling is illegal in the state. 1965-66 Op. Att'y Gen. No. 65-221.

State courts would have jurisdiction over a non-Indian charged with conducting a gambling operation on an Indian reservation. 1965-66 Op. Att'y Gen. No. 65-221.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Scheme for advertising or stimulating legitimate business as a lottery, 48 A.L.R. 1115, 57 A.L.R. 424, 103 A.L.R. 866, 109 A.L.R. 709, 113 A.L.R. 1121.

What is a game of chance, 135 A.L.R. 104.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking, 53 A.L.R.4th 801.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

30-19-2. Gambling.

Gambling consists of:

A. making a bet;

B. entering or remaining in a gambling place with intent to make a bet, to participate in a lottery or to play a gambling device;

C. conducting a lottery; or

D. possessing facilities with intent to conduct a lottery.

Whoever commits gambling is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-19-2, enacted by Laws 1963, ch. 303, § 19-2.

ANNOTATIONS

Cross-references. - For recovery of gambling losses and avoidance of gambling debts, see 44-5-1 NMSA 1978 et seq.

For provision granting immunity from punishment for gambling to one suing to recover losses, see 44-5-14 NMSA 1978.

For operation of pari-mutuel system, see 60-1-10 NMSA 1978.

Double jeopardy not threatened. - Defendant was not convicted of different offense than that with which he was charged, where information cited former 40-22-1, 1953 Comp. and judgment referred to former 40-22-2, 1953 Comp., as the former section merely defines certain acts as unlawful, while the latter section provides the penalty; the essential part of the judgment was finding defendant guilty of operating a game of chance for money, so that the judgment would bar a subsequent prosecution for the same offense. *State v. La Rue*, 67 N.M. 149, 353 P.2d 367 (1960).

No implied repeal of exemption statute. - Laws 1921, ch. 86, the former gambling act, did not repeal by implication 44-5-14 NMSA 1978, providing for exemption from

punishment for gamblers suing to recover their losses, when it imposed a specific penalty for gambling. *State v. Schwartz*, 70 N.M. 436, 374 P.2d 418 (1962).

Applicability of former law. - While former gambling act, Laws 1917, ch. 110, prohibited operation of game of chance for money or anything of value, it did not prohibit the playing of a game of chance. *Ex parte Hamm*, 24 N.M. 33, 172 P. 190, 1918D L.R.A. 694 (1918).

Gambling distinguished from commercial gambling. - Gambling under Subsection A of this section is distinguishable from commercial gambling under 30-19-3B NMSA 1978 in that this section requires only one act whereas 30-19-3B NMSA 1978 requires more than one act to constitute a violation. *State v. Owens*, 103 N.M. 121, 703 P.2d 898 (1984).

Longstanding prohibition. - The declared prohibition against gambling in any manner or form has long been a part of the existing law of this state. *Ross v. State Racing Comm'n*, 64 N.M. 478, 330 P.2d 701 (1958).

Frequenting and keeping game distinguished. - To frequent a gambling table of a banking game was one offense and to keep such table was another. *Territory v. Copely*, 1 N.M. 571 (1873).

Raffle where purchase unnecessary. - The offering by a nightclub and package store of raffle tickets to patrons upon their entry into the premises, for a drawing to be held once a week at which prizes would be given away, so long as an individual might participate in the drawing without being required to purchase something (part with anything of pecuniary value), this would not fall within the statutory definition of a lottery and is not prohibited by this section. 1973-74 Op. Att'y Gen. No. 73-31.

Raffle at \$50 per plate dinner. - A noncharitable organization may not hold a public dinner, the cost of which is \$50 per ticket, and at which the organization gives away prizes varying in value from a few cents to several hundred dollars, drawn by lot. 1969 Op. Att'y Gen. No. 69-60.

Distribution of common lands by lot illegal. - Scheme whereby community land grant attempted to distribute some 10,000 acres of common lands among almost 2000 heirs by lottery, at a nominal fee, amounted to a violation of the statute law of this state prohibiting lotteries, as well as amounting to a dissipation of the assets of the corporation, contrary to law. *Armijo v. Town of Atrisco*, 62 N.M. 440, 312 P.2d 91 (1957).

Defendants not exempt from punishment. - Where defendants, immediately prior to trial for playing at a game of chance for money, filed a civil action for recovery of individual gambling losses under 44-5-14 NMSA 1978, they were not entitled to exemption from punishment provided for in that section. *State v. Schwartz*, 70 N.M. 436, 374 P.2d 418 (1962).

Standing to challenge validity. - Because defendants were charged with a violation of 30-19-3F NMSA 1978, they had no standing to challenge 30-19-3E NMSA 1978 and this section. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Admission of "other crimes" held prejudicial. - The admission of evidence of "other crimes, wrongs and misconduct" is prejudicial error where it laps over into a smear on gambling and general criminal activity, destroying the justification of relevance on a particular issue of intent. *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983).

Gambling contract unenforceable. - See *Schnoor v. Griffin*, 79 N.M. 86, 439 P.2d 922 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Gambling §§ 26 to 54.

Entrapment to commit offense with respect to gambling or lotteries, 31 A.L.R.2d 1212.

Coin-operated pinball machine or similar device, played for amusement alone or confining reward to privilege of free replays, as prohibited or permitted by anti-gambling laws, 89 A.L.R.2d 815.

Bridge as within gambling laws, 97 A.L.R.2d 1420.

Private residence: gambling in private residence prohibited or permitted by anti-gambling laws, 27 A.L.R.3d 1074.

Advertising: promotion schemes of retail stores as criminal offense under anti-gambling laws, 29 A.L.R.3d 888.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling, 80 A.L.R.4th 1079.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling, 84 A.L.R.4th 740.

38 C.J.S. Gaming §§ 80 to 91; 54 C.J.S. Lotteries § 22.

30-19-3. Commercial gambling.

Commercial gambling consists of either:

- A. participating in the earnings of or operating a gambling place;
- B. receiving, recording or forwarding bets or offers to bet;
- C. possessing facilities with the intent to receive, record or forward bets or offers to bet;
- D. for gain, becoming a custodian of anything of value, bet or offered to be bet;
- E. conducting a lottery where both the consideration and the prize are money, or whoever with intent to conduct a lottery, possesses facilities to do so; or
- F. setting up for use, for the purpose of gambling, or collecting the proceeds of, any gambling device.

Whoever commits commercial gambling is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-19-3, enacted by Laws 1963, ch. 303, § 19-3.

ANNOTATIONS

Cross-references. - For gambling and gambling houses deemed public nuisances, see 30-19-8 NMSA 1978.

Constitutionality. - Subsection F of this section is not void for vagueness and uncertainty. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Standing to challenge validity. - Because defendants were charged with a violation of Subsection F of this section, they had no standing to challenge Subsection E and 30-19-2D NMSA 1978. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Applicability. - Former law, designed to prevent and prohibit gambling, was applicable to private individuals and fraternal organizations alike. *State v. Las Cruces Elks Club*, 54 N.M. 137, 215 P.2d 821 (1950).

Offense distinguished from permitting of gambling. - Subsection F of this section and 30-19-4B NMSA 1978 do not relate to the same activity, since Subsection F of this section requires a positive act by an accused relating to commercial gambling, while 30-19-4B NMSA 1978 connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

As permitting a gambling device to be set up and setting up a gambling device are not identical acts, an individual could not be held accountable under both sections for the same act. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Gambling distinguished from commercial gambling. - Gambling under 30-19-2A NMSA 1978 is distinguishable from commercial gambling under Subsection B of this section in that 30-19-2A NMSA 1978 requires only one act whereas this section requires more than one act to constitute a violation. *State v. Owens*, 103 N.M. 121, 703 P.2d 898 (1984).

Elements of offense. - That game be played for money or anything of value was an essential element in violation of former gambling law, as merely playing or operating the gaming device was not actionable. *State v. Valdez*, 51 N.M. 393, 185 P.2d 977 (1947).

Consideration. - Either a promise by the participant to pay if he does not win or payment by the participant subject to return of his money should chance make him the winner is sufficient as consideration; that a subsequent event may relieve from the promise or payment cannot obliterate the fact that at the time the participant enters the scheme consideration is rendered. 1955-56 Op. Att'y Gen. No. 6168.

Either a promise to pay or payment is, when tested by the law of contracts, sufficient as consideration. 1955-56 Op. Att'y Gen. No. 6347.

Amusement as value under former law. - The legislature having omitted making distinctions between kinds of value in Laws 1921, ch. 86, § 1 (40-22-1, 1953 Comp.), the court would not presume to do so; amusement was included as a thing of value. *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715 (1942).

Games prohibited by prior law. - All the games enumerated in Laws 1921, ch. 86, § 1 (40-22-1, 1953 Comp.) were not necessarily and essentially "banking" or "percentage" games, so that the general words following could not be restricted to include games of that kind only. *Grafe v. Delgado*, 30 N.M. 150, 228 P. 601 (1924).

Running games of chance. - Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.) prohibited the running of any games of chance including games of chance played with cards, dice, punchboards, slot machines and other gaming devices for money or other things of value. *State v. Las Cruces Elks Club*, 54 N.M. 137, 215 P.2d 821 (1950).

Card game for value. - The game of solo, played with cards for something of value, was made an offense by the general language of Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.). *Grafe v. Delgado*, 30 N.M. 150, 228 P. 601 (1924).

Slot machines. - Slot machines, where the chances were unequal with the chances in favor of the machine, were covered by former gambling law as illegal. *Territory v. Jones*, 14 N.M. 579, 99 P. 338 (1908).

Free games as thing of value. - Where free games were awarded through chance to a player for his enjoyment in successfully operating a pinball machine, he received something of value within proscription of Laws 1921, ch. 86, § 1 (former 40-22-1, 1953 Comp.). *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715 (1942).

Repayment in chewing gum. - Fact that slot machine always paid player value of his money in chewing gum did not exclude it from operation of anti-gambling law. *State v. Apodaca*, 32 N.M. 80, 251 P. 389 (1926).

Supplying of lottery tickets. - One who supplied lottery tickets to others to be sold, but did not otherwise participate in the promotion of the lottery was nevertheless subject to the penalty. *State v. Butler*, 42 N.M. 271, 76 P.2d 1149 (1938).

Converted slot machine. - Converted slot machine which has been mechanically transformed into a vending machine to sell souvenir tokens for a quarter was not a gambling device, since no element of chance was involved in its use. 1971-72 Op. Att'y Gen. No. 72-39.

Essential allegations. - If allegation that operation of a game of chance "for money or anything of value" was omitted, the indictment or information failed to charge any offense and use of word "unlawfully" operating of a game of chance did not cure the defect. *State v. Valdez*, 51 N.M. 393, 185 P.2d 977 (1947).

Failure to charge offense. - Where information was insufficient in failing to charge an offense under statute prohibiting operation of games of chance "for money or anything of value," did not state particulars of the offense and did not refer to the section of the statute creating the offense, information could not be amended after all the evidence was introduced at the trial. *State v. Ardovino*, 55 N.M. 161, 228 P.2d 947 (1951), distinguished in *State v. Silva*, 78 N.M. 286, 430 P.2d 783 (Ct. App. 1967).

Indictment sufficient. - An information charging accused, under former law, with "having in his possession lottery tickets for the purpose of vending the same contrary to the form of the statute," with bill of particulars describing the form of the tickets used, was sufficient. *State v. Butler*, 42 N.M. 271, 76 P.2d 1149 (1938).

Admissions as part of res gestae. - Unless the corpus delicti of the offense charged has been otherwise established, a conviction cannot be sustained solely on extrajudicial confessions or admissions of an accused, but where evidence establishes the commission of the offense charged independently of the admissions by appellant, admissions at the time of arrest and at the place where the paraphernalia was found are a part of the res gestae and, for that reason, are admissible. *State v. La Rue*, 67 N.M. 149, 353 P.2d 367 (1960).

Evidence of operating adequate. - While no gambling was observed on the premises, evidence of discovery of gambling paraphernalia in basement of cafe, in which defendant and others were also found, along with statements of defendant admitting

that he was the operator, pointed unerringly to defendant's guilt. *State v. La Rue*, 67 N.M. 149, 353 P.2d 367 (1960).

Admission of "other crimes" held prejudicial. - The admission of evidence of "other crimes, wrongs and misconduct" is prejudicial error where it laps over into a smear on gambling and general criminal activity, destroying the justification of relevance on a particular issue of intent. *United States v. Biswell*, 700 F.2d 1310 (10th Cir. 1983).

Instruction on operation approved. - Instruction that any person who manages, controls or takes or receives any money or thing of value from game for running the game or like purpose shall be deemed an operator of such game was substantially in the language of the applicable statute and correctly stated the law. *Kilpatrick v. State*, 58 N.M. 88, 265 P.2d 978 (1954).

Questions for jury. - Where there was a substantial conflict as to whether or not the defendant operated a game of chance for money in his premises on the night in question, it was for the jury to determine the weight of the evidence, and also the credibility of the witnesses, and not the duty of the appellate court to do so. *Kilpatrick v. State*, 58 N.M. 88, 265 P.2d 978 (1954).

Law reviews. - For annual survey of New Mexico criminal law, see 16 N.M.L. Rev. 9 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Gambling §§ 82 to 117.

Connection with place where gaming is carried on which will render one guilty as keeper thereof, 15 A.L.R. 1202.

Possession of gambling device as offense not requiring showing that device was used for gambling or kept for gambling purposes, 162 A.L.R. 1188.

Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia, 51 A.L.R.4th 796.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool, 78 A.L.R.4th 483.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling, 82 A.L.R.4th 356.

38 C.J.S. Gaming §§ 97 to 101; 54 C.J.S. Lotteries §§ 22, 23.

30-19-4. Permitting premises to be used for gambling.

Permitting premises to be used for gambling consists of:

A. knowingly permitting any property owned or occupied by such person or under his control to be used as a gambling place; or

B. knowingly permitting a gambling device to be set up for use for the purpose of gambling in a place under his control.

Whoever commits permitting premises to be used for gambling is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-19-4, enacted by Laws 1963, ch. 303, § 19-4.

ANNOTATIONS

Offense distinguished from commercial gambling. - Section 30-19-3F NMSA 1978 and Subsection B of this section do not relate to the same activity, since 30-19-3F requires a positive act by an accused relating to commercial gambling, while Subsection B of this section connotes mere passive acquiescence in permitting a gambling device to be set up for use for the purpose of gambling in a place under his control. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

As permitting a gambling device to be set up and setting up a gambling device are not identical acts, an individual could not be held accountable under both sections for the same act. *State v. Marchiondo*, 85 N.M. 627, 515 P.2d 146 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Guilty pleas of others inadmissible. - Upon trial of one charged with unlawfully and knowingly permitting a game of chance for money to be played on premises occupied by him, the record of the information charging third persons with unlawful gaming and their pleas of guilty thereto was inadmissible as hearsay and as depriving the defendant of his constitutional right to be confronted by the witnesses against him. *State v. Martino*, 25 N.M. 47, 176 P. 815 (1918).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 A.L.R.3d 694.

30-19-5. Dealing in gambling devices.

A. Dealing in gambling devices consists of manufacturing, transferring commercially or possessing, with intent to transfer commercially, any of the following:

(1) anything which he knows evidences, purports to evidence or is designed to evidence participation in gambling; or

(2) any device which he knows is designed exclusively for gambling purposes or anything which he knows is designed exclusively as a subassembly or essential part of such device. This includes, without limitation, gambling devices, numbers jars, punchboards and roulette wheels.

Proof of possession of any device designed exclusively for gambling purposes which is not in a gambling place and is not set up for use is prima facie evidence of possession with intent to transfer.

B. The provisions of this section shall not apply to any manufacturer of gambling devices who exports his product exclusively in foreign commerce, and who is under ten thousand dollar (\$10,000) bond payable to the state of New Mexico to assure export.

Provided, however, the provisions of this section shall apply to manufacturers of gambling devices used, adapted, devised or designed to be used in bookmaking, in wagering pools with respect to a sporting event, or in a numbers, policy, bolita or similar game.

C. Nothing in this section shall be construed to prohibit the ownership, possession, display, sale, purchase, exchange or transfer of antique gambling devices.

D. Whoever deals in gambling devices, other than those herein specified and excluded, is guilty of a misdemeanor.

History: 1953 Comp., § 40A-19-5, enacted by Laws 1963, ch. 303, § 19-5; 1965, ch. 230, § 1; 1985, ch. 108, § 2.

ANNOTATIONS

Cross-references. - For sentencing for misdemeanors, see 31-19-1 NMSA 1978.

The 1985 amendment effective June 14, 1985, designated the formerly undesignated introductory paragraph as Subsection A, redesignating former Subsections A and B as present Paragraphs (1) and (2) within that subsection, redesignated former Subsection C as present Subsection B, added present Subsection C and designated the formerly undesignated last paragraph as present Subsection D.

Specific intent required. - The narrow definitions of gambling device and dealing in gambling devices in the New Mexico law require a specific intent to use or transfer for use with a gambling §1 purpose, and use for entertainment alone would not subject the parties to prosecution under the gambling statutes. 1969 Op. Att'y Gen. No. 69-54.

Transporting devices to Indian country. - Under this section and 30-19-10 NMSA 1978 the state could seize gambling devices being transported across lands under state jurisdiction to Indian country. 1965-66 Op. Att'y Gen. No. 65-221.

Importation for entertainment. - Gambling devices may be imported into the state and held for the purposes of providing entertainment for patrons of a nightclub which plans to use the devices with stage money and without any consideration or prize involved in the entertainment. 1969 Op. Att'y Gen. No. 69-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Gambling §§ 82 to 106.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 A.L.R.3d 726.

Possession: validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts, 17 A.L.R.3d 491.

38 C.J.S. Gaming §§ 97 to 104.

30-19-6. Permissive lottery.

A. Nothing in Article 19, Chapter 30 NMSA 1978 shall be construed to apply to any sale or drawing of any prize at any fair held in this state for the benefit of any church, public library or religious society situate or being in this state, or for charitable purposes when all the proceeds of such fair shall be expended in this state for the benefit of such church, public library, religious society or charitable purposes.

A lottery shall be operated for the benefit of the organization or charitable purpose only when the entire proceeds of the lottery go to the organization or charitable purpose and no part of such proceeds go to any individual member or employee thereof.

B. Nothing in Article 19, Chapter 30 NMSA 1978 shall be held to prohibit any bona fide motion picture theatre from offering prizes of cash or merchandise for advertising purposes, in connection with such business, or for the purpose of stimulating business, whether or not any consideration other than a monetary consideration in excess of the regular price of admission is exacted for participation in drawings for prizes.

C. Nothing in Article 19, Chapter 30 NMSA 1978 shall be held to apply to any bona fide county fair, including fairs for more than one county, which shall have been held annually at the same location for at least two years and which shall offer prizes of livestock or poultry in connection with such fair when the proceeds of such drawings shall be used for the benefit of said fair.

D. Nothing in Article 19, Chapter 30 NMSA 1978 shall be construed to apply to any lottery operated by an organization exempt from the state income tax pursuant to Subsection C [B] of Section 7-2-4 NMSA 1978 and not subject to the provisions of Subsection A of this section; provided that:

(1) no more than two lotteries shall be operated in any year by such an organization;

(2) all the gross proceeds less the reasonable cost of prizes of any lottery operated by such an organization shall be expended in the state for the benefit of the organization or public purposes; and

(3) no part of the proceeds of any lottery shall go to any individual member or employee of any organization except as payment for the purchase of prizes at no more than the reasonable retail price.

History: 1953 Comp., § 40A-19-6, enacted by Laws 1963, ch. 303, § 19-6; 1981, ch. 231, § 1.

ANNOTATIONS

Compiler's note. - Subsection C of 7-2-4 NMSA 1978, referred to in the introductory language of Subsection D of this section, was redesignated as Subsection B of 7-2-4 NMSA 1978 by Laws 1981, ch. 37, § 15.

Size of permissive lotteries of necessity limited. - Although the provision of Laws 1949, ch. 133, § 1 (former 40-22-18, 1953 Comp.) lifting the ban against lotteries conducted at fairs where entire proceeds were expended in the state for benefit of public libraries, churches or religious societies did not place a limitation on the size of such lotteries, the condition imposed confined them to petty lotteries since removal of profit from a lottery would greatly curtail the size. *State v. Jones*, 44 N.M. 623, 107 P.2d 324 (1940).

Donation of gross proceeds necessary. - Under Laws 1949, ch. 133, § 1 (former 40-22-18, 1953 Comp.), a lottery scheme which appropriated only net proceeds to a charitable organization was illegal. "All the proceeds" meant "gross proceeds." *Harriman Inst. of Social Research, Inc. v. Carrie Tingley Crippled Children's Hosp.*, 43 N.M. 1, 84 P.2d 1088 (1938).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Gambling § 60.

State lotteries: Actions by ticketholders against state or contractor for state, 40 A.L.R.4th 662.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Enforceability of contract to share winnings from legal lottery ticket, 90 A.L.R.4th 784.

54 C.J.S. Lotteries § 11.

30-19-7. Fraudulently operating a lottery.

Fraudulently operating a lottery consists of operating or managing any lottery which does not provide a fair and equal chance to all participants, or which lottery is conducted in a manner tending to defraud or mislead the public.

Whoever commits fraudulently operating a lottery is guilty of a misdemeanor.

History: 1953 Comp., § 40A-19-7, enacted by Laws 1963, ch. 303, § 19-7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Recovery of money or property lost through cheating or fraud in forbidden gambling or game, 39 A.L.R.2d 1213.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

30-19-8. Gambling and gambling houses as public nuisance.

Except as otherwise permitted or excepted under this article [30-19-1 to 30-19-15 NMSA 1978], any gambling device or gambling place is a public nuisance per se.

The attorney general, any district attorney or any citizen of this state may institute an injunction proceeding to have such public nuisance abated. In the event such injunction is issued on behalf of any citizen of this state it shall not be necessary in such proceeding to show that he is personally injured by the act complained of.

History: 1953 Comp., § 40A-19-8, enacted by Laws 1963, ch. 303, § 19-8.

ANNOTATIONS

Cross-references. - For provision defining a public nuisance, see 30-8-1 NMSA 1978.

For abatement of a public nuisance, see 30-8-8 NMSA 1978.

Former law not exclusive. - Laws 1921, ch. 86, § 9 (40-22-9, 1953 Comp.), providing for closing of gaming-house, did not impair or modify the common-law powers of courts to abate public nuisances summarily inasmuch as it was a permissive statute only. *State v. Johnson*, 52 N.M. 229, 195 P.2d 1017 (1948).

Suit to enjoin pari-mutuel betting not maintainable. - Plaintiffs could not seek injunctive relief through the general gambling statute, 40-22-6, 1953 Comp., to enjoin defendant from using certain premises for pari-mutuel betting on horse racing, until they could have shown that the pari-mutuel statute, 60-1-10 NMSA 1978, was unconstitutional. *Patton v. Fortuna Corp.*, 68 N.M. 40, 357 P.2d 1090 (1960).

Destruction of equipment. - Under Laws 1921, ch. 86, § 9 (former 40-22-9, 1953 Comp.), any gaming-house, gambling table, banking game, gaming paraphernalia or

gaming device or equipment of any sort was a public nuisance and the equipment could be ordered destroyed upon hearing for an injunction in district court. State v. Las Cruces Elks Club, 54 N.M. 137, 215 P.2d 821 (1950).

Contempt charge. - Injunction against use of certain premises for gaming was not ineffectual as a basis for contempt charge because of failure of court to order premises closed. Contempt was sufficiently charged by alleging injunction, and subsequent use of premises. State v. Dunn, 36 N.M. 258, 13 P.2d 557 (1932).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Gambling § 16.

Private residence: gambling in private residence as prohibited or permitted by anti-gambling laws, 27 A.L.R.3d 1074.

66 C.J.S. Nuisances § 48.

30-19-9. Evidence of unlawful use of premises.

Evidence that a place has a general reputation as a gambling site or that at or about the time in question it was frequently visited by persons known to be professional gamblers or known as frequenters of gambling places is admissible on the issue of whether such site is a gambling place.

History: 1953 Comp., § 40A-19-9, enacted by Laws 1963, ch. 303, § 19-9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

30-19-10. Forfeiture of prizes and equipment.

Any gambling device or other equipment of any type used in gambling shall be seized by the law enforcement officers discovering such device or equipment, and it shall be the duty of such officers to retain custody of the property seized until such property is disposed of by order of the district court. Upon proper application by the district attorney to the judge of the district court, the judge of the district court may by proper order direct the destruction of any gambling device, paraphernalia or equipment of any kind or character seized by law enforcement officers.

History: 1953 Comp., § 40A-19-10, enacted by Laws 1963, ch. 303, § 19-10.

ANNOTATIONS

Applicability. - Statute providing for forfeiture of gambling devices seized by law enforcement officials has no application to equipment not "used in gambling." 1969 Op. Att'y Gen. No. 69-54.

Forfeiture of money. - Money segregated as gambling paraphernalia cannot be restored to the former owner, and such money which has been earmarked as an integral part of gambling equipment may be seized as a gambling device; this rule is not limited to situations where money is placed inside a gambling device such as a slot machine and becomes a component part thereof, but includes money found lying on a card table which had been used in the game. State v. Casarez, 75 N.M. 436, 405 P.2d 759 (1965).

Devices transported to Indian country. - Under 30-19-5 NMSA 1978 and this section the state could seize gambling devices being transported across lands under state jurisdiction to Indian country. 1965-66 Op. Att'y Gen. No. 65-221.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 Am. Jur. 2d Gambling §§ 174 to 183.

Money in gambling machine or other receptacle, used in connection with gambling, seized by public authorities, rights and remedies in respect of, 79 A.L.R. 1007.

Forfeiture of property for unlawful use before trial of individual offender, 3 A.L.R.2d 738.

Forfeiture of money used in connection with gambling or lottery, or seized by officers in connection with an arrest or search on premises where such activities took place, 19 A.L.R.2d 1228.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance, 1 A.L.R.3d 726.

Lawfulness of seizure of property used in violation of law as prerequisite to forfeiture action or proceeding, 8 A.L.R.3d 473.

Constitutionality of statutes providing for destruction of gambling devices, 14 A.L.R.3d 366.

38 C.J.S. Gaming § 78.

30-19-11. Remedy of lessor.

If the lessee of property has been convicted of using it as a gambling place or if the property has been adjudged to constitute a public nuisance, such lease shall be voidable at the option of the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

History: 1953 Comp., § 40A-19-11, enacted by Laws 1963, ch. 303, § 19-11.

ANNOTATIONS

Cross-references. - For forcible entry and detainer, see 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, see 47-8-1 NMSA 1978 et seq.

30-19-12. Duties of enforcement officials.

Upon the filing with any district judge or justice of the peace [magistrate court] of an affidavit in writing made by any citizen that gambling as prohibited by this article [30-19-1 to 30-19-15 NMSA 1978] is being conducted in any building, room, premises or place describing the same for sufficient identification, it shall be the duty of the district judge or justice of the peace [magistrate] with whom such affidavit is filed to immediately issue a warrant commanding the peace officer to whom the same is addressed to forthwith enter and search the building, room, premises or place. In the event the location is being used for purposes prohibited by this article, the peace officer shall arrest without a warrant the parties therein or making their escape therefrom, and who would be subject to arrest with a warrant. The officers shall also take possession of any gambling paraphernalia, device or equipment found therein, and shall hold the same until deprived of the possession thereof by law. It shall be the duty of the peace officers to take any persons so arrested before some magistrate having jurisdiction and to forthwith file a proper complaint against each person so arrested.

History: 1953 Comp., § 40A-19-12, enacted by Laws 1963, ch. 303, § 19-12.

ANNOTATIONS

Magistrate courts. - The office of justice of the peace has been abolished by 35-1-38 NMSA 1978, and the jurisdiction, powers and duties thereof have been transferred to the magistrate courts.

Affidavit as prerequisite for warrant. - The affidavit under former 40-22-8, 1953 Comp. was for consideration by the judge and was a prerequisite to his issuance of a search warrant. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

Disposition of affidavit. - Former section 40-22-8, 1953 Comp., provided only for the filing of the required affidavit and had no further directive as to the disposition of the same by the judge. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

Effect of misplacing affidavit. - If the affidavit provided for in 40-22-8, 1953 Comp., was lost or misplaced, the search warrant and the proceedings leading to its issuance, otherwise in conformity with the statute, could not be thereby invalidated. *Howard v. United States*, 306 F.2d 392 (10th Cir. 1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 38 C.J.S. Gaming § 78.

30-19-13. Bribery of participant in a contest.

Bribery of participant in a contest consists of:

A. the transferring or promise to transfer anything of value to any person with intent to influence thereby any participant in a contest to refrain from exerting his full skill, speed, strength or endurance in such contest; or

B. the agreeing or offering by a participant in a contest, to refrain from exerting his full skill, speed, strength or endurance, in return for anything of value transferred or promised to himself or another.

The term "participant" as used in this section includes any person who is selected to or expects to take part in any such contest.

Whoever commits bribery of participant in a contest is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-19-13, enacted by Laws 1963, ch. 303, § 19-13.

ANNOTATIONS

Cross-references. - For other provisions relating to bribery, see 30-24-1 to 30-24-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Bribery in athletic contest, 49 A.L.R.2d 1234.

Private contests and lotteries: entrants' rights and remedies, 64 A.L.R.4th 1021.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest, 85 A.L.R.4th 1048.

30-19-14. Testimony of witnesses to gambling.

Any district judge or justice of the peace [magistrate court] having jurisdiction over any of the crimes enumerated in this article [30-19-1 to 30-19-15 NMSA 1978], or any district attorney inquiring into the alleged violation of any of the provisions of this article, may subpoena persons and compel their attendance as witnesses and may compel such witnesses to testify concerning any violation of this article.

Any person who is so subpoenaed and examined shall be immune to prosecution or conviction for any violation of this article about which he testifies.

A conviction may be had for any violation of this article upon the unsupported testimony of any accomplice or participant.

History: 1953 Comp., § 40A-19-14, enacted by Laws 1963, ch. 303, § 19-14.

ANNOTATIONS

Magistrate courts. - The office of justice of the peace has been abolished by 35-1-38 NMSA 1978 and the jurisdiction, powers and duties thereof have been transferred to the magistrate courts.

Subpoena powers limited. - A close study of the statutory language contained in 40-22-11, 1953 Comp., predecessor of this section, leads to the conclusion that the powers vested in district attorneys under the provisions of that section were limited to situations wherein the witnesses were brought before a grand jury, or were subpoenaed to testify as to alleged violations of the gaming laws of the state at the time of trial. 1961-62 Op. Att'y Gen. No. 61-88.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Witness, asking as to pursuing occupation of gambling for purposes of impeachment, 1 A.L.R. 1402.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling, 64 A.L.R.2d 823.

30-19-15. Unlawful to accept for profit anything of value to be transmitted or delivered for gambling; penalty.

A. It is unlawful for any person to, directly or indirectly, knowingly accept for a fee, property, salary or reward anything of value from another to be transmitted or delivered for gambling or pari-mutuel wagering on the results of a race, sporting event, contest or other game of skill or chance or any other unknown or contingent future event or occurrence whatsoever.

B. None of the provisions of this act shall be construed to prohibit the operation or continued operation of bingo programs presently conducted for charitable purposes.

C. Any person violating any of the provisions of this section is guilty of a fourth degree felony.

History: Laws 1979, ch. 4, § 1.

ANNOTATIONS

Meaning of "this act". - The term "this act," referred to in Subsection B, means Laws 1979, ch. 4. Laws 1979, ch. 4, § 1, is compiled as this section. Laws 1979, ch. 4, § 2,

conflicts with Laws 1979, ch. 348, § 1, in amending 60-1-10 NMSA 1978, which is set out as it appears in the second 1979 amendment. See 12-1-8 NMSA 1978.

ARTICLE 20

CRIMES AGAINST PUBLIC PEACE

30-20-1. Disorderly conduct.

Disorderly conduct consists of:

A. engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace; or

B. maliciously disturbing, threatening or, in an insolent manner, intentionally touching any house occupied by any person.

Whoever commits disorderly conduct is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-1, enacted by Laws 1963, ch. 303, § 20-1; 1967, ch. 120, § 1.

ANNOTATIONS

Constitutionality. - This section is not void for vagueness and is not overly broad. *State v. James M.*, 111 N.M. 473, 806 P.2d 1063 (Ct. App. 1991).

No common-law crime. - There is no common-law crime of disorderly conduct; hence, unless the acts complained of fall clearly within the statute, they are not disorderly. *State v. Florstedt*, 77 N.M. 47, 419 P.2d 248 (1966).

Elements of offense. - To violate this section, defendant's conduct must have (1) been indecent or profane and (2) tended to disturb the peace. *State v. James M.*, 111 N.M. 473, 806 P.2d 1063 (Ct. App. 1991).

Evidence supported defendant's conviction of disorderly conduct, where defendant - while pointing and flailing his arms - directed loud and profane language to another person, and defendant's conduct supported an intervening police officer's belief that a fight was possible. *State v. James M.*, 111 N.M. 473, 806 P.2d 1063 (Ct. App. 1991).

Meaning of "indecent". - Meaning of indecent includes that tending toward or being in fact something generally viewed as morally indelicate or improper or offensive. *State v. Oden*, 82 N.M. 563, 484 P.2d 1273 (Ct. App. 1971).

Disturbing peace as breach thereof. - The meaning of "disturb the peace" in this statute is not strained if equated with the words "breach of the peace" as used in New York statute. State v. Florstedt, 77 N.M. 47, 419 P.2d 248 (1966).

Tendency to disturb peace. - All this section required in the case at hand was indecent conduct which tended to disturb the peace; conduct which is inconsistent with the peaceable and orderly conduct of society tends to disturb the peace and quiet of the community. State v. Oden, 82 N.M. 563, 484 P.2d 1273 (Ct. App. 1971).

Section contemplates conduct which tends to disturb the peace; a breach of the peace is a disturbance of public order by an act of violence or by any act likely to produce violence or which, by causing consternation and alarm, disturbs the peace and quiet of the community. State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978).

Nonprovocative objection to police detention. - One is not to be punished for nonprovocatively voicing his objection to what he obviously feels is a highly questionable detention by a police officer. State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978).

Determining nature of conduct. - Since disturbance is viewed in relation to the peace and quiet of the community, the question of disturbing the peace would not be determined solely by the reaction of the girls toward whom his conduct was directed. State v. Oden, 82 N.M. 563, 484 P.2d 1273 (Ct. App. 1971).

Conduct indecent. - Where defendant by language and gesture referred to male and female sex organs while talking to girls on tennis courts and after defendant's companions appeared naked he asked girls if they had ever seen a nude boy before, there was substantial evidence that defendant's conduct was indecent and tended to disturb the peace. State v. Oden, 82 N.M. 563, 484 P.2d 1273 (Ct. App. 1971).

Blocking of road by cars was not disorderly conduct. State v. Florstedt, 77 N.M. 47, 419 P.2d 248 (1966).

Elements of breach of peace not present. - Where the defendant was angry and had his fist clenched but made no gesture or movement toward some police officers, and there was no evidence that a crowd was gathering, that the defendant was inciting belligerent behavior or that he was causing consternation or alarm, then the defendant's words and actions did not constitute disorderly conduct. State v. Doe, 92 N.M. 100, 583 P.2d 464 (1978).

Tendency to disturb peace not shown. - Where officer saw no acts of violence or indecent behavior, nor did he hear any boisterous, loud, noisy or profane language and he observed only a gathering crowd of teenagers and people in their early twenties, conviction for disorderly conduct would be overturned as conduct was not such as "tends to disturb the peace." State v. Florstedt, 77 N.M. 47, 419 P.2d 248 (1966).

Acquittal bars retrial for battery. - After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. State v. Orosco, 99 N.M. 180, 655 P.2d 1024 (Ct. App. 1982).

Law reviews. - For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Breach of Peace and Disorderly Conduct §§ 30 to 37.

Police officer, failure of one on street to obey order of, to move on, as disorderly conduct, 65 A.L.R.2d 1152.

Students: participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly or similar offense, 32 A.L.R.3d 551.

Validity and construction of statutes or ordinances prohibiting profanity or profane swearing or cursing, 5 A.L.R.4th 956.

Insulting words addressed directly to police officer as breach of peace or disorderly conduct, 14 A.L.R.4th 1252.

Validity, construction, and effect of "hate crimes" statutes, "ethnic intimidation" statutes, or the like, 22 A.L.R.5th 261.

27 C.J.S. Disorderly Conduct § 1 (2).

30-20-2. Public affray.

Public affray consists of two or more persons voluntarily or by agreement engaging in any fight or using any blows or violence toward each other in an angry or quarrelsome manner in any public place, to the disturbance of others.

Whoever commits public affray is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-3, enacted by Laws 1963, ch. 303, § 20-3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Breach of Peace and Disorderly Conduct § 18.

Sufficiency of evidence to establish criminal participation by individual involved in gang fight or assault, 24 A.L.R.4th 243.

2A C.J.S. Affray §§ 5 to 14.

30-20-3. Unlawful assembly.

Unlawful assembly consists of three or more persons assembling together with intent to do any unlawful act with force or violence against the person or property of another, and who shall make any overt act to carry out such unlawful purpose.

Whoever commits unlawful assembly is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-4, enacted by Laws 1963, ch. 303, § 20-4.

ANNOTATIONS

Connivance to act unlawfully. - Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.) required proof that three or more persons, gathered together, connived to commit some unlawful act against the person or property of another or to commit some other act proscribed by the statute. *State v. Martinez*, 53 N.M. 432, 210 P.2d 620 (1949).

Watermelon stealing. - Boys on a watermelon stealing escapade were guilty of having assembled unlawfully to do an unlawful act of force and violence against the property in question and to commit an unlawful act against the peace. *Brown v. Martinez*, 68 N.M. 271, 361 P.2d 152 (1961).

Interfering with mine. - Testimony that activities of accused prevented workmen from entering mine, that it was planned to shut off pump in mine, without which the mine would be flooded, and that gas bombs were necessary to disperse the crowd about mine shaft was sufficient to sustain a conviction of unlawful assembly under Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.). *State v. Gennis*, 41 N.M. 453, 70 P.2d 902 (1937).

Attack on school bus driver. - Evidence that defendants acted in concert in meeting school bus and attacking driver thereof was sufficient to support verdict of unlawful assembly under Laws 1876, ch. 10, § 1 (former 40-12-10, 1953 Comp.). *State v. Hawks*, 28 N.M. 486, 214 P. 753 (1923).

Indictment sufficient. - Indictment charging defendant and 100 other persons with unlawful assembly was not defective for failure to allege names of others than defendants or that their names were unknown. *State v. Gennis*, 41 N.M. 453, 70 P.2d 902 (1937).

Member of unlawful assembly may not recover for injuries inflicted upon him by a fellow member while they are carrying out the unlawful purposes of such assembly if there is a causal connection between such act and the injury. *Curry v. Vesely*, 66 N.M. 372, 348 P.2d 490 (1960).

Unless unlawful plan abandoned. - Where boy who, along with a group of others, had been proceeding to picnic grounds to take part in a nighttime gang fight had either never intended to have any part in contemplated fight or had abandoned intention to do so prior to his injury, judgment against driver of other vehicle in the group for injuries in accident caused by his negligence would be affirmed. *Curry v. Vesely*, 66 N.M. 372, 348 P.2d 490 (1960).

Suppression of riot as homicide defense. - Request for directed verdict based on defense of suppression of riot was properly refused in homicide prosecution where there was no proof of any common design by decedent's party to do some unlawful act. *State v. Martinez*, 53 N.M. 432, 210 P.2d 620 (1949).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 54 Am. Jur. 2d Mobs and Riots §§ 5, 7 to 9.

What constitutes offense of unlawful assembly, 71 A.L.R.2d 875.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

91 C.J.S. Unlawful Assembly § 2.

30-20-4. Riot control; short title.

This act [30-20-4 to 30-20-9 NMSA 1978] may be cited as the "Riot Control Act."

History: 1953 Comp., § 40A-20-4.1, enacted by Laws 1969, ch. 281, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - What constitutes sufficiently violent, tumultuous, forceful, aggressive, or terrorizing conduct to establish crime of riot in state courts, 38 A.L.R.4th 648.

77 C.J.S. Riot; Insurrection § 25 et seq.

30-20-5. Proclamation of emergency.

Upon request of the mayor of a municipality or the sheriff of a county or a majority of the members of the governing body of the municipality or county having jurisdiction and after finding that a public disorder, disaster or emergency which affects life or property

exists in the state, the governor may proclaim a state of emergency in the area affected. The proclamation becomes effective immediately upon its signing by the governor, but the governor shall give public notice of its contents through the public press and other news media.

History: 1953 Comp., § 40A-20-4.2, enacted by Laws 1969, ch. 281, § 2.

30-20-6. Emergency restrictions.

A. During the existence of a state of emergency, the governor may, by proclamation, prohibit:

- (1) any person being on the public streets, in the public parks or at any other public place during the hours proclaimed by the governor to be a period of curfew;
- (2) any designated number of persons from assembling or gathering on the public streets, public parks or other open areas, either public or private, or in any public building;
- (3) the manufacture, transfer, use, possession or transportation of any device or object designed to explode or produce uncontained combustion;
- (4) the transportation, possession or use of combustible, flammable or explosive materials in a glass or uncapped container of any kind except in connection with the normal operation of motor vehicles, normal home use or legitimate commercial use;
- (5) the possession of firearms or any other deadly weapon by a person in any place other than his place of residence or business, except for peace officers;
- (6) the sale, purchase or dispensing of alcoholic beverages or other commodities or goods designated by the governor;
- (7) the use of certain streets or highways by the public; and
- (8) other activities the governor reasonably believes should be prohibited to help maintain life, property or the public peace.

B. Any proclamation issued under this section becomes effective immediately upon its signing by the governor, but the governor shall give public notice of its contents through the public press and other news media. The restrictions may be imposed during times, upon conditions, with exceptions and in areas of the state designated by proclamation of the governor from time to time.

History: 1953 Comp., § 40A-20-4.3, enacted by Laws 1969, ch. 281, § 3.

30-20-7. Termination of emergency.

Any state of emergency proclaimed under the Riot Control Act [30-20-4 to 30-20-9 NMSA 1978], along with any restrictions imposed for control of that emergency, terminates automatically at noon on the third day after it becomes effective unless sooner terminated by proclamation of the governor.

History: 1953 Comp., § 40A-20-4.4, enacted by Laws 1969, ch. 281, § 4.

30-20-8. Penalty.

Any person who, during a state of emergency, fails to comply with restrictions imposed by proclamation of the governor under the Riot Control Act [30-20-4 to 30-20-9 NMSA 1978] is guilty of a misdemeanor, and upon conviction of a second or subsequent offense under this section is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-20-4.5, enacted by Laws 1969, ch. 281, § 5.

30-20-9. Governor's powers not limited.

The Riot Control Act [30-20-4 to 30-20-9 NMSA 1978] does not limit any other power to maintain the public peace and safety which is vested in the governor.

History: 1953 Comp., § 40A-20-4.6, enacted by Laws 1969, ch. 281, § 6.

ANNOTATIONS

Cross-references. - For governor's power to call out the militia, see N.M. Const., art. V, § 4.

For governor's power to call out the national or state guard, see 20-2-6, 20-9-4, 20-10-16 NMSA 1978.

30-20-10. Loitering of minors.

Loitering of minors consists of the owner or operator of any saloon permitting a person under the age of twenty-one years to attend, frequent or loiter in or about such premises without being accompanied by the parent or guardian of the person.

Whoever commits loitering of minors is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-6, enacted by Laws 1963, ch. 303, § 20-6; 1973, ch. 138, § 17; 1977, ch. 35, § 1.

ANNOTATIONS

Absolute prohibition. - There is an absolute prohibition against the frequenting and loitering of any minor upon premises used for the sale and consumption of alcoholic beverages. 1957-58 Op. Att'y Gen. No. 58-151.

Public dance to be kept free of alcohol. - Where minors for the purposes of a public dance use a segregated part of the American Legion Hall, it must at all times during such use be kept entirely free from alcoholic beverages, such restriction including not only sales and services but the permitting of beverages to be carried into the hall by anyone regardless of the source or place of original purchase. 1957-58 Op. Att'y Gen. No. 58-151.

Instructions to employees no defense. - That proprietor of saloon in which gambling was permitted instructed his employees not to allow minors to gamble was no defense, where minors were permitted to gamble by his bartender. *Territory v. Church*, 14 N.M. 226, 91 P. 720 (1907).

Principal business and purpose. - The only workable method of classifying an establishment as a poolroom (permission of unaccompanied minors to frequent which was prohibited prior to 1977 amendment) was the principal business and purpose test. 1963-64 Op. Att'y Gen. No. 64-32.

Establishment not poolroom. - Since principal business and purpose of bowling establishment which also contained four pool tables and a snack bar was not the playing of pool, the establishment was not a poolroom. 1963-64 Op. Att'y Gen. No. 64-32.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of loitering statutes and ordinances, 25 A.L.R.3d 836.

30-20-11. Dueling.

Dueling consists of any person:

A. conveying by written or verbal message a challenge to any other person to fight a duel with any deadly weapon, and whether or not such duel ensues;

B. accepting a challenge from another person to fight a duel with any deadly weapon, and whether or not such duel ensues;

C. engaging in or fighting a duel with any deadly weapon; or

D. aiding, encouraging or seconding either party to a duel and being present at such duel when deadly weapons are used.

Whoever commits dueling is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-20-7, enacted by Laws 1963, ch. 303, § 20-7.

ANNOTATIONS

Cross-references. - For definition of deadly weapon, see 30-1-12 NMSA 1978.

Purpose. - The purpose of antidueling statutes is to discourage and discountenance the settlement of quarrels by duel. *State v. Romero*, 111 N.M. 99, 801 P.2d 681 (Ct. App. 1990).

Dueling defined. - A duel is a combat with deadly weapons between two persons, fought according to the terms of a precedent agreement and under certain agreed and prescribed rules. *State v. Romero*, 111 N.M. 99, 801 P.2d 681 (Ct. App. 1990).

Duel distinguished from affray. - A duel differs from an affray in that the former is always a result of design while the latter is upon a sudden quarrel. *State v. Romero*, 111 N.M. 99, 801 P.2d 681 (Ct. App. 1990).

Characteristics of dueling. - A duel has none of the elements of sudden heat and passion. *State v. Romero*, 111 N.M. 99, 801 P.2d 681 (Ct. App. 1990).

Duels are generally fought under rules of considerable formality. *State v. Romero*, 111 N.M. 99, 801 P.2d 681 (Ct. App. 1990).

Conviction reversed. - Conviction for dueling was reversed, where a formal agreement to fight a duel could not be inferred from evidence that the respective combatants went to their home and car to retrieve their weapons, that they were facing each other as they were shooting, and that gunfire took place in rapid succession. *State v. Romero*, 111 N.M. 99, 801 P.2d 681 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Dueling § 1.

28 C.J.S. Dueling § 1.

30-20-12. Use of telephone to terrify, intimidate, threaten, harass, annoy or offend; penalty.

A. It shall be unlawful for any person, with intent to terrify, intimidate, threaten, harass, annoy or offend, to telephone another and use any obscene, lewd or profane language or suggest any lewd, criminal or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person. It shall also be unlawful for any person to attempt by telephone to extort money or other thing of value from any other person, or to otherwise disturb by repeated anonymous telephone calls the peace, quiet or right of privacy of any other person at the place where the telephone call or calls were received, or to maliciously make a telephone call, whether or not conversation ensues, with intent to annoy or disturb another, or to disrupt the telecommunications of another.

B. The use of obscene, lewd or profane language or the making of a threat or statement as set forth in Subsection A shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy or offend.

C. Any offense committed by use of a telephone as set forth in this section shall be deemed to have been committed at either the place where the telephone call or calls originated or at the place where the telephone call or calls were received.

D. Whosoever violates this section is guilty of a misdemeanor, unless such person has previously been convicted of such offense or of an offense under the laws of another state or of the United States which would have been an offense under this section if committed in this state, in which case such person is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-20-8, enacted by Laws 1967, ch. 120, § 2.

ANNOTATIONS

Cross-references. - For evidentiary rule relating to use of presumptions in criminal cases, see Rule 11-302.

Severability clauses. - Laws 1967, ch. 120, § 3, provides for the severability of the act if any part or application thereof is held invalid.

Constitutionality. - This section is not unconstitutionally overbroad, nor is it void for vagueness. *State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (Ct. App. 1986).

Applicability of Subsection A. - The first sentence of Subsection A explicitly covers threats conveyed by telephone. The legislature did not intend that the later portion of the statute relating to malicious calls should duplicate that coverage. When a threat is the sole basis for finding that a call with an otherwise proper purpose is inexcusable, then the first sentence of Subsection A controls. *State v. Stephens*, 111 N.M. 543, 807 P.2d 241 (Ct. App. 1991).

"**Threats**" under this section include, at most, threats of criminal or tortious misconduct. *State v. Stephens*, 111 N.M. 543, 807 P.2d 241 (Ct. App. 1991).

Determination of intent. - The language used in calls may be considered in determining defendant's intent in making the calls. Likewise, the time that the calls were made and the previous efforts to make defendant desist may be considered. *State v. Gattis*, 105 N.M. 194, 730 P.2d 497 (Ct. App. 1986).

Legitimate purpose. - When a caller has a legitimate purpose and the call communicates that purpose, only in extreme circumstance is the call inexcusable. Such a circumstance can be created by a variety of factors. One factor would be the language employed in the call. Other factors could be the frequency of calls, the time of day of the

call, or the strength and frequency of the recipient's objections to such calls. State v. Stephens, 111 N.M. 543, 807 P.2d 241 (Ct. App. 1991).

Evidence insufficient. - Evidence was insufficient to sustain defendant's conviction, where defendant made telephone calls for the legitimate purpose of seeking assistance from the parents of her granddaughter's boyfriend to try to terminate what she saw as an unhealthy relationship. State v. Stephens, 111 N.M. 543, 807 P.2d 241 (Ct. App. 1991).

Evidence of the effect on the recipient of the calls cannot substitute for evidence of the defendant's misconduct. State v. Stephens, 111 N.M. 543, 807 P.2d 241 (Ct. App. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Misuse of telephone as minor criminal offense, 97 A.L.R.2d 503.

Right of telephone or telegraph company to refuse, or discontinue, service because of use of improper language, 32 A.L.R.3d 1041.

Validity, construction, and application of state criminal statute forbidding use of telephone to annoy or harass, 95 A.L.R.3d 411.

Telephone company's liability for disclosure of number or address of subscriber holding unlisted number, 1 A.L.R.4th 218.

Telephone calls as nuisance, 53 A.L.R.4th 1153.

86 C.J.S. Telegraphs, Telephones, Radio and Television § 121.

30-20-13. Interference with members of staff, public officials or the general public; trespass; damage to property; misdemeanors; penalties.

A. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivisions, willfully deny to staff, public officials or the general public:

(1) lawful freedom of movement within the building or facility or the land on which it is situated;

(2) lawful use of the building or facility or the land on which it is situated; or

(3) the right of lawful ingress and egress to the building or facility or the land on which it is situated.

B. No person shall, at or in any building or other facility or property owned, operated or controlled by the state or any of its political subdivision [subdivisions], willfully impede the staff or a public official or a member of the general public through the use of restraint, abduction, coercion or intimidation or when force and violence are present or threatened.

C. No person shall willfully refuse or fail to leave the property of or any building or other facility owned, operated or controlled by the state or any of its political subdivisions when requested to do so by a lawful custodian of the building, facility or property if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the property, building or facility.

D. No person shall willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

E. Nothing in this section shall be construed to prevent lawful assembly and peaceful and orderly petition for the redress of grievances, including any labor dispute.

F. Any person who violates any of the provisions of this section shall be deemed guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-20-10, enacted by Laws 1970, ch. 86, § 2; 1975, ch. 52, § 2; 1981, ch. 32, § 1.

ANNOTATIONS

Flexibility not vagueness. - Subsection C of this section, referring prior to 1975 amendment specifically to institutions of higher education, allowed control of campus disturbances in terms marked by flexibility and reasonable breadth, rather than meticulous specificity, and was not void for vagueness. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Campus restrictions not overbroad. - Since this section, referring in Subsection C, prior to 1975 amendment, specifically to institutions of higher education, vindicated significant government interest in the control of campus disturbances, reasonable "time, place and manner" regulations were valid even though they incidentally suppressed otherwise protected conduct. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

No invalid delegation of power. - Subsection C of this section specifies adequate standards and guidelines to be followed, in that criminality is based first on a refusal to leave after requests, and second on a determination by the judge or jury that the person

committed the specified disruptive acts. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Nor unbridled discretion. - Subsection C of this section does not put unbridled discretion in the hands of the administrator or police officer because the decision of each must be checked by the decision of the other, and the discretion of both is limited by the reasonably precise directive of the statute. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Meaning of "impair". - The term "impair" in Subsection C means, in context, a substantial physical diminution or damage and not just any diminution in quality. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Substantial physical invasion required. - The word "impair," along with the other operative verbs of present Subsection C (which subsection prior to 1975 amendment referred specifically to institutions of higher education), denotes a substantial physical invasion, and requires interference with the actual functioning of the university. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Willfulness and intent essential. - Not only must the refusal contemplated by Subsection C of this section be willful but the disruption must also be accompanied by general intent. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Application constitutional. - Defendants' refusal to honor the request of the university president to leave his office although he had appointments to keep, substantially interfered with the functioning of the president's business, and hence Subsection C of this section (referring prior to 1975 amendment specifically to institutions of higher education) was constitutionally applied to warrant their convictions. *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974).

Limitations on sales of handicrafts on state property. - Since the legislature intended that those who set the lawful mission, processes, procedures or functions of state property are to be able to avail themselves of Subsection C's provisions in furtherance of those policies and functions, the board of regents of the museum of New Mexico may properly rely on the provisions of this section to effectuate the provisions of a resolution which permits only Indians to sell handicrafts under the portals of the governor's palace. *Livingston v. Ewing*, 98 N.M. 685, 652 P.2d 235 (1982).

Law reviews. - For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense, 32 A.L.R.3d 551.

"Choice of evils," necessity, duress, or similar defense to state or local criminal charges based on acts of public protest, 3 A.L.R.5th 521.

30-20-14. Institutions permitted to adopt rules.

Nothing in this act [30-20-13 to 30-20-15 NMSA 1978] shall be construed as limiting the power or duty of any institution of higher education to establish standards of conduct and scholastic achievement relevant to its lawful missions, processes and functions and to invoke appropriate discipline for violations of the standards.

History: 1953 Comp., § 40A-20-11, enacted by Laws 1970, ch. 86, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Participation of student in demonstration on or near campus as warranting expulsion or suspension from school or college, 32 A.L.R.3d 864.

30-20-15. Construction.

This act [30-20-13 to 30-20-15 NMSA 1978] shall be construed to be an alternative to and not in lieu of the provisions of Laws 1969, Chapter 281 [30-20-4 to 30-20-9 NMSA 1978].

History: 1953 Comp., § 40A-20-12, enacted by Laws 1970, ch. 86, § 4.

30-20-16. Bomb scares unlawful.

Making a bomb scare consists of falsely and maliciously stating to another that a bomb or other explosive has been placed in such a position that property or persons are likely to be injured or destroyed.

Whoever makes a bomb scare is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-20-13, enacted by Laws 1975, ch. 285, § 1; 1981, ch. 15, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

30-20-17. Reward.

If a person provides information leading to the conviction, or adjudication of delinquency pursuant to the Children's Code, of another for making a bomb scare, he shall, upon the recommendation of the district attorney, be entitled to a reward in the amount of one hundred dollars (\$100).

History: 1953 Comp., § 40A-20-14, enacted by Laws 1975, ch. 285, § 2.

ANNOTATIONS

Children's Code. - See 32A-1-1 NMSA 1978 and notes thereto.

30-20-18. Interference with athletic event.

Interference with athletic event consists of intentionally throwing any object on or across the field of play of an athletic event with the intent to interfere with the normal conduct of that event while the contestants of that event are on that field. As used in this section, "athletic event" means a scheduled sports event for which an admission fee is charged to the public.

Any person other than an official or a contestant of an athletic event who commits interference with [an] athletic event is guilty of a petty misdemeanor.

History: Laws 1986, ch. 53, § 1.

ANNOTATIONS

Cross-references. - For sentencing for petty misdemeanors, see 31-19-1 NMSA 1978.

ARTICLE 20A ANTITERRORISM

30-20A-1. Short title.

This act [30-20A-1 to 30-20A-4 NMSA 1978] may be cited as the "Antiterrorism Act".

History: Laws 1990, ch. 66, § 1.

30-20A-2. Definitions.

As used in the Antiterrorism Act [30-20A-1 to 30-20A-4 NMSA 1978]:

A. "civil disorder" means any planned act of violence by an assemblage of two or more persons with the intent to cause damage or injury to another individual or his property;

B. "destructive device" means:

(1) any explosive, incendiary or poison gas:

(a) bomb;

(b) grenade;

(c) rocket having a propellant charge of more than four ounces;

(d) missile having an explosive or incendiary charge of more than one-quarter ounce;

(e) mine; or

(f) similar device;

(2) any type of weapon that can expel or may be readily converted to expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than six-tenths inch in diameter, except a shotgun, shotgun shell or muzzle loading firearm that is generally recognized as particularly suitable for sporting purposes; or

(3) any part or combination of parts either designed or intended for use in converting or assembling any device described in Paragraphs (1) and (2) of this subsection.

The term "destructive device" shall not include any device that is neither designed nor redesigned for use as a weapon;

C. "firearm" means any weapon that can expel or is designed to or may readily be converted to expel a projectile by the action of an explosion, the frame or receiver of any such weapon, any firearm muffler or firearm silencer. "Firearm" includes any handgun, rifle or shotgun; and

D. "law enforcement officer" means any employee of a police or public safety department administered by the state or any political subdivision of the state where the employee is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of this state. "Law enforcement officer" includes any member of the New Mexico national guard; any peace officer of the United States, any state, any political subdivision of a state or the District of Columbia; any member of the New Mexico mounted patrol or the national guard, as defined in 10 U.S.C. Sec. 101(9); any member of the organized militia of any state or territory of the United States, the commonwealth of Puerto Rico or the District of Columbia not included within the definition of national guard; and any member of the armed forces of the United States.

"Law enforcement officer" also means any person or entity acting as a contractor for any other law enforcement officer, police or public safety department described in this section.

History: Laws 1990, ch. 66, § 2.

30-20A-3. Unlawful acts; penalty.

A. Any person who teaches or demonstrates the use, application or making of any firearm, destructive device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used in furtherance of a civil disorder is guilty of a fourth degree felony and shall be sentenced under the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978] to imprisonment for a definite term of eighteen months or, in the discretion of the sentencing court, to a fine of not more than five thousand dollars (\$5,000), or both.

B. Any person who trains, practices or receives instruction in the use of any firearm, destructive device or technique capable of causing injury or death to any person with the intent that the knowledge or skill taught, demonstrated or gained be unlawfully used in furtherance of a civil disorder is guilty of a fourth degree felony and shall be sentenced under the provisions of the Criminal Sentencing Act to imprisonment for a definite term of eighteen months or, in the discretion of the sentencing court, to a fine of not more than five thousand dollars (\$5,000), or both.

History: Laws 1990, ch. 66, § 3.

30-20A-4. Exemptions.

A. Nothing in the Antiterrorism Act [30-20A-1 to 30-20A-4 NMSA 1978] shall make unlawful any activity:

- (1) in accordance with Article 2, Section 6 of the constitution of New Mexico;
- (2) of any governmental agency;
- (3) of any law enforcement agency;
- (4) of any hunting, rifle, pistol, shotgun, sportsmen's or conservation club;
- (5) lawfully engaged in on a shooting range;
- (6) lawfully undertaken pursuant to any shooting school or other program of instruction;
- (7) intended to teach the safe handling, including marksmanship, or use of firearms, archery equipment or other weapons or techniques to individuals or groups;

(8) that teaches the use of martial arts or arms for the defense of home, person or property or the lawful use of force as defined in Section 30-2-7 NMSA 1978; or

(9) that is otherwise lawful.

B. Nothing in the Antiterrorism Act shall make unlawful any act of a law enforcement officer that is performed as a part of his official duties.

History: Laws 1990, ch. 66, § 4.

ARTICLE 21 SABOTAGE AND DISLOYALTY

30-21-1. Sabotage.

Sabotage consists of:

A. intentionally destroying, impairing, injuring, interfering or tampering with real or personal property with reasonable grounds to believe that such act will delay or interfere with the preparation of the United States or of any of the states for defense or for war or with the prosecution of war by the United States; or

B. intentionally making or causing to be made or omitting to note on inspection any defect in any article or thing with reasonable grounds to believe that such article or thing is intended to be used in connection with the preparation of the United States or any of the states for defense or war or for the prosecution of war by the United States.

Whoever commits sabotage is guilty of a second degree felony.

History: 1953 Comp., § 40A-21-1, enacted by Laws 1963, ch. 303, § 21-1.

ANNOTATIONS

Cross-references. - For conspiracy to commit a felony, see 30-28-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 70 Am. Jur. 2d Sedition, Subversive Activities and Treason § 61.

Validity of legislation against sabotage, 1 A.L.R. 336, 20 A.L.R. 1535, 73 A.L.R. 1494.

93 C.J.S. War and National Defense § 57.

30-21-2. Protection of rights of employees.

Nothing in this article [30-21-1 to 30-21-5 NMSA 1978] shall be construed to impair, curtail or destroy the lawful rights of employees and their representatives to self-organization, or [to] form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

History: 1953 Comp., § 40A-21-2, enacted by Laws 1963, ch. 303, § 21-2.

30-21-3. Detention or arrest of trespassers upon restricted areas.

Any peace officer or person employed as a watchman, guard or in a supervisory capacity on premises utilized in the manufacture, transportation or storage of any product in the preparation of the United States or of any of the states for defense or for war, or the manufacture, transportation, distribution or storage of gas, oil, coal, electricity or water or of any public utility, may stop any person found on such premises to which entry without permission is forbidden and where such premises are clearly posted with signs prohibiting entry, and may detain such person for the purpose of demanding the name, address and the individual's business in such place. If such peace officer or employee has reason to believe from the answers or conduct of the person so interrogated that the person detained has no right to be in such restricted [restricted] area, he shall forthwith either release such person, or may arrest the individual without a warrant on the charge of committing the crime of criminal trespass. In the event such peace officer or employee shall arrest such person found in the restricted area he shall forthwith turn the individual over to a peace officer who may arrest the individual without a warrant on the charge of committing criminal trespass.

History: 1953 Comp., § 40A-21-3, enacted by Laws 1963, ch. 303, § 21-3.

ANNOTATIONS

Cross-references. - For criminal trespass, see 30-14-1 NMSA 1978.

30-21-4. Improper use of official symbols.

Improper use of official symbols consists of:

- A. the use of the state or national flags for any purpose other than the purposes for which it was designed by law;
- B. offering any insult by word or act to the state or national flags; or
- C. using the state or national flags for advertising purposes by painting, printing, stamping or otherwise placing thereon or affixing thereto any name or object not connected with the patriotic history of the nation or the state.

Whoever commits improper use of official symbols is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-21-4, enacted by Laws 1963, ch. 303, § 21-4.

ANNOTATIONS

Law reviews. - For comment, "Official Symbols: Use and Abuse," see 1 N.M.L. Rev. 352 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 Am. Jur. 2d Flag §§ 3 to 5.

Flag desecration: what constitutes violation of flag desecration statutes, 41 A.L.R.3d 502.

36A C.J.S. Flags § 2.

30-21-5. Improper use of official anthems.

Improper use of official anthems consists of singing, playing or rendering "The Star Spangled Banner" or "Oh Fair New Mexico" in any public place or assemblage in this state except as an entire or separate composition or number.

Whoever commits improper use of official anthems is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-21-5, enacted by Laws 1963, ch. 303, § 21-5.

ARTICLE 22 INTERFERENCE WITH LAW ENFORCEMENT

30-22-1. Resisting, evading or obstructing an officer.

Resisting, evading or obstructing an officer consists of:

A. knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;

B. intentionally fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or evasion has knowledge that the officer is attempting to apprehend or arrest him;

C. willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle; or

D. resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties.

Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-1, enacted by Laws 1963, ch. 303, § 22-1; 1981, ch. 248, § 1.

ANNOTATIONS

Magistrate. - The office of justice of the peace has been abolished by 35-1-38 NMSA 1978 which provides that use of the term "justice of the peace" shall be construed to refer to the magistrate court.

Section not vague. - There is no merit to claim that this section is vague on its face. *State v. Andazola*, 95 N.M. 430, 622 P.2d 1050 (Ct. App. 1981).

Section places those interfering with officer on notice of criminal sanctions. - In clear simple language, this statute puts everyone on notice that one would be exposed to criminal sanctions if he resisted or abused any peace officer who was engaged in the lawful discharge of his duties. *State v. Andazola*, 95 N.M. 430, 622 P.2d 1050 (Ct. App. 1981).

Construction of former law. - Former 40-31-4 and 40-31-5, 1953 Comp., made it unlawful to obstruct justice, the former relating to obstructing an officer in serving process and the latter to resisting or abusing an officer while executing the duties of his office. *City of Clovis v. Archie*, 60 N.M. 239, 290 P.2d 1075 (1955).

Applicability of former law. - Kearny Code, Crimes and Punishments, art. 3, § 4, prescribing penalty for obstruction or assaulting officer serving process was not applicable where the sheriff was not armed with process. *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933).

Resisting sheriff formerly serious offense. - Under former law, resisting a sheriff was itself a felony. *State v. Smelcer*, 30 N.M. 122, 228 P. 183 (1924). But see *State v. Welch*, 37 N.M. 549, 25 P.2d 211 (1933) (resistance to a sheriff making a lawful arrest, but not armed with process, a misdemeanor).

Double jeopardy. - The jurisdictional exception to double jeopardy permitted defendant's prosecution in the district court on a charge of peace officer battery, after he had pleaded guilty to several misdemeanors, including resisting arrest, in the magistrate court. *State v. Padilla*, 101 N.M. 58, 678 P.2d 686 (1984), *aff'd sub. nom.*, *Fugate v. New Mexico*, 470 U.S. 904, 105 S. Ct. 1858, 84 L. Ed. 2d 777 (1985).

Conviction varying from crime charged in information. - The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from

the crime charged in the criminal information, i.e., aggravated assault upon a peace officer. State v. Hamilton, 107 N.M. 186, 754 P.2d 857 (Ct. App. 1988).

"Abusing" speech equated to "fighting" words. - "Abusing" speech in Subsection D covers only speech that can be called "fighting" words: Any other interpretation of that subsection applied to speech would render it unconstitutional. State v. Wade, 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983).

"Fighting" words are those which tend to incite an immediate breach of the peace. State v. Wade, 100 N.M. 152, 667 P.2d 459 (Ct. App. 1983).

Self-defense distinguished from resisting unlawful arrest. - The right of self-defense against a police officer is a concept different from the right to resist an unlawful arrest, in that self-defense is for the purpose of protecting a person's bodily integrity and health, whereas the purpose of resisting an unlawful arrest is to prevent the arrest. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Limits of right to self-defense. - One has a right to defend oneself from a police officer, whether the attempted arrest is lawful or unlawful; this right, however, is limited, so that one may defend oneself against excessive use of force by the officer, but one may not resort to self-defense when the officer is using necessary force to effect an arrest. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Involuntary manslaughter while resisting arrest. - Instruction that killing an officer while resisting a lawful arrest was murder in first or second degree was error, since resistance to arrest, where sheriff was not armed with process, was a misdemeanor and death without malice resulting therefrom was involuntary manslaughter. State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933).

Instruction on self-defense. - Defendant had a limited right of self-defense against police officer, and was entitled to an instruction on that limited right, which the instruction did not cover since it went only to the arrest and did not refer to the right to defend against excessive force whether or not the arrest was unlawful. State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Acquittal bars retrial for battery. - After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. State v. Orosco, 99 N.M. 180, 655 P.2d 1024 (Ct. App. 1982).

Law reviews. - For comment on State v. Selgado, 76 N.M. 187, 413 P.2d 469 (1966), see 7 Nat. Resources J. 119 (1967).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico Criminal Procedure, see 20 N.M.L. Rev. 285 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 58 Am. Jur. 2d Obstructing Justice §§ 10 to 17.

Criminal liability for obstructing process as affected by invalidity or irregularity of the process, 10 A.L.R.3d 1146.

67 C.J.S. Obstructing Justice §§ 7, 10-14.

30-22-2. Refusing to aid an officer.

Refusing to aid an officer consists of refusing to assist any peace officer in the preservation of the peace when called upon by such officer in the name of the United States or the state of New Mexico.

Whoever commits refusing to aid an officer is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-22-2, enacted by Laws 1963, ch. 303, § 22-2.

ANNOTATIONS

Cross-references. - For provisions authorizing officer to call on others for aid in execution of process, and setting penalty for refusal to provide such aid when called upon, see 29-1-7, 29-1-8 NMSA 1978.

Declaratory of common law. - Laws 1853-1854, p. 122 (former 40-31-6, 1953 Comp.) was declaratory of the common law upon the requirements for help from the posse comitatus. *Eaton v. Bernalillo County*, 46 N.M. 318, 128 P.2d 738 (1942).

Refusing assistance to sheriff. - A sheriff or his legally constituted deputy could call on any citizen or citizens to assist him in the execution of his office, and any person who refused such assistance without sufficient excuse was subject to penalty. *Territory v. Taylor*, 11 N.M. 588, 71 P. 489 (1903).

Grounds for summoning posse. - The grounds for summoning the posse comitatus were found in the common law and statutes which were largely declaratory thereof and the court did not have authority to invest the sheriff with further grounds. *Eaton v. Bernalillo County*, 46 N.M. 318, 128 P.2d 738 (1942).

Wrongful expulsion from train. - Railroad was liable for wrongful expulsion where conductor ejected two Negro women from train on information that a railroad special

officer had a request from police for two women having similar ticket. *Manning v. Atchison, T. & S. F. Ry.*, 42 N.M. 381, 79 P.2d 922 (1938).

30-22-3. Concealing identity.

Concealing identity consists of concealing one's true name or identity, or disguising oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty or the exercise of his rights under the laws of the United States or of this state.

Whoever commits concealing identity is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-22-3, enacted by Laws 1963, ch. 303, § 22-3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - What amounts to disguise, 1 A.L.R. 642.

30-22-4. Harboring or aiding a felon.

Harboring or aiding a felon consists of any person, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister by consanguinity or affinity, who knowingly conceals any offender or gives such offender any other aid, knowing that he has committed a felony, with the intent that he escape or avoid arrest, trial, conviction or punishment.

In a prosecution under this section it shall not be necessary to aver, nor on the trial to prove, that the principal felon has been either arrested, prosecuted or tried.

Whoever commits harboring or aiding a felon is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-4, enacted by Laws 1963, ch. 303, § 22-4.

ANNOTATIONS

Constitutionality. - This section is not unconstitutional for vagueness. *State v. Rogers*, 94 N.M. 527, 612 P.2d 1338 (Ct. App.), cert. denied, 94 N.M. 629, 614 P.2d 546 (1980).

Common law. - This section grew out of the common law of accessories after the fact. *State v. Martinez*, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

The offense of harboring a felon had its genesis in the common law offense of accessory after the fact. *State v. Gardner*, 112 N.M. 280, 814 P.2d 458 (Ct. App. 1991).

Classifications reasonable. - Exemption of certain named groups of persons from application of this section on the basis of relationship to the felon are reasonable

classifications and do not violate the equal protection clauses of the New Mexico and United States constitutions. *State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975).

Elements of offense. - Under this section and the common law applicable to accessories, in order to convict a defendant as an accessory, the state must prove that a felony has been committed and that the defendant knew the offender committed a felony. *State v. Gardner*, 112 N.M. 280, 814 P.2d 458 (Ct. App. 1991).

This section requires that the state prove that a specific felony has been committed, whether or not the perpetrator has been arrested, prosecuted, or tried. *State v. Gardner*, 112 N.M. 280, 814 P.2d 458 (Ct. App. 1991).

To aid means to assist, support or help. *State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975).

"Felon". - The legislature intended to include, within the meaning of the word "felon", felons already convicted but who are wanted for punishment as well as persons who have committed a felony but who have not been arrested, prosecuted, or tried. *State v. Serna*, 112 N.M. 738, 819 P.2d 688 (Ct. App. 1991).

If revealing felon would also reveal spouse. - This section does not exempt a defendant from prosecution where she could not have revealed the presence of a felon in her house without also revealing the presence of her husband, another felon. *State v. Mobbley*, 98 N.M. 557, 650 P.2d 841 (Ct. App. 1982).

Crimes of harboring felon and conspiracy to harbor felon do not merge. *State v. Smith*, 102 N.M. 512, 697 P.2d 512 (Ct. App. 1985).

Harboring does not supersede crime of assisting escape. - The offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape. *State v. Martinez*, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Evidence sufficient. - Evidence that defendant's girl friend, with whom he lived, was present and witnessed shootings by him (even though she claimed not to have seen gun or observed shootings), was with defendant at the place of the shootings afterwards and later at the house in which they were apprehended, that she undertook to close door upon the arresting officer, and that she ran toward the front of the house while defendant secreted himself in a closet, together with all inferences reasonably deducible therefrom, supported conviction for aiding defendant with intent that he escape or avoid arrest. *State v. Lucero*, 88 N.M. 441, 541 P.2d 430 (1975).

Law reviews. - For article, "The Advocate's Role in the Legal System," see 6 N.M.L. Rev. 1 (1975).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 39 Am. Jur. 2d Harboring Criminals, § 1 et seq.

30-22-5. Tampering with evidence.

Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person or to throw suspicion of the commission of a crime upon another.

Whoever commits tampering with evidence is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-5, enacted by Laws 1963, ch. 303, § 22-5.

ANNOTATIONS

Removing documents from their proper files amounts to "hiding" evidence prohibited by this section. *State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

There was ample evidence of intent to tamper with evidence where directories crucial to the proof of the prosecution's case were removed from the defendant's offices to the office of someone not affiliated with defendant's association. In short, evidence relevant to a criminal prosecution for securities fraud was hidden for the purpose of avoiding the prosecution. *State v. Shade*, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986), overruled on other grounds, *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Accomplice liability. - One may be found guilty of tampering on a theory of accomplice liability in aiding the destruction of evidence. *State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Intent requirements can be met regardless of whether a crime has in fact been committed and regardless of any belief or knowledge by the police concerning crimes or suspected crimes, or cause by the police to apprehend an individual. *State v. Arellano*, 91 N.M. 195, 572 P.2d 223 (Ct. App. 1977).

Evidence sufficient to convict. - See *State v. Sanders*, 117 N.M. 452, 872 P.2d 870 (1994).

Evidence insufficient to convict. - Since defendant merely dropped some items from his hand to the ground upon the officers' announcement of police presence, there was insufficient evidence to support a finding of either element of intent or action under this section. *State v. Roybal*, 115 N.M. 27, 846 P.2d 333 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Intentional spoliation of evidence, interfering with prospective civil action, as actionable, 70 A.L.R.4th 984.

30-22-6. Compounding a crime.

Compounding a crime consists of knowingly agreeing to take anything of value upon the agreement or understanding, express or implied, to compound or conceal a crime or to abstain from a prosecution therefor, or to withhold any evidence thereof.

For purposes of this section, a person may be prosecuted and convicted of compounding a crime though the person guilty of the original crime has not been charged, indicted or tried.

Whoever commits compounding a crime is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-6, enacted by Laws 1963, ch. 303, § 22-6.

ANNOTATIONS

Threat of prosecution for bad check. - Specific language of this section controls over the more general language of the Worthless Check Act (30-36-1 NMSA 1978 et seq.), even if the latter act could by implication be construed to authorize a threat of prosecution in a bad check notice. 1965-66 Op. Att'y Gen. No. 65-197.

Written notice that a check has been returned unpaid for lack of funds or credit, as called for in the Worthless Check Act (30-36-1 NMSA 1978 et seq.), may not contain a statement that the district attorney has been contacted and that criminal proceedings will be instituted unless the check is paid within a period of time. 1965-66 Op. Att'y Gen. No. 65-197.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 15A Am. Jur. 2d Compounding Crimes §§ 1 to 4.

15A C.J.S. Compounding Offenses § 3.

30-22-7. Unlawful rescue.

Unlawful rescue consists of intentionally, and without lawful authority, rescuing any person lawfully in custody or confinement.

Whoever commits unlawful rescue of a person charged with or convicted of a crime not constituting a capital felony, or who is charged with but not convicted of a capital felony, is guilty of a third degree felony.

Whoever commits unlawful rescue of an individual convicted of a capital felony is guilty of a first degree felony.

History: 1953 Comp., § 40A-22-7, enacted by Laws 1963, ch. 303, § 22-7.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 3.

30A C.J.S. Escape and Related Offenses; Rescue § 28 et seq.

30-22-8. Escape from jail.

Escape from jail consists of any person who shall have been lawfully committed to any jail, escaping or attempting to escape from such jail.

Whoever commits escape from jail is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-8, enacted by Laws 1963, ch. 303, § 22-8.

ANNOTATIONS

Section does not require commitment under criminal charge. - This section does not require commitment on a criminal charge. A literal reading of the statute would indicate that any person who has been committed to jail pursuant to lawful authority who escapes or attempts to escape is guilty of escape from jail. *State v. Alderette*, 111 N.M. 297, 804 P.2d 1116 (Ct. App. 1990), overruling *State v. Garcia*, 98 N.M. 585, 651 P.2d 120 (Ct. App. 1982).

Commitment pursuant to arrest warrant. - Whether "committed" in this section means "placing in confinement" or "an order of confinement," defendant held by virtue of an arrest warrant for a petty misdemeanor was "committed" to jail when he left the jail through the roof. *State v. Garcia*, 78 N.M. 777, 438 P.2d 521 (Ct. App. 1968).

Physical confinement not required. - Physical confinement in jail at the time a defendant escapes is not an element required for conviction under this section. "Lawfully committed", as used in this section, includes situations in which an inmate has been lawfully ordered to be confined in jail and thereafter is temporarily released on a furlough, but is legally obligated to return to jail at a specific time. *State v. Hill*, 117 N.M. 806, 877 P.2d 1110 (Ct. App. 1994).

Kitchen part of jail. - Evidence that kitchen was used for preparation of prisoners' meals and that it was part of the jail, supported guilty verdict which necessarily determined that the kitchen was an integral part and parcel of the jail and that the defendant had escaped therefrom. *State v. Weaver*, 83 N.M. 362, 492 P.2d 144 (Ct. App. 1971).

Escape deemed from penitentiary, not jail. - Where the trial court had ordered the defendant released from the penitentiary into the custody of the county sheriff until after his arraignment, the order provided for a change in the location of his physical confinement but did not change the fact that the defendant's lawful custody or confinement was in the penitentiary, and the defendant was properly convicted of

escape from the penitentiary under 30-22-9B NMSA 1978, rather than escape from jail under this section. *State v. Martin*, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Escape from work detail while serving jail sentence. - Where the defendant was assigned to a work detail at the county fairgrounds while serving a lawful sentence at a county jail, and it was while so assigned that he escaped, the defendant was guilty of escape from jail. *State v. Gilman*, 97 N.M. 67, 636 P.2d 886 (Ct. App. 1981); *State v. Coleman*, 101 N.M. 252, 680 P.2d 633 (Ct. App. 1984).

Invalid conviction as defense. - So long as the commitment to custody is valid on its face, it is no defense to a charge of escaping jail that the incarceration was based on a violation of a law which was allegedly unconstitutionally applied. *State v. Lopez*, 79 N.M. 235, 441 P.2d 764 (1968).

Law reviews. - For article, "The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?" see 2 N.M.L. Rev. 141 (1972).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 1.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

30A C.J.S. Escape §§ 2 to 15.

30-22-9. Escape from penitentiary.

Escape from penitentiary consists of any person who shall have been lawfully committed to the state penitentiary:

A. escaping or attempting to escape from such penitentiary; or

B. escaping or attempting to escape from any other lawful place of custody or confinement and although not actually within the confines of the penitentiary.

Whoever commits escape from penitentiary is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-9, enacted by Laws 1963, ch. 303, § 22-9.

ANNOTATIONS

- I. General Consideration.
- II. Sentence Under Former Law.

I. GENERAL CONSIDERATION.

Cross-references. - For officer of penitentiary aiding escape of prisoner, see 33-2-8 NMSA 1978.

For escape by prisoners under inmate-release programs, see 33-2-46 NMSA 1978.

Escape constitutes a continuing offense so that an escapee continues to commit the offense as long as he voluntarily remains at large. *State v. Martinez*, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Conviction not double jeopardy. - Assuming without deciding that some administrative sanctions had been levied against defendant for his escape from prison, conviction under this section did not constitute double jeopardy. *State v. Budau*, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Application to honor farm constitutional. - Defendant's argument that application of this section to escapees from the prison honor farm constituted cruel and unusual punishment because of the difference in facilities at the farm compared with the state penitentiary was without merit. *State v. Budau*, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974).

Honor farm part of penitentiary. - Prison honor farm was an integral part and parcel of the state penitentiary, and escape therefrom was an escape from the state penitentiary. *State v. Budau*, 86 N.M. 21, 518 P.2d 1225 (Ct. App. 1973), cert. denied, 86 N.M. 5, 518 P.2d 1209 (1974); *State v. Peters*, 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962).

Escapee does not forfeit right of appeal. - A person convicted of a crime does not forfeit his right to appeal simply because he has escaped from confinement: he still has a right to have his conviction reversed if he was erroneously convicted or if his constitutional rights were violated. *Mascarenas v. State*, 94 N.M. 506, 612 P.2d 1317 (1980).

Regardless of the outcome of the appeal, the escapee may still be criminally liable for the act of escape; therefore, there is no need to use the forfeiture of the constitutional right of appeal as a further sanction. *Mascarenas v. State*, 94 N.M. 506, 612 P.2d 1317 (1980).

Collateral attack of legality of commitment. - To collaterally attack the lawfulness of his commitment to the penitentiary prior to his escape, a defendant must come forward with substantive evidence to show that at the time of his escape he was illegally incarcerated. *State v. Ellis*, 95 N.M. 427, 622 P.2d 1047 (Ct. App. 1980).

Escape deemed from penitentiary, not jail. - Where the trial court had ordered the defendant released from the penitentiary into the custody of the county sheriff until after his arraignment, the order provided for a change in the location of his physical confinement but did not change the fact that the defendant's lawful custody or confinement was in the penitentiary, and the defendant was properly convicted of escape from the penitentiary under this section, rather than escape from jail under 30-22-8 NMSA 1978. *State v. Martin*, 94 N.M. 251, 609 P.2d 333 (Ct. App.), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Law reviews. - For comment on *State v. Vaughn*, 74 N.M. 365, 393 P.2d 711 (1964) and *Sanders v. Cox*, 74 N.M. 524, 395 P.2d 353 (1964), see 4 Nat. Resources J. 616 (1964).

For article, "Approaching Statutory Interpretation in New Mexico," see 8 Nat. Resources J. 689 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Escape, Prison Breaking, and Rescue § 1.

Escape or prison breach as affected by means employed, 96 A.L.R.2d 520.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Conviction for escape where prisoner fails to leave confines of prison or institution, 79 A.L.R.4th 1060.

What constitutes "custody" under 18 USCS § 751(a) defining offense of escape from custody, 114 A.L.R. Fed. 581.

30A C.J.S. Escape §§ 16 to 18.

II. SENTENCE UNDER FORMER LAW.

Sentence under former law indeterminate. - Former law providing for a sentence of "not less than" two years for escape from the penitentiary prescribed a punishment with a minimum of two years and a maximum of life imprisonment. *Jones v. Cox*, 73 N.M. 450, 389 P.2d 214 (1964).

An individual convicted of unlawful escape from a penitentiary under former law was to be sentenced to a term of not less than two years and not more than life. *McCutcheon v. Cox*, 71 N.M. 274, 377 P.2d 683 (1962).

Former law calling for a sentence of "not less than" two years for escape from custody while under sentence to a term in the state penitentiary, though not actually within its confines, meant a sentence of not less than two years and not more than life. *Newlon v. Cox*, 74 N.M. 309, 393 P.2d 334 (1964).

Sentence not cruel and unusual. - Argument that sentence provided by former law of not less than two years for escape from the penitentiary was tantamount to cruel and unusual punishment was without merit. *State v. Peters*, 78 N.M. 224, 430 P.2d 382 (1967).

Nonconforming sentence vacated. - Under former law providing that sentence for escape from penitentiary should not run concurrently with any other sentence the defendant was already serving, sentence of two years "to run concurrently with previous sentences" was void, and could be vacated even though partially served. *State v. Peters*, 69 N.M. 302, 366 P.2d 148 (1961), cert. denied, 369 U.S. 831, 82 S. Ct. 849, 7 L. Ed. 2d 796 (1962).

30-22-10. Escape from custody of a peace officer.

Escape from custody of a peace officer consists of any person who shall have been placed under lawful arrest for the commission or alleged commission of any felony, unlawfully escaping or attempting to escape from the custody or control of any peace officer.

Whoever commits escape from custody of a peace officer is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-10, enacted by Laws 1963, ch. 303, § 22-10.

ANNOTATIONS

Actual custody required. - The defendant, who was transported from jail to the state hospital for evaluation, from which hospital he escaped, could not be found guilty of escape from a peace officer. This section applies only to those who are in the actual custody or control of a peace officer while under arrest, and cannot be extended to legal or "constructive custody" as well. *State v. Trujillo*, 106 N.M. 616, 747 P.2d 262 (Ct. App. 1987).

Double jeopardy. - Combination of administrative punishment and judicial sentence following plea of guilty to escape from custody of peace officer (for escaping from penitentiary honor farm) did not amount to double jeopardy in violation of the state and federal constitutions. *State v. Millican*, 84 N.M. 256, 501 P.2d 1076 (Ct. App. 1972).

Escape from lawful arrest. - Although marijuana discovered by officer should have been suppressed, because the search and seizure was the fruit of an illegal detention, nonetheless arrests by the officer, after smelling and seeing the marijuana, were in the lawful discharge of his duties and thus defendants' convictions for escape from custody were proper. *State v. Bloom*, 90 N.M. 226, 561 P.2d 925 (Ct. App. 1976), reversed on other grounds, 90 N.M. 192, 561 P.2d 465 (1977).

Disposition of original charge immaterial. - Offense is committed if escape occurs after arrest for commission or alleged commission of a felony whether defendant is later found guilty of originally charged felony or not. *State v. Martinez*, 79 N.M. 232, 441 P.2d 761 (1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - What constitutes "custody" under 18 USCS § 751(a) defining offense of escape from custody, 114 A.L.R. Fed. 581.

30-22-11. Assisting escape.

Assisting escape consists of:

A. intentionally aiding any person confined or held in lawful custody or confinement to escape; or

B. any officer, jailer or other employee, intentionally permitting any prisoner in his custody to escape.

Whoever commits assisting escape is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-11, enacted by Laws 1963, ch. 303, § 22-11.

ANNOTATIONS

Cross-references. - For unlawful rescue of prisoner, see 30-22-7 NMSA 1978.

For officer of penitentiary aiding escape of prisoner, see 33-2-8 NMSA 1978.

Harboring or aiding felon does not supersede this offense. - The offense of harboring or aiding a felon was not meant to supersede the crime of assisting escape. *State v. Martinez*, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Charge not double jeopardy. - Charging defendant with three counts of assisting escape, in a prosecution arising out of the escape of three prison inmates, did not violate the constitutional prohibition against double jeopardy. *State v. Martinez*, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Person properly charged with offense. - An individual who intentionally aids a person to avoid recapture, who he knows has escaped from lawful custody, may properly be

charged with the offense of assisting escape. State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Defenses of consanguinity or affinity not applicable. - Nothing in this section evinces a legislative intent to immunize a defendant from prosecution for assisting the escape of inmates because of consanguinity or affinity. The defenses of consanguinity or affinity recognized under 30-22-4 NMSA 1978 are not applicable to a charge filed under this section. State v. Martinez, 109 N.M. 34, 781 P.2d 306 (Ct. App. 1989).

Defect in indictment insubstantial. - Although the indictment charged that defendant assisted a prisoner in escaping from jail while the statute condemned assisting a prisoner in his endeavor to escape, such defect was formal rather than substantial as the act of escape includes endeavoring to escape, and as this slightly faulty allegation was not called to the attention of the trial court, it was cured by the verdict. State v. Montgomery, 28 N.M. 344, 212 P. 341 (1923).

Merger of this section and furnishing articles for escape. - The charges of assisting escape and furnishing articles for escape should not be merged for sentencing purposes when the facts supporting the convictions are not identical in that the jury could properly have found that the defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape. State v. Gibson, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30A C.J.S. Escape §§ 19 to 25.

30-22-11.1. Escape from the custody of the children, youth and families department.

Escape from the custody of the children, youth and families department consists of any person who has been adjudicated as a delinquent child and has been committed lawfully to the custody of a department juvenile justice facility:

A. escaping or attempting to escape from custody within the confines of a children, youth and families department juvenile justice facility; or

B. escaping or attempting to escape from another lawful place of custody or confinement that is not within the confines of a children, youth and families department juvenile justice facility.

Any person who commits escape from the custody of a children, youth and families department juvenile justice facility is guilty of a misdemeanor.

History: Laws 1993, ch. 121, § 1.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 121, § 2 makes the act effective on July 1, 1993.

30-22-11.2. Aggravated escape from the custody of the children, youth and families department.

Aggravated escape from the custody of the children, youth and families department consists of any person who has been adjudicated as a delinquent child and has been committed lawfully to the custody of a department juvenile justice facility:

A. escaping or attempting to escape from custody within the confines of a children, youth and families department juvenile justice facility and committing assault or battery on another person in the course of escaping or attempting to escape; or

B. escaping or attempting to escape from a lawful place of custody or confinement that is not within the confines of a children, youth and families department juvenile justice facility and committing assault or battery on another person in the course of escaping or attempting to escape.

Any person who commits aggravated escape from the custody of the children, youth and families department is guilty of a fourth degree felony.

History: Laws 1994, ch. 18, § 1.

ANNOTATIONS

Effective dates. - Laws 1994, ch. 18, § 3 makes the act effective on July 1, 1994.

30-22-12. Furnished [Furnishing] articles for prisoner's escape.

Furnishing articles for prisoner's escape consists of:

A. intentionally giving to any person in lawful custody or confinement any deadly weapon or explosive substance, without the express consent of the officer in charge of such place of confinement; or

B. intentionally giving to any person in lawful custody or confinement any disguise, instrument, tool or other thing useful to aid any prisoner to effect an escape, with intent to assist a prisoner to escape from custody.

Whoever commits furnishing articles for prisoner's escape is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-12, enacted by Laws 1963, ch. 303, § 22-12.

ANNOTATIONS

Cross-references. - For definition of deadly weapon, see 30-1-12 NMSA 1978.

Title of former law constitutionally adequate. - Laws 1912, ch. 39, § 2, as amended by Laws 1941, ch. 59, § 1 (40-41-4, 1953 Comp.) was not unconstitutional under N.M. Const., art. IV, § 16 (requiring subject of legislation to be covered in its title) since the word "explosives" and the term "deadly weapons" were not separate subjects of the 1941 act; rather, the act related to the state prison system, the prohibition against the introduction of explosives and deadly weapons within such institutions, or within the vicinity thereof, being a means designed to carry out the general purpose thereof. *State v. Williams*, 71 N.M. 210, 377 P.2d 513 (1962).

Merger of this section and assisting escape. - The charges of assisting escape and furnishing articles for escape should not be merged for sentencing purposes when the facts supporting the convictions are not identical in that the jury could properly have found that the defendant's participation in the escape extended significantly beyond furnishing tangible objects to effect the escape. *State v. Gibson*, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Evidence sufficient to support conviction. See *State v. Gibson*, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

30-22-13. Furnishing drugs or liquor to a prisoner.

Furnishing drugs or liquor to a prisoner consists of directly or indirectly furnishing any narcotic drug or intoxicating liquor to any person held in lawful custody or confinement, unless such narcotic drug or intoxicating liquor is furnished pursuant to the direction or prescription of a regularly licensed physician attending such person or penal facility.

Whoever commits furnishings [furnishing] drugs or liquor to a prisoner is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-13, enacted by Laws 1963, ch. 303, § 22-13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

72 C.J.S. Prisons § 75.

30-22-14. Bringing contraband into places of imprisonment; penalties; definitions.

A. Bringing contraband into a prison consists of carrying, transporting or depositing contraband onto the grounds of the penitentiary of New Mexico or any other institution designated by the corrections commission for the confinement of adult prisoners. Whoever commits bringing contraband into a prison is guilty of a third degree felony.

B. Bringing contraband into a jail consists of carrying contraband into the confines of a county or municipal jail. Whoever commits bringing contraband into a jail is guilty of a fourth degree felony.

C. As used in this section, "contraband" means:

(1) any deadly weapon, as defined in Section 30-1-12 NMSA 1978, or an essential component part thereof, including ammunition, explosive devices and explosive materials, but does not include a weapon carried by a peace officer in the lawful discharge of his duties;

(2) currency brought onto the grounds of the institution for the purpose of transfer to a prisoner, but does not include currency carried into areas designated by the warden as areas for the deposit and receipt of currency for credit to a prisoner's account before contact is made with any prisoner;

(3) any alcoholic beverage; or

(4) any controlled substance, as defined in the Controlled Substances Act, but does not include a controlled substance carried into a prison through regular prison channels and pursuant to the direction or prescription of a regularly licensed physician.

History: 1953 Comp., § 40A-22-13.1, enacted by Laws 1976, ch. 15, § 1.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Corrections commission. - Although formerly the corrections commission had management and control over the department of corrections (now the corrections department), by Laws 1977, ch. 257, § 99, the commission is made advisory only. See 33-1-4 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Nature and elements of offense of conveying contraband to state prisoner, 64 A.L.R.4th 902.

Validity and construction of prison regulation of inmates' possession of personal property, 66 A.L.R.4th 800.

30-22-15. Maintaining male and female prisoners together.

Maintaining male and female prisoners together consists of any sheriff, jailer or guard, keeping male and female prisoners in the same cell or room, unless such prisoners are man and wife.

Whoever commits maintaining male and female prisoners together is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-14, enacted by Laws 1963, ch. 303, § 22-14.

30-22-16. Possession of deadly weapon or explosive by prisoner.

Possession of deadly weapon or explosive by prisoner in lawful custody consists of any inmate of a penal institution, reformatory, jail or prison farm or ranch possessing any deadly weapon or explosive substance.

Whoever commits possession of deadly weapon or explosive by prisoner is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-15, enacted by Laws 1963, ch. 303, § 22-15; 1986, ch. 4, § 1.

ANNOTATIONS

Cross-references. - For definition of "deadly weapon", see 30-1-12 NMSA 1978.

For sentencing for second degree felonies, see 31-18-15 NMSA 1978.

The 1986 amendment substituted "second degree felony" for "third degree felony" in the second paragraph.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Sufficiency of evidence of possession in prosecution under state statute prohibiting persons under indictment for, or convicted of, crime from acquiring, having, carrying, or using firearms or weapons, 43 A.L.R.4th 788.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

30-22-17. Assault by prisoner.

Assault by prisoner consists of intentionally:

A. placing an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, in apprehension of an immediate battery likely to cause death or great bodily harm;

B. causing or attempting to cause great bodily harm to an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein; or

C. confining or restraining an officer or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, with intent to use such person as a hostage.

Whoever commits assault by prisoner is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-16, enacted by Laws 1963, ch. 303, § 22-16.

ANNOTATIONS

Cross-references. - For definition of great bodily harm, see 30-1-12 NMSA 1978.

For assault, generally, see 30-3-1 to 30-3-3 NMSA 1978.

For kidnaping, see 30-4-1 NMSA 1978.

This section and 30-22-24 NMSA 1978 relate to two different crimes. - Although it is possible for the same set of facts to fall within the ambit of this section and 30-22-24 NMSA 1978, relating to battery upon a peace officer, they do not deal with the same crime, but with two different crimes. *State v. Rhea*, 94 N.M. 168, 608 P.2d 144 (1980).

Merger of this section and false imprisonment. - The charge of assault by a prisoner should not be merged for sentencing purposes with the charge of false imprisonment where the facts supporting the two charges are not identical. Merger is also inappropriate in such a case because the statute prohibiting assault and the statute prohibiting false imprisonment advance two distinct social norms. *State v. Gibson*, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Jailers as peace officers. - Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 94 N.M. 168, 608 P.2d 144 (1980).

Evidence sufficient. - Evidence introduced to show how the defendant and his cohorts carefully orchestrated a prison escape was sufficient for the jury to find that the defendant planned, anticipated, and intended the assault and false imprisonment of a peace officer during the escape. The defendant need not have known the peace officer's name, but only that the victim would be a peace officer. *State v. Gibson*, 113 N.M. 547, 828 P.2d 980 (Ct. App. 1992).

Evidence of great bodily harm. - Evidence that after throwing hot coffee at the sheriff, defendant attempted to choke him with one hand while he tried to get the sheriff's gun with the other hand, along with the sheriff's testimony that while being choked his breath was practically cut off and he realized that "it was he or I, one or the other," was evidence that the choking created a high probability of death, which is one part of the definition of great bodily harm, and justified instructing the jury to consider whether

defendant caused great bodily harm under this section. State v. Hollowell, 80 N.M. 756, 461 P.2d 238 (Ct. App. 1969).

Acquittal of charge for which confined no defense. - Despite the fact that at the time he committed assault defendant was confined in the city jail on a charge for which he was later found not guilty, conviction imposed, upon his guilty plea, for assault by prisoner was not violative of defendant's constitutional rights. Chavez v. State, 80 N.M. 560, 458 P.2d 812 (Ct. App. 1969).

30-22-18. Encouraging violation of probation, parole or bail.

Encouraging violation of probation, parole or bail consists of intentionally aiding or encouraging a person known by him to be on parole, probation or bail to abscond or to violate a term or condition of his probation, parole or bail.

Whoever commits encouraging violation of probation, parole or bail is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-17, enacted by Laws 1963, ch. 303, § 22-17.

30-22-19. Unlawful assault on any jail.

Unlawful assault on any jail consists of any person or group of persons assaulting or attacking any jail, prison or other public building or place of confinement of prisoners held in lawful custody or confinement.

Whoever commits unlawful assault on any jail, prison or other public building or place of confinement of prisoners held in lawful custody or confinement is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-18, enacted by Laws 1963, ch. 303, § 22-18.

ANNOTATIONS

Collateral estoppel. - Acquittal of defendant on charge of assault on a jail did not collaterally estop state from bringing subsequent prosecution against him on charge of assault with intent to commit a violent felony, even where both offenses allegedly occurred at same time and place, since charge of assault with intent to commit a violent felony required a jury to consider facts not required in the first trial. State v. Tijerina, 86 N.M. 31, 519 P.2d 127 (1973), cert. denied, 417 U.S. 956, 94 S. Ct. 3085, 41 L. Ed. 2d 674 (1974).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

30-22-20. Unlawful distribution of convict-made goods.

Unlawful distribution of convict-made goods consists of any person knowingly distributing, exchanging, selling or offering for sale any goods, wares or merchandise manufactured, produced or mined, either wholly or in part, by prisoners held in lawful custody or confinement of any other state or country.

Nothing in this section shall be construed to forbid the sale or distribution of goods, wares or merchandise:

A. made by prisoners of this state;

B. made by prisoners on parole or probation; or

C. which are sold or exchanged to a qualified purchaser and where such goods are to be initially used or possessed solely by a qualified purchaser. As used in this subsection, "qualified purchaser" means a state agency, local public bodies, agencies of the federal government, tribal and pueblo governments, nonprofit organizations properly registered under state law and supported wholly or in part by funds derived from public taxation and persons, partnerships, corporations or associations which provide public school transportation services to a state agency or local public body pursuant to contract.

Whoever commits unlawful distribution of convict-made goods is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-19, enacted by Laws 1963, ch. 303, § 22-19; 1982, ch. 35, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 60 Am. Jur. 2d Penal and Correctional Institutions §§ 171, 172.

18 C.J.S. Convicts § 20.

30-22-21. Assault upon peace officer.

A. Assault upon a peace officer consists of:

(1) an attempt to commit a battery upon the person of a peace officer while he is in the lawful discharge of his duties; or

(2) any unlawful act, threat or menacing conduct which causes a peace officer while he is in the lawful discharge of his duties to reasonably believe that he is in danger of receiving an immediate battery.

B. Whoever commits assault upon a peace officer is guilty of a misdemeanor.

History: 1953 Comp., § 40A-22-20, enacted by Laws 1971, ch. 265, § 1.

ANNOTATIONS

Cross-references. - For assaults and batteries, generally, see 30-3-1 to 30-3-5 NMSA 1978.

For petty misdemeanor of resisting or obstructing an officer, see 30-22-1 NMSA 1978.

For third-degree felony of assault by prisoner, see 30-22-17 NMSA 1978.

Fact that defendant's gunfire hit police officers does not show an absence of evidence of assault, where there is evidence of an assault under Subsection A(2). *State v. Brown*, 93 N.M. 236, 599 P.2d 389 (Ct. App.), cert. quashed, 93 N.M. 172, 598 P.2d 215 (1979), cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Extent of injuries: admissibility, in prosecution for assault or similar offense involving physical violence, of extent or effect of victim's injuries, 87 A.L.R.2d 926.

6A C.J.S. Assault and Battery § 81.

30-22-22. Aggravated assault upon peace officer.

A. Aggravated assault upon a peace officer consists of:

(1) unlawfully assaulting or striking at a peace officer with a deadly weapon while he is in the lawful discharge of his duties;

(2) committing assault by threatening or menacing a peace officer who is engaged in the lawful discharge of his duties by a person wearing a mask, hood, robe or other covering upon the face, head or body, or while disguised in any manner so as to conceal identity; or

(3) willfully and intentionally assaulting a peace officer while he is in the lawful discharge of his duties with intent to commit any felony.

B. Whoever commits aggravated assault upon a peace officer is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-21, enacted by Laws 1971, ch. 265, § 2.

ANNOTATIONS

Cross-references. - For definition of deadly weapon, see 30-1-12 NMSA 1978.

For aggravated assault, generally, see 30-3-2 NMSA 1978.

For third-degree felony of assault by prisoner, see 30-22-17 NMSA 1978.

Intent required to sustain conviction under this section is that of conscious wrongdoing. *Rutledge v. Fort*, 104 N.M. 7, 715 P.2d 455 (1986), overruled on other grounds *Reese v. State*, 106 N.M. 498, 745 P.2d 1146 (1987).

Conscious wrongdoing required. - Conscious wrongdoing is an essential element of Paragraph (1) of Subsection A, and instructions in the language of the statute were insufficient to inform the jury of the intent required. *State v. Cutnose*, 87 N.M. 307, 532 P.2d 896 (Ct. App.), cert. denied, 87 N.M. 299, 532 P.2d 888 (1975).

Defendant's knowledge as to the identity of the peace officer assaulted is a necessary element of the crimes defined in this section and 30-22-24 NMSA 1978. *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987).

To deny the defendant the right to have the jury informed as to his knowledge of the identity of police officer he assaulted would be to deny him the right to have the jury apprised of a necessary element of the crime for which he is charged, and that in turn would be to deny him his constitutional guarantee of due process of law. *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987).

Officer's performance is essential element of crime because of the requirement that the jury be instructed that the officer must have been performing his duties and the restriction on fiddling with an elements instruction. *State v. Rhea*, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979).

Failure to instruct reversible error. - The failure to instruct that the officer must have been performing his duties is the omission of an essential element, and this omission requires reversal of a conviction of aggravated assault upon a peace officer. *State v. Rhea*, 93 N.M. 478, 601 P.2d 448 (Ct. App. 1979).

Assault with razor. - Testimony of police officers concerning incidents where defendant struck at officers with a straight razor was substantial evidence to support defendant's conviction for aggravated assault upon a peace officer. *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct. App. 1974).

Conviction of resisting, evading, or obstructing police officer. - The defendant was properly convicted of resisting, evading or obstructing an officer, because the evidence supported the verdict of the jury to that charge, and his opportunity to prepare and defend against the charge was not impaired by the fact that such an offense varied from the crime charged in the criminal information, i.e., aggravated assault upon a peace officer. *State v. Hamilton*, 107 N.M. 186, 754 P.2d 857 (Ct. App. 1988).

Collateral estoppel. - The state is collaterally estopped from attempting to prove in district court that the defendant was the driver of a car used in an assault when it has already tried and failed to prove this same issue in municipal court. *Abramson v. Griffin*, 693 F.2d 1009 (10th Cir. 1982).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Intent to do physical harm as essential element of crime of assault with deadly or dangerous weapon, 92 A.L.R.2d 635.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

30-22-23. Assault with intent to commit violent felony upon peace officer.

A. Assault with intent to commit a violent felony upon a peace officer consists of any person assaulting a peace officer while he is in the lawful discharge of his duties with intent to kill the peace officer.

B. Whoever commits assault with intent to commit a violent felony upon a peace officer is guilty of a second degree felony.

History: 1953 Comp., § 40A-22-22, enacted by Laws 1971, ch. 265, § 3.

ANNOTATIONS

Cross-references. - For assault with intent to commit a violent felony, generally, see 30-3-3 NMSA 1978.

For instruction on self-defense or justifiable homicide, see UJI 14-5171.

For instruction on self-defense, see UJI 14-5181.

Standing to challenge section's validity. - Where defendant was convicted of committing aggravated battery upon peace officer (30-22-25 NMSA 1978), a lesser included offense of this section, defendant's rights under this section were not at issue, despite the fact that it had been charged in the indictment, and he had no standing to challenge its constitutionality. *State v. Bojorquez*, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Lawful discharge of duties jury question. - Whether police officers were in the lawful discharge of their duties when they were shot by the defendant is a question for the jury

to decide. *State v. Brown*, 93 N.M. 236, 599 P.2d 389 (Ct. App. 1979), cert. denied, 444 U.S. 1084, 100 S. Ct. 1041, 62 L. Ed. 2d 769 (1980).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Malice or intent to kill where killing is by blow without weapon, 22 A.L.R.2d 854.

Homicide: acquittal on homicide charge as bar to subsequent prosecution for assault and battery or vice versa, 37 A.L.R.2d 1068.

30-22-24. Battery upon peace officer.

A. Battery upon a peace officer is the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

B. Whoever commits battery upon a peace officer is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-22-23, enacted by Laws 1971, ch. 265, § 4.

ANNOTATIONS

Cross-references. - For battery, generally, see 30-3-4 NMSA 1978.

Constitutionality since act coupled with words. - Where a defendant coupled his rude, insolent, or angry remarks with force upon a police officer, the jury could properly find defendant guilty of battery upon a police officer. Thus the statute is not vague or overbroad. *State v. Cruz*, 110 N.M. 780, 800 P.2d 214 (Ct. App. 1990).

Intent required to sustain conviction under this section is that of conscious wrongdoing. *Rutledge v. Fort*, 104 N.M. 7, 715 P.2d 455 (1986), overruled on other grounds *Reese v. State*, 106 N.M. 498, 745 P.2d 1146 (1987).

Knowledge that victim is peace officer. - Defendant's knowledge as to the identity of the peace officer assaulted is a necessary element of the crimes defined in 30-22-22 NMSA 1978 and this section. *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987).

To deny the defendant the right to have the jury informed as to his knowledge of the identity of police officer he assaulted would be to deny him the right to have the jury apprised of a necessary element of the crime for which he is charged, and that in turn would be to deny him his constitutional guarantee of due process of law. *Reese v. State*, 106 N.M. 505, 745 P.2d 1153 (1987).

An instruction regarding a defendant's knowledge that the victim is a peace officer is necessary only when defendant raises lack of such knowledge as a defense to the charge and there is evidence that the defendant acted without knowing that the victim was a peace officer. *State v. Hilliard*, 107 N.M. 506, 760 P.2d 799 (Ct. App. 1988).

This section and 30-22-17 NMSA 1978 relate to two different crimes. - Although it is possible for the same set of facts to fall within the ambit of this section and 30-22-17 NMSA 1978, relating to assault by a prisoner, they do not deal with the same crime, but with two different crimes. *State v. Rhea*, 94 N.M. 168, 608 P.2d 144 (1980).

Jailers as peace officers. - Legislature did not exclude jailers from definition of peace officers: a jailer is an officer in the public domain, charged with the duty to maintain public order. *State v. Rhea*, 94 N.M. 168, 608 P.2d 144 (1980).

Correctional officer is a "peace officer". - The legislature has amended the correctional officers statute to provide that crimes against correctional officers and employees of the Corrections Department acting as peace officers were deemed crimes against peace officers. *State v. Gutierrez*, 115 N.M. 551, 854 P.2d 878 (Ct. App. 1993).

Juvenile correctional officer is a peace officer for purposes of the battery on a peace officer statute, despite the fact that JCOs are no longer under the control of the New Mexico Corrections Department. *State v. Gutierrez*, 115 N.M. 551, 854 P.2d 878 (Ct. App. 1993).

Double jeopardy. - The jurisdictional exception to double jeopardy permitted defendant's prosecution in the district court on a charge of peace officer battery, after he had pleaded guilty to several misdemeanors, including resisting arrest, in the magistrate court. *State v. Padilla*, 101 N.M. 58, 678 P.2d 686 (1984), *aff'd sub. nom.*, *Fugate v. New Mexico*, 470 U.S. 904, 105 S. Ct. 1858, 84 L. Ed. 2d 777 (1985).

Officers acting in good faith. - Even if an arrest was illegal, the courts cannot condone the use of force in resisting every subsequent act made in good faith by a law enforcement officer, as police officers acting in good faith, although mistakenly, should be relieved of the threat of physical harm. *State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978).

Test is whether officer engaged in performance of official duties. - Even if an arrest is effected without probable cause, a police officer is engaged in the performance of his official duties and therefore protected under this section if he is simply acting within the scope of what he is employed to do; the test is whether he is acting within that compass or is engaging in a personal frolic of his own. *State v. Doe*, 92 N.M. 100, 583 P.2d 464 (1978).

When officer in lawful discharge of duties. - An officer is in the lawful discharge of his duties if he is acting within the scope of what he is employed to do. *State v. Gonzales*, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

If there is evidence that a peace officer used excessive force, there is a factual issue for the jury as to whether the officer acted within the scope of what he was employed to do and, thus, a factual issue as to whether the officer was performing his duties. *State v. Gonzales*, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

Scope of contact with person. - The jury was properly instructed that it could find defendant guilty of battery under this section if it found that defendant knocked or took a flashlight out of the arresting officer's hand. The word "person" as used in this statute includes anything intimately connected with a person. *State v. Ortega*, 113 N.M. 437, 827 P.2d 152 (Ct. App. 1992).

Included offense. - Battery upon a peace officer is included within the charge of aggravated battery upon a peace officer, and thus defendant's conviction was for an offense included within charge of which he had notice. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

Instruction on simple battery warranted. - One cannot batter a peace officer while in the lawful discharge of his duties without battering the person of another, and there being evidence that the police officer was not in the lawful discharge of his duties in connection with the altercation, the trial court erred in refusing to instruct on simple battery as well as on battery on an officer. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

If there is a factual issue as to performance of duties, the defendant is entitled to an instruction on simple battery as a lesser included offense to battery upon a police officer. *State v. Gonzales*, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982).

Instruction on right to detain. - There was no error in refusing a requested instruction on an officer's right to detain a person which focused only on the officer's initial approach to defendant and disregarded the officer's attempt to arrest after defendant allegedly hit the officer, since in light of the evidence, the requested instruction was incomplete and would have confused the jury on the issue of lawful discharge of duties. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

When charge barred by acquittal on other charges. - After a magistrate's determination that the defendant was not guilty of resisting and obstructing an officer and disorderly conduct because he was acting in defense of another, the state cannot charge him with battery on a police officer and constitutionally bring him before a new fact finder to relitigate that same factual issue. *State v. Orosco*, 99 N.M. 180, 655 P.2d 1024 (Ct. App. 1982).

Conviction supported by evidence. - Testimony of police officer that he and defendant exchanged blows was sufficient evidence of intentional touching to support defendant's conviction for battery under this section, notwithstanding the officer's

concession on cross-examination that he couldn't actually remember whether defendant had hit him. *State v. Ortega*, 113 N.M. 437, 827 P.2d 152 (Ct. App. 1992).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico criminal law and procedure, 19 N.M.L. Rev. 655 (1990).

30-22-25. Aggravated battery upon peace officer.

A. Aggravated battery upon a peace officer consists of the unlawful touching or application of force to the person of a peace officer with intent to injure that peace officer while he is in the lawful discharge of his duties.

B. Whoever commits aggravated battery upon a peace officer, inflicting an injury to the peace officer which is not likely to cause death or great bodily harm, but does cause painful temporary disfigurement or temporary loss or impairment of the functions of any member or organ of the body, is guilty of a fourth degree felony.

C. Whoever commits aggravated battery upon a peace officer, inflicting great bodily harm, or does so with a deadly weapon or in any manner whereby great bodily harm or death can be inflicted, is guilty of a third degree felony.

History: 1953 Comp., § 40A-22-24, enacted by Laws 1971, ch. 265, § 5.

ANNOTATIONS

Cross-references. - For definitions of deadly weapon and great bodily harm, see 30-1-12 NMSA 1978.

For aggravated battery, generally, see 30-3-5 NMSA 1978.

Lesser offense. - The offense of aggravated battery upon a peace officer is a lesser included offense of the crime of assault with intent to commit a violent felony upon a peace officer (30-22-23 NMSA 1978). *State v. Bojorquez*, 88 N.M. 154, 538 P.2d 796 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Battery upon officer included. - Battery upon a peace officer is a charge included within the charge of aggravated battery upon a peace officer, and thus defendant's conviction was for an offense included within the charge of aggravated battery of an officer of which he had notice. *State v. Kraul*, 90 N.M. 314, 563 P.2d 108 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977).

30-22-26. Assisting in assault upon peace officer.

A. Every person who assists or is assisted by one or more other persons to commit a battery upon any peace officer while he is in the lawful discharge of his duties is guilty of a fourth degree felony.

B. This section is designed to protect officers from assaults and batteries by multiple assailants while quelling riots and other unlawful assemblages.

History: 1953 Comp., § 40A-22-25, enacted by Laws 1971, ch. 265, § 6.

ANNOTATIONS

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

ARTICLE 23 MISCONDUCT BY OFFICIALS

30-23-1. Demanding illegal fees.

Demanding illegal fees consists of any public officer or public employee knowingly asking or accepting anything of value greater than that fixed or allowed by law for the execution or performance of any service or duty.

Whoever commits demanding illegal fees is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-23-1, enacted by Laws 1963, ch. 303, § 23-1.

ANNOTATIONS

Cross-references. - For section making knowingly demanding or receiving illegal fees one of the grounds for discharge of local officer, see 10-4-2 NMSA 1978.

Municipal court fees. - Absent statutory authority, a municipality may not charge filing fees or other cost for cases filed in its municipal courts. 1967-68 Op. Att'y Gen. No. 68-65.

Unauthorized inspection fees. - For the cattle sanitary board (now the livestock board) to charge slaughterhouses any inspection fees which are not authorized expressly by statute might put the board in possible criminal jeopardy in view of this section. 1965-66 Op. Att'y Gen. No. 66-128.

Dual salaries. - An individual employed as a full-time district court reporter and as a deputy court clerk over the same period of time may not receive salaries for both jobs. 1963-64 Op. Att'y Gen. No. 64-152.

Not lesser included offense of 30-23-2 NMSA 1978. - The offense of demanding illegal fees, as contained in this section, is not a lesser included offense of paying or receiving public money for services not rendered under 30-23-2 NMSA 1978. *State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Law reviews. - For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Officers and Employees §§ 407, 410.

67 C.J.S. Officers §§ 255 to 263.

30-23-2. Paying or receiving public money for services not rendered.

Paying or receiving public money for services not rendered consists of knowingly making or receiving payment or causing payment to be made from public funds where such payment purports to be for wages, salary or remuneration for personal services [services] which have not in fact been rendered.

Nothing in this section shall be construed to prevent the payment of public funds where such payments are intended to cover lawful remuneration to public officers or public employees for vacation periods or absences from employment because of sickness, or for other lawfully authorized purposes.

Whoever commits paying or receiving public money for services not rendered is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-23-2, enacted by Laws 1963, ch. 303, § 23-2.

ANNOTATIONS

Section not vague. - This section gives fair warning against expenditure of public funds for services not rendered, while excluding lawful payments for vacation time or sick leave or other lawfully authorized purposes, and hence, there is no vagueness in the statute as written. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Title of Laws 1945, ch. 71 gave sufficient notice to one reading it that in the act one could expect to find a provision denouncing as a felony the paying out of public funds,

or causing them to be so paid, for services not rendered. *State v. Aragon*, 55 N.M. 423, 234 P.2d 358 (1951).

Application of this section is not left to administrative discretion, and lawfulness of authorization is not determined by an administrative official but by a court. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Public policy. - While the provisions of former 40-8-12, 1953 Comp., were probably not broad enough to cover travel expenses and per diem allowances, they indicated quite clearly a strong public policy of requiring rendition of services prior to any payment therefor or in connection therewith. 1961-62 Op. Att'y Gen. No. 62-55.

Locale of services rendered. - Former 40-8-12, 1953 Comp., required that payment was only to be made for services actually rendered to the state of New Mexico; however, it did not mean that the services would necessarily have to be rendered in the state. 1955-56 Op. Att'y Gen. No. 6469.

State funds covered. - This section places restrictions on the payment of funds which are the property of the state. 1975-76 Op. Att'y Gen. No. 75-10.

Separation of powers to be respected. - This section cannot be read to impose limits on the health and social services (now the human services) department's use of federal funds in administering social service programs, since the legislature is prevented by the separation of powers doctrine from imposing any conditions on the executive branch's use of federal or non-state money. 1975-76 Op. Att'y Gen. No. 75-10.

Executive departments not unreasonably obstructed. - This section is not applicable to disbursements from revolving funds established out of its general appropriation by the health and social services department (now the human services department) as advances to "providers" under certain federal programs conducted by the department, which advances the providers must return; to read these sections so as to prohibit such advances would unreasonably obstruct the department in the exercise of its statutory powers. 1975-76 Op. Att'y Gen. No. 75-10.

Dual salaries. - A person may not be employed as a juvenile probation officer and deputy court clerk and paid as both although performing no services as deputy court clerk since this section makes it a misdemeanor to pay or to receive public money for services not rendered. 1963-64 Op. Att'y Gen. No. 64-152.

Commencement of salary. - Contracts employing new faculty members cannot provide for the commencement of salary payments before teaching services are rendered. 1971-72 Op. Att'y Gen. No. 72-44.

Payment for sick leave authorized. - Continued payment during sick leave is not payment of public money for services not rendered, even though no services are

rendered during the time the employee is absent from work because sick leave is part of the compensation for services which were rendered before the sick leave was taken. 1973-74 Op. Att'y Gen. No. 73-34.

When services already rendered. - Payment of wages to teachers during sick leave must be made in consideration of services performed; payments made before the services were performed would be payment of "public money for services not rendered" and would violate this section. 1971-72 Op. Att'y Gen. No. 72-33.

Use of sick leave for maternity purposes. - This section is not violated if the school board allows an employee to use sick leave for maternity purposes, where the employee received payment during "maternity leave" only to the extent of her accumulated sick leave. 1973-74 Op. Att'y Gen. No. 73-34.

Absence of professor from class. - Unless a faculty member's failure to meet a class on a particular day could be said as a matter of law to constitute a failure to render contracted - for services, no violation of this section would be involved if an institution of higher education failed to deduct salary for such day not actually taught. 1969-70 Op. Att'y Gen. No. 70-73.

Jury duty constitutes lawfully authorized purpose within the meaning of this section. 1975-76 Op. Att'y Gen. No. 75-33.

School employees need not lose regular compensation while serving on jury duty, but may receive no more than their ordinary rate of compensation during the period of jury duty; however, school employees serving on juries would be entitled to accept the allowance for mileage. 1975-76 Op. Att'y Gen. No. 75-33.

If the board of regents of the school for the deaf decided that time spent by school employees on jury duty would be "vacation periods," then payment of wages during such absence would not be prohibited by former 40-8-12, 1953 Comp. 1961-62 Op. Att'y Gen. No. 62-73.

Educational leave is lawfully authorized purpose. - Grant of educational leave with pay to a state employee to attend university program on public science policy and administration is "for other lawfully authorized purposes" under this section and does not violate constitutional or statutory provisions. 1971-72 Op. Att'y Gen. No. 72-67.

Training public employee for special program. - The New Mexico boys' school may properly send one of the employees of the institution to another state for a period of one month for indoctrination in the duties of a youth forestry camp director so that such employee may assist the New Mexico boys' school in managing a forestry camp for boys established in New Mexico. 1963-64 Op. Att'y Gen. No. 63-126.

Section does not concern judgments for damages for breach of contract awarded to discharge tenured teacher. *Sanchez v. Board of Educ.*, 80 N.M. 286, 454 P.2d 768 (1969).

Section 30-23-1 NMSA 1978 not lesser included offense. - The offense of demanding illegal fees, as contained in 30-23-1 NMSA 1978, is not a lesser included offense of paying or receiving public money for services not rendered contained in this section. *State v. Casteneda*, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Restitution. - Upon conviction under this section, 30-23-7 NMSA 1978 would come into play and recovery thereunder could be had. 1963-64 Op. Att'y Gen. No. 64-152.

Charging in alternative. - Indictment charging defendant in the alternative with knowingly making or receiving payment or causing payment to be made from public funds charged one crime committed in various ways and was not legally deficient. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Indictment was not duplicitous because the statement of facts and subsequent proof related to a series of items, even though each might have been alleged as a separate violation. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Notice sufficient. - Where defendant asserted he could not properly prepare his defense because he was not informed as to which of 17 instances the state would attempt to prove, and the statement of facts informed defendant that the state was relying on each of the instances to prove the one offense charged in the indictment, defendant was informed of the crime charged in sufficient detail to enable him to prepare his defense. *State v. Gurule*, 90 N.M. 87, 559 P.2d 1214 (Ct. App.), cert. denied, 90 N.M. 254, 561 P.2d 1347 (1977).

Law reviews. - For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

30-23-3. Making or permitting false public voucher.

Making or permitting false public voucher consists of knowingly, intentionally or willfully making, causing to be made or permitting to be made, a false material statement or forged signature upon any public voucher, or invoice supporting a public voucher, with intent that the voucher or invoice shall be relied upon for the expenditure of public money.

Whoever commits making or permitting false public voucher is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-23-3, enacted by Laws 1963, ch. 303, § 23-3.

ANNOTATIONS

Cross-references. - For forgery, generally, see 30-16-10 NMSA 1978.

Section not vague. - Section is not unconstitutionally vague, ambiguous or indefinite; it gives fair warning of the prohibited acts and declares those acts to be a crime. *State v. Sierra*, 90 N.M. 680, 568 P.2d 206 (Ct. App.), cert. denied, 90 N.M. 4, 569 P.2d 414 (1977).

Meaning of "material" herein is not vague, ambiguous or indefinite, as it imports nothing less than a matter which is so substantial and important as to influence a party. *State v. Sierra*, 90 N.M. 680, 568 P.2d 206 (Ct. App.), cert. denied, 90 N.M. 4, 569 P.2d 414 (1977).

The term "public money", as used in this section, is sufficiently specific to not require a person of ordinary intelligence to guess at the conduct the statute proscribes. *State v. Hearne*, 112 N.M. 208, 813 P.2d 485 (Ct. App. 1991).

Section applies to public employees. - This section is unambiguous and applies to public employees as well as public officials. *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981).

The heading of this article, "Misconduct by Officials," does not restrict its application to public officials. *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981).

Applicability not determined by nature of expenditure. - It cannot be the nature of the expenditure which determines the applicability of this section. If the nature of the expenditure was relied upon to determine if funds were "public money", then absurd results are produced. Any public official could falsify public vouchers for his own purposes and then defend himself by claiming the funds were not "public money" because they were not spent for a "public purpose". *State v. Hearne*, 112 N.M. 208, 813 P.2d 485 (Ct. App. 1991).

Money donated to university by private individual. - It would be against public policy to allow a university official to enter into private agreements to expend funds made available only to pursue the agenda of the donating entity. To rule otherwise would mean any benefactor of the university could create a fund, give authority over the fund to a university official and claim the fund did not contain public money, thereby circumventing all university spending and accounting policies. *State v. Hearne*, 112 N.M. 208, 813 P.2d 485 (Ct. App. 1991).

State university head coach. - This section applies to a state university head coach. *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981).

Prosecution for both fraud and violation of this section permitted. - The double jeopardy clause does not prohibit the prosecution of an individual under both this

section and 30-16-6 NMSA 1978. *State v. Ellenberger*, 96 N.M. 287, 629 P.2d 1216 (1981).

Because the fraud statute does not require the making of a false voucher, and the false-voucher statute does not require the misappropriation or taking of anything of value, and because fraud, unlike the crime of making false public vouchers, requires proof of the victim's reliance, defendant may be prosecuted and sentenced for violation of both statutes. *State v. Whitaker*, 110 N.M. 486, 797 P.2d 275 (Ct. App. 1990).

Dual salaries prohibited. - A person may not be employed as a juvenile probation officer and deputy court clerk and paid as both although performing no services as deputy court clerk since this section makes it a fourth-degree felony to make or permit to be made a false public voucher for the expenditure of public money. 1963-64 Op. Att'y Gen. No. 64-152.

Restitution. - Upon conviction under this section, 30-23-7 NMSA 1978 would come into play and recovery thereunder could be had. 1963-64 Op. Att'y Gen. No. 64-152.

Law reviews. - For comment, "The Use of an Information Following the Return of a Grand Jury No Bill: *State v. Joe Nestor Chavez*," see 10 N.M.L. Rev. 217 (1979-1980).

30-23-4. Injunction to restrain unlawful payment of public funds.

Any citizen of this state may file suit in the district court to restrain the payment or receipt of public money in violation of Sections 23-2 and 23-3 [30-23-2 and 30-23-3 NMSA 1978]. Jurisdiction to entertain and adjudicate such suits is conferred upon the district courts, and such suits shall be subject to the same rules, statutes and law with respect to procedure, venue and appeals as ordinary civil actions for injunctive relief.

History: 1953 Comp., § 40A-23-4, enacted by Laws 1963, ch. 303, § 23-4.

ANNOTATIONS

Cross-references. - For civil actions for injunctive relief, see Rules 1-065 and 1-066 SCRA 1986.

Citizen's authority restricted. - The authority granted private citizens by former law was restricted to the bringing of actions to restrain the payment or receipt of public funds. *Hatch v. Keehan*, 61 N.M. 1, 293 P.2d 314 (1956).

Recovery of funds not authorized. - A private citizen was not authorized by former law to bring an action for the recovery or restoration of public funds. *Hatch v. Keehan*, 61 N.M. 1, 293 P.2d 314 (1956).

30-23-5. Unlawful speculation in claims against state.

Unlawful speculation in claims against state consists of any public officer or public employee directly or indirectly buying, selling, bartering, dealing in or speculating in or with any certificate, warrant or other evidence of indebtedness issued by the state, a municipality or other political subdivision, unless such certificate, warrant or other evidence of indebtedness shall have been lawfully issued to such person in payment of his salary or in consideration for services rendered by such person for supplies furnished by him.

Whoever commits unlawful speculation in claims against state is guilty of a misdemeanor.

History: 1953 Comp., § 40A-23-5, enacted by Laws 1963, ch. 303, § 23-5.

30-23-6. Unlawful interest in a public contract.

Unlawful interest in a public contract consists of:

A. any public officer or public employee receiving anything of value, directly or indirectly, from either a seller or a seller's agents, or a purchaser or a purchaser's agents in connection with the sale or purchase of securities, goods, leases, lands or anything of value by the state or any of its political subdivisions, unless:

(1) prior written consent of the head of the department of the state or political subdivision involved in the transaction is obtained and filed as a matter of public record in the office of secretary of state; and

(2) subsequent to the transaction a statement is filed as a matter of public record in the office of secretary of state by the purchaser or seller giving anything of value to a public officer or public employee and this statement contains the date the services were rendered, the amount of remuneration for the rendered services and the nature of the rendered services;

B. any seller, or his agents, or a purchaser, or his agents, offering to pay or paying anything of value directly or indirectly to a public officer or public employee in connection with the sale or purchase of securities or goods by the state or any of its political subdivisions unless the requirements of Paragraphs (1) and (2) of Subsection A of this section are [are] complied with.

Any person violating the provisions of Subsection B of this section, where such violation forms the basis for prosecution and conviction of a public officer or public employee, shall be disqualified from transacting any business with the state or its political subdivisions for a period of five years from the date of such violation.

Nothing in this section shall prohibit a public officer or public employee from receiving his regular remuneration for services rendered to the state or its political subdivisions in connection with the aforementioned transactions.

Whoever commits unlawful interest in public contracts where the value received by him is fifty dollars (\$50.00) or less is guilty of a misdemeanor.

Whoever commits unlawful interest in public contracts where the value received by him is more than fifty dollars (\$50.00) is guilty of a fourth degree felony. Any public officer or public employee convicted of a felony hereunder is forever disqualified from employment by the state or any of its political subdivisions.

History: 1953 Comp., § 40A-23-6, enacted by Laws 1963, ch. 303, § 23-6.

ANNOTATIONS

Cross-references. - For Conflict of Interest Act, see 10-16-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Public Officers and Employees § 411.

30-23-7. Civil damages for engaging in illegal acts.

In addition to any criminal penalties imposed by Section 23-6 [30-23-6 NMSA 1978], a public officer or public employee convicted of violating such section shall be liable for anything of value received by him to the department of the state or political subdivision in whose employ or service he was at the time of such violation of that section. Action for recovery of amounts under this section shall be brought in the district court of the county in which any element of the crime occurred. The actions shall be brought in the name of the state for the benefit and use of the department of the state or political subdivision in whose employ or service the public officer or public employee was at the time of the commission of the crime.

History: 1953 Comp., § 40A-23-7, enacted by Laws 1963, ch. 303, § 23-7.

ANNOTATIONS

Conviction required. - A judgment of conviction is the condition precedent to the maintenance by the state of an action for restitution. 1963-64 Op. Att'y Gen. No. 64-152.

Statute of limitations. - Under 37-1-8 NMSA 1978, prior to its 1976 amendment, an action for restitution was to be commenced within three years after judgment, assuming that the statute of limitations applies to actions brought or maintained by the state. 1963-64 Op. Att'y Gen. No. 64-152.

Upon conviction under 30-23-2 or 30-23-3 NMSA 1978 recovery could be had hereunder. 1964 Op. Att'y Gen. No. 64-152.

ARTICLE 24

BRIBERY

30-24-1. Bribery of public officer or public employee.

Bribery of public officer or public employee consists of any person giving or offering to give, directly or indirectly, anything of value to any public officer or public employee, with intent to induce or influence such public officer or public employee to:

- A. give or render any official opinion, judgment or decree;
- B. be more favorable to one party than to the other in any cause, action, suit, election, appointment, matter or thing pending or to be brought before such person;
- C. procure him to vote or withhold his vote on any question, matter or proceeding which is then or may thereafter be pending, and which may by law come or be brought before him in his public capacity;
- D. execute any of the powers in him vested; or
- E. perform any public duty otherwise than as required by law, or to delay in or omit to perform any public duty required of him by law.

Whoever commits bribery of public officer or public employee is guilty of a third degree felony.

History: 1953 Comp., § 40A-24-1, enacted by Laws 1963, ch. 303, § 24-1.

ANNOTATIONS

Cross-references. - For bribery of contest participants, see 30-19-13 NMSA 1978.

For bribery of public treasurers or employees, see 6-10-53 NMSA 1978.

Offering to bribe. - The words "offer to bribe" in Laws 1912, ch. 75, § 3 (former 40-8-3, 1953 Comp.) were intended to mean an "attempt" to bribe by solicitation, and were not intended to create a new crime. *State v. Armijo*, 19 N.M. 345, 142 P. 1126 (1914).

Equipment engineer for state highway department was not a state "officer" under Laws 1912, ch. 75, § 2 (former 40-8-2, 1953 Comp.) prior to its amendment in 1931. *State v. Quinn*, 35 N.M. 62, 290 P. 786 (1930).

Bribery statute excludes operation of the common law of bribery. *State v. Quinn*, 35 N.M. 62, 290 P. 786 (1930); *State v. Collins*, 28 N.M. 230, 210 P. 569 (1922).

Prosecution by indictment. - Prosecution for bribery under Laws 1912, ch. 75 was to be by indictment and not information. State v. Collins, 28 N.M. 230, 210 P. 569 (1922).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bribery §§ 1 to 17.

Charge of bribery or cognate offense predicated upon an unaccepted offer by or to an official, 52 A.L.R. 816.

Nonexistence of duty upon part of official to do, or refrain from doing, the act in respect of which it was sought to influence him, as defense to prosecution for bribery or acceptance of bribe, 158 A.L.R. 323.

Other bribery or acceptance of bribe, admissibility of evidence tending to show commission of, in prosecution for bribery or accepting bribes, 20 A.L.R.2d 1012.

Entrapment to commit bribery or offer to bribe, 69 A.L.R.2d 1397.

Validity of state statute prohibiting award of government contract to person or business entity previously convicted of bribery or attempting to bribe state public employee, 7 A.L.R.4th 1202.

11 C.J.S. Bribery §§ 2, 3.

30-24-2. Demanding or receiving bribe by public officer or public employee.

Demanding or receiving bribe by public officer or public employee consists of any public officer or public employee soliciting or accepting, directly or indirectly, anything of value, with intent to have his decision or action on any question, matter, cause, proceeding or appointment influenced thereby, and which by law is pending or might be brought before him in his official capacity.

Whoever commits demanding or receiving bribe by public officer or public employee is guilty of a third degree felony, and upon conviction thereof such public officer or public employee shall forfeit the office then held by him.

History: 1953 Comp., § 40A-24-2, enacted by Laws 1963, ch. 303, § 24-2.

ANNOTATIONS

Cross-references. - For removal of local officers, see 10-4-1 NMSA 1978 et seq.

For acceptance of bribes by irrigation district officials, see 73-9-33, 73-10-18, NMSA 1978.

Statutory crime void. - The statutory crime of demanding or receiving a bribe as a public official (30-24-2 NMSA 1978) conflicts with the constitutional crime of soliciting a bribe as a member of the legislature (N.M. Const., art. IV, § 39) and is therefore void. State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Demand for sexual favor to forego arrest deemed bribe. - Where police officer coerced victim to perform fellatio on him so she would not be arrested for driving violations, police officer could properly be charged with demanding a bribe and with criminal sexual penetration. State v. Johnson, 102 N.M. 110, 692 P.2d 35 (Ct. App. 1984).

Assistant district attorney could be prosecuted for attempted bribery under Laws 1912, ch. 75. State v. Collins, 28 N.M. 230, 210 P. 569 (1922).

Attorney was disbarred for conviction of bribery under this section. In re Esquibel, 113 N.M. 24, 822 P.2d 121 (1992).

Indictment sufficient. - Indictment charging justice of the peace with having wrongfully handed over papers in a case, decided by him and appealed, to a third party upon payment of a bribe, instead of transmitting them to the clerk of the district court, was not insufficient. State v. Williams, 22 N.M. 337, 161 P. 334 (1916).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bribery § 11.

Solicitation or receipt of funds by public officer or employee for political campaign expenses or similar purposes as bribery, 55 A.L.R.2d 1137.

11 C.J.S. Bribery § 7.

30-24-3. Bribery or intimidation of a witness; retaliation against a witness.

A. Bribery or intimidation of a witness consists of any person knowingly:

(1) giving or offering to give anything of value to any witness or to any person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding to testify falsely or to abstain from testifying to any fact in such cause or proceeding;

(2) intimidating or threatening any witness or person likely to become a witness in any judicial, administrative, legislative or other official cause or proceeding for the purpose of preventing such individual from testifying to any fact, to abstain from testifying or to testify falsely; or

(3) intimidating or threatening any person or giving or offering to give anything of value to any person with the intent to keep the person from truthfully reporting to a law

enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.

B. Retaliation against a witness consists of any person knowingly engaging in conduct that causes bodily injury to another person or damage to the tangible property of another person, or threatening to do so, with the intent to retaliate against any person for any information relating to the commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings given by a person to a law enforcement officer.

C. Whoever commits bribery or intimidation of a witness or retaliation against a witness is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-24-3, enacted by Laws 1963, ch. 303, § 24-3; 1987, ch. 227, § 1; 1991, ch. 84, § 1.

ANNOTATIONS

Cross-references. - For perjury, see 30-25-1 NMSA 1978.

The 1987 amendment, effective June 19, 1987, rewrote the catchline, which read "Bribery of witness," substituted "or intimidation of a witness consists of any person knowingly and maliciously" for "of witness consists of any person" in the introductory language, deleted "pending or about to be brought" preceding "to testify" in Subsection A, added "or" at the end of Subsection A, deleted "pending or about to be brought in this state or" at the end of Subsection B and "pending or about to be brought" following "proceeding" in Subsection C, inserted Subsection D and substituted "or intimidation of a witness or retaliation against a witness" for "of witness" in the last undesignated paragraph.

The 1991 amendment, effective April 2, 1991, redesignated former Subsections A and C as Paragraphs (1) and (2) of Subsection A and former Subsection D as Subsections B and C; deleted "and maliciously" following "knowingly" in the introductory phrase of Subsection A; deleted former Subsection B which read "who is a witness or is likely to become a witness, receiving or agreeing to receive any bribe or anything of value to testify falsely or to abstain from testifying to any fact in any cause in any judicial, administrative, legislative or other official cause or proceeding"; added Paragraph (3) of Subsection A; substituted "engaging in conduct that causes" for "and maliciously engaging in any conduct and thereby causing" near the beginning of Subsection B; and made related stylistic changes.

Strict construction. - This section is criminal in nature and must be construed strictly. State v. Bell, 78 N.M. 317, 431 P.2d 50 (1967).

Cause not pending. - Where alleged acts of bribery of witnesses in a homicide case took place after the death of defendant's wife but long before any final decision was made concerning the holding of an inquest or the filing of a criminal complaint against the defendant no proceeding was pending or about to be brought within the meaning of this section at the time of those alleged acts of bribery. State v. Bell, 78 N.M. 317, 431 P.2d 50 (1967).

Preliminary hearing. - A justice of the peace (now replaced by magistrates) sitting as a magistrate in a preliminary hearing, was a court, and the matter which he was investigating was a cause, within meaning of Laws 1887, ch. 22, § 2 (former 40-31-2, 1953 Comp.) penalizing intimidation of witnesses. State v. Lazarovich, 27 N.M. 282, 200 P. 422 (1921).

Coverage of former law. - Laws 1887, ch. 22, § 1 (former 40-31-1, 1953 Comp.) covered bribery of a witness to abstain from testifying in any cause. The nature of the proceedings was immaterial, as was whether such withholding of testimony was accomplished by having the bribed witness withhold the testimony while on the stand, or totally absenting himself from the witness stand. State v. Jones, 39 N.M. 395, 48 P.2d 403 (1935).

Allegation of knowledge or intent. - In prosecution for intimidating witness, indictment was not defective for failing to charge that accused knowingly committed the act or that he did it with corrupt intent. State v. Lazarovich, 27 N.M. 282, 200 P. 422 (1921).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 58 Am. Jur. 2d Obstructing Justice §§ 46, 47, 64 to 66.

Validity, construction, and application of state statutes imposing criminal penalties for influencing, intimidating, or tampering with witness, 8 A.L.R.4th 769.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

67 C.J.S. Obstructing Justice §§ 16 to 18.

30-24-3.1. Acceptance of a bribe by a witness.

A. No person who is a witness or is likely to become a witness shall receive, agree to receive or solicit any bribe or anything of value to:

(1) testify falsely or to abstain from testifying to any fact in any cause in any judicial, administrative, legislative or other proceeding; or

(2) abstain from truthfully reporting to a law enforcement officer or any agency of government that is responsible for enforcing criminal laws information relating to the

commission or possible commission of a felony offense or a violation of conditions of probation, parole or release pending judicial proceedings.

B. Whoever receives, agrees to receive or solicits a bribe is guilty of a fourth degree felony.

History: 1978 Comp., § 30-24-3.1, enacted by Laws 1991, ch. 84, § 2.

ARTICLE 25 PERJURY AND FALSE AFFIRMATIONS

30-25-1. Perjury.

Perjury consists of making a false statement under oath or affirmation, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding, knowing such statement to be untrue.

Whoever commits perjury is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-25-1, enacted by Laws 1963, ch. 303, § 25-1.

ANNOTATIONS

- I. General Consideration.
- II. Materiality.

I. GENERAL CONSIDERATION.

Cross-references. - For bribery of witness, see 30-24-3 NMSA 1978.

For provision making false swearing to accounts by county officers perjury, see 4-44-32 NMSA 1978.

For perjury in land contest proceedings, see 19-7-66 NMSA 1978.

For perjury concerning regulated oil and gas wells, see 70-2-10 NMSA 1978.

Essential elements of perjury are that the testimony of the defendant in the prior case was false testimony under oath made on a material matter with knowledge that it was false. State v. Naranjo, 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), rev'd on other grounds, 94 N.M. 407, 611 P.2d 1101 (1980).

"Willfulness" not required. - "Willfulness" as an aspect distinct from "knowledge" is not a part of the offense established by the statute and the trial court did not err in

refusing to instruct on "willfulness." State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Former law distinguished. - Under former law, willfully testifying falsely was the gravamen of the offense of perjury, and failure of trial court so to charge, upon oral request of defense counsel, was so basic as to require a reversal. State v. Reed, 62 N.M. 147, 306 P.2d 640 (1957), distinguished in State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Rule for proving perjury. - In prosecution for perjury, it is necessary to prove the falsity of defendant's sworn statements beyond a reasonable doubt. This may be done by the testimony of one witness supported by corroborating evidence or circumstances, but the corroboration must go beyond slight or indifferent particulars; it must strongly support the accusing witness. State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972); Territory v. Remuzon, 3 N.M. (Gild.) 648, 9 P. 598 (1886), overruled on other grounds Territory v. Lockhart, 8 N.M. 523, 45 P. 1106 (1896); Territory v. Williams, 9 N.M. 400, 54 P. 232 (1898); State v. Naranjo, 94 N.M. 407, 611 P.2d 1101 (1980).

Reason for special rule. - Justification for special rule in perjury cases is that it is not unreasonable that a conviction for perjury ought not to rest entirely upon an oath against an oath. State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Requirements of proof in perjury case are strictest in law, outside of treason charges. State v. Naranjo, 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), rev'd on other grounds, 94 N.M. 407, 611 P.2d 1101 (1980).

Presumption of truth under oath until dispelled. - In a perjury prosecution, the state must begin with the fact that an accused is clothed with a presumption that one will tell the truth when under oath and that, until this presumption is dispelled, one did tell the truth under oath: if the state does not prove the falsity of the statement under oath, the presumption must prevail that he did tell the truth. State v. Naranjo, 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), rev'd on other grounds, 94 N.M. 407, 611 P.2d 1101 (1980).

Knowledge inferred. - The jury could have inferred that defendant knew his testimony to be false when he gave it through reasoning that an ordinary person under similar circumstances testifying as to a specific date and time as defendant did should have known that his testimony was not true. State v. Montoya, 77 N.M. 129, 419 P.2d 970 (1966).

Perjury before grand jury. - Penalty provided by former 40-32-1, 1953 Comp., for perjury "committed in any other case" applied to a conviction under former 40-32-2, 1953 Comp., for perjury before the grand jury. State v. Reed, 62 N.M. 147, 306 P.2d 640 (1957), distinguished in State v. Borunda, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

False value given property. - A surety who swore falsely as to value of his property was guilty of perjury. *Territory v. Weller*, 2 N.M. 470 (1883).

Statements at variance with previous unsworn statements. - The state is not entitled to a conviction for perjury merely on proof that statements under oath were at variance with previous unsworn statements. *State v. Naranjo*, 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), rev'd on other grounds, 94 N.M. 407, 611 P.2d 1101 (1980).

Evidence was sufficient to find that defendant testified falsely when he claimed in a prior homicide trial that he, and not the defendant therein, had committed the murder, where along with direct evidence to that effect, the testimony of four witnesses placed the other man at the scene of the crime, one of whom saw gun in his hand. *State v. Borunda*, 83 N.M. 563, 494 P.2d 976 (Ct. App.), cert. denied, 83 N.M. 562, 494 P.2d 975 (1972).

Allegations of charge must be direct and specific. - Before a charge of perjury can be sustained, the allegations must be direct and specific, the indictment must particularize where the testimony was false, a general allegation of falsity being insufficient, and, if the offense encompasses many allegedly perjurious statements, the defendant must be told in the indictment where and to what extent the statements alleged to have been made by him were false. *State v. Naranjo*, 94 N.M. 407, 611 P.2d 1101 (1980).

Indictment deficient. - Where the indictment did not specifically negative any fact testified to, demurrer by the defendant was properly sustained. *Territory v. Lockhart*, 8 N.M. 523, 45 P. 1106 (1896).

Evidence admissible. - On trial for perjury for false swearing in a prosecution for adultery, defendant's admissions of marriage were admissible. *United States v. Chaves*, 6 N.M. 180, 27 P. 489 (1891); *United States v. de Amador*, 6 N.M. 173, 27 P. 488 (1891); *United States v. de Lujan*, 6 N.M. 179, 27 P. 489 (1891).

Perjury as basis for post-conviction relief. - Defendant's contention that he was convicted on the basis of perjured testimony given by an informer was not supported with the requisite showing of a factual basis for the claim, and hence his motion for post-conviction relief was properly denied without a hearing. *Nieto v. State*, 79 N.M. 330, 443 P.2d 500 (Ct. App. 1968).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 60A Am. Jur. 2d Perjury §§ 1 to 4, 7, 8 to 14, 22 to 24, 27 to 35, 91.

Fear or compulsion, false statement made under, as perjury, 4 A.L.R. 1319.

Perjury in verifying pleadings, 7 A.L.R. 1283.

Marriage license, perjury as predicated upon statements upon application for, 101 A.L.R. 1263.

Administrative requirement, oath taken in pursuance of, as predicate for criminal offense of perjury, 108 A.L.R. 1240.

Recantation as defense in perjury prosecution, 64 A.L.R.2d 276.

Statement of belief or opinion as perjury, 66 A.L.R.2d 791.

Circumstantial evidence, conviction of perjury where one or more of elements is established solely by, 88 A.L.R.2d 852.

Perjury or false swearing as contempt, 89 A.L.R.2d 1258.

Defense: invalidity of statute or ordinance giving rise to proceedings in which false testimony was received as defense for prosecution for perjury, 34 A.L.R.3d 413.

Jurisdiction: offense of perjury as affected by lack of jurisdiction by court or government body before which false testimony was given, 36 A.L.R.3d 1038.

Propriety of sentencing judge's consideration of defendant's perjury or lying in pleas or testimony in present trial, 34 A.L.R.4th 888.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial, 37 A.L.R.4th 948.

Admonitions against perjury or threats to prosecute potential defense witness, inducing refusal to testify, as prejudicial error, 88 A.L.R.4th 388.

Two-witness rule in perjury prosecutions under 18 USCS § 1621, 49 A.L.R. Fed. 185.

Determination of "materiality" under 18 USCS § 1623, penalizing false material declarations before grand jury or court, 60 A.L.R. Fed. 76.

70 C.J.S. Perjury §§ 1 to 28.

II. MATERIALITY.

"Material" construed. - The false testimony giving rise to a charge of perjury in a grand jury investigation does not actually have to impede or influence the investigation to be material; rather the false testimony is material if it has the capacity or tendency to influence or impede the investigation. *State v. Watkins*, 92 N.M. 470, 590 P.2d 169 (Ct. App. 1979).

False testimony is material if it has the capacity or tendency to influence the decision of the tribunal or the inquiring or investigative body, or to impede the proceeding, with respect to matters which such tribunal is competent to consider. *State v. Gallegos*, 98 N.M. 31, 644 P.2d 545 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

A lie removing a murder suspect from the scene of the murder has the capacity or tendency to impede the administration of justice. *State v. Gallegos*, 98 N.M. 31, 644 P.2d 545 (Ct. App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

Question of law. - Materiality is a question of law to be decided by the trial court. *State v. Gallegos*, 98 N.M. 31, 644 P.2d 545 (Ct. App. 1982), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

Testimony held material. - False testimony given by defendant in larceny proceedings, which was designed to establish an alibi, was material to the issues involved in the larceny case and therefore constituted perjury. *State v. Montoya*, 77 N.M. 129, 419 P.2d 970 (1966).

Averment of materiality. - Where the indictment fully set forth the question averred to be material, in relation to which the testimony was given, it was sufficient in this respect. *Territory v. Lockhart*, 8 N.M. 523, 45 P. 1106 (1896).

Evidentiary basis for determining materiality. - In order for the trial court to make a determination of materiality as a matter of law of an allegedly perjured statement, all that is needed, by way of evidentiary support, is the text of the statement and knowledge of the principal issue in the judicial proceeding in which the statement was made. *State v. Albin*, 104 N.M. 315, 720 P.2d 1256 (Ct. App. 1986).

Since materiality is properly determinable as an issue of law, there cannot appropriately be any evidentiary or factual burden. *State v. Albin*, 104 N.M. 315, 720 P.2d 1256 (Ct. App. 1986).

30-25-2. Refusal to take oath or affirmation.

Refusal to take oath or affirmation consists of the refusal of any person, when legally called upon to give testimony before any court, administrative proceeding, legislative proceeding or other authority in this state, authorized to administer oaths or affirmations, to take such oath or affirmation.

Whoever commits refusal to take oath or affirmation is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-25-2, enacted by Laws 1963, ch. 303, § 25-2.

ARTICLE 26 INTERFERENCE WITH PUBLIC RECORDS

30-26-1. Tampering with public records.

Tampering with public records consists of:

- A. knowingly altering any public record without lawful authority;
- B. any public officer or public employee knowingly filing or recording any written instrument, judicial order, judgment or decree in a form other than as the original thereof in fact appeared;
- C. any public officer or public employee knowingly falsifying or falsely making any record or file, authorized or required by law to be kept;
- D. any public officer or public employee knowingly issuing or causing to be issued, any false or untrue certified copy of a public record; or
- E. knowingly destroying, concealing, mutilating or removing without lawful authority any public record or public document belonging to or received or kept by any public authority for information, record or pursuant to law.

Whoever commits tampering with public records is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-26-1, enacted by Laws 1963, ch. 303, § 26-1.

ANNOTATIONS

Cross-references. - For altering, changing or making away with bill pending in or passed by the legislature, see N.M. Const., art. IV, § 21.

Scope of coverage. - It could reasonably be assumed that Laws 1939, ch. 8, § 1 (former 40-36-1, 1953 Comp.) covered public records which the respective public officials controlled and had the responsibility for maintaining in carrying out the responsibilities of their respective offices. *State v. Gallegos*, 48 N.M. 72, 145 P.2d 999 (1944).

Status of records. - Laws 1939, ch. 8, § 1 (former 40-36-1, 1953 Comp.) would not apply to a defendant where vouchers in question were not public records of office where defendant worked and had not acquired status of public records at time of alleged offense. *State v. Gallegos*, 48 N.M. 72, 145 P.2d 999 (1944).

Vouchers became public records in the contemplation of Laws 1939, ch. 8, § 1 (former 40-36-1, 1953 Comp.) when they were filed with state auditor who was the officially designated custodian of such papers. *State v. Gallegos*, 48 N.M. 72, 145 P.2d 999 (1944).

Falsifying record. - Public officer or employee who knowingly and willfully made as a matter of public record in his office any false or untrue statement of fact, or so caused or permitted the same to be made or entered, or otherwise falsified or made falsely any public record of his office, violated Laws 1939, ch. 8, § 1 (former 40-36-1, 1953 Comp.) and incurred its penalties. State v. Gallegos, 48 N.M. 72, 145 P.2d 999 (1944).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Records and Recording Laws §§ 10, 11.

What constitutes a public record or document within statute making falsification, forgery, mutilation, removal, or other misuse thereof an offense, 75 A.L.R.4th 1067.

76 C.J.S. Records § 57 et seq.

30-26-2. Refusal to surrender public record.

Refusal to surrender public record consists of any person wrongfully or unlawfully refusing or neglecting to deliver unto the proper authority, any record of either house of the legislature, of any court of this state or of any department of the state or local government which he has in his possession, within three days after demand therefor shall have been made by the proper officer.

Whoever commits refusal to surrender public records is guilty of a misdemeanor.

History: 1953 Comp., § 40A-26-2, enacted by Laws 1963, ch. 303, § 26-2.

ANNOTATIONS

Cross-references. - For altering, changing or making away with bill pending in or passed by the legislature, see N.M. Const., art. IV, § 21.

For duty of public officers to deliver records to their successors, see 10-17-5 NMSA 1978.

ARTICLE 27 MALICIOUS PROSECUTION, ETC.

30-27-1. Malicious criminal prosecution.

Malicious criminal prosecution consists of maliciously procuring or attempting to procure an indictment or otherwise causing or attempting to cause a criminal charge to be preferred or prosecuted against an innocent person, knowing him to be innocent.

Whoever commits malicious criminal prosecution is guilty of a misdemeanor.

History: 1953 Comp., § 40A-27-1, enacted by Laws 1963, ch. 303, § 27-1.

ANNOTATIONS

Bad check as probable cause. - Allegation of complaint that two years before prosecution took place plaintiff had given a fraudulent check sufficiently showed that "probable cause" existed for bringing the criminal action and made immaterial other allegations with reference to defendant's motive in commencing prosecution. *Marchbanks v. Young*, 47 N.M. 213, 139 P.2d 594 (1943).

Mayor not liable. - Under the circumstances mayor charged by plaintiff with false arrest and imprisonment and malicious prosecution had probable cause to believe that a crime or misdemeanor was being committed in his presence where plaintiff, stockholder and manager of a racing firm whose lease of racetrack had been canceled by the city, stopped a circus cortege on the highway before it could enter the track for the purpose of wintering therein; hence, verdict in mayor's favor was supported by the evidence. *Cherry v. Williams*, 63 N.M. 244, 316 P.2d 880 (1957).

Law reviews. - For note, "Municipal Assumption of Tort Liability for Damage Caused by Police Officers," see 1 N.M.L. Rev. 263 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 52 Am. Jur. 2d Malicious Prosecution § 197.

Institution of confessed judgment proceedings as ground of action for abuse of process or malicious prosecution, 87 A.L.R.3d 554.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 A.L.R.3d 826.

Defendant's state of mind necessary or sufficient to warrant award of punitive damages in action for malicious prosecution, 94 A.L.R.3d 791.

Venue in action for malicious prosecution, 12 A.L.R.4th 1278.

Termination of criminal proceedings as result of compromise or settlement of accused's civil liability as precluding malicious prosecution action, 26 A.L.R.4th 565.

Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution, 30 A.L.R.4th 572.

Liability of attorney, acting for client, for malicious prosecution, 46 A.L.R.4th 249.

Malicious prosecution: defense of acting on advice of justice of the peace, magistrate, or lay person, 48 A.L.R.4th 250.

Liability of better business bureau or similar organization in tort, 50 A.L.R.4th 745.

Excessiveness or inadequacy of compensatory damages for malicious prosecution, 50 A.L.R.4th 843.

Liability of police or peace officers for false arrest, imprisonment, or malicious prosecution as affected by claim of suppression, failure to disclose, or failure to investigate exculpatory evidence, 81 A.L.R.4th 1031.

Admissibility of evidence of polygraph test result, or offer or refusal to take test, in action for malicious prosecution, 10 A.L.R.5th 663.

54 C.J.S. Malicious Prosecution § 7.

30-27-2. Impersonating public officer.

Impersonating a public officer consists of any person:

A. without due authority exercising or attempting to exercise the functions of any peace officer; or

B. falsely assuming or pretending to be a peace officer, justice of the peace [magistrate] or coroner with intent to deceive another.

Whoever commits impersonating a public officer is guilty of a petty misdemeanor.

History: 1953 Comp., § 40A-27-2, enacted by Laws 1963, ch. 303, § 27-2.

ANNOTATIONS

Cross-references. - For unauthorized wearing of state police uniform or badge or unauthorized marking of car, see 29-2-14 NMSA 1978.

Office abolished. - The office of justice of the peace has been abolished by 35-1-38 NMSA 1978 which provides that references thereto shall mean the magistrate court.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 32 Am. Jur. 2d False Personation §§ 1 to 12.

Intent as affecting false personation, 97 A.L.R. 1510.

35 C.J.S. False Personation § 3.

30-27-3. Barratry.

Barratry consists of:

A. intentionally instigating, maintaining, exciting, prosecuting or encouraging the bringing of any suit in any court of this state in which such person has no interest, with the intent to distress or harass the defendant;

B. intentionally bringing or prosecuting any false suit by a person on his own account, with intent to distress or harass the defendant therein;

C. any attorney-at-law seeking or obtaining employment in any suit or case to prosecute or defend the same by means of personal solicitation of such employment or, procuring another to solicit employment for him; or

D. any attorney-at-law seeking or obtaining employment in any suit, by giving to the person from whom the employment is sought anything of value or directly or indirectly paying the debts or liabilities of the person from whom such employment is sought or loaning or promising to give or otherwise grant anything of value to the person from whom such employment is sought before such employment in order to induce such employment.

Whoever commits barratry is guilty of a misdemeanor.

History: 1953 Comp., § 40A-27-3, enacted by Laws 1963, ch. 303, § 27-3.

ANNOTATIONS

Cross-references. - For requirement that attorney's claims and contentions be meritorious, see Rule 16-301 SCRA 1986.

For rule relating to attorney advertizing, see Rule 16-702 SCRA 1986.

For rule relating to attorney conflict of interest, see Rule 16-108 SCRA 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 14 Am. Jur. 2d Champerty and Maintenance § 20.

Purchase of cause of action by attorney as champertous, 4 A.L.R. 173.

Quantum meruit or implied contract, right of attorney to recover upon, for services rendered under champertous contract, 85 A.L.R. 1365.

Validity of agreement between attorney and layman to divide attorney's fees or compensation for business of third person, 86 A.L.R. 195.

Solicitation, right of attorney to recover for services performed under contract procured by, 86 A.L.R. 517.

Government or agencies of government, law as to champerty or maintenance as applied to agreement with respect to bringing and prosecution of claims against, 106 A.L.R. 1494.

Contract by one person to defend litigation that has been or may be instituted against another as champertous, 121 A.L.R. 847.

Assertion of defense of champerty in action by champertous assignee, 22 A.L.R.2d 1000.

Validity and propriety of arrangement by which attorney pays or advances expenses of client, 8 A.L.R.3d 1155.

Maintenance of lawyer reference system by organization having no legal interest in proceedings, 11 A.L.R.3d 1206.

7A C.J.S. Attorney and Client § 149; 14 C.J.S. Champerty and Maintenance §§ 25, 26.

30-27-4. Securing signature to petition by unlawful means.

Securing signature to petition by unlawful means consists of securing the signature of any person to any petition now or hereafter provided for by the laws of this state, by paying or promising to pay the signer anything of value, direct or indirect, or by securing such signature by force, threats or intimidation, or by forging or copying the names of any person to any such petition.

Whoever commits securing signature to petition by unlawful means is guilty of a misdemeanor.

History: 1953 Comp., § 40A-27-4, enacted by Laws 1963, ch. 303, § 27-4.

ANNOTATIONS

Cross-references. - For forgery, generally, see 30-16-10 NMSA 1978.

ARTICLE 28 INITIATORY CRIMES

30-28-1. Attempt to commit a felony.

Attempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission.

Whoever commits attempt to commit a felony upon conviction thereof, shall be punished as follows:

A. if the crime attempted is a capital or first degree felony, the person committing such attempt is guilty of a second degree felony;

B. if the crime attempted is a second degree felony, the person committing such attempt is guilty of a third degree felony;

C. if the crime attempted is a third degree felony, the person committing such attempt is guilty of a fourth degree felony; and

D. if the crime attempted is a fourth degree felony, the person committing such attempt is guilty of a misdemeanor.

No person shall be sentenced for an attempt to commit a misdemeanor.

History: 1953 Comp., § 40A-28-1, enacted by Laws 1963, ch. 303, § 28-1.

ANNOTATIONS

Double jeopardy. - Since defendant was not tried on charge of attempt to commit aggravated battery, which charge was dismissed before any evidence was presented, there was no issue as to double punishment or merged offenses when defendant was tried and convicted of aggravated burglary. *State v. Hibbs*, 82 N.M. 722, 487 P.2d 150 (Ct. App. 1971).

Crime of attempt to commit a felony (burglary) did not merge with the crime of possession of burglary tools, as the "overt act" required in the attempt statute did not necessarily involve possession of burglary tools; hence defendant's sentence for each crime did not constitute double punishment. *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Section is general law, inapplicable if special law covers same matter. -

Albuquerque's ordinance making it unlawful for any person under the influence to operate a vehicle is enforceable under and consistent with state law. The fact that the ordinance defines an attempted misdemeanor does not render it invalid under this section, which is a general law not applicable if a special law covers the same matter. Moreover, former 64-15-7, 1953 Comp. (similar to 66-7-8 NMSA 1978) specifically authorized Albuquerque to adopt additional traffic regulations. *City of Albuquerque v. Chavez*, 91 N.M. 559, 577 P.2d 457 (Ct. App.), cert. denied, 91 N.M. 610, 577 P.2d 1256 (1978).

Overt act necessary. - To constitute an attempt, defendant must do an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

An attempt has been accomplished when an overt act, in furtherance of and tending to effect the commission of the felony, has been performed or undertaken with intent to commit the felony. *State v. Flowers*, 83 N.M. 113, 489 P.2d 178 (1971).

Attempted murder does not require that victim be injured. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Overt act described. - Overt act required hereunder must be more than preparation; it must be in part execution of the intent to commit the crime, and slight acts in furtherance of that intent will constitute an attempt. *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972); *State v. Stettheimer*, 94 N.M. 149, 607 P.2d 1167 (Ct. App. 1980).

Purpose and effort involved. - The word "attempt" was more comprehensive than the word "intent," implying both the purpose and the actual effort to carry that purpose into execution. *State v. Grayson*, 50 N.M. 147, 172 P.2d 1019 (1946).

Nature of attempted act. - If the intended act is not criminal there can be no criminal liability for an attempt to commit it. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Attempt under this section requires intent to commit a felony; therefore, this is a specific intent crime and the statutory language states this requisite intent. *State v. Dosier*, 88 N.M. 32, 536 P.2d 1088 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1084 (1975).

Intent must be corroborated by objective facts. - To convict a defendant of an attempt, the required criminal intent must be sufficiently corroborated by objective facts: Such corroboration is required to prevent conviction on the basis of criminal intent alone. *State v. Lopez*, 100 N.M. 291, 669 P.2d 1086 (1983).

Instruction on intent essential. - Since specific intent to murder was gist of crime of attempt to commit murder under Laws 1853-1854, p. 92 (former 40-6-10, 1953 Comp.), refusal to instruct on question of intent constituted error. *State v. Grayson*, 50 N.M. 147, 172 P.2d 1019 (1946).

The crime of attempted sodomy was a specific intent crime, and where there were no instructions regarding the element of specific intent, conviction would be reversed. *State v. Foster*, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

Factual impossibility not defense. - A defense of impossibility is not available to a defendant charged with an attempt to traffic in a controlled substance, i.e., cocaine, where the defendant received money for what he represented as cocaine, but which due to a circumstance unknown to him, in fact was not. *State v. Lopez*, 100 N.M. 291, 669 P.2d 1086 (1983).

Section does not apply to attempts regarding controlled substances. - The legislature intended to punish attempts regarding controlled substances under 30-31-25A(3) NMSA 1978 specifically as felonies and consequently, this section does not apply to such attempts covered by 30-31-25A(3) NMSA 1978. *State v. Mirabal*, 108 N.M. 749, 779 P.2d 126 (Ct. App. 1989).

"Attempt" inconsistent with completed crime. - For an attempt under this section, the perpetrator must have failed to effect commission of the crime, and if the evidence is of the completed crime, then the crime of "attempt" is not involved. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

An attempt to commit a felony is an act done with intent to commit such crime but which fails of completion. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

To instruct on an "attempt" where there is no evidence tending to establish failure to complete the crime would present a false issue to the jury. *State v. Andrada*, 82 N.M. 543, 484 P.2d 763 (Ct. App.), cert. denied, 82 N.M. 534, 484 P.2d 754 (1971).

Attempted burglary. - The jury, after it had found that the defendant shattered grocery store window, validly inferred that the window was broken in an attempt to enter and unlawfully take property from inside the store. *State v. Serrano*, 74 N.M. 412, 394 P.2d 262 (1964).

It is possible to have a physical act which is an attempt to transfer one's interest in forged item but to have such an attempt thwarted at some stage of perpetration. *State v. Tooke*, 81 N.M. 618, 471 P.2d 188 (Ct. App. 1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Evidence that defendant represented himself as being person named as payee of check, and presented identification to this effect, supported conviction for attempted forgery, regardless of fact that state did not undertake to prove that the checks if presented to drawee bank would not have been paid, or that defendant did not have the right to use the payee's name. *State v. Lopez*, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), cert. denied, 81 N.M. 140, 464 P.2d 559 (1970), overruled on other grounds, *State v. Ruffins*, 109 N.M. 668, 789 P.2d 616 (1990).

Attempted trafficking of cocaine. - Defendant failed to effect the crime of possession with intent to distribute because he never actually possessed the package containing cocaine which was addressed to him; nevertheless, the fact that he never actually possessed the package did not negate his intent to possess the package, as evidenced by his attempting to pick up the package, nor did it negate his intent to distribute the cocaine, as is evidenced by the amount of cocaine found in the package. Therefore, he was properly convicted of attempted trafficking under this section and 30-31-20A(3). *State v. Curry*, 107 N.M. 133, 753 P.2d 1321 (Ct. App. 1988).

Defendant was properly convicted for attempted trafficking in cocaine since he committed the overt acts of accepting a sizeable amount of cash from an underground narcotics officer and engaging in prior discussion of the illicit transaction. *State v. Green*, 116 N.M. 273, 861 P.2d 954 (1993).

Attempted sodomy. - Defendant's beating of minor, partially stripping him and straddling him with his fly open constituted an active effort to consummate the crime of sodomy and were more than mere preparation. *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972).

Felony murder during attempt. - Felony- murder provision is applicable once conduct in furtherance of the commission of a felony has progressed sufficiently to constitute an attempt to commit the felony. *State v. Flowers*, 83 N.M. 113, 489 P.2d 178 (1971).

There was ample evidence to support a finding that defendant had accomplished an attempt to unlawfully take decedent's automobile before the bullet struck decedent in the head, and that defendant, at the time he killed decedent, was in the act of committing at least this felony. *State v. Flowers*, 83 N.M. 113, 489 P.2d 178 (1971).

Transferred intent applicable to attempted murder. - The doctrine of transferred intent applies to both murder and attempted murder. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Multiple counts proper where there are multiple victims. - The single violent act of firebombing a residence with six people inside gives rise to six counts of attempted second degree murder. *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

No such crime as attempted "depraved mind" murder. - The crime of attempted "depraved mind" murder does not exist since in order to convict for such an offense, the jury would have to find that the defendant intended to perpetrate an unintentional killing, a logical impossibility. *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

Attempted second degree murder of unintended victims. - If defendant committed an act, intending to kill someone but knowing that his act created a strong probability of death or great bodily harm to others, he is guilty of attempted second degree murder as to the others. *State v. Johnson*, 103 N.M. 364, 707 P.2d 1174 (Ct. App. 1985).

Information adequate. - Information charging defendant with attempting to break and enter a certain grocery in the nighttime with intent to take property therefrom, alleged a felony offense, and since under the applicable statutory sections, theft of property of any value would have been a felony, value need not have been specified in the information. *State v. Serrano*, 74 N.M. 412, 394 P.2d 262 (1964).

Information insufficient. - An information that merely stated that crime was committed by assault failed to charge an attempt to commit the crime of murder by poisoning,

drowning or strangling contemplated under Laws 1854-1855, p. 92 (former 40-6-10, 1953 Comp.). State v. Grayson, 50 N.M. 147, 172 P.2d 1019 (1946).

Circumstantial evidence. - A conviction of poisoning with intent to kill or injure under Laws 1854-1855, p. 94 (former 40-6-11, 1953 Comp.) could be had on circumstantial evidence. State v. Holden, 45 N.M. 147, 113 P.2d 171 (1941).

Inadmissible hearsay. - In prosecution for murder and attempted murder admission of extra-judicial statements attributed to children of victims was error where the children were not called as witnesses because defendant was denied his constitutional right of confrontation, being deprived of opportunity to cross-examine. State v. Lunn, 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971).

Instruction on abandoned intent not warranted. - Where defendant was charged with aiding and abetting in an attempted rape, and the evidence was uncontradicted that codefendant ripped off victim's shirt and attempted to take off her pants before he stopped his aggression, that the defendant had been in the automobile prior to this action, and was in close proximity at the time, having left the automobile at the request of codefendant, therefore implicating himself in and giving his tacit consent to codefendant's actions, defendant's requested instruction on abandonment of criminal intent was properly refused. State v. LeMarr, 83 N.M. 18, 487 P.2d 1088 (1971).

Instruction on attempted rape. - In prosecution under federal act for rape on an Indian reservation, the federal court had jurisdiction to instruct on lesser included offenses under state law, and it was error not to instruct on attempted rape and other lesser offenses for which there was some evidence. Joe v. United States, 510 F.2d 1038 (10th Cir. 1974).

Defendant could not create provocation which would reduce attempted murder to attempted manslaughter, and his requested instruction on attempted voluntary manslaughter was therefore properly refused. State v. Durante, 104 N.M. 639, 725 P.2d 839 (Ct. App. 1986).

Evidence necessary for lesser included offense of attempted murder with firearm. - Where there is no showing that the defendant either intended to scare or intended to injure the victim, but the facts clearly show that the defendant intended to kill the victim, the trial court is correct in rejecting an aggravated battery instruction as a lesser included offense of attempted murder with a firearm. State v. Simonson, 100 N.M. 297, 669 P.2d 1092 (1983).

Evidence sufficient to sustain conviction of attempted fraud. - See State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: State v. Gillette," see 17 N.M.L. Rev. 189 (1987).

For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 158 to 160, 601.

Assault: attempt to commit assault as criminal offense, 79 A.L.R.2d 597.

Receiving stolen goods: attempts to receive stolen property, 85 A.L.R.2d 259.

Escape from prison, attempt to escape or commit prison breach as affected by means employed, 96 A.L.R.2d 520.

Larceny by trick, confidence game, false pretenses, and the like, attempts to commit offenses of, 6 A.L.R.3d 241.

Woman upon whom abortion is committed or attempted as accomplice for purposes of rule requiring corroboration of accomplice testimony, 34 A.L.R.3d 858.

Impossibility: comment note on impossibility of consummation of substantive crime as defense in criminal prosecution or for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Duress, necessity, or conditions of confinement as justification for escape from prison, 69 A.L.R.3d 678.

Drunken driving: attempt to commit crime as to driving, being in control of, or operating a motor vehicle while intoxicated, 93 A.L.R.3d 7.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Construction and application of state statute governing impossibility of consummation as defense to prosecution for attempt to commit crime, 41 A.L.R.4th 588.

22 C.J.S. Criminal Law §§ 114, 116 to 121.

30-28-2. Conspiracy.

A. Conspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state.

B. Whoever commits conspiracy shall be punished as follows:

(1) if the highest crime conspired to be committed is a capital or first degree felony, the person committing such conspiracy is guilty of a second degree felony;

(2) if the highest crime conspired to be committed is a second degree felony, the person committing such conspiracy is guilty of a third degree felony; and

(3) if the highest crime conspired to be committed is a third degree felony or a fourth degree felony, the person committing such conspiracy is guilty of a fourth degree felony.

History: 1953 Comp., § 40A-28-2, enacted by Laws 1963, ch. 303, § 28-2; 1979, ch. 257, § 1.

ANNOTATIONS

Cross-references. - For compounding a crime, see 30-22-6 NMSA 1978.

Section applicable to crimes within and outside of Criminal Code. - This section applies to conspiracies to commit crimes whether they are contained in the Criminal Code or are found elsewhere in the New Mexico statutes, e.g., securities laws. *State v. Shafer*, 102 N.M. 629, 698 P.2d 902 (Ct. App. 1985).

Conspiracy is defined as a common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means. *State v. Chavez*, 99 N.M. 609, 661 P.2d 887 (1983).

Overt act not required. - Section does not require overt act in connection with the conspiracy, as conspiracy in New Mexico is complete when the prohibited agreement is reached. *State v. Davis*, 92 N.M. 341, 587 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

The overt act which constitutes the object of a conspiracy is no part of the crime of conspiracy; an overt act is not required, but the crime is complete when the felonious agreement is reached. *State v. Leyba*, 93 N.M. 366, 600 P.2d 312 (Ct. App. 1979); *State v. Gilbert*, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

Common design is essence of conspiracy. *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976); *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Number of criminal conspiracies. - The number of agreements to break the law determines the number of criminal conspiracies subject to prosecution. *State v. Sanders*, 117 N.M. 452, 872 P.2d 870 (1994).

Mutually implied understanding is sufficient so far as combination or confederacy is concerned. *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970); *State v. Davis*, 92 N.M. 341, 587 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Conspiracy is defined in terms of a common design or mutually implied understanding. State v. Armijo, 90 N.M. 10, 558 P.2d 1149 (Ct. App. 1976).

For a conspiracy to exist there must be a common design or a mutually implied understanding; an agreement. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Common design may be established by circumstantial evidence. See State v. Davis, 92 N.M. 341, 587 P.2d 1352 (Ct. App.), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978).

Established through circumstantial evidence. - A conspiracy may be established by circumstantial evidence, the agreement being a matter of inference from the facts and circumstances, which, considered as a whole, show the parties united to accomplish the fraudulent scheme. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Circumstantial evidence for fact of inception of common design. - Question of when conspirators began to act in pursuance of a common design is ordinarily not the subject of direct proof; circumstances must be relied on to establish the fact. State v. Farris, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Formal agreement not necessary. - To establish conspiracy formal agreement need not be proved; a mutually implied understanding is sufficient to establish the conspiracy. State v. Dressel, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973); State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

While common design is the essence of a conspiracy, this fact may be established by evidence other than that the parties came together and actually agreed upon a method of operation for the accomplishment of the offense. State v. Deaton, 74 N.M. 87, 390 P.2d 966 (1964).

Agreement a matter of inference. - A mutually implied understanding is sufficient so far as combination or confederacy is concerned, which agreement is generally a matter of inference deduced from the facts and circumstances, and from the acts of the person accused done in pursuance of an apparent criminal purpose. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976); State v. Deaton, 74 N.M. 87, 390 P.2d 966 (1964).

Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties. State v. Dressel, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973); State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Knowledge of conspiracy necessary. - One cannot be a party to a conspiracy unless one knows of the conspiracy. State v. Sheets, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

It takes at least two persons to effect a conspiracy as the essence of a conspiracy is a common design or agreement to accomplish an unlawful purpose or a lawful purpose

by unlawful means. *State v. Dressel*, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973); *State v. Sheets*, 96 N.M. 75, 628 P.2d 320 (Ct. App. 1981).

Convictions of all conspirators unnecessary. - Although it takes two or more to effect a conspiracy, conviction of all conspirators, or even more than one, is not required and ordinarily, the entry of a nolle prosequi as to other alleged conspirators does not vitiate the conviction of a remaining defendant charged with conspiring with them. *State v. Verdugo*, 79 N.M. 765, 449 P.2d 781 (1969).

Fact that co-defendant's substantive crimes dismissed not determinative for conspiracy convictions. - There was sufficient evidence from which the jury could have inferred that defendant had agreed with co-defendant, as a sales representative and later as a sales manager of the condominium project, to sell unregistered securities and to engage in sales practices which had the effect of operating as a fraud upon purchasers. The fact that the substantive crimes of fraudulent practices and the sale or offer to sell unregistered securities as to the co-defendant were dismissed by the trial court is not determinative for the conspiracy convictions. The substantive crimes and the crime of conspiracy are different, and involve separate concepts; and failure to convict on one does not prevent a conviction on the other. *State v. Shade*, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986), overruled on other grounds, *State v. Olguin*, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Applicability of Wharton's Rule. - Wharton's Rule provides that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the particular crime is of such a nature as to necessarily require the participation of two persons for its commission. The conduct involved in a conspiracy to commit trafficking under the Controlled Substances Act (30-31-1 NMSA 1978 et seq.) is not like those offenses to which Wharton's Rule traditionally applies and therefore the rule's presumption does not apply to such a conspiracy. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Conspiracy not barred by incarceration. - Incarceration may prevent active participation in carrying out some of the acts of a conspiracy; it has no effect whatever in dampening initiatory conspiratorial activity. *State v. Gilbert*, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

Conspiracy not susceptible to firearm enhancement. - Since conspiracy is an initiatory crime which involves no physical act other than communication, it is not conceivable how a firearm could be used in the commission of that offense. Accordingly, the crime of conspiracy is not susceptible to firearm enhancement under § 31-18-16 (NMSA 1978). *State v. Padilla*, 118 N.M. 189, 879 P.2d 1208 (Ct. App. 1994).

Derivative liability. - Defendant, as a conspirator, can be guilty of a substantive offense on a theory of derivative liability. *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976) See also; *State v. Armijo*, 90 N.M. 10, 558 P.2d 1149 (Ct. App. 1976).

Acts and declarations of coconspirators may be admitted into evidence whether or not conspiracy is directly charged. *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Acts made during existence of conspiracy. - The acts and declarations of a conspirator to be admissible against his coconspirator must occur during the existence of the conspiracy. *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Act made prior to consummation of crime. - A conspirator may testify to acts done or statements made by a coconspirator from the commencement to the consummation of the offense. *State v. Robinson*, 84 N.M. 2, 498 P.2d 694 (Ct. App. 1972).

Acts made prior to abandonment. - Rule that statements of a conspirator made after abandonment of the conspiracy or after it has terminated without accomplishing its object are inadmissible as against a co-conspirator, refers to those statements originally made among conspirators, and not the testimony given at trial about those statements. *State v. Robinson*, 84 N.M. 2, 498 P.2d 694 (Ct. App. 1972).

Acts prior to inception of conspiracy. - While the acts and declarations of one conspirator during the existence of a conspiracy are competent evidence against his coconspirators, no act or declaration made before the inception of the conspiracy may be binding, or given in evidence against the coconspirator on trial. *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Laying foundation for testimony. - When a sufficient foundation is laid by the evidence to establish the existence of a conspiracy, the acts and declarations of coconspirators in pursuance of the common purpose are admissible, whether conspiracy is directly charged or not. *State v. Farris*, 81 N.M. 589, 470 P.2d 561 (Ct. App. 1970).

Out-of-court statements made by a coconspirator about matters relating to the conspiracy are not admissible unless and until a prima facie case of conspiracy is shown by other independent evidence. *State v. Harge*, 94 N.M. 11, 606 P.2d 1105 (Ct. App. 1979), overruled on other grounds *State v. Penner*, 100 N.M. 377, 671 P.2d 38 (Ct. App. 1983).

Order of proof not dispositive. - The trial court has wide discretion in supervising the order of proof in a conspiracy case, and hence regardless of whether acts and declarations of one coconspirator were admitted prior to prima facie proof of a conspiracy, the dispositive issue was whether there was prima facie proof of a conspiracy apart from those acts and declarations, that is, evidence sufficient to make a prima facie case which would support a finding. *State v. Armijo*, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Presenting co-defendant's guilty plea in defendant's conspiracy trial. - The fact that a co-defendant has pled guilty to conspiracy to commit murder, presented to the

jury in a case involving the defendant's conspiracy, does not come within Rule 803(22), N.M.R. Evid., and is hearsay. State v. Urioste, 94 N.M. 767, 617 P.2d 156 (Ct. App. 1980).

Conspiracy as single agreement. - Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Entailing single punishment. - The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one; thus, where there is only one conspiracy and, therefore, only one conspiracy offense, only a single penalty can be validly imposed. State v. Ross, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

But conspiracy and the completed offense are separate offenses and conviction of both does not amount to double jeopardy. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Double jeopardy not bar to conspiracy and substantive crime convictions. - Plea of double jeopardy is no defense to convictions for a substantive offense and a conspiracy to commit that offense. State v. Smith, 102 N.M. 512, 697 P.2d 512 (Ct. App. 1985).

Punishment for both constitutional. - Although defendant had been convicted and was being punished for his conspiracy at the time of his trial, he was not placed in double jeopardy by being convicted and sentenced on the substantive counts. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Conspiracy does not arise out of same transaction as shoplifting. - A charge of conspiracy does not arise out of the same transaction which results in an indictment for shoplifting, and thus cannot be dismissed as in violation of a statute prohibiting the charging of separate or additional offense if it arises out of the same transaction, notwithstanding proof of the subsequent shoplifting may also tend to circumstantially prove the conspiracy charge. State v. Leyba, 93 N.M. 366, 600 P.2d 312 (Ct. App. 1979).

Two distinct crimes shown. - Evidence that a conspiracy to commit burglary was entered on the evening of November 16th, that the conspirators unsuccessfully attempted to carry out the conspiracy at 10:30 p.m. of that day, and that the burglary was performed between 9:00 and 9:30 a.m. of November 17th, showed two distinct crimes, and there was no factual basis for the contention that they were either the same or so similar that multiple convictions were prohibited. State v. Watkins, 88 N.M. 561, 543 P.2d 1189 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

Aiding and abetting and conspiracy are distinct and separate concepts. State v. Armijo, 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Knowledge essential to aiding and abetting. - One does not become a party to a conspiracy by aiding and abetting it unless one knows of the conspiracy. State v. Dressel, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973).

Mere presence insufficient. - Where there was no evidence that defendant's partner had any knowledge whatsoever of defendant's scheme, even though she was present with him while he was effectuating it, the evidence was insufficient to sustain a conviction for conspiracy. State v. Dressel, 85 N.M. 450, 513 P.2d 187 (Ct. App. 1973).

Jury question. - When a series of illegal transactions has occurred, the issue of whether there is one conspiracy directed toward several acts or multiple conspiracies is a factual one for the jury. State v. Hernandez, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Evidence sufficient. - The size, frequency and manner of the transactions were evidence sustaining defendant's conviction for conspiracy with two others to traffic in heroin. State v. Armijo, 90 N.M. 10, 558 P.2d 1149 (Ct. App. 1976).

Review of the record indicates the existence of substantial evidence to support the jury verdicts for conspiracy to commit fraud, and the evidence was such that the jury could reasonably determine that defendants knowingly committed the offense of conspiracy to commit fraud upon the District and state in excess of \$20,000. State v. Crews, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Sufficient evidence of underlying crime(s). - Where the jury must determine which of two underlying crimes is supported by evidence, as opposed to determining the legality or constitutionality of the underlying crimes, a conviction for conspiracy will be upheld, notwithstanding that one of the underlying crimes may not have been supported by sufficient evidence. State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Evidence found sufficient for conviction. - See State v. Bankert, 117 N.M. 614, 875 P.2d 370 (1994); State v. Sellers, 117 N.M. 643, 875 P.2d 400 (Ct. App. 1994).

Two convictions for one conspiracy unconstitutional. - Because the defendant robbed two different victims but only one conspiracy to commit the robberies existed, it was a violation of double jeopardy to convict the defendant for two conspiracies, as he was punished twice for the same offense. State v. Jackson, 116 N.M. 130, 860 P.2d 772 (Ct. App. 1993).

Charging in alternative. - Where defendant was charged under two counts enveloping a single conspiracy which violated two statutes, the trial court did not err in refusing to dismiss either count as duplicious, as although there was only one conspiracy, the two

counts alternatively charged the single conspiracy. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Where the conspiracy to burglarize and vandalize an insured business involved acts not covered by the arson statute (30-17-5 NMSA 1978), that section was not a special provision prohibiting the prosecution of defendant under 30-15-3 NMSA 1978 relating to damaging insured property, for the aspect of the conspiracy directed toward burglary and vandalism. *State v. Ross*, 86 N.M. 212, 521 P.2d 1161 (Ct. App. 1974).

Conspiracy as basis for post-conviction relief. - Where defendant claimed that an assistant district attorney, a state police officer and two other persons violated this section, that this conspiracy was directed against him and that as a result his conviction, judgment and sentence were illegal, but did not allege in what manner the alleged conspiracy affected him, he failed to state a basis for post-conviction relief. *State v. Dominguez*, 80 N.M. 328, 455 P.2d 194 (Ct. App. 1969).

Law reviews. - For note, "Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: *State v. Gillette*," see 17 N.M.L. Rev. 189 (1987).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 16 Am. Jur. 2d Conspiracy §§ 1 to 11.

Adultery or other offense which can only be committed by concerted action of parties to it, conspiracy to commit, 11 A.L.R. 196, 104 A.L.R. 1430.

Merger of conspiracy in completed offense, 75 A.L.R. 1411.

Woman who connives or consents to own transportation for immoral purpose, responsibility of, as a coconspirator, 84 A.L.R. 376.

Right of accused to bill of particulars, 5 A.L.R.2d 444.

Joint liability for slander, 26 A.L.R.2d 1031.

Liability for procuring breach of contract, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Conviction or acquittal of attempt to commit particular crime as bar to prosecution for conspiracy to commit same crime, or vice versa, 53 A.L.R.2d 622.

Limitation of actions: when does statute of limitations begin to run against civil action or criminal prosecution for conspiracy, 62 A.L.R.2d 1369.

Gambling, criminal conspiracies as to, 91 A.L.R.2d 1148.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence, 4 A.L.R.3d 671.

Jurisdiction to prosecute conspirator who is not in state at time of substantive criminal act, for offense committed pursuant to conspiracy, 5 A.L.R.3d 887.

False testimony: actionability of conspiracy to give or procure false testimony or other evidence, 31 A.L.R.3d 1423.

Impossibility: comment note on impossibility of consummation of substantive crime as defense in criminal prosecution for conspiracy or attempt to commit crime, 37 A.L.R.3d 375.

Spouses, criminal conspiracy between, 74 A.L.R.3d 838.

Entrapment: availability of defense of entrapment where one accused of conspiracy denies participation in offense, 5 A.L.R.4th 1128.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators, 19 A.L.R.4th 192.

Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

When is conspiracy continuing offense for purposes of statute of limitations under 18 USCS § 3282, 109 A.L.R. Fed. 616.

30-28-3. Criminal solicitation; penalty.

A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

B. In any prosecution for criminal solicitation, it is an affirmative defense that under circumstances manifesting a voluntary and complete renunciation of criminal intent, the defendant:

(1) notified the person solicited; and

(2) gave timely and adequate warning to law enforcement authorities or otherwise made a substantial effort to prevent the criminal conduct solicited.

The burden of raising this issue is on the defendant, but does not shift the burden of proof of the state to prove all of the elements of the crime of solicitation beyond a reasonable doubt.

C. It is not a defense that the person solicited could not be guilty of the offense solicited due to insanity, minority or other lack of criminal responsibility or incapacity. It is not a defense that the person solicited is unable to commit the crime solicited because of lack of capacity, status or other characteristic needed to commit the crime solicited, so long as the person soliciting or the person solicited believes that he or they have such capacity, status or characteristics.

D. A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited. When the solicitation constitutes a felony offense other than criminal solicitation, which is related to but separate from the offense solicited, the defendant is guilty of such related felony offense and not of criminal solicitation. Provided, a defendant may be prosecuted for and convicted of both the criminal solicitation as well as any other crime or crimes committed by the defendant or his accomplices or coconspirators, or the crime or crimes committed by the person solicited.

E. Any person convicted of criminal solicitation shall be punished as follows:

(1) if the highest crime solicited is a capital or first degree felony, the person soliciting such felony is guilty of a second degree felony;

(2) if the highest crime solicited is a second degree felony, the person soliciting such a felony is guilty of a third degree felony; and

(3) if the highest crime solicited is a third degree felony or a fourth degree felony, the person soliciting such felony is guilty of a fourth degree felony.

History: 1978 Comp., § 30-28-3, enacted by Laws 1979, ch. 265, § 1.

ANNOTATIONS

The offense of solicitation requires some form of actual communication from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation. *State v. Cotton*, 109 N.M. 769, 790 P.2d 1050 (Ct. App. 1990).

Under this section, proof that defendant solicited, commanded, requested, induced, or employed another to commit a felony necessarily requires evidence that the defendant, in some manner, in fact communicated the solicitation to the person or persons intended to be solicited. *State v. Cotton*, 109 N.M. 769, 790 P.2d 1050 (Ct. App. 1990).

Offense complete when solicitation made. - The offense of solicitation is complete when the solicitation is made and it is immaterial that the object of the solicitation is never consummated, or that no overt steps are subsequently taken toward its consummation. State v. Casteneda, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Agreement not required. - The crime of solicitation does not require an agreement. There need be only unilateral acts on the part of the accused of an inducement or request for another to commit a felony. State v. Gilbert, 98 N.M. 77, 644 P.2d 1066 (Ct. App. 1982).

"Facilitate" and "promote" construed. - The terms "facilitate" and "promote" have common, well defined definitions, meaning respectively "to make easier or less difficult," and to "further, or encourage." State v. Casteneda, 97 N.M. 670, 642 P.2d 1129 (Ct. App. 1982).

Solicitation incidental to conspiracy or liability as accessory. - If the theory of guilt of the principal offense is that of accessory liability for fraud or conspiracy to commit fraud, solicitation will be necessarily incidental to it and there can be no liability for solicitation. State v. McCall, 101 N.M. 616, 686 P.2d 958 (Ct. App. 1983), rev'd on other grounds, 101 N.M. 32, 677 P.2d 1068 (1984).

Separate sentences for conspiracy and solicitation, if solicitation constitutes conspiracy, impermissible. - A formal adjudication of guilt of both conspiracy to commit and solicitation of the same felony is proper; however, the imposition of a separate sentence for solicitation when (1) a defendant is convicted and sentenced for conspiracy and (2) the solicitation also constitutes the conspiracy is not permissible. State v. Shade, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986), overruled on other grounds, State v. Olguin, 118 N.M. 91, 879 P.2d 92 (Ct. App. 1994).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Solicitation to commit crime against more than one person or property, made in single conversation, as single or multiple crimes, 24 A.L.R.4th 1324.

15A C.J.S. Conspiracy §§ 34 to 78.

ARTICLE 29

GLUES

30-29-1. Glues; limiting the sales; requiring records; penalty.

A. No person shall sell glue to any person under eighteen years of age. A New Mexico driver's license shall be prima facie proof of age.

B. Wholesale distributors of glue shall make available to the health services division of the health and environment department [department of health] and to law enforcement

agencies of the state, county and municipality during business hours their records of all sales to retailers of glue.

C. As used in this section, "glue" means what is commonly referred to as plastic or model airplane cement and includes any cement containing hexane, benzene, toluene, xylene, carbon tetrachloride, chloroform, ethylene dichloride, acetone, cyclohexanone, methyl ethyl ketone, methylisobutyl ketone, amyl acetate, butyl acetate, ethyl acetate, tricresyl phosphate, butyl alcohol, ethyl alcohol, isopropyl alcohol or methylcellosolve acetate.

D. Any person violating any provision of this section is guilty of a petty misdemeanor.

History: 1953 Comp., § 12-3-40, enacted by Laws 1968, ch. 23, § 1; 1977, ch. 253, § 24; 1979, ch. 82, § 2.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Penal offense of sniffing glue or similar volatile intoxicants, 32 A.L.R.3d 1438.

30-29-2. Glue; aerosol spray; abuse or possession for abuse; penalty.

A. No person shall intentionally smell, sniff or inhale the fumes or vapors from a glue, aerosol spray product or other chemical substance for the purpose of causing a condition of or inducing symptoms of intoxication, elation, euphoria, dizziness, excitement, irrational behavior, exhilaration, stupefaction or dulling of the senses, or for the purpose of in any manner changing, distorting or disturbing the audio, visual or mental processes.

B. No person shall intentionally possess a glue, aerosol spray product or other chemical substance for any purpose set forth in Subsection A of this section.

C. As used in this section, "glue" means what is commonly referred to as plastic or model airplane cement and includes any cement containing hexane, benzene, toluene, xylene, carbon tetrachloride, chloroform, ethylene dichloride, acetone, cyclohexanone, methyl ethyl ketone, methylisobutyl ketone, amyl acetate, butyl acetate, ethyl acetate, tricresyl phosphate, butyl alcohol, ethyl alcohol, isopropyl alcohol or methylcellosolve acetate.

D. The provisions of this section do not apply to any aerosol spray product or other chemical substance used for legitimate medicinal purposes and obtained either on a prescription basis or for medicinal purposes by a person over the age of eighteen.

E. Any person who violates any provision of this section is guilty of a misdemeanor. The sentence or fine may be waived in the discretion of the court in the case of any person who has not been previously convicted of violating this section and who has successfully completed a drug education or treatment program approved by the court.

History: Laws 1979, ch. 82, § 1.

ARTICLE 30

MERCURY

30-30-1. Illegal possession of mercury.

Illegal possession of mercury consists of possessing more than one pound of mercury without also possessing a bona fide bill of sale or other instrument in writing relating to the mercury in possession stating the name and address of the seller, the name and address of the purchaser, the date of the sale, the amount sold and the price paid therefor; provided however, this section shall not be applicable to any person engaged in the business of mining, processing mercury, or to any person using mercury as an integral part of a tool, instrument or device in his business, or to a law enforcement officer in discharge of his duties.

Whoever commits illegal possession of mercury is guilty of a fourth degree felony.

History: 1953 Comp., § 54-5-17, enacted by Laws 1967, ch. 88, § 1.

ANNOTATIONS

Cross-references. - For evidentiary rule relating to the use of presumptions in criminal cases, see Rule 11-302.

Section is not an unreasonable restriction of property rights in violation of due process requirements. *State v. Davis*, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

Reasonable regulation of possession. - As physical characteristics of mercury are such that there is no way to identify a particular lot of mercury, it is reasonably necessary to regulate possession of mercury in order to prevent theft, and the regulation of possession, as limited in this section, is reasonable, and does not violate the requirements of due process. *State v. Davis*, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

While it is true that this section prohibits a formerly legal possession, the act prohibited is intentional possession of mercury in those instances covered hereunder. *State v. Davis*, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

Section neither destroys presumption of innocence nor shifts burden of proof.

State v. Davis, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

State required to prove possession. - The presumption of innocence in this section is not destroyed by an inference of guilt based either on a suspicion or an unproven fact as it requires the state to prove possession of a specified item (mercury) in a stated amount (more than one pound). *State v. Davis*, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

Along with absence of bill of sale. - The state has the burden of proving that the defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in defendant's possession; this negative may be proved by the unexplained absence of a bill of sale or instrument in writing from which it may be (but is not required to be) inferred that defendant did not possess such an item, such inference being an evidentiary matter. *State v. Cranford*, 82 N.M. 331, 481 P.2d 410 (Ct. App. 1971).

Locus of bill of sale. - The bill of sale or other written instrument need not be on defendant's person in order to be possessed by the defendant. *State v. Davis*, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

Intent essential. - Criminal intent, an intent to possess the mercury, is required for violation of this section. *State v. Davis*, 80 N.M. 347, 455 P.2d 851 (Ct. App.), cert. denied, 80 N.M. 316, 454 P.2d 973 (1969).

Evidence sufficient. - Evidence that, according to defendant, 60 pounds of mercury found in his closet was not supposed to be there, along with evidence that defendant acknowledged his guilt to investigating officer, permitted the inference that defendant did not possess a bona fide bill of sale or other written instrument relating to the mercury in his possession. *State v. Cranford*, 82 N.M. 331, 481 P.2d 410 (Ct. App. 1971).

ARTICLE 31 CONTROLLED SUBSTANCES

30-31-1. Short title.

Sections 1 through 42 of this act may be cited as the "Controlled Substances Act."

History: 1953 Comp., § 54-11-1, enacted by Laws 1972, ch. 84, § 1.

ANNOTATIONS

Controlled Substances Act. - "Sections 1 through 42 of this act", referred to in this section means Laws 1972, ch. 84, §§ 1 to 42, which presently appear as 30-31-1 to 30-31-25, 30-31-26 to 30-31-28 and 30-31-30 to 30-31-40 NMSA 1978. However, Laws 1981, ch. 31, § 2 added 30-31-25.1 NMSA 1978 to the Controlled Substances Act.

Constitutionality. - The title of Laws 1972, Chapter 84 does not violate N.M. Const., art. IV, § 16 by embracing more than one subject, because although the act amends sections of the state Drug and Cosmetic Act, the amendments are all concerned with drugs. *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Uniform scheme for controlling registrants and nonregistrants. - The legislature did not establish a parallel scheme for punishing violations of the Controlled Substances Act. That is, there is not one system for controlling registrants authorized to conduct transactions in controlled substances and another for nonregistrants. The punishment for violating a provision of the act depends not on the offender's status but on the nature of the violation. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Law reviews. - For article, "Survey of New Mexico Law, 1982-83: Criminal Law," see 14 N.M.L. Rev. 89 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16 to 27.

Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws, 92 A.L.R.3d 47.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Liability for discharge of at-will employee for refusal to submit to drug testing, 79 A.L.R.4th 105.

Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws, 1 A.L.R.5th 938.

Availability of defense of duress or coercion in prosecution for violation of federal narcotics laws, 75 A.L.R. Fed. 722.

When may offender found guilty of multiple crimes under Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS §§ 841-851) be punished for only one offense, 80 A.L.R. Fed. 794.

Validity under federal constitution of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government, 86 A.L.R. Fed. 420.

28 C.J.S. Drugs and Narcotics Supplement §§ 7 to 9.

30-31-2. Definitions.

As used in the Controlled Substances Act:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or his agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. It does not include a common or contract carrier, public warehouseman or employee of the carrier or warehouseman;

C. "board" means the board of pharmacy;

D. "bureau" means the bureau of narcotics and dangerous drugs, United States department of justice, or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act or regulations adopted thereto;

F. "counterfeit substance" means a controlled substance that bears the unauthorized trademark, trade name, imprint, number, device or other identifying mark or likeness of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the controlled substance;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" or "substance" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, official national formulary or any respective supplement to these publications. It does not include devices or their components, parts or accessories;

L. "hashish" means the resin extracted from any part of marijuana, whether growing or not, and every compound, manufacture, salt, derivative, mixture or preparation of such resins;

M. "manufacture" means the production, preparation, compounding, conversion or processing of a controlled substance or controlled substance analog by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance:

(1) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(2) by a practitioner, or by his agent under his supervision, for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

N. "marijuana" means all parts of the plant Cannabis, including any and all varieties, species and subspecies of the genus Cannabis, whether growing or not, the seeds thereof and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds. It does not include the mature stalks of the plant, hashish, tetrahydrocannabinols extracted or isolated from marijuana, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, fiber, oil or cake, or the sterilized seed of the plant that is incapable of germination;

O. "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis:

(1) opium and opiate and any salt, compound, derivative or preparation of opium or opiate;

(2) any salt, compound, isomer, derivative or preparation that is a chemical equivalent of any of the substances referred to in Paragraph (1) of this subsection, except the isoquinoline alkaloids of opium;

(3) opium poppy and poppy straw, including all parts of the plant of the species *Papaver somniferum* L. except its seeds; or

(4) coca leaves and any salt, compound, derivative or preparation of coca leaves, any salt, compound, isomer, derivative or preparation that is a chemical equivalent of any of these substances except decocainized coca leaves or extractions of coca leaves that do not contain cocaine or ecgonine [ecgonine];

P. "opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. Opiate does not include, unless specifically designated as controlled under Section 30-31-5 NMSA 1978, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). Opiate does include its racemic and levorotatory forms;

Q. "person" includes a partnership, corporation, association, institution, political subdivision, government agency or other legal entity;

R. "practitioner" means a physician, dentist, veterinarian or other person licensed to prescribe and administer drugs that are subject to the Controlled Substances Act;

S. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto;

T. "scientific investigator" means a person registered to conduct research with controlled substances in the course of his professional practice or research and includes analytical laboratories;

U. "ultimate user" means a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administering to an animal under the care, custody and control of the person or by a member of his household;

V. "drug paraphernalia" means all equipment, products and materials of any kind that are used, intended for use or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance or controlled substance analog in violation of the Controlled Substances Act. It includes but is not limited to:

(1) kits used, intended for use or designed for use in planting, propagating, cultivating, growing or harvesting any species of plant that is a controlled substance or controlled substance analog or from which a controlled substance can be derived;

- (2) kits used, intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances or controlled substance analogs;
- (3) isomerization devices used, intended for use or designed for use in increasing the potency of any species of plant that is a controlled substance;
- (4) testing equipment used, intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances or controlled substance analogs;
- (5) scales or balances used, intended for use or designed for use in weighing or measuring controlled substances or controlled substance analogs;
- (6) diluents and adulterants, such as quinine hydrochloride, mannitol, mannite dextrose and lactose, used, intended for use or designed for use in cutting controlled substances or controlled substance analogs;
- (7) separation gins and sifters used, intended for use or designed for use in removing twigs and seeds from or in otherwise cleaning and refining marijuana;
- (8) blenders, bowls, containers, spoons and mixing devices used, intended for use or designed for use in compounding controlled substances or controlled substance analogs;
- (9) capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances or controlled substance analogs;
- (10) containers and other objects used, intended for use or designed for use in storing or concealing controlled substances or controlled substance analogs;
- (11) hypodermic syringes, needles and other objects used, intended for use or designed for use in parenterally injecting controlled substances or controlled substance analogs into the human body;
- (12) objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, such as:
 - (a) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes, with or without screens, permanent screens, hashish heads or punctured metal bowls;
 - (b) water pipes;
 - (c) carburetion tubes and devices;

(d) smoking and carburetion masks;

(e) roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small to hold in the hand;

(f) miniature cocaine spoons and cocaine vials;

(g) chamber pipes;

(h) carburetor pipes;

(i) electric pipes;

(j) air-driven pipes;

(k) chilams;

(l) bongs; or

(m) ice pipes or chillers; and

(13) in determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(a) statements by the owner or by anyone in control of the object concerning its use;

(b) the proximity of the object, in time and space, to a direct violation of the Controlled Substances Act or any other law relating to controlled substances or controlled substance analogs;

(c) the proximity of the object to controlled substances or controlled substance analogs;

(d) the existence of any residue of a controlled substance or controlled substance analog on the object;

(e) instructions, written or oral, provided with the object concerning its use;

(f) descriptive materials accompanying the object that explain or depict its use;

(g) the manner in which the object is displayed for sale; and

(h) expert testimony concerning its use;

W. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or that was specifically designed to produce effects

substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found include, but are not limited to, the following:

- (1) phenethylamines;
- (2) N-substituted piperidines;
- (3) morphinans;
- (4) ecogonines [ecgonines];
- (5) quinazolinones;
- (6) substituted indoles; and
- (7) arylcycloalkylamines.

Specifically excluded from the definition of "controlled substance analog" are those substances that are generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

X. "human consumption" includes application, injection, inhalation, ingestion or any other manner of introduction whatsoever; and

Y. "drug-free school zone" means any public school or property that is used for public school purposes and the area within one thousand feet of the school property line, but it does not mean any post-secondary school.

History: 1953 Comp., § 54-11-2, enacted by Laws 1972, ch. 84, § 2; 1979, ch. 2, § 1; 1981, ch. 31, § 1; 1987, ch. 68, § 1; 1989, ch. 177, § 19; 1990, ch. 19, § 2.

ANNOTATIONS

Bracketed material. - The bracketed terms in Paragraphs O(4) and W(4) were inserted by the compiler. See Subparagraph A(1)(d) of 30-31-7 NMSA 1978. The bracketed material was not enacted by the legislature and is not a part of the law.

The 1989 amendment, effective July 1, 1989, substituted "drug or substance" for "drug, substance or immediate precursor" in Subsection E; deleted former Subsection M, which read: "'immediate precursor' means a substance which the board has designated by regulation as being the principal compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance,

the control of which is necessary to prevent, curtail or limit manufacture"; redesignated former Subsections N through Y as present Subsections M through X; made minor stylistic changes in Paragraph (4) of Subsection O, in the first sentence of Subsection W, and in Subsection X; and in Subsection V inserted "or controlled substance analogs" in Paragraph (9) and in subparagraph (c) of Paragraph (13).

The 1990 amendment, effective July 1, 1990, added Subsection Y and made minor stylistic changes throughout the section.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Federal Food, Drug and Cosmetic Act. - The Federal Food, Drug and Cosmetic Act, referred to in the last undesignated paragraph of Subsection W, appears as 21 U.S.C. § 301 et seq. Section 505 of that act, also referred to in the last undesignated paragraph of Subsection W, appears as 21 U.S.C. § 355.

Search for "controlled substances". - Specification in a search warrant of "controlled substances" kept on premises contrary to law was as precise as the situation permitted considering the wide variety of drugs used by addicts, the words used in the warrant having a definite meaning in that they referred to certain and definite lists of drugs and their derivatives, and left nothing to the discretion of the officers. *State v. Quintana*, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88 N.M. 29, 536 P.2d 1085, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

Term "constructive transfer" is not void under due process clause on the grounds of vagueness. *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Constructive delivery. - A "constructive delivery" occurs when the conduct of the parties is such as to be inconsistent with any other supposition than that there has been a change in the nature of the holding. *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Aiding actual transfer. - Testimony that seller handed marijuana to defendant, who in turn handed it to undercover agent, was sufficient evidence of aiding and abetting "actual transfer" of marijuana. *State v. Montoya*, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974).

"Distributing" includes prescription for other than legitimate medical purpose. - When a physician writes a prescription neither for a legitimate medical purpose nor in the usual course of his professional practice, he is "distributing" drugs. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Agency not defense to distribution charge. - Court properly refused instructions defining agency and telling the jury that if the accused had acted as agent for police officers in obtaining heroin he could not be convicted of distributing it, since agency is

not a defense to a distribution charge. State v. Bustamante, 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978).

Mailing as distribution. - Placing a controlled substance in the mail was a constructive transfer which had the effect of turning the controlled substance over to an agent for delivery and constituted a distribution. State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Distribution to minor. - Neither the federal constitution nor 18 U.S.C. § 1716 preempt New Mexico jurisdiction over distribution of controlled substances to a minor through the use of the mails. State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Growing marijuana as manufacture. - Defendant was a "manufacturer" of marijuana within the contemplation of 54-7-2, 1953 Comp. (now repealed), by reason of his being a grower and cultivator thereof. State v. Gonzales, 78 N.M. 591, 435 P.2d 210 (Ct. App. 1967); State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct. App. 1967).

Marijuana is not a narcotic drug under present statutes. State v. Mabrey, 88 N.M. 227, 539 P.2d 617 (Ct. App. 1975).

But was formerly. - Expert witness' identification of substance as cannabis leaves, or a substance neither chemically or physically distinguishable from cannabis, was sufficient evidence for jury to find that the substance was a "narcotic drug" under former law. State v. Tapia, 77 N.M. 168, 420 P.2d 436 (1966).

Cannabis sativa. - State was not required to show that the cannabis leaves were sown or cultivated, as indicated by the name "sativa." State v. Tapia, 77 N.M. 168, 420 P.2d 436 (1966).

Substances held identical. - Marijuana, cannabis indica and cannabis sativa L. have been held to be identical as a matter of law. State v. Everidge, 77 N.M. 505, 424 P.2d 787 (1967); State v. Romero, 74 N.M. 642, 397 P.2d 26 (1964)(decided before 1979 amendment).

"Marijuana" and "cannabis indica" are merely geographical oriented names of cannabis, whereas "cannabis sativa L." is the botanical name of cannabis. State v. Romero, 74 N.M. 642, 397 P.2d 26 (1964)(decided before 1979 amendment).

"Mature stalks" of marijuana exempt. - Where expert testified that marijuana in defendant's possession was a "mature stalk" which is specifically exempted under this section, conviction for unlawful possession of marijuana could not be sustained. State v. Benavidez, 71 N.M. 19, 375 P.2d 333 (1962).

Cocaine may be classified as "narcotic". - The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and

regulatory purposes. *State v. Chouinard*, 96 N.M. 658, 634 P.2d 680 (1981), cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Heroin is narcotic drug as matter of law. *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974), overruled on other grounds *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Trial court did not err in instructing the jury, as a matter of law, that heroin was a narcotic drug, since Subsection P (now Subsection O) of this section includes opium and any derivative of opium within the definition of narcotic drug, and 30-31-6 NMSA 1978 lists heroin as one of the opium derivatives. *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Meaning of "person" extended. - The word "includes" in Subsection R (now Subsection Q) added to the definition of "person" by extending the meaning to the entities listed; the subsection constitutes an extension rather than an entire definition of "person." *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

A natural person is included within definition of "person." *State v. Tucker*, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974); *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974); *State v. McHorse*, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

"Prescription" construed. - If a written direction is not for a substance to be used in treating illness, it is not a prescription as that term is used in the Controlled Substances Act. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Subsection V guidelines adequately clear. - The guidelines present in Subsection W (now Subsection V) are adequate to alert law enforcement officers as to what activity is specifically proscribed. *General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

The "intended for use" language in Subsection W (now Subsection V) is applicable to the state of mind of the individual charged with the offense of selling, distributing or displaying drug paraphernalia. The statutory definition of "drug paraphernalia" is thus clear and provides notice of what is prohibited. *General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

Subsection V(13)(f) not violative of free speech. - Subsection W(13)(f) (now Subsection V(13)(f)), regarding descriptive materials accompanying an object, does not constitute a chilling factor nor invade the right of free speech. Any effect on protected speech is incidental. *General Stores, Inc. v. Bingaman*, 695 F.2d 502 (10th Cir. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 1 to 60.

Chemically synthesized LSD, STP, MDA or other hallucinogenic or psychedelic substances as narcotics for purposes of drug prosecution, 50 A.L.R.3d 1284.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

28 C.J.S. Drugs and Narcotics Supplement §§ 1 to 6.

30-31-3. Duty to administer.

A. The board shall administer the Controlled Substances Act and may add by regulation substances to the list of substances enumerated in Schedules I through IV pursuant to the procedures of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978]. In determining whether a substance has the potential for abuse, the board shall consider the following:

- (1) the actual or relative abuse of the substance;
- (2) the scientific evidence of the pharmacological effect of the substance, if known;
- (3) the state of current scientific knowledge regarding the substance;
- (4) the history and current pattern of abuse;
- (5) the scope, duration and significance of abuse;
- (6) the risk to the public health; and
- (7) the potential of the substance to produce psychic or physiological dependence liability.

B. After considering the factors enumerated in Subsection A of this section, the board shall make findings and issue regulations controlling the substance if it finds the substance has a potential for abuse.

C. If any substance is designated as a controlled substance under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Controlled Substances Act after providing for a hearing pursuant to the Uniform Licensing Act.

D. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 to 76-4-39 NMSA 1978].

E. The board shall exclude any nonnarcotic substance from a schedule if such substance may, under Section 61-11-22 NMSA 1978, be lawfully sold over the counter without a prescription.

History: 1953 Comp., § 54-11-3, enacted by Laws 1972, ch. 84, § 3; 1989, ch. 177, § 20.

ANNOTATIONS

The 1989 amendment, effective July 1, 1989, in Subsection A deleted former Paragraph (8), which read: "whether the substance is an immediate precursor of a substance already controlled under the Controlled Substances Act"; inserted "of this section" in Subsection B; deleted former Subsection C, which read: "If the board designates a substance as an immediate precursor, substances which are precursors of the controlled precursor shall not be subject to control solely because they are precursors of the controlled precursor"; redesignated former Subsections D through F as present Subsections C through E; substituted all of the language of Subsection D beginning with "pesticides" for "economic poisons as defined in Section 45-9-2 NMSA 1953"; and in Subsection E substituted "Section 61-11-22 NMSA 1978" for "Section 67-9-53 NMSA 1953".

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Board's scheduling of drugs not unconstitutional delegation of authority. - To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is not an unconstitutional delegation of authority under N.M. Const., art. III, § 1. *Montoya v. O'Toole*, 94 N.M. 303, 610 P.2d 190 (1980).

Penalty provisions applicable to drugs scheduled by regulation. - Express legislative authority is not required to make the penalty provisions of the Controlled Substances Act applicable to drugs scheduled by administrative regulation. *State v. Reams*, 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1981), *aff'd in part, rev'd on other grounds*, 98 N.M. 215, 647 P.2d 417 (1982).

Law reviews. - For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16, 17, 40 to 48.

28 C.J.S. Drugs and Narcotics Supplement §§ 100 to 109, 183 to 187.

30-31-4. Nomenclature.

The controlled substances listed or to be listed in Schedules I through V are included by whatever official, common, usual, chemical or trade name designated.

History: 1953 Comp., § 54-11-4, enacted by Laws 1972, ch. 84, § 4.

30-31-5. Schedules; criteria.

There are established five schedules of controlled substances to be known as Schedules I, II, III, IV and V.

A. The board shall place a substance in Schedule I if it finds that the substance:

- (1) has a high potential for abuse; and
- (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.

B. The board shall place a substance in Schedule II if it finds that:

- (1) the substance has a high potential for abuse;
- (2) the substance has a currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and
- (3) the abuse of the substance may lead to severe psychic or physical dependence.

C. The board shall place a substance in Schedule III if it finds that:

- (1) the substance has a potential for abuse less than the substances listed in Schedules I and II;
- (2) the substance has a currently accepted medical use in treatment in the United States; and
- (3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.

D. The board shall place a substance in Schedule IV if it finds that:

- (1) the substance has a low potential for abuse relative to the substances in Schedule III;
- (2) the substance has a currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substance in Schedule III.

E. The board shall place a substance in Schedule V if it finds that:

(1) the substance has a currently accepted medical use in treatment in the United States; and

(2) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule IV.

History: 1953 Comp., § 54-11-5, enacted by Laws 1972, ch. 84, § 5.

ANNOTATIONS

Board's scheduling of drugs not unconstitutional delegation of authority. - To allow the board of pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is not an unconstitutional delegation of authority under N.M. Const., art. III, § 1. *Montoya v. O'Toole*, 94 N.M. 303, 610 P.2d 190 (1980).

Cocaine may be classified as narcotic. - The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes because of the similarity between cocaine and narcotic drugs in terms of cocaine's potential for societal harm. *Chouinard v. State*, 96 N.M. 783, 635 P.2d 986 (1980), rev'd on other grounds, 96 N.M. 658, 634 P.2d 680 (1981), cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Law reviews. - For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to constitutional law, see 12 N.M.L. Rev. 191 (1982).

30-31-6. Schedule I.

The following controlled substances are included in Schedule I:

A. any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, esters and ethers, unless specifically exempted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) acetylmethadol;

(2) allylprodine;

- (3) alphacetylmethadol;
- (4) alphameprodine;
- (5) alphasmethadol;
- (6) benzethidine;
- (7) betacetylmethadol;
- (8) betameprodine;
- (9) betamethadol;
- (10) betaprodine;
- (11) clonitazene;
- (12) dextromoramide;
- (13) dextrorphan;
- (14) diampromide;
- (15) diethylthiambutene;
- (16) dimenoxadol;
- (17) dimepheptanol;
- (18) dimethylthiambutene;
- (19) dioxaphetyl butyrate;
- (20) dipipanone;
- (21) ethylmethylthiambutene;
- (22) etonitazene;
- (23) etoxeridine;
- (24) furethidine;
- (25) hydroxypethidine;

- (26) ketobemidone;
- (27) levomoramide;
- (28) levophenacymorphan;
- (29) morpheridine;
- (30) noracymethadol;
- (31) norlevorphanol;
- (32) normethadone;
- (33) norpipanone;
- (34) phenadoxone;
- (35) phenampromide;
- (36) phenomorphan;
- (37) phenoperidine;
- (38) piritramide;
- (39) proheptazine;
- (40) properidine;
- (41) racemoramide; and
- (42) trimeperidine;

B. any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

- (1) acetorphine;
- (2) acetyldihydrocodeine;
- (3) benzylmorphine;
- (4) codeine methylbromide;

- (5) codeine-N-oxide;
- (6) cyprenorphine;
- (7) desomorphine;
- (8) dihydromorphine;
- (9) etorphine;
- (10) heroin;
- (11) hydromorphinol;
- (12) methyl-desorphine;
- (13) methyl-dihydromorphine;
- (14) morphine methylbromide;
- (15) morphine methylsulfonate;
- (16) morphine-N-oxide;
- (17) myrophine;
- (18) nicocodeine;
- (19) nicomorphine;
- (20) normorphine;
- (21) pholcodine; and
- (22) thebacon;

C. any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically exempted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

- (1) 3,4-methylenedioxy amphetamine;
- (2) 5-methoxy-3,4-methylenedioxy amphetamine;
- (3) 3,4,5-trimethoxy amphetamine;

- (4) bufotenine;
- (5) diethyltryptamine;
- (6) dimethyltryptamine;
- (7) 4-methyl-2,5-dimethoxy amphetamine;
- (8) ibogaine;
- (9) lysergic acid diethylamide;
- (10) marijuana;
- (11) mescaline;
- (12) peyote, except as otherwise provided in the Controlled Substances Act;
- (13) N-ethyl-3-piperidyl benzilate;
- (14) N-methyl-3-piperidyl benzilate;
- (15) psilocybin;
- (16) psilocyn;
- (17) tetrahydrocannabinols; and
- (18) hashish;

D. the enumeration of peyote as a controlled substance does not apply to the use of peyote in bona fide religious ceremonies by a bona fide religious organization, and members of the organization so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the organization or its members shall comply with the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 and all other requirements of law;

E. the enumeration of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol as Schedule I controlled substances does not apply to the use of marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol by certified patients pursuant to the Controlled Substances Therapeutic Research Act [26-2A-1 to 26-2A-7 NMSA 1978].

History: 1953 Comp., § 54-11-6, enacted by Laws 1972, ch. 84, § 6; 1978, ch. 22, § 8.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Comprehensive Drug Abuse Prevention and Control Act. - The Comprehensive Drug Abuse Prevention and Control Act of 1970 is compiled as 21 U.S.C. § 801 et seq.

Law reviews. - For discussion of Indian law concerning peyote's use for religious purposes, see 18 N.M.L. Rev. 403 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

30-31-7. Schedule II.

A. The following controlled substances are included in Schedule II:

(1) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:

(a) opium and opiate, and any salt, compound, derivative or preparation of opium or opiate;

(b) any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of the substances referred to in Subparagraph (a), but not including the isoquinoline alkaloids of opium;

(c) opium poppy and poppy straw;

(d) coca leaves and any salt, compound, derivative or preparation of coca leaves, and any salt, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine;

(e) marijuana, but only for the use by certified patients pursuant to the Controlled Substances Therapeutic Research Act [26-2A-1 to 26-2A-7 NMSA 1978]; and

(f) tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol, but only for the use of certified patients pursuant to the Controlled Substances Therapeutic Research Act.

Marijuana, tetrahydrocannabinols or chemical derivatives of tetrahydrocannabinol shall be considered Schedule II controlled substances only for the purposes enumerated in the Controlled Substances Therapeutic Research Act.

(2) Any of the following opiates, including their isomers, esters, ethers, salts and salts of isomers, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

- (a) alphaprodine;
- (b) anileridine;
- (c) bezitramide;
- (d) dihydrocodeine;
- (e) diphenoxylate;
- (f) fentanyl;
- (g) hydromorphone;
- (h) isomethadone;
- (i) levomethorphan;
- (j) levorphanol;
- (k) meperidine;
- (l) metazocine;
- (m) methadone;
- (n) methadone - intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
- (o) moramide - intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid;
- (p) oxycodone;
- (q) pethidine;
- (r) pethidine - intermediate - A, 4-cyano-1-methyl-4-phenylpiperidine;
- (s) pethidine - intermediate - B, ethyl-4-phenylpiperidine-4-carboxylate;
- (t) pethidine - intermediate - C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
- (u) phenazocine;

(v) piminodine;

(w) racemethorphan; and

(x) racemorphan.

(3) Unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system:

(a) amphetamine, its salts, optical isomers and salts of its optical isomers;

(b) phenmetrazine and its salts;

(c) methamphetamine, its salts, isomers and salts of isomers; and

(d) methylphenidate.

B. Where methadone is prescribed, administered or dispensed by a practitioner of a drug abuse rehabilitation program as defined in Paragraph (3) of Subsection A of Section 26-2-13 NMSA 1978 while acting in the course of his professional practice, or otherwise lawfully obtained or possessed by a person, such person shall not possess such methadone beyond the date stamped or typed on the label of the container of the methadone, nor shall any person possess methadone except in the container in which it was originally administered or dispensed to such person, and such container must include a label showing the name of the prescribing physician or practitioner, the identity of methadone, the name of the ultimate user, the date when the methadone is to be administered to or used or consumed by the named ultimate user shown on the label and a warning on the label of the methadone container that the ultimate user must use, consume or administer to himself the methadone in such container. Any person who violates this subsection is guilty of a felony and shall be punished by imprisonment for not less than one year nor more than five years, or by a fine of up to five thousand dollars (\$5,000), or both.

History: 1953 Comp., § 54-11-7, enacted by Laws 1972, ch. 84, § 7; 1978, ch. 22, § 9; 1979, ch. 112, § 1.

ANNOTATIONS

Morphine. - Although the word "morphine" does not appear in the schedules in this act, the trial court could properly take judicial notice that morphine is an opium derivative under this section. *State v. Yanez*, 89 N.M. 397, 553 P.2d 252 (Ct. App. 1976).

Percodan. - Percodan is a Schedule II controlled substance. *State v. Sanchez*, 93 N.M. 596, 603 P.2d 335 (Ct. App. 1979).

Cocaine may be classified as narcotic. - The legislature can rationally classify cocaine, a nonnarcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes because of the similarity between cocaine and narcotic drugs in terms of cocaine's potential for societal harm. *Chouinard v. State*, 96 N.M. 783, 635 P.2d 986 (1980), rev'd on other grounds, 96 N.M. 658, 634 P.2d 680 (1981), cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Proof of abusive quantity of amphetamine not required. - The state need not prove that an amphetamine alleged to have been sold by the defendant was of a sufficient quantity to have a potential for abuse associated with a stimulant effect, since, in Subsection A(3), the statutory words "having a potential for abuse" modify "substances," not "any quantity." *State v. Hernandez*, 104 N.M. 97, 717 P.2d 73 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986); *State v. Martinez*, 104 N.M. 584, 725 P.2d 263 (Ct. App. 1986).

Identification of cocaine by expert. - Expert testimony is not required to establish that a witness sold cocaine to a defendant. *State v. Rubio*, 110 N.M. 605, 798 P.2d 206 (Ct. App. 1990).

30-31-8. Schedule III.

The following controlled substances are included in Schedule III:

A. any material, compound, mixture or preparation containing limited quantities of any substance having a stimulant effect on the central nervous system which is controlled and listed in Schedule II;

B. unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) any substance which contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid, except those substances which are specifically listed in other schedules;

(2) chlorhexadol;

(3) glutethimide;

(4) lysergic acid;

(5) lysergic acid amide;

(6) methyprylon;

(7) phencyclidine;

(8) sulfondiethylmethane;

(9) sulfonethylmethane; or

(10) sulfonmethane;

C. nalorphine;

D. any material, compound, mixture or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(1) not more than one and eight-tenths grams of codeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;

(2) not more than one and eight-tenths grams of codeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(3) not more than three hundred milligrams of dihydrocodeinone, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;

(4) not more than three hundred milligrams of dihydrocodeinone, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(5) not more than one and eight-tenths grams of dihydrocodeine, or any of its salts, per one hundred milliliters or not more than ninety milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

(6) not more than three hundred milligrams of ethyl morphine, or any of its salts, per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts;

(7) not more than five hundred milligrams of opium per one hundred milliliters or per one hundred grams, or not more than twenty-five milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts; or

(8) not more than fifty milligrams of morphine, or any of its salts, per one hundred milliliters or per one hundred grams with one or more active, nonnarcotic ingredients in recognized therapeutic amounts;

E. the board may exempt by regulation any compound, mixture or preparation containing any stimulant or depressant substance listed in Subsections A and B from the application of any part of the Controlled Substances Act if the compound, mixture or

preparation contains any active medicinal ingredients not having a stimulant or depressant effect on the central nervous system and if the admixtures are included in combinations, quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

History: 1953 Comp., § 54-11-8, enacted by Laws 1972, ch. 84, § 8.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Exemptions. - For conditions under which the board may exempt certain compounds, mixtures or preparations enumerated in this section from the application of the Controlled Substances Act, see 30-31-10 NMSA 1978.

30-31-9. Schedule IV.

The following controlled substances are included in Schedule IV:

A. any material, compound, mixture or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

- (1) barbital;
- (2) chloral betaine;
- (3) chloral hydrate;
- (4) ethchlorvynol;
- (5) ethinamate;
- (6) methohexital;
- (7) meprobamate;
- (8) methylphenobarbital;
- (9) paraldehyde;
- (10) petrichloral; or
- (11) phenobarbital;

B. the board may exempt by regulation any compound, mixture or preparation containing any depressant substance listed in Subsection A from the application of all or any part of the Controlled Substances Act if the compound, mixture or preparation contains any active medicinal ingredients not having a depressant effect on the central nervous system and if the admixtures are included in combinations, quantity, proportion or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

History: 1953 Comp., § 54-11-9, enacted by Laws 1972, ch. 84, § 9.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Exemptions. - For conditions under which the board may exempt certain compounds, mixtures or preparations enumerated in this section from the application of the Controlled Substances Act, see 30-31-10 NMSA 1978.

30-31-10. Schedule V.

The following controlled substances are included in Schedule V:

A. any compound, mixture or preparation containing limited quantities of any of the following narcotic drugs, which also contains one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) not more than two hundred milligrams of codeine, or any of its salts, per one hundred milliliters or per one hundred grams;

(2) not more than one hundred milligrams of dihydrocodeine, or any of its salts, per one hundred milliliters or per one hundred grams;

(3) not more than one hundred milligrams of ethylmorphine, or any of its salts, per one hundred milliliters or per one hundred grams;

(4) not more than two and five-tenths milligrams of diphenoxylate and not less than twenty-five micrograms of atropine sulfate per dosage unit; or

(5) not more than one hundred milligrams of opium per one hundred milliliters or per one hundred grams;

B. the board may by regulation exempt any compound, mixture or preparation containing any depressant or stimulant substance enumerated in Schedules III, IV or V from the application of the Controlled Substances Act if:

(1) the compound, mixture or preparation contains one or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system; and

(2) such ingredients are included in such combinations, quantity, proportion or concentration as to vitiate the potential for abuse of the substances which do have a depressant or stimulant effect on the central nervous system.

History: 1953 Comp., § 54-11-10, enacted by Laws 1972, ch. 84, § 10.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-11. Regulations.

The board may promulgate regulations and charge reasonable fees relating to the registration and control of the manufacture, distribution and dispensing of controlled substances; provided, however, that in no case shall the fees exceed eighty dollars (\$80.00) per year. If the board determines to increase any fee, the board shall notify, in addition to any other notice required by law, the affected professional group of the board's intention to increase the fee and the date for the scheduled hearing to review the matter.

History: 1953 Comp., § 54-11-11, enacted by Laws 1972, ch. 84, § 11; 1989, ch. 57, § 1; 1994, ch. 42, § 1.

ANNOTATIONS

The 1989 amendment, effective June 16, 1989, added the proviso at the end of the first sentence and added the last two sentences.

The 1994 amendment, effective May 18, 1994, substituted "eighty dollars (\$80.00) per year" for "sixty dollars per year for a period of three years after January 1, 1989" in the first sentence and deleted the former second sentence, which read: "After January 1, 1992, if the board determines, for good cause shown, that a fee increase is necessary, the board may increase the fees, but in no case shall the fees exceed seventy-five dollars (\$75.00) per year".

Interests of state legitimate. - The regulations propounded under this section and 26-1-18 NMSA 1978 do not violate due process since the state has a legitimate interest in the control of dangerous drugs sold or distributed therein and has not brought within the orbit of state power any matters unrelated to local interests. *Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

License fee not violative of commerce clause. - Although the regulations adopted pursuant to this section and 26-1-18 NMSA 1978 include a license fee to cover administrative costs, their primary purpose is the protection of the public from dangerous drugs, a purpose within the traditional definition of police power; and where the burden of a small fee does not outweigh the substantial state benefit derived from the control, and the regulations do not discriminate against interstate commerce since there are no drug manufacturers within the state, there is no violation of the commerce clause. *Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

No unconstitutional delegation of power. - Granting of authority to the board of pharmacy was not an unconstitutional delegation of legislative authority nor is there any constitutional prohibition to granting the board the power to adopt registration fees without specification of any statutory minimum. 1973-74 Op. Att'y Gen. No. 73-7.

Registration fees authorized. - This section grants to the state board of pharmacy authority to set registration fees for all persons required to register under the Controlled Substances Act. 1973-74 Op. Att'y Gen. No. 73-7.

It is presumed that the authority conferred on the board of pharmacy would be exercised with fair and just regard for the interest affected; and a \$10.00 registration fee appears to meet this standard. 1973-74 Op. Att'y Gen. No. 73-7.

Formal findings unnecessary. - In propounding regulations the board of pharmacy need not make formal findings, but must only insure that the public and the reviewing courts are informed as to the reasoning behind the regulation; the comments of the one board member suffice in this regard. *Pharmaceutical Mfrs. Ass'n v. New Mexico Bd. of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (Ct. App. 1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16, 17.

28 C.J.S. Drugs and Narcotics Supplement §§ 100 to 109.

30-31-12. Registration requirements.

A. Every person who manufactures, distributes or dispenses any controlled substance or who proposes to engage in the manufacture, distribution or dispensing of any controlled substance must obtain annually a registration issued by the board in accordance with its regulations. Registration of practitioners, however, may be obtained annually from the practitioners' respective examining and licensing authorities pursuant to regulations promulgated by the board and on forms supplied by the board. Copies of all registrations shall be provided to the board by all such examining and licensing authorities at such time as registration is initiated. Practitioners whose examining and licensing authorities do not elect to obtain registration of their own licensees, as provided in this subsection, shall be registered directly by the board.

B. Persons registered by the board to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense, prescribe or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of the Controlled Substances Act.

C. The following persons need not register and may lawfully possess controlled substances:

(1) an agent of any registered manufacturer, distributor or dispenser of any controlled substance if he is acting in the usual course of his principal's business or employment;

(2) a common or contract carrier or warehouseman, or an employee whose possession of any controlled substance is in the usual course of the common or contract carrier or warehouseman's business; or

(3) an ultimate user.

D. The board may waive by regulation the requirement for registration of certain manufacturers, distributors or dispensers if it is consistent with the public health and safety.

E. The board may inspect the establishment of a registrant or applicant for registration in accordance with the board's regulations.

History: 1953 Comp., § 54-11-12, enacted by Laws 1972, ch. 84, § 12; 1975, ch. 346, § 1.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 10 to 15.

28 C.J.S. Drugs and Narcotics Supplement §§ 27 to 42, 54 to 58.

30-31-13. Registrations.

A. The board shall register an applicant to manufacture or distribute controlled substances unless it determines that the issuance of that registration would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific or industrial channels;

- (2) compliance with applicable state and local law;
- (3) any convictions of the applicant under any federal or state laws relating to any controlled substance;
- (4) past experience in the manufacture or distribution of controlled substances, and the existence in the applicant's establishment of effective controls against diversion;
- (5) furnishing by the applicant of false or fraudulent material in any application filed under the Controlled Substances Act;
- (6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances as authorized by federal law; and
- (7) any other factors relevant to and consistent with the public health and safety.

B. Registration under this section does not entitle a registrant to manufacture and distribute controlled substances in Schedules I or II other than those allowed in the registration.

C. Compliance by manufacturers and distributors with the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 respecting registration, excluding state registration fees entitles them to be registered under the Controlled Substances Act.

D. Practitioners must be registered to dispense any controlled substances or to conduct research with controlled substances in Schedules II through V if they are authorized to dispense or conduct research under Section 39 [30-31-40 NMSA 1978] of the Controlled Substances Act. The board need not require separate registration under this act for practitioners engaging in research with nonnarcotic controlled substances in Schedules II through V where the registrant is already registered under the Controlled Substances Act in another capacity. Practitioners or scientific investigators registered under the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 to conduct research with Schedule I substances may conduct research with Schedule I substances within this state upon furnishing the board evidence of that federal registration.

History: 1953 Comp., § 54-11-13, enacted by Laws 1972, ch. 84, § 13.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Comprehensive Drug Abuse Prevention and Control Act. - The Comprehensive Drug Abuse Prevention and Control Act of 1970 appears as 21 U.S.C. § 801 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 11.

28 C.J.S. Drugs and Narcotics Supplement §§ 29 to 31, 36 to 39.

30-31-14. Revocation and suspension of registration.

A. A registration under Section 30-31-13 NMSA 1978 to manufacture, distribute or dispense a controlled substance may be suspended or revoked upon a finding that the registrant:

(1) has furnished false or fraudulent material information in any application filed with the board;

(2) has been convicted of a felony under any state or federal law relating to a controlled substance;

(3) has had his federal registration suspended or revoked to manufacture, distribute or dispense controlled substances; or

(4) has had his practitioner's license suspended or revoked by his professional licensing board.

B. A hearing to revoke or suspend a registration of a practitioner shall be held before a special hearing panel consisting of the board and two additional persons designated to sit on the hearing panel by the practitioner's own examining and licensing authority.

C. The special hearing panel may limit revocation or suspension of a registration to the particular controlled substance with respect to which grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a registration, all controlled substances owned or possessed by the registrant at the time of suspension or the effective date of the revocation order may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded unless a court, upon application, orders the sale of perishable substances and the deposit of the proceeds of the sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell all controlled substances under seal. The court shall order the sale of such controlled substances under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking registration and all sales of controlled substances.

History: 1953 Comp., § 54-11-14, enacted by Laws 1972, ch. 84, § 14; 1975, ch. 346, § 2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 14.

Revocation or suspension of license or permit to practice pharmacy or operate drugstore because of improper sale or distribution of narcotic or dangerous drugs, 17 A.L.R.3d 1408.

28 C.J.S. Drugs and Narcotics Supplement § 40.

30-31-15. Order to show cause.

A. Before denying, suspending or revoking a registration or refusing a renewal of registration, the board shall serve upon the applicant or registrant an order to show cause why registration should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of registration the order shall be served not later than thirty days before the expiration of the registration unless the proceedings relate to suspension or revocation of a registration. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a registration or to refuse renewal of registration shall not abate the existing registration which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any registrant simultaneously with the institution of proceedings under Section 14 [30-31-14 NMSA 1978] or where renewal of registration is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

History: 1953 Comp., § 54-11-15, enacted by Laws 1972, ch. 84, § 15.

30-31-16. Records of registrants.

A. Every registrant under the Controlled Substances Act manufacturing, distributing or dispensing a controlled substance shall maintain, on a current basis, a complete and accurate record of each substance manufactured, received, sold or delivered by him in accordance with regulations of the board.

Inventories as required in the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 shall be deemed in compliance with inventory requirements under this section.

B. Records for drugs under Schedules I and II shall be kept separate from other records. Prescriptions for all Schedule I and II drugs and narcotic prescriptions for controlled substances listed in Schedules III, IV and V shall be maintained separately from other prescription drugs in accordance with regulations of the board.

C. Records for nonnarcotic controlled substances under Schedules III, IV and V shall be maintained either separately or in such form that they are readily retrievable and are marked for ready identification in accordance with regulations of the board. Prescriptions for nonnarcotic controlled substances shall be maintained either in a separate prescription file or in such form that they are readily retrievable from other prescription records and are marked for ready identification in accordance with regulations of the board.

D. Records shall be maintained for a period of at least three years from the date of the record and may be inspected as required by authorized agents of the board.

E. A practitioner is not required to keep records of controlled substances listed in Schedules II through V that he prescribes or administers in the lawful course of his professional practice. He shall keep records of controlled substances that he dispenses other than by prescribing or administering.

F. Each pharmacy licensed in the state shall provide information relating to the dispensing of any controlled substance designated by the board. The board shall administer the collection and dissemination of the information obtained. The manner of reporting and the extent of the required information shall be designated by regulation of the board.

History: 1953 Comp., § 54-11-16, enacted by Laws 1972, ch. 84, § 16; 1994, ch. 42, § 2.

ANNOTATIONS

Cross-references. - For definitions applicable to Medical Practice Act, see 61-6-6 NMSA 1978.

For definitions applicable to Physician Assistants Act, see 61-6-7.1 NMSA 1978.

For certification and registration of osteopathic physician's assistants, see 61-10A-4 NMSA 1978.

For rules and regulations applicable to osteopathic physician's assistants, see 61-10A-6 NMSA 1978.

For pharmacist clinician prescriptive authority, see 61-11B-3 NMSA 1978.

The 1994 amendment, effective May 18, 1994, substituted "that" for "which" in both sentences in Subsection E and added Subsection F.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Comprehensive Drug Abuse Prevention and Control Act. - The Comprehensive Drug Abuse Prevention and Control Act of 1970 appears as 21 U.S.C. § 801 et seq.

30-31-17. Order forms.

Controlled substances in Schedules I and II shall be distributed by a registrant to another registrant only pursuant to an order form. Compliance with the provisions of the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 respecting order forms shall be deemed compliance with this section.

History: 1953 Comp., § 54-11-17, enacted by Laws 1972, ch. 84, § 17.

ANNOTATIONS

Comprehensive Drug Abuse Prevention and Control Act. - The Comprehensive Drug Abuse Prevention and Control Act of 1970 appears as 21 U.S.C. § 801 et seq.

30-31-18. Prescriptions.

A. No controlled substance listed in Schedule II which is a prescription drug as determined by the federal food and drug administration, may be dispensed without a written prescription of a practitioner, unless administered directly to an ultimate user. No prescription for a Schedule II substance may be refilled. No person other than a practitioner shall prescribe or write a prescription.

B. Prescriptions for Schedules II through IV shall contain the following information:

(1) the name and address of the patient for whom the drug is prescribed; and

(2) the name, address and registry number of the person prescribing the drug. The name of the pharmacist and the dispensing date of the drug shall be inscribed on the face of the prescription.

C. A controlled substance included in Schedules III or IV, which is a prescription drug as determined under the New Mexico Drug[, Device] and Cosmetic Act, shall not be dispensed without a written or oral prescription of a practitioner, except when administered directly by a practitioner to an ultimate user. The prescription shall not be filled or refilled more than six months after the date of issue or be refilled more than five

times, unless renewed by the practitioner and a new prescription is placed in the file. Prescriptions shall be retained in conformity with the regulations of the board.

D. The label affixed to the dispensing container of a drug listed in Schedules II, III or IV, when dispensed to or for a patient, shall contain the following information:

- (1) date of dispensing and prescription number;
- (2) name and address of the pharmacy;
- (3) name of the patient;
- (4) name of the practitioner; and
- (5) directions for use and cautionary statements, if any.

E. The label affixed to the dispensing container of a drug listed in Schedule II, III or IV when dispensed to or for a patient, shall contain a clear concise warning that it is a crime to transfer the drug to any person other than the patient.

F. No controlled substance included in Schedule V, which is a proprietary nonprescription drug, shall be distributed, offered for sale or dispensed other than for a medical purpose and a record of the sale shall be made in accordance with the regulations of the board.

G. In emergency situations, as defined by regulation, Schedule II drugs may be dispensed upon oral prescription of a practitioner, if reduced promptly to writing and filed by the pharmacy in accordance with regulations of the board.

History: 1953 Comp., § 54-11-18, enacted by Laws 1972, ch. 84, § 18.

ANNOTATIONS

New Mexico Drug and Cosmetic Act. - Laws 1987, ch. 270, § 1 amends 26-1-1 NMSA 1978, formerly the short title of the New Mexico Drug and Cosmetic Act to read "Chapter 26, Article 1 NMSA 1978 may be cited as the 'New Mexico Drug, Device and Cosmetic Act.' "

Physician's assistants are not authorized to prescribe controlled substances in violation of Subsection A. *New Mexico Bd. of Pharmacy v. New Mexico Bd. of Osteopathic Medical Exmrs.*, 95 N.M. 780, 626 P.2d 854 (Ct. App. 1981).

Law reviews. - For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

30-31-19. Distributions by manufacturers or distributors.

A registered manufacturer or distributor may distribute controlled substances to the following:

- A. a registered manufacturer, pharmacy or distributor;
- B. a registered practitioner;
- C. a registered hospital or clinic; and
- D. to a person in charge of a registered laboratory, but only for use by that laboratory for scientific and medical purposes.

History: 1953 Comp., § 54-11-19, enacted by Laws 1972, ch. 84, § 19.

30-31-20. Trafficking controlled substances; violation.

A. As used in the Controlled Substances Act, "traffic" means the:

- (1) manufacture of any controlled substance enumerated in Schedules I through V or any controlled substance analog as defined in Subsection W of Section 30-31-2 NMSA 1978;
- (2) distribution, sale, barter or giving away of any controlled substance enumerated in Schedule I or II that is a narcotic drug or a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug; or
- (3) possession with intent to distribute any controlled substance enumerated in Schedule I or II that is a narcotic drug or controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug.

B. Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally traffic. Any person who violates this subsection is:

- (1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and
- (2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Any person who knowingly violates Subsection B of this section within a drug-free school zone, excluding private property residentially zoned or used primarily as a

residence, is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-20, enacted by Laws 1972, ch. 84, § 20; 1974, ch. 9, § 1; 1980, ch. 23, § 1; 1987, ch. 68, § 2; 1990, ch. 19, § 3.

ANNOTATIONS

Cross-references. - For instructions as to trafficking in controlled substances, see U.J.I. 14-3110 et seq.

The 1990 amendment, effective July 1, 1990, substituted "Subsection W" for "Subsection X" in Paragraph (1) and made minor stylistic changes in Paragraphs (2) and (3) of Subsection A, and added Subsection C.

Compiler's note. - After the 1989 amendment to 30-31-2 NMSA 1978, the reference to Subsection X of 30-31-2 NMSA 1978 in Subsection A(1) is no longer correct. The intended reference is now apparently to Subsection W of 30-31-2 NMSA 1978.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Title constitutional. - The title of Laws 1972, Chapter 84, of which this section is a part, does not violate N.M. Const., art. IV, § 16, by embracing more than one subject, because although the act also amends sections of the state Drug and Cosmetic Act, the amendments are all concerned with drugs. *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Defendant's contention that this section violated N.M. Const., art. IV, § 16, because it is concerned with trafficking in controlled substances, while title of the act of which it is a part does not include trafficking, was without merit since prohibition on trafficking was a detail germane to drugs, their administration and penalties. *State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974).

Sections 30-31-21 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties, are not unconstitutional because "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Constitutionality. - Subsection A(3) is not unconstitutionally overbroad, as it does not sweep within its ambit actions that would ordinarily be deemed to be constitutionally-protected activities. *State v. Curry*, 107 N.M. 133, 753 P.2d 1321 (Ct. App. 1988).

Section 30-31-20B(2) NMSA 1978 applies to all second and subsequent trafficking offenses, and, therefore, does not violate the prohibition against special laws of N.M. Const., art. IV, § 24; nor does it violate the requirements of equal protection. *State v. Bejar*, 104 N.M. 138, 717 P.2d 591 (Ct. App. 1985).

Section applicable to physician. - This section applies to a physician who gives out drugs for something other than a legitimate medical purpose. State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Delivery which is effected by a physician which is not for a legitimate medical purpose is not excepted from the prohibitions of the Controlled Substances Act. When a physician acts without any legitimate medical purpose and beyond the course of professional practice by selling prescriptions that allow the bearer to obtain controlled substances, his conduct should be treated like that of any street-corner pill pusher. State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Double jeopardy. - Since marijuana is not defined as a narcotic drug, trial court acquired no jurisdiction when defendant was charged with violating this section by selling marijuana, hence, there was no basis for a claim of double jeopardy where defendant was later charged under the proper section. State v. Mabrey, 88 N.M. 227, 539 P.2d 617 (Ct. App. 1975).

Indictment charging alternatives. - Where an indictment charged that the defendants "did intentionally distribute, possess with intent to distribute, or aided and abetted one another in the distribution of a controlled substance," the indictment gave each defendant notice that he must defend against each of these alternatives. State v. Turner, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

Merger with charge of conspiracy to racketeer. - In order for the jury to have convicted defendant of conspiracy to racketeer pursuant to the court's instruction, it was also necessary for the state to prove, and the jury to find, that she and another conspired to traffic by manufacture. Thus, the two offenses for which defendant was convicted merged under the facts and circumstances of the case. State v. Wynne, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

Miranda warnings from informer unnecessary. - Claim that defendant should have been given Miranda warnings immediately prior to selling heroin to informer, who was accompanied by an undercover policewoman, was without merit. State v. Anaya, 81 N.M. 52, 462 P.2d 637 (Ct. App. 1969).

Sections not inconsistent. - There is no conflict between 30-31-22A NMSA 1978 which excludes narcotic drugs enumerated in Schedule I, such as heroin, from its purview, and this section, under which trafficking in narcotic drugs is prohibited. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Section does not require specific intent. - Trafficking in a controlled substance by distribution is not a specific intent crime. Since this section prohibiting trafficking by "distribution, sale, barter or giving away any controlled substance . . . which is a narcotic drug" only describes a particular act without reference to a defendant's intent to do

some further act or achieve some additional consequence, the crime is properly one of general intent. *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Trafficking by distribution is not a specific intent crime. *State v. Turner*, 97 N.M. 575, 642 P.2d 178 (Ct. App. 1981).

Elements of offense of transferring controlled substance. - In order to find a defendant guilty of transferring a controlled substance, the state must prove beyond a reasonable doubt that: (1) the defendant transferred a controlled substance; (2) the defendant knew or believed it was a controlled substance; and (3) the transfer occurred in New Mexico on a particular date. *Martinez v. State*, 91 N.M. 747, 580 P.2d 968 (1978).

Knowledge of presence and narcotic character of drug essential. - In a prosecution for trafficking in narcotics, the state must prove that defendant knew of the presence and narcotic character of the object possessed. *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974), overruled on other grounds *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Along with control. - Since he was not in physical possession of the heroin when it was found by the officers, to be convicted defendant must have constructively possessed it, that is, he must have had knowledge of the presence of the heroin and control over it. *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Inference of knowledge of presence of drugs. - While knowledge of the presence of drugs may be inferred where exclusive possession of the premises is shown, where exclusive possession is not shown, additional evidence is required to support such an inference. *State v. Becerra*, 112 N.M. 604, 817 P.2d 1246 (Ct. App. 1991).

Inference of control of drugs. - Control of the premises on which contraband is found is not sufficient to support a determination of criminal liability. There must be knowledge of the presence of the contraband, and there must be evidence sufficient to support an inference of control of the contraband. *State v. Becerra*, 112 N.M. 604, 817 P.2d 1246 (Ct. App. 1991).

Ownership not element. - This section prohibits a defendant from transferring narcotics by way of distribution, sale, barter, or gift: Ownership is not an element. *State v. Hernandez*, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Conviction despite no actual possession. - Defendant failed to effect the crime of possession with intent to distribute because he never actually possessed the package containing cocaine which was addressed to him; nevertheless, the fact that he never actually possessed the package did not negate his intent to possess the package, as evidenced by his attempting to pick up the package, nor did it negate his intent to

distribute the cocaine, as is evidenced by the amount of cocaine found in the package. Therefore, he was properly convicted of attempted trafficking under 30-28-1 and subsection A(3) of this section. *State v. Curry*, 107 N.M. 133, 753 P.2d 1321 (Ct. App. 1988).

When the evidence shows a third party engaging in drug trafficking by possession with intent to distribute a narcotic drug, and the defendant is the third party's accomplice, the evidence is sufficient to support a conviction under Subsection A(3). The fact defendant never touched the cocaine and was often not in the same room where the drug deal took place is not controlling. *State v. Bankert*, 117 N.M. 614, 875 P.2d 370 (1994).

Heroin is narcotic drug as matter of law. *State v. Gonzales*, 86 N.M. 556, 525 P.2d 916 (Ct. App. 1974), overruled on other grounds *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Possession deemed lesser offense. - Possession of heroin is a lesser offense included within the offense of possession with intent to distribute heroin. *State v. Alderete*, 91 N.M. 373, 574 P.2d 592 (Ct. App. 1977), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

Instructing on lesser included offense. - Although possession of heroin is a lesser included offense of trafficking in heroin, it should not be instructed on when the evidence does not support the defendant's claim that possession was the highest crime which occurred. *State v. Hernandez*, 104 N.M. 268, 720 P.2d 303 (Ct. App.), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Expert testimony identifying substance. - Direct testimony by expert that he analyzed substance according to standard tests and found it to be morphine was sufficient evidence that the substance, which had been sold by defendant, was morphine, despite the fact that on cross-examination the expert did not remember specifically which tests he had used, nor how many different tests he conducted. *State v. Baca*, 81 N.M. 686, 472 P.2d 651 (Ct. App.), cert. denied, 81 N.M. 721, 472 P.2d 984 (1970).

Sufficient evidence to convict. - See *State v. Sellers*, 117 N.M. 643, 875 P.2d 400 (Ct. App. 1994).

Conviction sustained by circumstantial evidence. - A conviction for trafficking in a controlled substance can be sustained by circumstantial evidence. *State v. Chouinard*, 96 N.M. 658, 634 P.2d 680 (1981), cert. denied, 456 U.S. 930, 102 S. Ct. 1980, 72 L. Ed. 2d 447 (1982).

Circumstantial evidence is sufficient to support a conviction for possession of heroin with an intent to distribute where the defendant was caught with a small amount of heroin, there is an inference that more heroin was flushed down a toilet, and there was paraphernalia at the scene of the arrest consistent with distribution of heroin. *State v.*

Bejar, 101 N.M. 190, 679 P.2d 1288 (Ct. App. 1984); State v. Bejar, 104 N.M. 138, 717 P.2d 591 (Ct. App. 1986).

Circumstantial evidence on nature of substance. - Although there was no direct scientific evidence that the substance which defendant was convicted of trafficking in by possession with intent to distribute was heroin, there was substantial, almost overwhelming, circumstantial evidence to that effect, which was sufficient to sustain the convictions. State v. Armijo, 90 N.M. 10, 558 P.2d 1149 (Ct. App. 1976); 90 N.M. 12, 558 P.2d 1151 (Ct. App. 1976).

Identity of substance a jury question. - Evidence that defendant stated he had brought five vials of morphine to an arranged meeting, that the vial sold, which was sealed and contained a yellowish liquid labeled dilaudid HCL, was taken from the same pocket as other vials and looked the same as others tested and shown to contain a morphine derivative, along with defendant's statement that he had injected the contents of a vial several hours before and was still feeling the effects, and fact that one of the users of the contents of the vial in question claimed to experience a "tingly feeling" was sufficient to present a jury question as to whether the contents of the vial sold were a controlled substance, and being substantial was sufficient to sustain conviction. State v. Burrell, 89 N.M. 64, 547 P.2d 69 (Ct. App. 1976).

Negating narcotic character. - The burden of proof was on the defendant to prove that substance identified as heroin was not a narcotic drug as an exemption or exception. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Proving intent by inference. - Intent may be proved by inference from the surrounding facts and circumstances, such as the quantity and manner of packaging of the controlled substance. State v. Muniz, 110 N.M. 799, 800 P.2d 734 (Ct. App. 1990).

Proving knowledge of narcotic character. - While there is no requirement that proof of possession with knowledge of narcotic character should be by direct or uncontradicted evidence, nevertheless, the evidence must be such as discloses some conduct, declarations or actions on the part of the defendant sufficient to satisfy the fact finder beyond a reasonable doubt that he had knowledge of the presence and nature of the narcotics. State v. Garcia, 76 N.M. 171, 413 P.2d 210 (1966).

Proof of possession of controlled substance may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting the defendant with the crime. State v. Donaldson, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

When inference of constructive possession proper. - Since defendant's wife resided with him, he was not in exclusive possession of the premises, and an inference of constructive possession could not be drawn against him unless there were incriminating

statements or circumstances tending to support the inference. *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Inference of trafficking from possession by nonuser. - Where evidence showed that defendant was in possession of more than 30 caps of heroin, while defendant himself testified that he was not and had never been a heroin user, the only possible inference was that defendant, at the least, intended to give the heroin away, and this evidence was sufficient to conclude that he was trafficking in heroin. *State v. Quintana*, 87 N.M. 414, 534 P.2d 1126 (Ct. App.), cert. denied, 88 N.M. 28, 536 P.2d 1085, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975).

And from amount of drug found. - Evidence that the heroin found weighed 3.3 grams and was 16% pure while street heroin is usually 3% to 5% pure and packaged in weights of 20 to 40 milligrams, that reduction of the heroin to street purity packaged for street sale would result in at least 264 caps of heroin, that heroin is generally packaged for resale on the street in small tinfoil packets such as were found and that search failed to disclose paraphernalia indicating use of the heroin on the premises, permitted the inference that defendant intended to distribute the heroin. *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Proof of possession of a large quantity of a controlled substance, inconsistent with personal use, is sufficient proof of trafficking in a controlled substance. *State v. Donaldson*, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

If the amount of an illegal drug found in an accused's possession is not by itself sufficient to prove inconsistency with personal use, then the state must present testimony that the amount of drugs in the accused's possession is inconsistent with personal use or that the other items found in possession of the accused, such as drug paraphernalia or significant sums of cash, showed that the accused intended to transfer drugs. *State v. Hubbard*, 113 N.M. 538, 828 P.2d 971 (Ct. App. 1992).

Using weight alone to show intent to distribute. - Where there was no evidence of the concentration of the drug, and no evidence of how long it would normally take a single drug user to consume a given quantity, the weight of the amount recovered (just under two ounces) could not in itself enable a fact finder to conclude, beyond a reasonable doubt, that defendant intended to distribute the substance. *State v. Becerra*, 112 N.M. 604, 817 P.2d 1246 (Ct. App. 1991).

Attempted trafficking of cocaine. - Defendant was properly convicted for attempted trafficking in cocaine since he committed the overt acts of accepting a sizeable amount of cash from an underground narcotics officer and engaging in prior discussion of the illicit transaction. *State v. Green*, 116 N.M. 273, 861 P.2d 954 (1993).

Conspiracy to traffic. - The size (one-half to one ounce amounts), frequency (nine transactions in approximately seven weeks) and manner of the transactions (cash, after the receipt of a phone call) were evidence sustaining defendant's conviction for

conspiracy with two others to traffic in heroin, and the jury could properly conclude that the heroin defendant supplied was for resale. *State v. Armijo*, 90 N.M. 10, 558 P.2d 1149 (Ct. App. 1976).

Entrapment submitted to jury. - Issue of entrapment in prosecution for selling and distribution of heroin was properly submitted to the jury, where the evidence raised a factual question concerning defendant's predisposition to sell or distribute heroin and concerning the extent of agent's activity in connection with the heroin. *State v. Wilson*, 86 N.M. 348, 524 P.2d 520 (Ct. App. 1974).

Separate offenses. - As there is no ambiguity in this section, which prohibits the sale of "any" controlled substance, where evidence showed sales to two separate people, there were two offenses and consecutive sentences received by defendant did not constitute an abuse of the trial court's discretion. *State v. Burrell*, 89 N.M. 64, 547 P.2d 69 (Ct. App. 1976).

Severance not necessary. - It was not error for the trial court to refuse to grant motion for severance where defendant was charged with having made three sales to the same individual in the same community and all within a comparatively short period of time, and no prejudice to defendant had been shown. *State v. Riordan*, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974).

First offense punishable as second-degree felony. - Sentence of 10 to 50 years imposed on defendant, convicted of trafficking prior to the 1974 amendment to this section, was proper; as the statute then declared the crime to be a second-degree felony, 31-18-11 NMSA 1978 (now repealed), making a "felony" as to which a penalty is not specified a fourth-degree felony, was not applicable. *State v. Herrera*, 86 N.M. 224, 522 P.2d 76 (1974).

Procedure upon conviction of subsequent offense. - Upon proof that a conviction is a second or subsequent conviction for trafficking, Subsection B requires that the previous sentence be vacated and that the sentence imposed by law be imposed. *State v. Bejar*, 104 N.M. 138, 717 P.2d 591 (Ct. App. 1986).

Notice prior to sentencing as second offender. - Although former narcotic drug statute failed to specify the precise manner in which a prior conviction was to be brought to the attention of the defendant and the court, essential fairness required that there be some pleading filed by the state, whether it be by motion or otherwise, by which a defendant would be given notice and opportunity to be heard before an increased penalty could be imposed. *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966), appeal after remand, 77 N.M. 536, 425 P.2d 47 (1967); *State v. Santillanes*, 96 N.M. 477, 632 P.2d 354 (1981).

Where there was never any charge filed against defendant which would give him notice that, if convicted, he would be sentenced as a second offender, and even though no objection was made by the defendant or his counsel to the questioning by the court as

to the prior conviction, sentencing him as a second offender was a denial of due process of law, in that there was no notice or true opportunity to be heard, in a constitutional sense. *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966), appeal after remand, 77 N.M. 536, 425 P.2d 47 (1967).

Enhancement proceeding. - Where an enhancement proceeding is brought after the defendant has begun serving his sentence on the most recent convictions, there is no violation of either the right of due process or the right against double jeopardy, even in the absence of statutory authorization of such a procedure. *State v. Santillanes*, 96 N.M. 477, 632 P.2d 354 (1981).

Where defendant's prior convictions for cocaine trafficking and possession of marijuana with intent to distribute resulted from a single arrest, the court did not make an impermissible "double use" of the prior convictions by utilizing the prior cocaine trafficking conviction to enhance the defendant's present cocaine trafficking conviction to a first degree felony pursuant to 30-31-20B(2) NMSA 1978, and then using the other prior conviction for possession of marijuana to enhance defendant's sentence under the general habitual-offender statute, 31-18-17C NMSA 1978. *State v. Hubbard*, 113 N.M. 538, 828 P.2d 971 (Ct. App. 1992).

When federal offense is prior conviction. - State convictions of trafficking of a controlled substance are "subsequent" to a federal conviction where the elements necessary to prove the federal offense are the same as those required to prove the state charges. Therefore, the federal offense is a prior conviction for purposes of the penalty provisions of the Controlled Substances Act. *State v. Garduno*, 93 N.M. 335, 600 P.2d 281 (1979).

Applicability of habitual offender statute. - In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 76 N.M. 111, 412 P.2d 405 (1966), which held that the Habitual Offender Act did not apply to persons convicted under the Controlled Substances Act. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

For cases construing former law see, *State v. Lujan*, 76 N.M. 111, 412 P.2d 616 (Ct. App. 1977); *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966); *State v. Heyward*, 90 N.M. 780, 568 P.2d 616 (Ct. App. 1977).

Failure of indictment to refer to Subsection B does not render it invalid. *State v. Bustamante*, 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

For annual survey of New Mexico law relating to criminal procedure, see 13 N.M.L. Rev. 341 (1983).

For article, "Evidence II: Evidence of Other Crimes as Proof of Intent," see 13 N.M.L. Rev. 423 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 40 to 48.

Validity and construction of statute creating presumption or inference of intent to sell from possession of specified quantity of illegal drugs, 81 A.L.R.3d 1192.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Entrapment as defense to charge of selling or supplying narcotics where government agents supplied narcotics to defendant and purchased them from him, 9 A.L.R.5th 464.

Validity, construction, and application of state laws imposing tax or license fee on possession, sale, or the like, of illegal narcotics, 12 A.L.R.5th 89.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of cocaine had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 397.

Admissibility of expert evidence concerning meaning of narcotics code language in federal prosecution for narcotics dealing - modern cases, 104 A.L.R. Fed. 230.

Illegal drugs or narcotics involved in alleged offense as subject to discovery by defendant under Rule 16 of Federal Rules of Criminal Procedure, 109 A.L.R. Fed. 363.

Propriety of instruction of jury on "conscious avoidance" of knowledge of nature of substance or transaction in prosecution for possession or distribution of drugs, 109 A.L.R. Fed. 710.

Under what circumstances should total weight of mixture or substance in which detectable amount of controlled substance is incorporated be used in assessing sentence under United States sentencing guideline § 2D1.1 - post-*Chapman* cases, 113 A.L.R. Fed. 91.

28 C.J.S. Drugs and Narcotics Supplement §§ 151, 163, 164 to 167.

30-31-21. Distribution to a minor.

Except as authorized by the Controlled Substances Act, no person who is eighteen years of age or older shall intentionally distribute a controlled substance to a person under the age of eighteen years. Any person who violates this section with respect to:

A. marijuana is:

(1) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

B. any other controlled substance enumerated in Schedules [Schedule] I, II, III or IV or a controlled substance analog of any controlled substance enumerated in Schedule I, II, III or IV is:

(1) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-21, enacted by Laws 1972, ch. 84, § 21; 1974, ch. 9, § 2; 1980, ch. 23, § 2; 1987, ch. 68, § 3.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Constitutionality. - Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional under N.M. Const., art. IV, § 16, because of the fact that "unlawful activities" are not mentioned in the title of the

act. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Greater penalty imposed on seller than on user. - The legislature clearly intended to impose greater penalties on the seller of a controlled substance than upon the user. State v. Sandoval, 98 N.M. 417, 649 P.2d 485 (Ct. App. 1982).

Distribution by mail. - Neither the federal constitution nor 18 U.S.C. § 1716 preempts New Mexico jurisdiction over distribution of controlled substances to a minor through the use of the mails. State v. McHorse, 85 N.M. 753, 517 P.2d 75 (Ct. App. 1973).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Giving, selling or prescribing dangerous drugs as contributing to the delinquency of a minor, 36 A.L.R.3d 1292.

30-31-22. Controlled or counterfeit substances; distribution prohibited.

A. Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally distribute or possess with intent to distribute a controlled substance or a controlled substance analog except a substance enumerated in Schedule I or II that is a narcotic drug or a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug. Any person who violates this subsection with respect to:

(1) marijuana is:

(a) for the first offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV

except a substance enumerated in Schedule I or II that is a narcotic drug or a controlled substance analog of a controlled substance enumerated in Schedule I or II that is a narcotic drug, is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(3) a controlled substance enumerated in Schedule V or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than five hundred dollars (\$500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

B. Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally create or deliver, or possess with intent to deliver, a counterfeit substance. Any person who violates this subsection with respect to:

(1) a counterfeit substance enumerated in Schedule I, II, III or IV is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(2) a counterfeit substance enumerated in Schedule V is guilty of a petty misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100) or by imprisonment for a definite term not to exceed six months, or both.

C. Any person who knowingly violates Subsection A or B of this section while within a drug-free school zone, excluding private property residentially zoned or used primarily as a residence, with respect to:

(1) marijuana is:

(a) for the first offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(b) for the second and subsequent offenses, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(c) for the first offense, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(d) for the second and subsequent offenses, if more than one hundred pounds is possessed with intent to distribute or distributed or both, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(2) any other controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a controlled substance enumerated in Schedule I, II, III or IV except a substance enumerated in Schedule I or II that is a narcotic drug or a controlled substance analog of a controlled substance enumerated [enumerated] in Schedule I or II that is a narcotic drug, is:

(a) for the first offense, guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) for the second and subsequent offenses, guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

(3) a controlled substance enumerated in Schedule V or a controlled substance analog of a controlled substance enumerated in Schedule V is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(4) the intentional creation, delivery or possession with the intent to deliver:

(a) a counterfeit substance enumerated in Schedule I, II, III or IV is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(b) a counterfeit substance enumerated in Schedule V is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or by imprisonment for a definite term not less than one hundred eighty days but less than one year, or both.

D. Notwithstanding Subsection A of this section, distribution of a small amount of marijuana for no remuneration shall be treated as provided in Paragraph (3) of Subsection B of Section 30-31-23 NMSA 1978.

History: 1953 Comp., § 54-11-22, enacted by Laws 1972, ch. 84, § 22; 1974, ch. 9, § 3; 1977, ch. 183, § 1; 1980, ch. 23, § 3; 1987, ch. 68, § 4; 1990, ch. 19, § 4.

ANNOTATIONS

Cross-references. - As to legal use of marijuana in research, see 26-2A-1 to 26-2A-7 NMSA 1978.

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1990 amendment, effective July 1, 1990, added Subsection C, designated the former last sentence of Subsection B as present Subsection D, and made minor stylistic changes in Subsections A and B.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Title constitutional. - Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Greater penalty imposed on seller than on user. - The legislature clearly intended to impose greater penalties on the seller of a controlled substance than upon the user. *State v. Sandoval*, 98 N.M. 417, 649 P.2d 485 (Ct. App. 1982).

Marijuana use not intrinsic part of religion. - Where the evidence shows that defendant's belief was derived from defendant's personal views of the Bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. *State v. Barshear*, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Effect of Subsection C. - The "notwithstanding" provision of Subsection C does not provide for a lesser penalty for the first marijuana distribution offense but rather affects only the penalties for second and subsequent marijuana distribution offenses; for second and subsequent marijuana distribution offenses that factually come within Subsection C, the penalty of 30-31-23B(3) applies, and a defendant thus avoids the higher penalty stated in Subsection A(1)(b) of this section. *State v. Bustamante*, 91 N.M. 772, 581 P.2d 460 (Ct. App. 1978).

Possession is lesser offense necessarily included in distribution of marijuana. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Distribution prosecution barred by conviction of possession. - Where defendant was convicted of the lesser offense of possession of marijuana, the principles of double jeopardy barred his subsequent prosecution of the greater offense of distribution. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Retrial for possession barred. - Where two counts were charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury was to disregard the possession count if it found defendant guilty of the latter offense operated as an acquittal on the possession count and prevented retrial of this issue when the verdict on possession with intent to distribute was overturned. *State v. Moreno*, 69 N.M. 113, 364 P.2d 594 (1961).

Penalty applicable to drugs scheduled by regulation. - Express legislative authority is not required to make the penalty provisions of the Controlled Substances Act applicable to drugs scheduled by administrative regulation. *State v. Reams*, 98 N.M. 372, 648 P.2d 1185 (Ct. App. 1982), *aff'd in part, rev'd on other grounds*, 98 N.M. 215, 647 P.2d 417 (1981).

Distribution by prescription. - When a physician writes a prescription neither for a legitimate medical purpose nor in the usual course of his professional practice, he is "distributing" drugs. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Sections not conflicting. - There is no conflict between Subsection A of this section and 30-31-20 A(3) and B NMSA 1978. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), *cert. denied*, 85 N.M. 483, 513 P.2d 1265 (1973).

Distribution of quaalude. - This section, and not 26-1-16A NMSA 1978, is the appropriate legislation under which defendants are to be prosecuted for allegedly unauthorized distribution of quaalude. *State v. Reams*, 98 N.M. 215, 647 P.2d 417 (1982).

Narcotic drugs not included. - Subsection A of this section concerns unlawful conduct involving controlled substances other than the narcotic drugs enumerated in Schedules I and II. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), *cert. denied*, 85 N.M. 483, 513 P.2d 1265 (1973).

The "except" language in Subsection A excludes a narcotic drug such as heroin, enumerated in Schedule I, from the purview of the subsection. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), *cert. denied*, 85 N.M. 483, 513 P.2d 1265 (1973).

Sale of narcotics is not involved under this section. *State v. Montoya*, 86 N.M. 155, 520 P.2d 1100 (Ct. App. 1974), *overruled on other grounds* *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Mere possession insufficient. - A conviction based on the offense of possession of marijuana with intent to illegally sell and deliver cannot be sustained upon proof of illegal possession alone and the verdict and judgment based thereon must be reversed. *State v. Moreno*, 69 N.M. 113, 364 P.2d 594 (1961).

Place of distribution immaterial. - The crime of possession with intent to distribute is complete if there is possession with the requisite intent, and the state is not required to prove the place of the intended distribution. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), *cert. denied*, 88 N.M. 29, 536 P.2d 1085 (1975).

Nature of substance inferred. - Where all of the alleged marijuana was in the form of bricks having the same size, color and appearance as those tested, the fact finder could infer from the evidence that the remaining substance was the same as the tested

portion. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Inference of intent to distribute. - While there was no evidence of defendants' sale or an attempted sale of marijuana, the possession of 246.15 pounds of the substance, together with the defendants' activities, allowed the court to infer that the defendants had the necessary intent to distribute. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Evidence of the amount of the cocaine possessed, about three grams, and evidence of the packaging and purity of the cocaine, as well as evidence that defendant had on his person a relatively large amount of cash, supported the state's argument that appellant intended to distribute the cocaine. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

Shared criminal intent. - Evidence regarding marijuana transaction established more than the mere presence of the defendant during the consummation of the sale, supporting a finding that he was in charge and directing the sale, or at least counseling, aiding and abetting in its consummation and sharing a criminal intent and purpose with the others. *State v. Favela*, 79 N.M. 490, 444 P.2d 1001 (Ct. App. 1968).

Constructive proof of possession sufficient. - Proof of actual possession is not necessary to sustain a conviction of possession of marijuana with intent to distribute. Constructive possession will suffice. *State v. Muniz*, 110 N.M. 799, 800 P.2d 734 (Ct. App. 1990).

Constructive possession and sale shown. - Evidence that witness bought six ounces of marijuana from defendant, who then gave witness detailed instructions as to the location of the drug behind a metal shack near the road leading to the airport, was ample evidence that defendant had constructive possession of and sold the marijuana to the witness. *State v. Wesson*, 83 N.M. 480, 493 P.2d 965 (Ct. App. 1972).

Evidence not inherently improbable. - Testimony in prosecution for unlawful sale and possession of marijuana was not inherently improbable despite fact that defendant was claimed to have insisted on delivering the cigarettes in question in the restroom where only he and undercover officer were present, yet afterwards supposedly received the money for the transaction and discussed other possible dealings in a car in the presence of several other persons. *State v. Soliz*, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

Establishing entrapment. - The necessity of having to resort to a greater degree of subterfuge, or to exercise more persistence, in making inquiries to set up an illegal sale of marijuana, without more, does not constitute evidence of illegal entrapment, nor is it necessary that a suspected crime be in the process of being committed in order to show a predisposition to commit that crime. *State v. Akin*, 75 N.M. 308, 404 P.2d 134 (1965).

Similar offenses indicative of predisposition. - Where the defense is entrapment, evidence of similar narcotics offenses bears on the defendant's predisposition, or readiness and willingness, to commit the offenses for which he is charged; and evidence of prior similar sales of heroin within a period shortly before those in question was admissible on the issue of entrapment. *State v. Anaya*, 81 N.M. 52, 462 P.2d 637 (Ct. App. 1969).

Entrapment for the jury. - Defendant's testimony that he was having financial difficulties, with his wife expecting a baby and his daughter having problems, and that he considered agent's numerous requests that he obtain marijuana for a month or two before he finally agreed to involve himself, raised a factual issue as to whether the criminal conduct was the product of the agent's creative activity. *State v. Martinez*, 83 N.M. 13, 487 P.2d 923 (Ct. App. 1971).

Entrapment not shown. - Suggestion that the act of officer in supplying the defendant with his favorite brand of whiskey constituted undue inducement was without merit where defendant not only dealt in the illegal sale of beer but also drank beer and whiskey of his own as well as that furnished by others. *State v. Akin*, 75 N.M. 308, 404 P.2d 134 (1965).

Testimony of a single witness was sufficient evidence for conviction of unlawful possession and sale of marijuana. *State v. Soliz*, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

Requirement of specific intent in Controlled Substances Act. - See *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Instructing on intent. - An instruction substantially in terms of the statute is sufficient. *State v. Tucker*, 86 N.M. 553, 525 P.2d 913 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974), overruled on other grounds *State v. Bender*, 91 N.M. 670, 579 P.2d 796 (1978).

Instructions which are phrased in the terms of this statute were sufficient on element of intent. *State v. Fuentes*, 85 N.M. 274, 511 P.2d 760 (Ct. App.), cert. denied, 85 N.M. 265, 511 P.2d 751 (1973).

Evidence sufficient to infer knowledge. - Defendant's conduct in selling pills, coupled with his assertion that they would get an undercover agent "good and high," was sufficient evidence from which to infer defendant's knowledge of a controlled substance. *State v. Martinez*, 104 N.M. 584, 725 P.2d 263 (Ct. App. 1986).

Even if someone else had knowledge of the presence of marijuana in defendant's bedroom and exercised some control over it, defendant could also have had sufficient knowledge and control to be in constructive possession, and the link establishing defendant's knowledge and control was evidence of his commerce in illicit drugs. *State v. Muniz*, 110 N.M. 799, 800 P.2d 734 (Ct. App. 1990).

Evidence sufficient to support conviction. - An undercover agent's testimony that defendant sold him marijuana on two occasions was sufficient evidence to support defendant's conviction for distributing marijuana. *State v. Laskay*, 103 N.M. 799, 715 P.2d 72 (Ct. App. 1986).

Defendant's conviction for possession of marijuana with intent to distribute was affirmed, where the evidence showed that: (1) the black book that defendant used for his drug transactions was kept in his residence, (2) defendant used the bedroom in which the marijuana was found at least to the extent of keeping his correspondence, including a bill for the pager used in his drug transactions, and (3) the marijuana found in a closet was packaged for distribution. *State v. Muniz*, 110 N.M. 799, 800 P.2d 734 (Ct. App. 1990).

Presumption of innocence. - In prosecution for unlawfully selling and unlawfully furnishing or giving away marijuana, it was error for the trial court to fail to instruct the jury on the presumption of innocence, where defendant requested an instruction thereon. *State v. Henderson*, 81 N.M. 270, 466 P.2d 116 (Ct. App. 1970).

Sentencing under Habitual Offenders Act. - In 1983 the habitual offender statute was amended to include persons convicted of narcotics offenses, overruling that part of *State v. Lujan*, 76 N.M. 111, 412 P.2d 405 (1966), which held that the Habitual Offender Act did not apply to persons convicted under the Controlled Substances Act. *Minner v. Kerby*, 30 F.3d 1311 (10th Cir. 1994).

For case construing former law, see *State v. Garcia*, 76 N.M. 171, 413 P.2d 210 (1966).

Applicability of former habitual criminal law to burglary conviction after drug offense. - There was no conflict between the provisions of Subsection A of this section and 31-18-5 NMSA 1978 (now repealed, see 31-18-17 NMSA 1978), nor any legislative intent within the Controlled Substances Act, to prohibit use of a Controlled Substances Act conviction to enhance a subsequent burglary conviction, since it was the fact of the prior felony that was the basis for the enhanced sentence for the current burglary. *State v. Jordan*, 88 N.M. 230, 539 P.2d 620 (Ct. App. 1975).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For annual survey of New Mexico law relating to criminal law, see 13 N.M.L. Rev. 323 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 40 to 48.

Free exercise of religion as defense to prosecution for narcotic or psychedelic drug offense, 35 A.L.R.3d 939.

Permitting unlawful use of narcotics in private home as criminal offense, 54 A.L.R.3d 1297.

Conviction of possession of illicit drugs found in premises or of which defendant was in nonexclusive possession, 56 A.L.R.3d 948.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

Sufficiency of evidence that possessor of heroin had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 78 A.L.R. Fed. 413.

Sufficiency of evidence that possessor of marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 79 A.L.R. Fed. 113.

Sufficiency of evidence that possessor of controlled substance other than cocaine, heroin, or marijuana had intent to distribute it, so as to violate 21 USCS § 841(a)(1), 80 A.L.R. Fed. 507.

Sufficiency of showing, in prosecution under Travel Act (18 USC § 1952), of act by accused, subsequent to accused's travel or use of facilities in interstate or foreign commerce, which furthers unlawful activity involving narcotics or controlled substances, 113 A.L.R. Fed. 625.

Admissibility, under Rule 404(b) of Federal Rules of Evidence (28 USCS Appx, Federal Rules of Evidence, Rule 404(b)), of evidence of accused's prior use of illegal drugs in prosecution for conspiracy to distribute such drugs, 114 A.L.R. Fed. 511.

28 C.J.S. Drugs and Narcotics Supplement §§ 149 to 174, 183 to 187.

30-31-23. Controlled substances; possession prohibited.

A. It is unlawful for any person intentionally to possess a controlled substance unless the substance was obtained pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or except as otherwise authorized by the Controlled Substances Act. It is unlawful for any person intentionally to possess a controlled substance analog.

B. Any person who violates this section with respect to:

(1) one ounce or less of marijuana is, for the first offense, guilty of a petty misdemeanor and shall be punished by a fine of not less than fifty dollars (\$50.00) or more than one hundred dollars (\$100) and by imprisonment for not more than fifteen days, and, for the second and subsequent offenses, guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both;

(2) more than one ounce and less than eight ounces of marijuana is guilty of a misdemeanor and shall be punished by a fine of not less than one hundred dollars (\$100) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both; or

(3) eight ounces or more of marijuana is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except for those substances listed in Subsection D of this section, any person who violates this section with respect to any amount of any controlled substance enumerated in Schedule I, II, III or IV or a controlled substance analog of a substance enumerated in Schedule I, II, III or IV is guilty of a misdemeanor and shall be punished by a fine of not less than five hundred dollars (\$500) or more than one thousand dollars (\$1,000) or by imprisonment for a definite term less than one year, or both.

D. Any person who violates this section with respect to phencyclidine as enumerated in Schedule III or a controlled substance analog of phencyclidine; methamphetamine, its salts, isomers or salts of isomers as enumerated in Schedule II or a controlled substance analog of methamphetamine, its salts, isomers or salts of isomers; or a narcotic drug enumerated in Schedule I or II or a controlled substance analog of a narcotic drug enumerated in Schedule I or II, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-23, enacted by Laws 1972, ch. 84, § 23; 1974, ch. 9, § 4; 1980, ch. 23, § 4; 1983, ch. 183, § 1; 1987, ch. 68, § 5; 1989, ch. 123, § 1; 1990, ch. 19, § 5; 1990, ch. 33, § 1.

ANNOTATIONS

- I. General Consideration.
- II. Constitutional Considerations.
- III. Elements of Possession.
 - A. In General.
 - B. Defenses.
- IV. Evidence.

I. GENERAL CONSIDERATION.

Cross-references. - For provision authorizing conditional discharge for first possession offense, and providing for expungement of records relating to a minor so discharged, see 30-31-28 NMSA 1978.

As to legal use of marijuana in research, see 26-2A-1 to 26-2A-7 NMSA 1978.

The 1989 amendment, effective July 1, 1989, inserted "or a controlled substance analog of phencyclidine" in Subsection B(4) and "or a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II" in Subsection B(5); and made minor stylistic changes throughout Subsection B.

The 1990 amendments. Laws 1990, ch. 19, § 5, effective July 1, 1990, adding a new Subsection C, relating to persons knowingly violating Subsection A while within a drug-free school zone, was approved February 28, 1990. However, Laws 1990, ch. 33, § 1, effective July 1, 1990, substituting "or" for "and" at the end of Paragraph (2) of Subsection A, deleting former Paragraph (4) of Subsection A pertaining to violations with respect to specific controlled substances and providing a penalty, adding Subsection C, redesignating former Paragraph (5) of Subsection A as Subsection D, and rewriting the provision which read "phencyclidine as enumerated in Schedule III a narcotic drug enumerated in Schedule I or II or a controlled substance analog of phencyclidine or a controlled substance analog of a narcotic drug enumerated in Schedule I or II, is guilty of a first degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.", was approved later on February 28, 1990. The section is set out as amended by Laws 1990, ch. 33, § 1. See 12-1-8 NMSA 1978.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Section is within scope of state's power and is valid on its face. Yanez v. Romero, 619 F.2d 851 (10th Cir.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980).

Possession of heroin deemed felony under Habitual Offender Act. - Where a federal conviction is had in New Mexico upon a purchase of heroin in New Mexico, the "purchase" of heroin necessarily includes the actual or constructive "possession" of heroin, and actual or constructive possession of heroin is a felony under the laws of New Mexico for purposes of the Habitual Offender Act. State v. Montoya, 94 N.M. 704, 616 P.2d 417 (1980).

Habitual offender law inapplicable. - Where the legislature intended an enhanced penalty to apply to a violation of the Controlled Substances Act it so provided within the act, the legislature did not intend that the habitual offender law was to apply to second or subsequent violations of Subsection B(5) of this section. State v. Alderete, 88 N.M. 150, 538 P.2d 422 (Ct. App. 1975).

Comparison not warranted. - Former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) was completely lacking in any legislative direction as to procedures in the event of second or subsequent convictions, and a comparison between the Narcotic Drug Act and former habitual criminal law was of no value. *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966).

Place of possession. - Defendant's conviction for possession of cocaine warranted reversal since there was insufficient evidence to prove that the drugs were actually possessed and ingested in New Mexico, although the defendant's urine tested positive for cocaine. *State v. McCoy*, 116 N.M. 491, 864 P.2d 307 (Ct. App. 1993).

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M. L. Rev. 63 (1974).

For article, "Survey of New Mexico Law, 1979-80: Criminal Law and Procedure," see 11 N.M.L. Rev. 85 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 40 to 48.

Conviction of possession of illicit drugs found in premises of which defendant was not in exclusive possession, 56 A.L.R.3d 948.

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant, 57 A.L.R.3d 1319.

Sufficiency of prosecution proof that substance defendant is charged with possessing or selling, or otherwise unlawfully dealing in, is marijuana, 75 A.L.R.3d 717.

Competency of drug addict or user to identify suspect material as narcotic or controlled substance, 95 A.L.R.3d 978.

Constitutionality of state legislation imposing criminal penalties for personal possession or use of marijuana, 96 A.L.R.3d 225.

Minimum quantity of drug required to support claim that defendant is guilty of criminal "possession" of drug under state law, 4 A.L.R.5th 1.

Drug abuse: what constitutes illegal constructive possession under 21 USCS § 841(a)(1), prohibiting possession of a controlled substance with intent to manufacture, distribute, or dispense the same, 87 A.L.R. Fed. 309.

Under what circumstances should total weight of mixture or substance in which detectable amount of controlled substance is incorporated be used in assessing sentence under United States sentencing guideline § 2D1.1 - post-*Chapman* cases, 113 A.L.R. Fed. 91.

28 C.J.S. Drugs and Narcotics Supplement §§ 154 to 163.

II. CONSTITUTIONAL CONSIDERATIONS.

Due process certainty. - The language of definitional Section 30-31-20 NMSA 1978, referring to all parts of the cannabis plant whether growing or not, coupled with Paragraph B(3) of this section, is not so indefinite that men of common intelligence must guess at its meaning and scope. *State v. Olive*, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Prohibition of "use" not vague. - Former section prohibiting "unlawful use" of marijuana was not unconstitutionally vague, since all use of marijuana not falling within a stated exception was made unlawful. *State v. Covens*, 83 N.M. 175, 489 P.2d 888 (Ct. App. 1971).

Equal protection. - Fact that the Controlled Substances Act does not specifically state when weighing of marijuana is to be done does not mean that Paragraph B(3) of this section, as applied to defendant convicted of possession of more than eight ounces of "green" marijuana, was a violation of his rights to equal protection since it was the possession of marijuana, on the date of the offense, which was the prohibited act and not the amount in some subsequent form suitable to a particular defendant. *State v. Olive*, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Due process requirements in sentence enhancement. - To meet due process requirements of essential fairness in sentencing defendant for a second drug offense, there must be some pleading filed by the state, whether by motion or otherwise, by which defendant is given notice of the state's charges, and defendant must be given an opportunity to be heard on the charges before an increased penalty can be imposed. *State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966).

Title constitutionally adequate. - Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Standing to challenge section. - Defendant's contention that this section violated his constitutional rights because he was a narcotic addict, where there was no evidence that he was an addict, was without merit. *State v. Jaramillo*, 88 N.M. 179, 538 P.2d 1201 (Ct. App. 1975).

Possession is lesser offense necessarily included in distribution of marijuana. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Distribution prosecution barred by conviction of possession. - The possession of marijuana was a lesser offense necessarily included in the greater offense of distribution of marijuana, and since the defendant was convicted of the lesser offense, the principles of double jeopardy barred the subsequent prosecution of the greater offense. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975).

Retrial for possession barred. - Where two counts were charged in an indictment, one for illegal possession of marijuana and the other for possession with intent to sell, an instruction by the court that the jury was to disregard the possession count if it found defendant guilty of the latter offense operated as an acquittal on the possession count and prevented retrial of this issue when the verdict on possession with intent to distribute was overturned. *State v. Moreno*, 69 N.M. 113, 364 P.2d 594 (1961).

Marijuana use not intrinsic part of religion. - Where the evidence shows that defendant's belief was derived from defendant's personal views of the Bible, and those views under the evidence are no more than that the use and distribution of marijuana was permitted because marijuana is a gift from God, such a personal use does not amount to an intrinsic part of a religion. *State v. Brashear*, 92 N.M. 622, 593 P.2d 63 (Ct. App. 1979).

Possession of narcotics, not addiction can be subject of prosecution. - Addiction is a disease which cannot be the subject of prosecution under the eighth and fourteenth amendments of the United States Constitution: possession of narcotics as a crime is valid and distinguishable. *Yanez v. Romero*, 619 F.2d 851 (10th Cir.), cert. denied, 449 U.S. 876, 101 S. Ct. 221, 66 L. Ed. 2d 98 (1980).

Legal to search defendant admitting "dope" possession. - Once the defendant voluntarily made the statement that there was "dope" in his pocket, a police officer had probable cause to believe that a crime was being committed, specifically, possession of a controlled substance. This provided a proper legal foundation for both a full search and the actual arrest of the defendant. *State v. Blakely*, 115 N.M. 446, 853 P.2d 168 (Ct. App. 1993).

III. ELEMENTS OF POSSESSION.

A. IN GENERAL.

Meaning of "eight ounces". - Weight of eight ounces mentioned in Paragraph B(3) of this section means the weight of the plant, or the plant's derivative products, weighed in the form seized, whether that form be the green plant, the dried plant or the various products which may be derived from the plant. *State v. Olive*, 85 N.M. 664, 515 P.2d 668 (Ct. App.), cert. denied, 85 N.M. 639, 515 P.2d 643 (1973).

Intent required. - Under 54-5-16, 1953 Comp. (now repealed), an intent to possess anhalonium (peyote) was required for conviction. *State v. Pedro*, 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971).

Locus of offense jurisdictional. - Where state in prosecution for unlawful use of heroin failed to establish where defendant used the narcotic, an essential element of the offense charged, this jurisdictional error would be raised sua sponte by the appellate court and defendant's conviction reversed for failure of proof. *State v. Losolla*, 84 N.M. 151, 500 P.2d 436 (Ct. App. 1972).

Possession coupled with knowledge. - The state must prove that defendant had physical or constructive possession, coupled with knowledge of the presence and narcotic character of the substance possessed. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974); *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974); *State v. Mosier*, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971); *State v. Maes*, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Possession means care, control and management on the occasion in question. *State v. Mosier*, 83 N.M. 213, 490 P.2d 471 (Ct. App. 1971); *State v. Maes*, 81 N.M. 550, 469 P.2d 529 (Ct. App.), cert. denied, 81 N.M. 588, 470 P.2d 309 (1970).

Proof of possession of controlled substance may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting the defendant with the crime. *State v. Donaldson*, 100 N.M. 111, 666 P.2d 1258 (Ct. App. 1983).

Direct proof unnecessary. - Proof of possession with knowledge of narcotic character need not be by direct or uncontradicted evidence. *State v. Garcia*, 76 N.M. 171, 413 P.2d 210 (1966).

Conduct permitting inference of guilt. - Evidence sufficient to support a violation of this section must be such as discloses some conduct, declarations or actions on the part of the accused from which the fact finder may fairly infer and which is sufficient to satisfy it beyond a reasonable doubt of knowledge in the accused of the presence and nature of the narcotics. *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975); *State v. Garcia*, 76 N.M. 171, 413 P.2d 210 (1966).

To show knowing possession of narcotics, the conduct and behavior of the parties, their admissions or contradictory statements and explanations are frequently sufficient; possession and knowledge that object is a narcotic drug can also be proven circumstantially. *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

Constructive possession defined. - Constructive possession exists when the accused has knowledge of the presence of the narcotic and control over it. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Montoya*, 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973).

Right to control. - An accused has constructive possession when he maintains control or a right to control the contraband. *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

Power to produce or dispose is evidence of control. *State v. Montoya*, 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973).

Exclusive possession is not required to support a conviction. *State v. Favela*, 79 N.M. 490, 444 P.2d 1001 (Ct. App. 1968).

But inference permissible from exclusive possession. - Where one has exclusive possession of a home or apartment in which narcotics are found, it may be inferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them. *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

Nonexclusive possession distinguished. - Where a person is not in exclusive possession of premises, it may not be inferred that he knew of the presence of the marijuana (or narcotics) or had control over same unless there are some other incriminating circumstances or statements tending to buttress such an inference. *State v. Bidegain*, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part on other grounds, 88 N.M. 466, 541 P.2d 971 (1975); *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975); *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

Since defendant's wife resided with him, he was not in exclusive possession of the premises, and an inference of constructive possession could not be drawn against him unless there were incriminating statements or circumstances tending to support the inference. *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

Possession of agent. - An accused has constructive possession of narcotics found in the physical possession of his agent or any other person when the defendant has the immediate right to exercise dominion and control over the narcotics. *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

Insufficiency of positive drug test by itself. - The common law rule in New Mexico requires additional proof of an intentional or knowing prior possession corroborating a positive drug test before a defendant can be charged and convicted of possession of a controlled substance; while a positive drug test might be circumstantial evidence of possession, it is insufficient, standing alone, to convict for that crime. *State v. McCoy*, 116 N.M. 491, 864 P.2d 307 (Ct. App. 1993).

B. DEFENSES.

No burden on state to negative plant maturity. - In prosecution for possession, the state was not required to expressly prove that substance identified as marijuana was not the mature stalk. *State v. Everidge*, 77 N.M. 505, 424 P.2d 787 (1967).

But proof thereof fatal. - Where the state's expert witness was unable to say whether the substance he tested was cannabis indica or cannabis sativa L., and could only identify it as mature stalk of some kind of cannabis, possession of which mature stalk did not constitute a violation of the statute under which the state had elected to proceed, defendant's conviction for possession of marijuana would be reversed. *State v. Benavidez*, 71 N.M. 19, 375 P.2d 333 (1962).

Evidence of predisposition. - In view of evidence that defendant, a heroin addict, had been brought off methadone rapidly when a methadone maintenance program was closed, that he encountered a waiting requirement for entry into a different methadone program, during which time he contacted his former heroin supplier (now an informer) who supplied him with heroin, and that defendant being utterly without funds, the two arranged a marijuana transaction during the course of which defendant was arrested, subsequently being convicted of unlawful possession, the jury could reasonably have believed that the parties pooled their thoughts to plan a criminal enterprise in which the defendant was predisposed to participate. *State v. Fiechter*, 89 N.M. 74, 547 P.2d 557 (1976).

Entrapment for the jury. - Evidence that defendant had previously been involved in "hauling" marijuana, that he had furnished informer with LSD in the past and that he himself had taken drugs went toward defendant's predisposition to commit the crime and bore on the credibility of his testimony that representations by informer involving thereto and violence were the inducing cause of the crime (possession of LSD); and since there were conflicts on the entrapment issue, the trial court properly refused to rule there was entrapment as a matter of law. *State v. Sena*, 82 N.M. 513, 484 P.2d 355 (Ct. App. 1971).

IV. EVIDENCE.

Substantial evidence of possession. - Evidence that a voice identified as female defendant's responded to the officers' knock, that thereafter running was heard from the front portion of the trailer to the vicinity of the trailer in which the bathrooms were located, that the toilet was flushed and heroin was recovered therefrom immediately thereafter, and that upon entry the officers found the defendant standing in a location consistent with her having been the person who flushed the toilet, along with evidence that the other occupants of the trailer were infants and young children, two sleeping adults and another adult in the living room, was substantial and supported defendant's conviction for possession of heroin. *State v. Anaya*, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Evidence that defendant knowingly transferred a forged prescription was sufficient to sustain a conviction for knowingly possessing the drug involved. *State v. Nation*, 85 N.M. 291, 511 P.2d 777 (Ct. App. 1973).

Appellant's acts of purchasing the cigarettes, receiving actual delivery thereof and then distributing them amply supported the conclusion that he had marijuana in his possession, as such term was defined in the instructions. *State v. Romero*, 79 N.M. 522, 445 P.2d 587 (Ct. App. 1968).

Constructive possession shown. - Finding of numerous unused tinfoils inside the house occupied by defendant and his wife and fact that on the way to the police station, when defendant's wife remarked that the police got everything that "we had," defendant told his wife to keep her mouth shut, were sufficient to sustain the inference that defendant constructively possessed the heroin that was found outside. *State v. Herrera*, 90 N.M. 306, 563 P.2d 100 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

A showing that heroin was found in the bathroom of the master bedroom usually occupied by defendant and his wife, that defendant was a former heroin addict who for the last three years had been undergoing methadone treatments and according to his own testimony took methadone daily and that the wife claimed to have never seen heroin and other items before and not to know what they were used for, constituted substantial evidence of defendant's constructive knowledge and possession of the heroin. *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct. App.), cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

Evidence was sufficient to find that defendant constructively possessed an eyeglass case left under patrol car seat by his wife, knowing it contained heroin, where it took defendant three blocks to stop his car for the police, various parts of the fix kit were found in the car trunk and in the eyeglass case, including a syringe with defendant's fingerprint, his wife's purse held squares of tinfoil and there were fresh needle marks on defendant's arm. *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

There was sufficient evidence to show constructive possession of controlled substance with knowledge thereof where defendant was in possession of a motel room for six days before a legal search of that room revealed heroin. *State v. Montoya*, 85 N.M. 126, 509 P.2d 893 (Ct. App. 1973).

"Ingestion" not possession. - The mere presence of drugs in the urine or bloodstream does not constitute possession. *State v. McCoy*, 116 N.M. 491, 864 P.2d 307 (Ct. App. 1993).

Evidence sufficient for conviction includes any clearly identifiable amount. *State v. Wood*, 117 N.M. 681, 875 P.2d 1113 (Ct. App. 1994).

Evidence of possession insufficient. - Evidence that one defendant was in bed asleep when the officers entered the trailer, that plastic baggie tops were found on top

of the commode in the bathroom off the bedroom where he was sleeping and that after his arrest defendant asked another man in the trailer to do him an unidentified favor was insufficient to sustain his conviction for possession of heroin flushed down a toilet by someone in the trailer. *State v. Anaya*, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976).

Where there was no evidence that female defendant had any control over the keys to the car in which she was riding or to the footlockers in its trunk, or that she had any knowledge whatsoever of the contents of the car trunk, it was held that the evidence relied upon to sustain her conviction was totally insubstantial. *State v. Bidegain*, 88 N.M. 384, 540 P.2d 864 (Ct. App.), rev'd in part on other grounds, 88 N.M. 466, 541 P.2d 971 (1975).

Where the only evidence concerning cocaine was that some was found in a vial in a box on the coffee table of the main room of defendants' house, and there was no testimony that any of the defendants knew of the contents of the vial or of its character, nor evidence that any of the defendants had the power to produce or dispose of the narcotic in question, nor any evidence that the defendants had any common purpose in the cocaine which was found, the trial court erred in finding that there was sufficient evidence to convict the defendants for possession of cocaine. *State v. Bowers*, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974), cert. denied, 88 N.M. 29, 536 P.2d 1085 (1975).

Ignorance of nature of substance. - Evidence that defendant, an Arapahoe Indian, after treatment for illness by an "Indian doctor," was given "medicine" to carry on his person as "protection," which medicine, unknown to defendant, was anhalonium (or peyote), could not support a conviction for possession of the substance. *State v. Pedro*, 83 N.M. 212, 490 P.2d 470 (Ct. App. 1971).

Knowledge not shown. - A degree of furtiveness on the part of juveniles in smoking and passing a pipe around between buildings while changing classes, in light of a school regulation prohibiting the smoking of tobacco, was not conduct sufficient to infer that the smokers knew the character of the substance they were using. *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Evidence not inherently improbable. - Testimony in prosecution for unlawful sale and possession of marijuana was not inherently improbable despite fact that defendant was claimed to have insisted on delivering the cigarettes in question in the restroom where only he and undercover officer were present, yet afterwards supposedly received the money for the transaction and discussed other possible dealings in a car in the presence of several other persons. *State v. Soliz*, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

Information and proof not variant. - Information charging defendant with unlawful possession of "certain narcotic drugs, to-wit, cannabis indica, also known as marijuana" was not at fatal variance with proof of possession of leaves and seeds of "marijuana," despite fact that there was no testimony identifying the substance by true botanical

name or referring to its chemical breakdown or grouping. State v. Romero, 74 N.M. 642, 397 P.2d 26 (1964).

Testimony of a single witness was sufficient evidence for a conviction of unlawful possession and sale of marijuana. State v. Soliz, 80 N.M. 297, 454 P.2d 779 (Ct. App. 1969).

Prejudicial hearsay. - Testimony by undercover officer that defendant's name had been called to his attention by local officers as a person allegedly dealing in marijuana was clearly hearsay and clearly prejudicial and necessitated reversal of her conviction for possession of marijuana. State v. Alberts, 80 N.M. 472, 457 P.2d 991 (Ct. App. 1969).

30-31-24. Controlled substances; violations of administrative provisions.

A. It is unlawful for any person:

(1) who is subject to Sections 30-31-11 through 30-31-19 NMSA 1978 to intentionally distribute or dispense a controlled substance in violation of Section 30-31-18 NMSA 1978;

(2) who is a registrant, to intentionally manufacture a controlled substance not authorized by his registration, or to intentionally distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person;

(3) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Controlled Substances Act; or

(4) to intentionally refuse an entry into any premises for any inspection authorized by the Controlled Substances Act.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-24, enacted by Laws 1972, ch. 84, § 24; 1974, ch. 9, § 5; 1980, ch. 23, § 5.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Title of act constitutionally adequate. - Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on the ground that "unlawful activities" are not mentioned in the title of the act. State v.

Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 14, 15, 27.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

28 C.J.S. Drugs and Narcotics Supplement §§ 84 to 90.

30-31-25. Controlled substances; prohibited acts.

A. It is unlawful for any person:

(1) who is a registrant to distribute a controlled substance classified in Schedules [Schedule] I or II, except pursuant to an order form as required by Section 30-31-17 NMSA 1978;

(2) to intentionally use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Controlled Substances Act, or any record required to be kept by that act; or

(5) to intentionally make, distribute or possess any punch, die, plate, stone or other thing designed to print, imprint or reproduce the trademark, trade name or other identifying mark, imprint or device of another or any likeness of any of the foregoing, upon any drug or container or labeling thereof so as to render the drug a counterfeit substance.

B. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1953 Comp., § 54-11-25, enacted by Laws 1972, ch. 84, § 25; 1974, ch. 9, § 6; 1979, ch. 122, § 1; 1980, ch. 23, § 6.

ANNOTATIONS

Cross-references. - As to forgery generally, see 30-16-10 NMSA 1978.

For meaning of "counterfeit substance," see 30-31-2 NMSA 1978.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Title of act constitutionally adequate. - Sections 30-31-20 to 30-31-25 NMSA 1978, which define unlawful activities and provide penalties therefor, are not unconstitutional on grounds that "unlawful activities" are not mentioned in the title of the act. *State v. Atencio*, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Subsection A(3) is not impermissibly vague. - Subsection A(3) provides a person with fair warning of the nature of the proscribed act, and it is therefore not impermissibly vague. *State v. Mirabal*, 108 N.M. 749, 779 P.2d 126 (Ct. App. 1989).

Section 30-28-1 does not apply to attempts covered by Subsection A(3). - The legislature intended to punish attempts under Subsection A(3) specifically as felonies and consequently, 30-28-1 NMSA 1978 does not apply to such attempts covered by Subsection A(3). *State v. Mirabal*, 108 N.M. 749, 779 P.2d 126 (Ct. App. 1989).

Application of Subsection A(3) to a physician does not violate due process guarantees because effecting delivery through a prescription not for a legitimate medical purpose is prohibited as distribution or trafficking. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Proof of possession. - In a prosecution for violation of Subsection A(3), constructive possession requires no more than knowledge of a narcotic and control over it; control, in turn, requires no more than the power to produce or dispose of the narcotic. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

In addition to proof of defendant's knowledge of the presence and character of the item possessed, the state must show the immediate right to exercise dominion and control over the narcotics to establish constructive possession. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

By circumstantial evidence. - Proof of possession of a controlled substance may be through circumstantial evidence. *State v. Carr*, 95 N.M. 755, 626 P.2d 292 (Ct. App.)

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons §§ 16 to 27.

Narcotics conviction as crime of moral turpitude justifying disbarment or other disciplinary action against attorney, 99 A.L.R.3d 288.

State law criminal liability of licensed physician for prescribing or dispensing drug or similar controlled substance, 13 A.L.R.5th 1.

28 C.J.S. Drugs and Narcotics Supplement §§ 100 to 109.

30-31-25.1. Possession, delivery, manufacture, or delivery to a minor of drug paraphernalia prohibited.

A. It is unlawful for any person to use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act.

B. It is unlawful for any person to deliver, possess with intent to deliver or manufacture with the intent to deliver drug paraphernalia with knowledge, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Controlled Substances Act.

C. Any person who violates this section with respect to:

(1) Subsection A of this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than one hundred dollars (\$100) or by imprisonment for a definite term less than one year, or both;

(2) Subsection B of this section is guilty of a misdemeanor.

D. Any person eighteen years of age or over who violates the provisions of Subsection B of this section by delivering drug paraphernalia to a person under eighteen years of age and who is at least three years his junior, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: 1978 Comp., § 30-31-25.1, enacted by Laws 1981, ch. 31, § 2.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Admissibility, in criminal prosecution, of expert opinion allegedly stating whether drugs were possessed with intent to distribute - state cases, 83 A.L.R.4th 629.

Validity, under Federal Constitution, of so-called "head shop" ordinances or statutes, prohibiting manufacture and sale of drug use related paraphernalia, 69 A.L.R. Fed. 15.

30-31-26. Penalties under other laws.

A. Any penalty imposed for violation of the Controlled Substances Act is in addition to any civil or administrative penalty or sanction otherwise provided by law.

B. A municipality may, by ordinance, prohibit distribution or possession of a controlled substance enumerated in Schedules I, II, III or IV but penalty provisions shall be the same as those provided for a similar crime in the Controlled Substances Act.

History: 1953 Comp., § 54-11-26, enacted by Laws 1972, ch. 84, § 26.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-27. Bar to prosecution.

If a violation of the Controlled Substances Act is a violation of a federal law, the law of another state or the ordinance of a municipality, a conviction or acquittal under federal law, the law of another state or the ordinance of a municipality for the same act is a bar to prosecution.

History: 1953 Comp., § 54-11-27, enacted by Laws 1972, ch. 84, § 27.

ANNOTATIONS

Cross-references. - For constitutional prohibition against double jeopardy, see N.M. Const., art. II, § 15.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Law reviews. - For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

30-31-28. Conditional discharge for possession as first offense.

A. If any person who has not previously been convicted of violating the laws of any state or any laws of the United States relating to narcotic drugs, marijuana, hallucinogenic or depressant or stimulant substances, is found guilty of a violation of Section 23 [30-31-23 NMSA 1978], after trial or upon a plea of guilty, the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place him on probation upon reasonable conditions and for a period, not to exceed one year, as the court may prescribe.

B. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against the person and discharge him from probation before the expiration of the maximum period prescribed from the person's probation.

C. If during the period of his probation the person does not violate any of the conditions of the probation, then upon expiration of the period the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt, but a nonpublic record shall be retained by the attorney general solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, the person qualifies under this section. A discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the penalties prescribed under this section for second or subsequent convictions or for any other purpose. Discharge and dismissal under this section may occur only once with respect to any person.

D. Upon the dismissal of a person and discharge of the proceedings against him under this section, a person, if he was not over eighteen years of age at the time of the offense, may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, trial, finding or plea of guilty, and dismissal and discharge pursuant to this section except nonpublic records filed with the attorney general. If the court determines, after hearing, that the person was dismissed and the proceedings against him discharged and that he was not over eighteen years of age at the time of the offense, it shall enter the order. The effect of the order shall be to restore the person, in the contemplation of the law, to the status he occupied before the arrest or indictment or information. No person in whose behalf an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

History: 1953 Comp., § 54-11-28, enacted by Laws 1972, ch. 84, § 28.

30-31-29. Probationary period.

Notwithstanding any other provision of law, the court may place on probation for a period not to exceed one year any person convicted of a violation of the Controlled Substances Act where the maximum length of the term of imprisonment is one year or less if:

- A. the judge does not impose a prison sentence; or
- B. the judge suspends all of any prison sentence which he imposes.

History: 1953 Comp., § 54-11-28.1, enacted by Laws 1975, ch. 80, § 1.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-30. Powers of enforcement personnel.

Any officer or employee designated by the board may:

- A. serve search warrants, arrest warrants and administrative inspection warrants;
- B. make arrests without warrant for any offense under the Controlled Substances Act committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Controlled Substances Act which may constitute a felony; or
- C. make seizures of property pursuant to the Controlled Substances Act.

History: 1953 Comp., § 54-11-29, enacted by Laws 1972, ch. 84, § 29.

ANNOTATIONS

Cross-references. - For constitutional guarantee against unreasonable searches and seizures, see N.M. Const., art. II, § 10.

As to issuance of arrest and search warrants, see Rules 5-208 and 5-211.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Warrantless arrests in public. - Statutory provisions regarding warrants must be considered in para materia with N.M. Const., art. II, § 10. Subsection B cannot establish conclusively that an arrest based on such authority comports with the constitutional protection afforded by N.M. Const., art. II, § 10. Warrantless arrests made under the authority of the statute may be presumed reasonable but that presumption may be rebutted under an interpretation of what is constitutional. *Campos v. State*, 117 N.M. 155, 870 P.2d 117 (1994).

Probable cause plus exigent circumstances. - Warrantless search of defendant's tractor and trailer was justified by probable cause arising from detailed information supplied by informant, along with exigent circumstances attendant in the case of moving vehicles. *State v. One 1967 Peterbilt Tractor*, 84 N.M. 652, 506 P.2d 1199 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Odor of narcotics as providing probable cause for warrantless search, 5 A.L.R.4th 681.

30-31-31. Administrative inspections and warrants.

Issuance and execution of administrative inspection warrants shall be as follows:

- A. a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative

inspections and seizures of property authorized by the Controlled Substances Act. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Controlled Substances Act sufficient to justify administrative inspection of the area, premises, building or conveyance in the circumstances specified in the application for the warrant;

B. a warrant shall issue only upon an affidavit of a designated officer or employee having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection, and, if appropriate, the type of property to be inspected, if any. The warrant shall:

(1) state the grounds for its issuance and the name of each person whose affidavit has been taken in its support;

(2) be directed to a person authorized by Section 29 [30-31-30 NMSA 1978] or a state police officer to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any; and

(5) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned;

C. a warrant issued pursuant to this section must be served and returned within five days of its date unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and the applicant for the warrant; and

D. the magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

History: 1953 Comp., § 54-11-30, enacted by Laws 1972, ch. 84, § 30.

ANNOTATIONS

Cross-references. - For constitutional guarantee against unreasonable searches and seizures, see N.M. Const., art. II, § 10.

As to issuance of search warrants generally, see Rule 5-211.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Probable cause. - Application for a warrant to search defendant's car, which as grounds for its issuance merely claimed that a packet of marijuana had been found in the trunk thereof, did not state probable cause and was constitutionally inadequate, as it gave no clue relating to the basis for the statement. *State v. Lewis*, 80 N.M. 274, 454 P.2d 360 (Ct. App. 1969), overruled on other grounds *State v. Nemrod*, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973).

Affidavit. - Former law providing for issuance of a search warrant upon affidavit by a legal voter of the state, for the purpose of searching for narcotic drugs, did not require a recital in the affidavit that the affiant was a legal voter. *State v. Chavez*, 77 N.M. 274, 421 P.2d 796 (1966), denial of motion for post-conviction relief aff'd, 79 N.M. 741, 449 P.2d 343 (Ct. App. 1968).

30-31-32. Administrative inspections.

The board may make administrative inspections of controlled premises in accordance with the following provisions:

A. for purposes of this section, "controlled premises" means:

(1) places where persons registered or exempted from registration requirements under the Controlled Substances Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons registered or exempted from registration requirements under the Controlled Substances Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any controlled substance;

B. when authorized by an administrative inspection warrant issued pursuant to Section 30 [30-31-31 NMSA 1978], an officer or employee designated by the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection;

C. when authorized by an administrative inspection warrant, an officer or employee designated by the board may:

(1) inspect and copy records required by the Controlled Substances Act to be kept;

(2) inspect, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection E, all other things bearing on violations of the Controlled Substances Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any controlled substance and obtain samples;

D. this section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required;

E. an inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

History: 1953 Comp., § 54-11-31, enacted by Laws 1972, ch. 84, § 31.

ANNOTATIONS

Cross-references. - For constitutional guarantee against unreasonable searches and seizures, see N.M. Const., art. II, § 10.

As to issuance of search warrants generally, see Rule 5-211.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-33. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Controlled Substances Act [30-31-1 to 30-31-40 NMSA 1978].

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

History: 1953 Comp., § 54-11-32, enacted by Laws 1972, ch. 84, § 32.

ANNOTATIONS

Cross-references. - For statutory provisions regarding contempt, see 34-1-2 to 34-1-5 NMSA 1978.

As to issuance of injunctions generally, see Rules 1-065 and 1-066.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-34. Forfeitures; property subject.

The following are subject to forfeiture:

A. all controlled substances and all controlled substance analogs which have been manufactured, distributed, dispensed or acquired in violation of the Controlled Substances Act;

B. all raw materials, products and equipment of any kind including firearms which are used or intended for use in manufacturing, compounding, processing, delivering, importing or exporting any controlled substance or controlled substance analog in violation of the Controlled Substances Act;

C. all property which is used or intended for use as a container for property described in Subsection A or B of this section;

D. all conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation for the purpose of sale of property described in Subsection A or B of this section;

E. all books, records and research products and materials, including formulas, microfilm, tapes and data, which are used or intended for use in violation of the Controlled Substances Act;

F. narcotics paraphernalia or money which is a fruit or instrumentality of the crime;

G. notwithstanding Subsection D of this section:

(1) no conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the Controlled Substances Act;

(2) no conveyance is subject to forfeiture under this section by reason of any act or omission established for the owner to have been committed or omitted without his knowledge or consent;

(3) a conveyance is not subject to forfeiture for a violation of law the penalty for which is a misdemeanor; and

(4) a forfeiture of a conveyance encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party neither had knowledge of nor consented to the act or omission; and

H. all drug paraphernalia as defined by Subsection W[V] of Section 30-31-2 NMSA 1978.

History: 1953 Comp., § 54-11-33, enacted by Laws 1972, ch. 84, § 33; 1975, ch. 231, § 1; 1981, ch. 31, § 3; 1987, ch. 68, § 6; 1989, ch. 196, § 1.

ANNOTATIONS

Bracketed material. - The bracketed reference to Subsection V in Subsection H was inserted by the compiler to reflect the redesignation of Subsections by the 1989 amendment to 30-31-2 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

The 1989 amendment, effective July 1, 1989, inserted "including firearms" in Subsection B.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Forfeiture not unconstitutional taking. - Forfeiture under former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) of tractor and trailer used in transportation of amphetamines did not constitute the taking of property without just compensation. *State v. One 1967 Peterbilt Tractor*, 84 N.M. 652, 506 P.2d 1199 (1973).

Nor excessive fine. - Disproportionate ratio between the value of a tractor and trailer which had been carrying amphetamines and the amount of fine imposed for the crime of possession did not render the forfeiture statute unconstitutional as an excessive fine. *State v. One 1967 Peterbilt Tractor*, 84 N.M. 652, 506 P.2d 1199 (1973).

Provisions penal in nature. - The forfeiture provisions of the Controlled Substances Act are penal in nature. *State v. Ozarek*, 91 N.M. 275, 573 P.2d 209 (1977).

And to be strictly construed. - Forfeitures are not favored at law, and statutes are to be construed strictly against forfeiture. *State v. Ozarek*, 91 N.M. 275, 573 P.2d 209 (1977).

Forfeiture of pickup truck is civil proceeding. - The forfeiture of a pickup truck under this section, although quasi-criminal and gauged by standards applicable to a criminal proceeding, is a civil proceeding. *State v. Barela*, 93 N.M. 700, 604 P.2d 838 (Ct. App. 1979).

Possession must be for sale. - In order for property to be forfeited under this section, possession of a controlled substance must be for the purpose of sale. *State ex rel. Dep't*

of Public Safety v. One 1990 Chevrolet Pickup, 115 N.M. 644, 857 P.2d 44 (Ct. App.), cert. denied, 115 N.M. 602, 856 P.2d 250 (1993).

Transportation need not be for purpose of sale. - A vehicle is subject to forfeiture under Subsection D if used to transport an illegal substance, and the transportation need not be for the purpose of sale. State v. Stevens, 100 N.M. 577, 673 P.2d 1310 (1983).

Nature of burden on owner. - The burden imposed on the owner is the burden of going forward and not the burden of persuasion. State v. Ozarek, 91 N.M. 275, 573 P.2d 209 (1977).

The owner need only assert that the vehicle was used without his knowledge and consent to shift the burden to the state. State v. Ozarek, 91 N.M. 275, 573 P.2d 209 (1977).

Interest of innocent co-owner exempt. - An innocent co-owner's interest in a truck seized due to illegal use by the guilty co-owner is exempt from forfeiture. In re Forfeiture of One 1970 Ford Pickup, 113 N.M. 97, 823 P.2d 339 (Ct. App. 1991).

Misdemeanor offenses excluded. - Subsections D and G(3) should be construed together as providing for forfeiture in those trafficking and distribution cases where the crime involved constitutes a felony, and the purpose of Subsection G(3) is to exclude misdemeanor drug trafficking offenses. State ex rel. Dep't of Public Safety v. One 1990 Chevrolet Pickup, 115 N.M. 644, 857 P.2d 44 (Ct. App.), cert. denied, 115 N.M. 602, 856 P.2d 250 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Forfeiture of money to state or local authorities based on its association with or proximity to other contraband, 38 A.L.R.4th 496.

Necessity of conviction of offense associated with property seized in order to support forfeiture of property to state or local authorities, 38 A.L.R.4th 515.

Forfeiture of property held in marital estate under uniform controlled substances act or similar statute, 84 A.L.R.4th 620.

Real property as subject of forfeiture under uniform controlled substances act or similar statutes, 86 A.L.R.4th 995.

Timeliness of institution of proceedings for forfeiture under Uniform Controlled Substances Act or similar statute, 90 A.L.R.4th 493.

Forfeiture of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Forfeiture of homestead based on criminal activity conducted on premises - state cases, 16 A.L.R.5th 855.

Forfeiture of personal property used in illegal manufacture, processing, or sale of controlled substances under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881), 59 A.L.R. Fed. 765, 109 A.L.R. Fed. 322.

Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189.

Seizure or forfeiture of real property used in illegal possession, manufacture, processing, purchase, or sale of controlled substances under § 511(a)(7) of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881(a)(7)), 104 A.L.R. Fed. 288.

Who is exempt from forfeiture of drug proceeds under "innocent owner" provision of 21 USCS § 881(a)(6), 109 A.L.R. Fed. 322.

30-31-35. Forfeiture; procedure.

A. Property subject to forfeiture and disposal under the Controlled Substances Act may be seized by any enforcement officer upon an order issued by the district court having jurisdiction.

B. Seizure without such an order may be made if:

(1) the seizure is incident to an arrest or search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in an injunction or forfeiture proceeding based upon the Controlled Substances Act;

(3) the enforcement officer has probable cause to believe that the property, which is a controlled substance, is directly or indirectly dangerous to health or safety; or

(4) the enforcement officer has probable cause to believe that the property was used or is intended to be used in violation of the Controlled Substances Act.

C. In the event of seizure pursuant to Subsection A or Subsection B of this section, proceedings under Subsection D of this section and the Rules of Civil Procedure for the District Courts of New Mexico shall be instituted promptly and not later than thirty days after seizure.

D. Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement agency seizing it subject only to the

orders and decrees of the district court. When property is seized under the Controlled Substances Act, the enforcement officer may:

- (1) place the property under seal;
- (2) remove the property to a place designated by the enforcement officer; or
- (3) require the law enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

E. When property is forfeited under the Controlled Substances Act, the law enforcement agency seizing it shall:

- (1) sell that which is not required to be destroyed by law. The proceeds shall revert to the general fund of the state, county or municipality as the case may be;
- (2) take custody of the property for use by law enforcement agencies in the enforcement of the Controlled Substances Act or remove it for disposition in accordance with law; provided that where a motor vehicle has been seized by a municipal police department or a county sheriff's department with [within] its respective jurisdictional boundaries, such department shall institute forfeiture proceedings; or
- (3) in case of property seized by the state police, forward property, the proceeds from the sale of which are not required to revert to the general fund, to the state police, bureau of narcotics for disposition; provided that motor vehicles seized by the state police may be loaned to the governor's organized crime prevention commission for use in undercover work, the entire cost of operating such vehicles to be borne by the governor's organized crime prevention commission.

History: 1953 Comp., § 54-11-34, enacted by Laws 1972, ch. 84, § 34; 1973, ch. 211, § 1; 1975, ch. 231, § 2; 1977, ch. 139, § 1; 1980, ch. 7, § 1; 1981, ch. 66, § 1.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Forfeiture cases are purely in rem proceedings. In re Forfeiture of One 1980 Honda Accord, 108 N.M. 274, 771 P.2d 982 (Ct. App. 1988).

Jurisdiction. - In forfeiture cases, execution on the judgment resulting in the removal of the res from the control of the district court deprives the court of its in rem jurisdiction. An exception to this rule occurs when the res is released accidentally, fraudulently or improperly. In re Forfeiture of One 1980 Honda Accord, 108 N.M. 274, 771 P.2d 982 (Ct. App. 1988).

County, by executing on a district court's judgment of forfeiture of an automobile and transferring the title of the vehicle, removed the res from the court's control and ended the court's constructive possession of the vehicle. *In re Forfeiture of One 1980 Honda Accord*, 108 N.M. 274, 771 P.2d 982 (Ct. App. 1988).

When a state entity initiates a forfeiture proceeding, thereby invoking the jurisdiction of the courts of New Mexico, those courts retain in personam jurisdiction until all appeals have been exhausted. *Mitchell v. City of Farmington Police Dep't*, 111 N.M. 746, 809 P.2d 1274 (1991).

Due process notice requirements. - The forfeiture provisions of the Controlled Substances Act are penal in nature and consequently no pre-seizure notice or hearing is constitutionally required, the provision for a hearing within 30 days of seizure being sufficient to satisfy due process standards. *In re One Cessna Aircraft*, 90 N.M. 40, 559 P.2d 417 (1977).

Hearing required to meet due process. - The failure of a city ordinance to provide for a hearing for people who lose alleged drug paraphernalia violates the due process guarantee of the constitution. Providing a hearing within 30 days satisfies the due process requirement. *Weiler v. Carpenter*, 695 F.2d 1348 (10th Cir. 1982).

The term "law enforcement agency" used in this section may include a district attorney's office. 1989 Op. Att'y Gen. No. 89-32.

The inability to post a supersedeas bond may not operate to deny the right to a stay of a forfeiture judgment. *Mitchell v. City of Farmington Police Dep't*, 111 N.M. 746, 809 P.2d 1274 (1991).

Criminal standards applicable. - Proceeding under former Narcotic Drug Act (54-7-1, 1953 Comp. et seq.) to declare the forfeiture of a tractor and trailer found to contain a large quantity of amphetamines, notwithstanding such was not a criminal proceeding, was properly gauged by the same standards applicable in a criminal proceeding. *State v. One 1967 Peterbilt Tractor*, 84 N.M. 652, 506 P.2d 1199 (1973).

Illegal evidence inadmissible. - If the evidence supporting a forfeiture was obtained by an unconstitutional search and seizure, that evidence would be inadmissible and would necessitate reversal of the judgment of forfeiture. *State v. One 1967 Peterbilt Tractor*, 84 N.M. 652, 506 P.2d 1199 (1973).

Disposition of forfeited properties. - Moneys or other properties do not have to revert to the general fund under this provision provided the moneys or other properties are used by law enforcement agencies in the enforcement of the Controlled Substances Act. 1977 Op. Att'y Gen. No. 77-14.

The state police bureau of narcotics may receive the proceeds of forfeitures of property seized before November 25, 1986, even though not disposed of by order of the district court prior to that date. 1987 Op. Att'y Gen. No. 87-20.

Subsection E(1) requires that the proceeds of vehicles sold by a law enforcement agency must revert to the applicable general fund. 1989 Op. Att'y Gen. No. 89-32.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Drugs, Narcotics and Poisons § 27.

Validity and construction of provisions of Uniform Controlled Substances Act providing for forfeiture hearing before law enforcement officer, 84 A.L.R.4th 637.

Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317.

Forfeiture of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 A.L.R.5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 A.L.R.5th 375.

Delay in setting hearing date or in holding hearing as affecting forfeitability under Uniform Controlled Substances Act or similar statute, 6 A.L.R.5th 711.

Forfeiture of personal property used in illegal manufacture, processing, or sale of controlled substances under § 511 of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 881), 59 A.L.R. Fed. 765, 109 A.L.R. Fed. 322.

Delay between seizure of personal property by federal government and institution of proceedings for forfeiture thereof as violative of fifth amendment due process requirements, 69 A.L.R. Fed. 373.

28 C.J.S. Drugs and Narcotics Supplement §§ 5, 139 to 148.

30-31-36. Summary forfeiture.

A. Controlled substances listed in Schedule I or controlled substance analogs of substances listed in Schedule I that are possessed, transferred, sold or offered for sale in violation of the Controlled Substances Act are contraband and shall be seized and summarily forfeited to the state.

B. Controlled substances listed in Schedule I or controlled substance analogs of substances listed in Schedule I which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

C. Species of plants from which controlled substances in Schedules I and II or controlled substance analogs of substances listed in Schedules I and II may be derived which have been planted or cultivated in violation of the Controlled Substances Act, or of which the owners or cultivators are unknown or which are wild growths, may be seized and summarily forfeited to the state.

History: 1953 Comp., § 54-11-35, enacted by Laws 1972, ch. 84, § 35; 1987, ch. 68, § 7.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Effect of forfeiture proceedings under Uniform Controlled Substances Act or similar statute on lien against property subject to forfeiture, 1 A.L.R.5th 317.

Forfeiture of property, under Uniform Controlled Substances Act or similar statute, where property or evidence supporting forfeiture was illegally seized, 1 A.L.R.5th 346.

Application of forfeiture provisions of Uniform Controlled Substances Act or similar statute where drugs were possessed for personal use, 1 A.L.R.5th 375.

Forfeiture of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Delay between seizure of personal property by federal government and institution of proceedings for forfeiture thereof as violative of fifth amendment due process requirements, 69 A.L.R. Fed. 373.

30-31-37. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Controlled Substances Act in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Controlled Substances Act. The burden of proof of any exemption or exception is upon the person claiming it.

History: 1953 Comp., § 54-11-36, enacted by Laws 1972, ch. 84, § 36.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

State not required to disprove excuses or exemptions. - The state's burden of proving guilt beyond a reasonable doubt does not entail the burden of disproving all excuses, provisos, exceptions and exemptions which might possibly relieve a defendant

of criminal liability for the offense with which he is charged. State v. Everidge, 77 N.M. 505, 424 P.2d 787 (1967).

Burden on defendant to negative narcotic character of substance. - The burden of proof is on the defendant, not the state, to prove that the substance identified as heroin was not a narcotic drug as an exemption or exception. State v. Atencio, 85 N.M. 484, 513 P.2d 1266 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Drugs and Narcotics Supplement §§ 144 to 148.

30-31-38. Cooperative duties of board.

A. The board shall cooperate with federal and other state agencies in discharging its responsibilities concerning traffic in controlled substances and in suppressing the abuse of controlled substances. To this end it may:

(1) arrange for the exchange of information among governmental officials concerning the use and abuse of controlled substances;

(2) cooperate in training programs concerning controlled substances law enforcement at local and state levels; and

(3) cooperate with the bureau by establishing a centralized unit to accept, catalogue, file and collect statistics and make the information available for federal, state and local law enforcement purposes. It shall not furnish the name or identity of a patient or research subject whose identity could not be obtained under Section 39 [30-31-40 NMSA 1978].

B. Results, information and evidence received from the bureau relating to the regulatory functions of the Controlled Substances Act, including results of inspections conducted by it, may be relied and acted upon by the board in the exercise of its regulatory functions under the Controlled Substances Act.

History: 1953 Comp., § 54-11-37, enacted by Laws 1972, ch. 84, § 37.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-39. Education.

The board shall provide for educational programs designed to prevent and deter misuse and abuse of controlled substances. In connection with these programs it may:

A. promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry;

B. assist the regulated industry in contributing to the reduction of misuse and abuse of controlled substances; and

C. assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances.

History: 1953 Comp., § 54-11-38, enacted by Laws 1972, ch. 84, § 38.

30-31-40. Research; confidentiality.

A. The board shall encourage research on misuse and abuse of controlled substances. In connection with the research, and in furtherance of the enforcement of the Controlled Substances Act, it may register public agencies, institutions of higher education and private organizations or individuals for the purpose of conducting research, demonstrations or special projects which bear directly on misuse and abuse of controlled substances.

B. The board may authorize persons engaged in research on the use and effects of controlled substances to withhold the names and other identifying characteristics of individuals who are subjects of the research. Persons who obtain this authorization are not compelled in any civil, criminal, administrative, legislative or other proceeding to identify the individuals who are the subjects of research for which the authorization was obtained.

C. The board may authorize the possession and distribution of controlled substances by persons engaged in research. Such authorization shall contain the conditions and terms of the research to be conducted. Persons who obtain this authorization are exempt from state prosecution for possession and distribution of controlled substances to the extent of the authorization.

D. A practitioner engaged in medical practice or research shall not be required to furnish the name or identity of a patient or research subject to the board, nor may he be compelled in any state or local civil, criminal, administrative, legislative or other proceedings to furnish the name or identity of an individual that the practitioner is obligated to keep confidential.

History: 1953 Comp., § 54-11-39, enacted by Laws 1972, ch. 84, § 39.

ANNOTATIONS

Cross-references. - As to confidentiality, in general, of health information involving specific individuals, and exceptions thereto, see 14-6-1 NMSA 1978.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31-41. Anabolic steroids; possession; distribution; penalties; notice.

A. Except as authorized by the New Mexico Drug[, Device] and Cosmetic Act, it is unlawful for any person to intentionally possess anabolic steroids. Any person who violates this subsection is guilty of a misdemeanor.

B. Except as authorized by the New Mexico Drug[, Device] and Cosmetic Act, it is unlawful for any person to intentionally distribute or possess with intent to distribute anabolic steroids. Any person who violates this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Except as authorized by the New Mexico Drug[, Device] and Cosmetic Act, it is unlawful for any person eighteen years of age or older to intentionally distribute anabolic steroids to a person under eighteen years of age. Any person who violates this subsection is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. A copy of this act shall be distributed to each licensed athletic trainer by the athletic trainers advisory board and displayed prominently in the athletic locker rooms of all state post-secondary and public schools.

History: Laws 1987, ch. 271, § 1.

ANNOTATIONS

Cross-references. - As to definition of "dangerous drug" for purposes of the New Mexico Drug, Device and Cosmetic Act, see 26-1-2F NMSA 1978.

New Mexico Drug and Cosmetic Act. - Laws 1987, ch. 270, § 1 amends 26-1-1 NMSA 1978, formerly the short title of the New Mexico Drug and Cosmetic Act, to read, "Chapter 26, Article 1 NMSA 1978 may be cited as the 'New Mexico Drug, Device and Cosmetic Act.' "

Meaning of this act. - The term "this act", referred to in Subsection D, means Laws 1987, Chapter 271, which appears as this section only.

ARTICLE 31A IMITATION CONTROLLED SUBSTANCES

30-31A-1. Short title.

This act [30-31A-1 to 30-31A-15 NMSA 1978] may be cited as the "Imitation Controlled Substances Act."

History: Laws 1983, ch. 148, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Federal criminal liability of narcotics conspirator for different substantive crime of other conspirator, 77 A.L.R. Fed. 661.

30-31A-2. Definitions.

As used in the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978]:

A. "board" means the board of pharmacy;

B. "controlled substance" means a substance as defined in Subsection E of Section 30-31-2 NMSA 1978;

C. "distribute" means the sale or possession with the intent to sell of an imitation controlled substance;

D. "imitation controlled substance" means a substance that is not a controlled substance which by dosage unit appearance, including color, shape, size and markings and by representations made would lead a reasonable person to believe that the substance is a controlled substance. The fact finder may consider:

(1) statements made by an owner or by anyone else in control of the substance concerning the nature of the substance or its use or effect;

(2) statements made to the recipient that the substance may be resold for inordinate profit;

(3) whether the substance is packaged in a manner normally used for illicit controlled substances;

(4) evasive tactics or actions utilized by the owner or person in control of the substance to avoid detection by law enforcement authorities;

(5) prior convictions, if any, of the owner or anyone in control of the object, under state or federal law related to controlled substances or fraud; and

(6) whether the physical appearance of the substance is substantially identical to a controlled substance; and

E. "manufacture" means the production, preparation, compounding, processing, encapsulating, packaging or repackaging or labeling or relabeling as an imitation controlled substance.

History: Laws 1983, ch. 148, § 2.

30-31A-3. Duty to administer.

The board shall administer the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978].

History: Laws 1983, ch. 148, § 3.

30-31A-4. Manufacture, distribution [or possession] of imitation controlled substance.

It is unlawful for any person to manufacture, distribute or possess with intent to distribute an imitation controlled substance. Any person who violates the provisions of this section is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1983, ch. 148, § 4.

ANNOTATIONS

Act not unconstitutionally vague or overbroad. - The language of this act clearly prohibits the manufacture, distribution, or possession with the intent to distribute a substance that looks like and is represented as being a controlled substance but is not, evincing a legislative intent to require general criminal intent while restricting from its reach those actions ordinarily deemed to be constitutionally protected. *State v. Castleman*, 116 N.M. 467, 863 P.2d 1088 (Ct. App. 1993).

Jury instruction on "transfer" proper. - Trial court did not err in employing the term "transfer" in charging the jury in a prosecution for violating this section, since it is not much broader than the term "sell". *State v. Castleman*, 116 N.M. 467, 863 P.2d 1088 (Ct. App. 1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

30-31A-5. Sale to a minor.

No person who is eighteen years of age or older shall intentionally sell an imitation controlled substance to a person under the age of eighteen years. Any person who violates this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1983, ch. 148, § 5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

30-31A-6. Possession with intent to distribute an imitation controlled substance.

It is unlawful for any person intentionally to possess an imitation controlled substance with the intent to distribute. Any person who violates this section is guilty of a fourth degree felony.

History: Laws 1983, ch. 148, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and effect of state statute regulating sale of counterfeit or imitation controlled substances, 84 A.L.R.4th 936.

30-31A-7. Advertisement.

It is unlawful for any person to place in any newspaper, magazine, handbill or other publication, or to post or distribute in any place visible to the general public, any advertisement or solicitation with reasonable knowledge that the purpose of the advertisement or solicitation is to promote the distribution of imitation controlled substances. Any person who violates this section is guilty of a misdemeanor.

History: Laws 1983, ch. 148, § 7.

30-31A-8. Defenses.

In any prosecution for unlawful delivery of an imitation controlled substance, it is no defense that the defendant believed the imitation controlled substance to be a controlled substance.

History: Laws 1983, ch. 148, § 8.

30-31A-9. Forfeitures; property subject.

The following are subject to forfeiture:

A. all imitation controlled substances which have been manufactured, distributed, dispensed or acquired in violation of the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978];

B. all raw materials, products and equipment of any kind which are used in manufacturing, compounding or processing of any imitation controlled substance in violation of the Imitation Controlled Substances Act;

C. all property which is used or intended for use as a container for property described in Subsection A or B of this section; and

D. all books, records and research products and materials, including formulas, microfilm, tapes and data which are used or intended for use in violation of the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of criminal forfeiture provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 USCS § 853), 88 A.L.R. Fed. 189.

30-31A-10. Forfeiture; procedure.

A. Property subject to forfeiture and disposal under the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978] may be seized by any law enforcement officer upon an order issued by the district court having jurisdiction.

B. Seizure without such an order may be made if:

(1) the seizure is incident to an arrest or search under a search warrant; or

(2) the property subject to seizure has been the subject of a prior judgment in favor of the state in an injunction or forfeiture proceeding based upon the Imitation Controlled Substances Act.

C. In the event of seizure pursuant to Subsection A or B of this section, proceedings under Subsection D of this section and the Rules of Civil Procedure for the District Courts of New Mexico shall be instituted promptly and not later than thirty days after seizure.

D. Property taken or detained under this section shall not be subject to replevin but is deemed to be in the custody of the law enforcement agency seizing it subject only to the orders and decrees of the district court. When property is seized under the Imitation Controlled Substances Act, the enforcement officer may:

- (1) place the property under seal;
- (2) remove the property to a place designated by the enforcement officer; or
- (3) require the law enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

E. When property is forfeited under the Imitation Controlled Substances Act, the law enforcement agency seizing it shall take custody of the property for use by law enforcement agencies in the enforcement of the Imitation Controlled Substances Act and the Controlled Substances Act and remove it for disposition in accordance with law.

History: Laws 1983, ch. 148, § 10.

ANNOTATIONS

Cross-references. - For Rules of Civil Procedure for the District Courts, see Judicial Pamphlet 1.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Forfeitability of property under Uniform Controlled Substances Act or similar statute where amount of controlled substance seized is small, 6 A.L.R.5th 652.

Delay in setting hearing date or in holding hearing as affecting forfeitability under Uniform Controlled Substances Act or similar statute, 6 A.L.R.5th 711.

30-31A-11. Summary forfeiture.

Imitation controlled substances that are possessed, transferred, sold or offered for sale in violation of the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978] are contraband and shall be seized and summarily forfeited to the state.

History: Laws 1983, ch. 148, § 11.

30-31A-12. Powers of enforcement personnel.

Any officer or employee designated by the board or other law enforcement officer may:

- A. serve search warrants, arrest warrants and administrative inspection warrants;
- B. make arrests without warrant for any offense under the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978] committed in his presence or if he has probable cause to believe that the person to be arrested has committed or is

committing a violation of the Imitation Controlled Substances Act which may constitute a felony; or

C. make seizures of property pursuant to the Imitation Controlled Substances Act.

History: Laws 1983, ch. 148, § 12.

30-31A-13. Administrative inspections and warrants.

Magistrate or metropolitan courts may issue administrative inspection warrants upon a showing of probable cause.

History: Laws 1983, ch. 148, § 13.

30-31A-14. Injunctions.

The district courts may exercise jurisdiction to restrain or enjoin violations of the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978].

History: Laws 1983, ch. 148, § 14.

30-31A-15. Immunity.

No civil or criminal liability shall be imposed by virtue of the Imitation Controlled Substances Act [30-31A-1 to 30-31A-15 NMSA 1978] on any person registered under the Controlled Substances Act who manufactures, distributes or possesses an imitation controlled substance for use as a placebo by a registered practitioner in the course of professional practice or research.

History: Laws 1983, ch. 148, § 15.

ANNOTATIONS

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

ARTICLE 31B DRUG PRECURSORS

30-31B-1. Short title.

Sections 1 through 18 [30-31B-1 to 30-31B-18 NMSA 1978] of this act may be cited as the "Drug Precursor Act".

History: Laws 1989, ch. 177, § 1.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-2. Definitions.

As used in the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978]:

A. "administer" means the direct application of a controlled substance by any means to the body of a patient or research subject by a practitioner or his agent;

B. "agent" includes an authorized person who acts on behalf of a manufacturer, distributor or dispenser. "Agent" does not include a common or contract carrier, public warehouseman or employee of the carrier or warehouseman;

C. "board" means the board of pharmacy;

D. "bureau" means the bureau of narcotics and dangerous drugs of the United States department of justice, or its successor agency;

E. "controlled substance" means a drug or substance listed in Schedules I through V of the Controlled Substances Act or regulations adopted thereto;

F. "controlled substance analog" means a substance other than a controlled substance that has a chemical structure substantially similar to that of a controlled substance in Schedule I, II, III, IV or V or which was specifically designed to produce effects substantially similar to that of controlled substances in Schedule I, II, III, IV or V. Examples of chemical classes in which controlled substance analogs are found include, but are not limited to, the following:

(1) phenethylamines;

(2) N-substituted piperidines;

(3) morphinans;

(4) ecogonines;

(5) quinazolinones;

(6) substituted indoles; and

(7) arylcycloalkylamines.

Specifically excluded from the definition of "controlled substance analog" are those substances which are generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

G. "deliver" means the actual, constructive or attempted transfer from one person to another of a controlled substance or controlled substance analog, whether or not there is an agency relationship;

H. "dispense" means to deliver a controlled substance to an ultimate user or research subject pursuant to the lawful order of a practitioner, including the administering, prescribing, packaging, labeling or compounding necessary to prepare the controlled substance for that delivery;

I. "dispenser" means a practitioner who dispenses and includes hospitals, pharmacies and clinics where controlled substances are dispensed;

J. "distribute" means to deliver other than by administering or dispensing a controlled substance or controlled substance analog;

K. "drug" means substances recognized as drugs in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, official national formulary or any respective supplement to these publications. "Drug" does not include devices or their components, parts or accessories;

L. "drug precursor" means any substance, material, compound, mixture or preparation listed in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act or regulations adopted thereto or any of their salts or isomers. "Drug precursor" specifically excludes those substances, materials, compounds, mixtures or preparations which are prepared for dispensing pursuant to a prescription or over-the-counter distribution as a substance which is generally recognized as safe and effective within the meaning of the Federal Food, Drug and Cosmetic Act or have been manufactured, distributed or possessed in conformance with the provisions of an approved new drug application or an exemption for investigational use within the meaning of Section 505 of the Federal Food, Drug and Cosmetic Act;

M. "immediate precursor" means a substance which is a compound commonly used or produced primarily as an immediate chemical intermediary used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail or limit the manufacture of controlled substances;

N. "license" means a license issued by the board to manufacture, possess, transfer or transport a drug precursor;

O. "manufacture" means the production, preparation, compounding, conversion or processing of a drug precursor by extraction from substances of natural origin, independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance by a practitioner:

(1) as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(2) by his agent under his supervision, for the purpose of or as an incident to research, teaching or chemical analysis and not for sale;

P. "person" includes an individual, sole proprietorship, partnership, corporation, association, the state or any political subdivision of the state or other legal entity;

Q. "possession" means to actively or constructively exercise dominion over;

R. "practitioner" means a physician, dentist, veterinarian or other person licensed to prescribe and administer drugs which are subject to the Controlled Substances Act;

S. "prescription" means an order given individually for the person for whom is prescribed a controlled substance, either directly from the prescriber to the pharmacist or indirectly by means of a written order signed by the prescriber and in accordance with the Controlled Substances Act or regulations adopted thereto; and

T. "transfer" means the sale, possession with intent to sell, barter or giving away of a controlled substance.

History: Laws 1989, ch. 177, § 2.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

Federal Food, Drug and Cosmetic Act. - The Federal Food, Drug and Cosmetic Act, referred to in Subsections F and L, appears as 21 U.S.C. § 301 et seq. Section 505 of that act, also referred to in Subsections F and L, appears as 21 U.S.C. § 355.

30-31B-3. Drug precursors list.

Any substance, material, compound, mixture or preparation of the following substances or any of their salts or isomers are subject to regulation by the board and to the requirements of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978]:

- A. 1-phenylcyclohexylamine;
- B. 1-piperidinocyclohexanecarbonitrile;
- C. ephedrine;
- D. psuedoephedrine;
- E. methylamine;
- F. methylformamide;
- G. phenylacetic acid; and
- H. phenylacetone.

History: Laws 1989, ch. 177, § 3.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-4. Duty to administer.

The board shall administer the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] and by regulation may add substances to the list of drug precursors enumerated in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act. The board shall promulgate regulations pursuant to the procedures of the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978].

A. In determining whether a substance, material, compound, mixture or preparation should be added to the list of drug precursors, the board shall consider:

(1) whether the substance, material, compound, mixture or preparation is an immediate precursor of a substance already controlled under the Controlled Substances Act;

(2) the relative ease by which use of the substance, material, compound, mixture or preparation can facilitate the manufacture of a controlled substance;

(3) legitimate uses which would be unduly hampered by listing the substance, material, compound, mixture or preparation as a drug precursor; and

(4) any other factors relevant to and consistent with the public health and safety.

B. After considering the factors enumerated in Subsection A of this section, the board shall make findings and issue regulations listing the substance, material, compound, mixture or preparation as a drug precursor if it finds that the substance, material, compound, mixture or preparation has a significant potential for use in the manufacture of controlled substances.

C. If the board designates a substance, material, compound, mixture or preparation as a drug precursor, then substances, materials, compounds, mixtures or preparations which are precursors of the drug precursor so designated shall not be subject to control solely because they are precursors of a drug precursor.

D. If any substance, material, compound, mixture or preparation is designated as controlled under federal law and notice is given to the board, the board may, by regulation, similarly control the substance under the Drug Precursor Act after providing for a hearing pursuant to the Uniform Licensing Act.

E. Authority to control under this section does not extend to distilled spirits, wine, malt beverages, tobacco or pesticides as defined in the Pesticide Control Act [76-4-1 to 76-4-39 NMSA 1978].

History: Laws 1989, ch. 177, § 4.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31B-5. Nomenclature.

The drug precursors listed in Section 3 [30-31B-3 NMSA 1978] of the Drug Precursor Act are included by whatever official, common, usual, chemical or trade name designated.

History: Laws 1989, ch. 177, § 5.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-6. Regulations.

The board may promulgate regulations and charge reasonable fees relating to the licensing and control of the manufacture, possession, transfer and transportation of drug precursors, which fees shall not be less than two hundred fifty dollars (\$250) per license.

A. Every person who manufactures, possesses, transfers or transports any drug precursor or who proposes to engage in the manufacture, possession, transfer or transportation of any drug precursor must obtain, annually, a license issued by the board.

B. Persons licensed by the board to manufacture, possess, transfer or transport drug precursors may manufacture, possess, transfer or transport those substances to the extent authorized by their license and in conformity with the other provisions of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978].

C. The following persons need not be licensed under the Drug Precursor Act and may lawfully possess drug precursors:

(1) physicians;

(2) an agent of any licensed manufacturer of any drug precursor if he is acting in the usual course of his principal's business or employment;

(3) an employee of a licensed common or contract carrier or licensed warehouseman whose possession of any drug precursor is in the usual course of the licensed common or contract carrier or licensed warehouseman's business; or

(4) a student enrolled in a college chemistry class for credit; provided, however, that the student's use of the drug precursor is for a bona fide educational purpose and that the chemistry department of the educational institution otherwise possesses all the necessary licenses required by the board.

D. The board may waive by regulation the requirement for licensing of certain manufacturers if it is consistent with the public health and safety.

E. The board may inspect the establishment of a licensee or applicant for license in accordance with the board's regulations.

History: Laws 1989, ch. 177, § 6.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-7. Licenses.

A. The board shall license an applicant to manufacture, possess, transfer or transport drug precursors unless it determines that the issuance of that license would be inconsistent with the public interest. In determining the public interest, the board shall consider the following factors:

(1) maintenance of effective controls against diversion of drug precursors into other than legitimate medical, scientific or industrial channels;

(2) compliance with applicable state and local law;

(3) any conviction of the applicant under federal or state laws relating to any controlled substance or drug precursor;

(4) past experience in the manufacture, possession, transfer or transportation of drug precursors and the existence in the applicant's establishment of effective controls against diversion;

(5) furnishing by the applicant of false or fraudulent material in any application filed under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] or the Controlled Substances Act;

(6) suspension or revocation of the applicant's federal registration to manufacture, distribute or dispense controlled substances or drug precursors as authorized by federal law; and

(7) any other factors relevant to and consistent with the public health and safety.

B. Licensing under this section does not entitle a licensee to manufacture, possess, transfer or transport drug precursors other than those allowed in the license.

History: Laws 1989, ch. 177, § 7.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. - See 30-31B-1 NMSA 1978 and notes thereto.

30-31B-8. Revocation and suspension of license.

A. A license to manufacture, possess, transfer or transport a drug precursor under Section 7 [30-31B-7 NMSA 1978] of the Drug Precursor Act may be suspended or revoked upon a finding that the registrant has:

(1) furnished false or fraudulent material information in any application filed with the board;

(2) been convicted of a felony under any state or federal law relating to a controlled substance or drug precursor;

(3) had his federal registration to manufacture, distribute or dispense controlled substances or drug precursors suspended or revoked; or

(4) violated any rule or regulation of the board with regard to drug precursors or controlled substances or any provision of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] or the Controlled Substances Act.

B. A hearing to revoke or suspend a license shall be held by a special hearing panel consisting of the board and two additional persons designated by the board to sit on the hearing panel.

C. The special hearing panel may limit revocation or suspension of a license to the particular drug precursor if grounds for revocation or suspension exist.

D. If the special hearing panel suspends or revokes a license, all drug precursors owned or possessed by the licensee at the time of suspension or the effective date of the revocation may be placed under seal. No disposition may be made of substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded, unless a court, upon application, orders the sale or destruction of perishable or dangerous substances and the deposit of the proceeds of any sale with the court.

E. Upon a revocation order becoming final, the board may apply to the court for an order to sell or destroy all drug precursors under seal. The court shall order the sale or destruction of such drug precursors under such terms and conditions that the court deems appropriate.

F. The board shall promptly notify the bureau of all orders suspending or revoking licenses.

G. The standard of proof necessary to revoke or suspend a license under this section shall be a preponderance of the evidence. The rules of evidence are not strictly applicable to a hearing under this section and all evidentiary matters are to be finally determined by the special hearing panel.

History: Laws 1989, ch. 177, § 8.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

Controlled Substances Act. - See 30-31-1 NMSA 1978 and notes thereto.

30-31B-9. Order to show cause.

A. Before denying, suspending or revoking a license or refusing a renewal of the license, the board shall serve upon the applicant or licensee an order to show cause why the license should not be denied, revoked or suspended or why the renewal should not be refused. The order to show cause shall contain a statement of the basis of the order and shall require the applicant or registrant to appear before the board not less than thirty days after the date of service of the order, but in the case of a denial of renewal of the license, the order shall be served not later than thirty days before the expiration of the license unless the proceedings relate to suspension or revocation of a license. These proceedings shall be conducted in accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978] without regard to any criminal prosecution or other proceeding. Proceedings to suspend or revoke a license or to refuse renewal of a license shall not abate the existing license which shall remain in effect pending the outcome of the proceeding.

B. The board may suspend, without an order to show cause, any license simultaneously with the institution of proceedings to revoke or suspend a registration under Section 30-31-14 NMSA 1978 or where renewal of the license is refused if it finds that there is such a substantial and imminent danger to the public health or safety which warrants this action. The suspension shall continue in effect until the conclusion of the proceedings, including judicial review, unless sooner withdrawn by the board or dissolved by a court of competent jurisdiction.

History: Laws 1989, ch. 177, § 9.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-10. Records of licensees.

Every licensee under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] manufacturing, possessing, transferring or transporting a drug precursor shall maintain, on a current basis, a complete and accurate record of each substance manufactured, possessed, transferred or transported by the licensee in accordance with regulations of the board.

History: Laws 1989, ch. 177, § 10.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-11. Distribution by manufacturers.

A licensed manufacturer or transferer may transfer drug precursors to a licensed manufacturer, licensed possessor or licensed transporter.

History: Laws 1989, ch. 177, § 11.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-12. Drug precursors; prohibited acts; penalties.

A. It is unlawful for any person:

(1) to transfer drug precursors except to an authorized licensee;

(2) to intentionally use in the course of the manufacture or transfer of a drug precursor a license number which is fictitious, revoked, suspended or issued to another person;

(3) to intentionally acquire or obtain, or attempt to acquire or obtain, possession of a drug precursor by misrepresentation, fraud, forgery, deception or subterfuge;

(4) to intentionally furnish false or fraudulent material information in, or omit any material information from, any application, report or other document required to be kept or filed under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978], or any record required to be kept by that act;

(5) who is a licensee to intentionally manufacture a drug precursor not authorized by his license, or to intentionally transfer a drug precursor not authorized by his license to another licensee or authorized person;

(6) to intentionally refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the Drug Precursor Act;

(7) to intentionally refuse an entry into any premises for any inspection authorized by the Drug Precursor Act; or

(8) to manufacture, possess, transfer or transport a drug precursor without the appropriate license or in violation of any rule or regulation of the board.

B. Any person who violates any provision of this section is:

(1) for the first offense, guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(2) for the second offense, guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(3) for the third or subsequent offense, guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 177, § 12.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-13. Powers of enforcement personnel.

Any law enforcement officer:

A. serve search warrants, arrest warrants and administrative inspection warrants;

B. make arrests without a warrant for any offense under the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] committed in his presence, or if he has probable cause to believe that the person to be arrested has committed or is committing a violation of the Drug Precursor Act which may constitute a felony; and

C. make seizures of property pursuant to the Drug Precursor Act.

History: Laws 1989, ch. 177, § 13.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-14. Administrative inspection warrants.

A. Issuance and execution of administrative inspection warrants shall be as follows:

(1) a magistrate, within his jurisdiction and upon proper oath or affirmation showing probable cause, may issue warrants for the purpose of conducting administrative inspections and seizures of property authorized by the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978]. For purposes of the issuance of administrative inspection warrants, probable cause exists upon showing a valid public interest in the effective enforcement of the Drug Precursor Act sufficient to justify administrative inspection of

the area, premises, building or conveyance in the circumstances specified in the application for the warrant; and

(2) a warrant shall be issued only upon an affidavit of a law enforcement officer or employee of the board having actual knowledge of the alleged facts, sworn to before the magistrate and establishing the grounds for issuing the warrant. If the magistrate is satisfied that grounds for the warrant exist, he shall issue a warrant identifying the area, premises, building or conveyance to be inspected, the purpose of the inspection and, if appropriate, the type of property to be inspected, if any.

B. The warrant shall:

(1) state the grounds for its issuance and the name of the affiant;

(2) be directed to a person authorized by this section to serve and carry out the warrant;

(3) command the person to whom it is directed to inspect the area, premises, building or conveyance identified for the purpose specified and, if appropriate, direct the seizure of the property specified;

(4) identify the items or types of property to be seized, if any;

(5) allow the sale or destruction of perishable or dangerous substances or equipment and deposit the proceeds of any sale with the court; and

(6) direct that it be served during normal business hours or other hours designated by the magistrate and designate the magistrate to whom it shall be returned.

C. A warrant issued pursuant to this section must be served and returned within five days of its date of issue unless, upon a showing of a need for additional time, the court orders otherwise. If property is seized pursuant to a warrant, a copy of the warrant shall be given to the person from whom or from whose premises the property is taken, together with a receipt for the property taken. The return of the warrant shall be made promptly, accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person serving the warrant and of the person from whose possession or premises the property was taken, if present, or in the presence of at least one credible person other than the person serving the warrant. A copy of the inventory shall be delivered to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

D. The magistrate who has issued a warrant shall attach a copy of the return and all papers returnable in connection with it and file them with the clerk of the magistrate court.

History: Laws 1989, ch. 177, § 14.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-15. Administrative inspections.

A. When authorized by an administrative inspection warrant issued pursuant to the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978], a law enforcement officer or employee of the board, upon presenting the warrant and appropriate credentials to the owner, operator or agent in charge, may enter the controlled premises for the purpose of conducting an administrative inspection.

B. When authorized by an administrative inspection warrant, a law enforcement officer or employee of the board may:

(1) inspect and copy records required to be kept by the Drug Precursor Act;

(2) inspect and sample, within reasonable limits and in a reasonable manner, controlled premises and all pertinent equipment, finished and unfinished material, containers and labeling found therein, and, except as provided in Subsection D of this section, all other things bearing on violation of the Drug Precursor Act, including records, files, papers, processes, controls and facilities; and

(3) inventory any stock of any drug precursor and obtain samples.

C. This section does not prevent entries and administrative inspections, including seizures of property, without a warrant:

(1) if the owner, operator or agent in charge of the controlled premises consents;

(2) in situations presenting substantial imminent danger to health or safety; or

(3) in all other situations in which a warrant is not constitutionally required.

D. An inspection authorized by this section shall not extend to financial data, sales data other than shipment data or pricing data unless the owner, operator or agent in charge of the controlled premises consents in writing.

E. When perishable or dangerous substances or equipment are seized pursuant to Subsection C of this section, the law enforcement officer or employee of the board may apply to the district court for an order to sell or destroy said property and deposit the proceeds of any sale with the court.

F. For purposes of this section "controlled premises" means:

(1) places where persons licensed or exempted from license requirements under the Drug Precursor Act are required to keep records; and

(2) places, including factories, warehouses, establishments and conveyances in which persons licensed or exempted from license requirements under the Drug Precursor Act are permitted to hold, manufacture, compound, process, sell, deliver or otherwise dispose of any drug precursor.

History: Laws 1989, ch. 177, § 15.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-16. Injunctions.

A. The district courts may exercise jurisdiction to restrain or enjoin violations of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978].

B. The defendant may demand trial by jury for an alleged violation of an injunction or restraining order under this section.

History: Laws 1989, ch. 177, § 16.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-17. Summary forfeiture.

A. Drug precursors that are manufactured in violation of the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] are contraband and shall be seized and summarily forfeited to the state.

B. Drug precursors which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

History: Laws 1989, ch. 177, § 17.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

30-31B-18. Burden of proof.

It is not necessary for the state to negate any exemption or exception in the Drug Precursor Act [30-31B-1 to 30-31B-18 NMSA 1978] in any complaint, information, indictment or other pleading or in any trial, hearing or other proceeding under the Drug Precursor Act. The burden of proof of any exception or exemption is upon the person claiming it.

History: Laws 1989, ch. 177, § 18.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 177, § 21 makes the Drug Precursor Act effective on July 1, 1989.

ARTICLE 32 FOREST FIRES

30-32-1. Fires extinguished by officers; responsibility for costs.

A. As used in this section "forest fire" means a fire burning uncontrolled on lands covered wholly or in part by timber, brush, grass, grain or other inflammable vegetation.

B. Any forest fire in New Mexico without proper precaution being taken to prevent its spread is hereby declared to be a public nuisance by reason of its menace to life or property.

C. Any person, firm or corporation responsible for either the starting or the existence of such fire is hereby required to commence efforts with reasonably available equipment and personnel to control or to extinguish it immediately, and if the responsible person, firm or corporation refuses, neglects or fails to commence and to continue reasonable efforts to do so, the state forester or his agents, or peace officers of the state upon investigation and finding of fact that life and property are endangered may declare the fire a public nuisance and may summarily abate the nuisance thus constituted, by controlling or extinguishing the fire and the cost thereof may be recovered from the responsible person, firm or corporation by action for debt.

History: Laws 1921, ch. 33, § 4; C.S. 1929, § 35-1409; 1941 Comp., § 14-1804; 1953 Comp., § 40-18-4; Laws 1967, ch. 136, § 1.

ANNOTATIONS

Cross-references. - As to public nuisances in general, see 30-8-1 NMSA 1978.

For offenses of improper handling of fire and negligent arson, see 30-17-1 and 30-17-5 NMSA 1978, respectively.

State forester. - Section 68-2-3 NMSA 1978 makes the director of the forestry division of the minerals and natural resources department the "state forester."

Law reviews. - For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

30-32-2. Appointment of voluntary fire wardens.

When requested by the forestry division, district judges in their respective districts may appoint as many voluntary forest fire wardens as they deem necessary for the proper protection of the forested lands within such district. Voluntary forest fire wardens shall serve without pay. The appointments shall expire on November 1 of each year.

History: Laws 1921, ch. 33, § 5; C.S. 1929, § 35-1410; 1941 Comp., § 41-1805; 1953 Comp., § 40-18-5; Laws 1959, ch. 123, § 1; 1977, ch. 254, § 44.

30-32-3. [Arrests for violating forest fire laws.]

Voluntary fire wardens and all peace officers of the state, including deputy game and fish wardens, shall have the power to make arrests, on warrant issued by any magistrate of the state for violation of any of the state forest fire laws, or without warrant for violations thereof committed in their presence, and shall not be liable to civil action for trespass for acts done in the discharge of their duties.

History: Laws 1921, ch. 33, § 6; C.S. 1929, § 35-1411; 1941 Comp., § 41-1806; 1953 Comp., § 40-18-6.

ANNOTATIONS

Cross-references. - As to the issuance of arrest warrants by the magistrate court, see Rules 6-204 and 6-206.

30-32-4. [Civil action for damages.]

If any person shall set on fire any woods, marshes, prairies, whether his own or not, so as thereby to occasion any damage to any other person, such person shall make satisfaction in double damages to the party injured, to be recovered by civil action.

History: Laws 1882, ch. 61, § 7; C.L. 1884, § 2314; C.L. 1897, § 3222; Code 1915, § 1518; C.S. 1929, § 35-1412; 1941 Comp., § 41-1807; 1953 Comp., § 40-18-7.

ANNOTATIONS

Law reviews. - For note, "Forest Fire Protection on Public and Private Lands in New Mexico," see 4 Nat. Resources J. 374 (1964).

ARTICLE 33

FRAUD AND FALSE DEALING

30-33-1. Sale of Indian-made articles as genuine.

It is unlawful to barter, trade, sell or offer for sale or trade any article represented as produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian.

History: Laws 1929, ch. 33, § 1; C.S. 1929, § 35-1925; 1941 Comp., § 41-2123; 1953 Comp., § 40-21-24; Laws 1957, ch. 93, § 1; 1991, ch. 90, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "Indian-made" for "American-Indian" in the catchline; substituted "produced by an Indian unless the article is produced, designed or created by the labor or workmanship of an Indian" for "handicrafted by American Indian unless the basic article be handicraft wholly by American Indian labor or workmanship"; and deleted provisions following "workmanship" which read "provided that all such articles purporting to be of silver shall be made of coin silver or sterling silver, and provided further that 'handicraft' means the production of such articles wholly by hand tools with the exception of buffing or polishing the same and with the exception of the findings used upon such article."

30-33-2. Repealed.

ANNOTATIONS

Repeals. - Laws 1991, ch. 90, § 12 repeals 30-33-2 NMSA 1978, as enacted by Laws 1929, ch. 33, § 2, relating to penalty for falsely selling American Indian items as genuine, effective June 14, 1991. For provisions of former section, see 1989 Replacement Pamphlet. For present comparable provisions, see 30-33-9 NMSA 1978.

30-33-3. Indian arts and crafts sales act; short title.

Sections 30-33-1 through 30-33-11 NMSA 1978 may be cited as the "Indian Arts and Crafts Sales Act".

History: 1953 Comp., § 40-21-25.1, enacted by Laws 1973, ch. 163, § 1; 1975, ch. 261, § 1; 1991, ch. 90, § 2.

ANNOTATIONS

Repeals and reenactments. - Laws 1973, ch. 163, § 1, repeals 40-21-25.1, 1953 Comp., relating to the short title of the Indian Arts and Crafts Sales Act, and enacts the above section.

The 1991 amendment, effective June 14, 1991, substituted "30-33-1 through 30-33-11 NMSA 1978" for "40-21-25.1 through 40-21-25.7 NMSA 1953."

30-33-4. Definitions.

As used in the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978]:

A. "Indian tribe" means:

(1) any tribe, band, nation, Alaska native village or other organized group or community that is eligible for the special programs and services provided by the United States government to Indians because of their status as Indians; or

(2) any tribe that has been formally recognized as an Indian tribe by a state legislature;

B. "Indian" means:

(1) any person who is an enrolled member of an Indian tribe as evidenced by a tribal enrollment card or certified tribal records; or

(2) any person who can meet the minimum qualifications for services offered by the United States government to Indians because of their special status as Indians as evidenced by a certificate of degree of Indian blood card;

C. "authentic Indian arts and crafts" means any product, including traditional or contemporary Indian arts, that:

(1) are Indian handmade; and

(2) are not made by machine;

D. "person" means any individual, firm, association, corporation, partnership or any other legal entity;

E. "made by machine" means the producing or reproducing of a product in mass production by mechanically stamping, blanking, weaving or offset printing;

F. "Indian handmade" means any product in which the entire shaping and forming of the product from raw materials and its finishing and decoration were accomplished by Indian hand labor and manually controlled methods that permit the maker to control and vary the construction, shape, design or finish of each part of each individual product, but does not exclude the use of findings, hand tools and equipment for buffing, polishing,

grinding, drilling, sawing or sewing and other processes approved by regulations adopted under the Indian Arts and Crafts Sales Act;

G. "Indian crafted" means any item that is made by an Indian when it is not entirely Indian handmade or is at least in part made by machine, including Indian-assembled and Indian-decorated items and other items consistent with this definition and approved by regulations adopted under the Indian Arts and Crafts Sales Act;

H. "findings" means an ingredient part of the product that adapts the product for wearing or display, including silver beads used in jewelry containing Indian handmade adornments in addition to beads, leather backing, binding material, bolo tie clips, tie bar clips, tie-tac pins, earring pins, earring clips, earring screw backs, cuff link toggles, money clips, pin stems, combs and chains;

I. "product" means the finished tangible arts or crafts;

J. "raw materials" means any material that can be converted by manufacture, processing or a combination of manufacture and processing into a new and useful product, and includes:

(1) "naturally occurring material", which means any material created and produced by nature;

(2) "natural material", which means any material created and produced by nature that is only altered in shape, form, finish or color as long as the color change is the result of finishing or polishing agents used that do not penetrate the surface of the material by more than one millimeter, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act;

(3) "treated material", which means any material created and produced by nature that has been altered by man-made processes that leave the material in its original shape and size after processing, but alter the color, hardness or character of the material, which may be formed, shaped or finished after treating, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act; and

(4) "reconstructed material", which means any material created and produced in nature that has been altered by man-made processes that change the color, hardness, shape or character of the material, provided that more than fifty percent of the original naturally occurring material is contained in the product after processing, or as further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act but excludes synthetic material; and

K. "synthetic material" means any material that imitates natural materials and is man-made or contains fifty percent or less of the original naturally occurring materials, or as

further defined consistent with this definition in regulations adopted under the Indian Arts and Crafts Sales Act.

History: 1953 Comp., § 40-21-25.2, enacted by Laws 1973, ch. 163, § 2; 1975, ch. 261, § 2; 1977, ch. 334, § 1; 1991, ch. 90, § 3.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Repeals and reenactments. - Laws 1973, ch. 163, § 2, repeals 40-21-25.2, 1953 Comp., defining various terms, and enacts the above section.

The 1991 amendment, effective June 14, 1991, rewrote this section to the extent that a detailed comparison would be impracticable.

30-33-5. Purpose of act.

The purpose of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978] is to protect the public and the Indian craftsman under the police powers of the state from false representation in the sale, trade, purchase or offering for sale of Indian arts and crafts.

History: 1953 Comp., § 40-21-25.3, enacted by Laws 1959, ch. 133, § 3; 1973, ch. 163, § 3; 1975, ch. 261, § 3; 1977, ch. 334, § 2; 1991, ch. 90, § 4.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, deleted "or of turquoise" at the end of the section.

30-33-6. Inquiry as to producer; duty of inquiry; election to label authentic Indian arts and crafts.

A. It is the duty of every person selling or offering for sale a product that is represented to be authentic Indian arts or crafts to make due inquiry of his suppliers concerning the true nature of the materials, product design and process of manufacture to determine whether the product may be lawfully represented as authentic Indian arts or crafts.

B. Each person may elect to label or otherwise clearly and conspicuously disclose as authentic Indian arts and crafts all articles that are authentic Indian arts and crafts in

accordance with the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978] and regulations adopted pursuant to that act.

C. Consistent with the purposes of the Indian Arts and Crafts Sales Act, regulations adopted under that act may specify designations other than "authentic Indian arts and crafts", including a designation such as "Indian crafted", for authorized labeling as Indian arts and crafts.

History: 1953 Comp., § 40-21-25.4, enacted by Laws 1959, ch. 133, § 4; 1973, ch. 163, § 4; 1975, ch. 261, § 4; 1977, ch. 334, § 3; 1991, ch. 90, § 5.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, added "Duty of inquiry; election to label authentic Indian arts and crafts" in the catchline; deleted former Subsection A, relating to a duty of persons selling Indian arts and crafts to make due inquiry concerning methods used in production and to determine authenticity; designated former Subsection B as Subsection A and rewrote the subsection which read "It is the duty of every person selling or offering for sale natural or unnatural turquoise, or both to make due inquiry of their suppliers concerning the true nature of the turquoise and to determine whether such turquoise is natural, stabilized, treated, reconstituted or imitation"; and added Subsections B and C.

30-33-7. Unlawful acts.

It is unlawful for any person to:

A. sell or offer for sale any products represented to be Indian handmade or authentic Indian arts and crafts unless such products are in fact Indian handmade or authentic Indian arts and crafts;

B. sell or offer for sale any products represented to be Indian crafted unless such products are in fact Indian crafted;

C. represent that any Indian arts and crafts product is made of a material, including natural material, unless it is made of that material;

D. fail to disclose in writing that any Indian arts and crafts product is made of treated material, reconstructed material or synthetic material;

E. solicit or buy for resale as authentic Indian arts and crafts any products that are known in fact not to be authentic; or

F. prepare, disseminate or otherwise engage in any unfair or deceptive trade practice, including any false, misleading or deceptive advertising, or any unconscionable trade practice, regarding Indian arts or crafts. For the purpose of this subsection, "unfair or deceptive trade practice" and "unconscionable trade practice" mean "unfair or deceptive trade practice" and "unconscionable trade practice" as those terms are defined in Section 57-12-2 NMSA 1978.

History: 1953 Comp., § 40-21-25.5, enacted by Laws 1973, ch. 163, § 5; 1975, ch. 261, § 5; 1977, ch. 334, § 4; 1991, ch. 90, § 6.

ANNOTATIONS

Repeals and reenactments. - Laws 1973, ch. 163, § 5, repealed former 40-21-25.5, 1953 Comp., relating to labeling imitation Indian arts and crafts, and enacted a new 40-21-25.5, 1953 Comp.

The 1991 amendment, effective June 14, 1991, rewrote this section to the extent that a detailed comparison would be impracticable.

30-33-8. Enforcement by attorney general or district attorney.

The attorney general or a district attorney with jurisdiction over a matter shall enforce the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978]. The New Mexico office of Indian affairs and an authorized tribal prosecutor may assist the office of the attorney general or the district attorney in determining whether the provisions of the Indian Arts and Crafts Sales Act have been or are being violated. Either the attorney general or a district attorney with jurisdiction over a matter may take action to enforce the provisions of the Indian Arts and Crafts Sales Act.

History: 1953 Comp., § 40-21-25.7, enacted by Laws 1973, ch. 163, § 6; 1977, ch. 334, § 5; 1991, ch. 90, § 7.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, added "or district attorney" in the catchline; inserted "or a district attorney with jurisdiction over a matter" in the first sentence; rewrote the second sentence which read "The New Mexico commission of Indian affairs shall assist the office of the attorney general in the determining whether the provisions of the Indian Arts and Crafts Sales Act have been violated"; and added the final sentence.

30-33-9. Violation of act; penalties.

A. In an action brought by the attorney general or a district attorney for a violation under the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978], the district court may order temporary or permanent injunctive relief. The district court shall order restitution and such other relief as may be necessary to redress injury to any person resulting from the violation.

B. In any action brought under this section, if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Indian Arts and Crafts Sales Act, the attorney general or district attorney, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty not to exceed five hundred dollars (\$500) per violation.

C. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act is guilty of a petty misdemeanor when the violation involves property valued at less than two thousand five hundred dollars (\$2,500) and shall be punished by a fine of not less than one hundred dollars (\$100) per violation per day, up to a maximum fine of five hundred dollars (\$500) or imprisonment in the county jail for a definite term not to exceed six months, or both.

D. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act is guilty of a misdemeanor when the violation involves property valued at or in excess of two thousand five hundred dollars (\$2,500) and less than twenty thousand (\$20,000) and shall be punished by a fine of not less than one hundred dollars (\$100) per violation per day, up to a maximum fine of one thousand dollars (\$1,000) or by imprisonment in the county jail for not more than one year, or both.

E. Any person willfully and knowingly violating the provisions of the Indian Arts and Crafts Sales Act is guilty of a fourth degree felony when the violation involves property valued at or in excess of twenty thousand dollars (\$20,000) and shall be punished by a fine of not less than one hundred dollars (\$100) per violation per day, up to a maximum fine of five thousand dollars (\$5,000), or up to eighteen months imprisonment in the county jail, or both.

History: 1953 Comp., § 40-21-25.8, enacted by Laws 1977, ch. 334, § 6; 1991, ch. 90, § 8.

ANNOTATIONS

Cross-references. - As to issuance of injunctions, in general, see Rules 1-065 and 1-066.

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, substituted "penalties" for "remedies" in the catchline; designated the formerly undesignated provision as Subsection A; in

Subsection A, inserted "or a district attorney" in the first sentence, deleted "civil penalties not to exceed five thousand dollars (\$5,000) per violation" following "restitution" in the second sentence and made a minor stylistic change; and added Subsections B to E.

30-33-10. Private right of action; damages.

Any person who suffers financial injury or damages by reason of any conduct declared in violation of the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978] may sue in district court. Upon a showing that that act is being violated, the court may award damages and order injunctive relief and shall award the cost of the suit, including reasonable attorneys' fees. Where the court finds that the party charged with violating the Indian Arts and Crafts Sales Act has willfully violated that act, the court may award treble damages to the party complaining of the violation.

History: 1953 Comp., § 40-21-25.9, enacted by Laws 1977, ch. 334, § 7; 1991, ch. 90, § 9.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, rewrote this section which read "Any person who suffers financial injury or damages by reason of any conduct declared in violation of the Indian Arts and Crafts Sales Act may sue in district court and may recover actual damages sustained and the cost of the suit, including reasonable attorneys' fees."

30-33-11. Administrative regulations.

The attorney general and the New Mexico office of Indian affairs are authorized jointly to promulgate necessary regulations, pursuant to the Administrative Procedures Act [12-8-1 to 12-8-25 NMSA 1978], to further the purpose and implement the provisions of the Indian Arts and Crafts Sales Act [30-33-1 to 30-33-11 NMSA 1978].

History: 1953 Comp., § 40-21-25.10, enacted by Laws 1977, ch. 334, § 8; 1991, ch. 90, § 10.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, rewrote this section which read "The attorney general is authorized to promulgate necessary regulations, pursuant to the

Administrative Procedures Act, to further the purpose of the Indian Arts and Crafts Sales Act as set forth in Section 40-21-25.3 NMSA 1953."

Severability clauses. - Laws 1991, ch. 90, § 11 provides for the severability of the act if any part or application thereof is held invalid.

30-33-12. Obtaining telecommunications service with intent to defraud; definitions.

For the purposes of Sections 30-33-12 through 30-33-14 NMSA 1978:

A. "credit card" means an identification card or plate issued to a person, firm or corporation by any person, firm or corporation engaged in the furnishing of telecommunications service, which permits the person, firm or corporation to whom the card has been issued to obtain telecommunications service on credit;

B. "credit card number" means the card number appearing in a credit card; and

C. "telecommunication service" means service furnished by a public utility, including a telephone company, by which there is accomplished, or may be accomplished, the sending or receiving of information, data, messages, writing, signs, signals, pictures and sound of all kinds, by aid of wire, cable, radio or other means or apparatus.

History: 1953 Comp., § 40-21-49, enacted by Laws 1963, ch. 49, § 1; 1967, ch. 134, § 1.

30-33-13. Crime to procure or to attempt to procure telecommunications service without paying charge; crime to make, possess, sell, give or transfer certain devices for certain purposes; penalty.

A. It is unlawful for any person, with intent to defraud any person, firm or corporation, to obtain or to attempt to obtain any telecommunications service without paying the lawful charge in whole or in part, by any of the following means:

(1) charging such service to an existing telephone number or credit card number without the authority of the subscriber thereto, or the legitimate holder thereof;

(2) charging such service to a nonexistent, false, fictitious or counterfeit telephone number or credit card number, or to a suspended, terminated, expired, canceled or revoked telephone number or credit card number;

(3) rearranging, tampering with or making electrical, acoustical, induction or other connection with any facilities or equipment;

(4) using a code, prearranged scheme or other stratagem or device whereby said person in effect sends or receives information; or

(5) using any other contrivance, device or means to avoid payment of the lawful charges, in whole or in part, for such service.

This subsection shall apply when said telecommunication service either originates or terminates, or both, in this state, or when charges for said service would have been billable in normal course by the public utility providing such service in this state but for the fact that said service was obtained, or attempted to be obtained, by one or more of the means set forth hereinabove.

Whoever violates this subsection when the charges for the telecommunication service obtained or attempted to be obtained are one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

Whoever violates this subsection when the charges for the telecommunication service obtained or attempted to be obtained are more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

Whoever violates this subsection when the charges for the telecommunication service obtained or attempted to be obtained are more than two hundred fifty dollars (\$250) but not more than twenty-five hundred dollars (\$2,500) is guilty of [a] fourth degree felony.

Whoever violates this subsection when the charges for the telecommunication service obtained or attempted to be obtained are more than twenty-five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

Whoever violates this subsection when the charges for the telecommunication service obtained or attempted to be obtained exceed twenty thousand dollars (\$20,000) is guilty of a second degree felony.

B. It is unlawful for any person under circumstances evidencing an intent to use or employ any instrument, apparatus, equipment or device described in Paragraph (1) of this subsection, or to allow the same to be used or employed, for the purpose described in Paragraph (1) of this subsection, or knowing or having reason to believe that the same is intended to be so used, or that the plans and instructions described in Paragraph (2) of this subsection are intended to be used for making or assembling such instrument, apparatus, equipment or device:

(1) to make or possess any instrument, apparatus, equipment or device designed, adapted or which can be used either:

(a) to obtain telecommunication service in violation of Subsection A of this section; or

(b) to conceal, or to assist another to conceal, from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication service; or

(2) to sell, give or otherwise transfer to another, or to offer or advertise for sale, any instrument, apparatus, equipment or device described in Paragraph (1) of this subsection or plans or instructions for making or assembling the same.

Whoever violates this subsection is guilty of a misdemeanor, unless such person has previously been convicted of such crime or of an offense under the laws of another state or of the United States which would have been an offense under this subsection if committed in this state, in which case such person is guilty of a fourth degree felony.

History: 1953 Comp., § 40-21-50, enacted by Laws 1963, ch. 49, § 2; 1967, ch. 134, § 2; 1987, ch. 121, § 11.

ANNOTATIONS

Cross-references. - For crime of fraud, in general, see 30-16-6 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - State civil actions by subscription television business for use, or providing technical means of use, of transmissions by nonsubscribers, 46 A.L.R.4th 811.

Offense of obtaining telephone services by unauthorized use of another's telephone - state cases, 61 A.L.R.4th 1197.

Federal legal problems arising from subscription television or "pay TV" broadcast over the air, 61 A.L.R. Fed. 809.

30-33-14. Venue.

Venue is in the county in this state where the telecommunication service giving rise to the prosecution was solicited or initiated, or attempted to be solicited or initiated, or where the service was received or was attempted to be received, or was billable in the normal course of business.

History: 1953 Comp., § 40-21-51, enacted by Laws 1963, ch. 49, § 3; 1967, ch. 134, § 3.

ARTICLE 34 LIBEL AND SLANDER

30-34-1 to 30-34-6. Transferred.

ANNOTATIONS

Compiler's note. - Former 30-34-1 to 30-34-6 NMSA 1978, concerning tort actions for libel and slander, have been transferred to 41-7-1 to 41-7-6 NMSA 1978.

ARTICLE 35 PUBLIC UTILITIES

30-35-1. [Failure to relinquish telephone party line for emergency call.]

It is unlawful for any person:

A. willfully to refuse to yield, or willfully to impede, the use of a telephone party line in time of emergency, by which he is not affected and of which he has been apprised, when he has been requested so to yield; or

B. to request another to yield the use of a telephone party line because of an emergency, which in fact does not exist.

History: 1953 Comp., § 40-37-6, enacted by Laws 1963, ch. 320, § 1.

30-35-2. Penalty.

Any person:

A. who fails to yield a telephone party line or impedes its use, and any person who falsely asserts an emergency as basis for a request of another to yield a telephone party line, as provided in the preceding section [30-35-1 NMSA 1978], is liable to the person aggrieved by his act for triple the amount of damages proximately caused by his act;

B. who violates any provision of this act [30-35-1, 30-35-2 NMSA 1978] is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) nor less than twenty-five dollars (\$25.00).

History: 1953 Comp., § 40-37-7, enacted by Laws 1963, ch. 320, § 2.

ARTICLE 36 WORTHLESS CHECKS

30-36-1. Short title.

This act may be cited as the "Worthless Check Act."

History: 1953 Comp., § 40-49-1, enacted by Laws 1963, ch. 315, § 1.

ANNOTATIONS

Meaning of this act. - The term "this act" refers to Laws 1963, Chapter 315, which is presently compiled as 30-36-1 to 30-36-8 and 30-36-9 NMSA 1978. However, Laws 1965, ch. 114, §§ 1 and 2 added present 30-36-5 and 30-36-7 NMSA 1978 to the Worthless Check Act.

Relation to general fraud statute. - The general fraud statute (30-16-6 NMSA 1978) and this act prohibit different offenses, and it is inappropriate to view this act as an exception to the fraud statute. *State v. Higgins*, 107 N.M. 617, 762 P.2d 904 (Ct. App. 1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Construction and effect of "bad check" statute with respect to check in payment of preexisting debt, 59 A.L.R.2d 1159.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

30-36-2. Definitions.

As used in the Worthless Check Act:

- A. "check" means any check, draft or written order for money;
- B. "person" means any person, firm or corporation;
- C. "draw" means the making, drawing, uttering or delivering a check;
- D. "thing of value" includes money, property, services, goods and wares; and lodging;
- E. "credit" means an arrangement or understanding with the drawer for the payment of the check.

History: 1953 Comp., § 40-49-2, enacted by Laws 1963, ch. 315, § 2.

ANNOTATIONS

Worthless Check Act. - See 30-36-1 NMSA 1978 and notes thereto.

30-36-3. Purpose.

It is the purpose of the Worthless Check Act to remedy the evil of giving checks on a bank without first providing funds in or credit with the depository on which they are

made or drawn to pay or satisfy the same, which tends to create the circulation of worthless checks on banks, bad banking, check kiting and mischief to trade and commerce.

History: 1953 Comp., § 40-49-3, enacted by Laws 1963, ch. 315, § 3.

ANNOTATIONS

Worthless Check Act. - See 30-36-1 NMSA 1978 and notes thereto.

"Issue" and "giving" same. - The term "issue" in 30-36-4 NMSA 1978 is used in the same sense as "giving" a check in this section, and "giving" a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

30-36-4. Unlawful to issue.

It is unlawful for a person to issue in exchange for anything of value, with intent to defraud, any check, draft or order for payment of money upon any bank or other depository, knowing at the time of the issuing that the offender has insufficient funds in or credit with the bank or depository for the payment of such check, draft or order in full upon its presentation.

History: 1953 Comp., § 40-49-4, enacted by Laws 1963, ch. 315, § 4.

ANNOTATIONS

Cross-references. - As to fraud generally, see 30-16-6 NMSA 1978.

For offense of falsely obtaining services or accommodations, see 30-16-16 NMSA 1978.

Section not void for vagueness. - This section gives one notice of the prohibited act; it is not void for vagueness. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

"Issue" and "giving" same. - The term "issue" in this section is used in the same sense as "giving" a check in 30-36-3 NMSA 1978, and "giving" a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

"Issue" and "give" mean delivery to holder with passing of interest from one to another. To violate this section, one must issue the check in exchange for value, with the requisite intent and knowledge. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Timing of delivery of goods/services and issuance of checks. - The fact that the goods and services were delivered before the check was issued did not signify that an exchange did not occur within the meaning of this section. A worthless check is given for something of value if the worthless check is issued as part of a contemporaneous transaction between the parties in which something of value is exchanged for the check, without regard to whether the thing of value is delivered before or after the worthless check is issued. State v. Platt, 114 N.M. 721, 845 P.2d 815 (Ct. App. 1992).

Section inapplicable to postdated checks. - Where neither evidence nor inference contradicts testimony that a check was postdated, defendant's motion to dismiss the charge as to the check should be sustained as the Worthless Check Act does not apply to postdated checks. State v. Downing, 83 N.M. 62, 488 P.2d 112 (Ct. App. 1971).

False pretenses. - Giving a worthless check constitutes a representation that the drawer has credit with the drawee bank for the amount involved, and such representation relates to an existing fact, so that under former law a prosecution for obtaining money by false pretenses could be maintained. State v. Tanner, 22 N.M. 493, 164 P. 821 (1917).

Finding of intent to defraud was supported by evidence where defendant cashed a \$20.00 check on a bank in which he had no account, the next day cashed a \$75.00 check on another bank with which he had just opened an account and made a \$25.00 deposit, and on the following morning before leaving town without checking out of motel cashed a \$35.00 check on that bank. State v. McKay, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

Intent lacking. - To issue a check in payment of an outstanding account, where credit was not given on the strength of check so issued, was not a violation of the statute, because there was no intent to defraud which is the gist of the offense. State v. Davis, 26 N.M. 523, 194 P. 882 (1921).

Sufficient bank credit. - Conviction for issuance of a fraudulent check was reversed upon evidence showing an arrangement with the bank whereby defendant was to deposit drafts drawn on various commission houses, and the bank was to honor checks drawn by defendant, and that at the time the check was presented, defendant's credit with the bank was sufficient, according to the bank's own records, to cover it. State v. Thompson, 37 N.M. 229, 20 P.2d 1030 (1933).

Compulsion as defense. - Where defendant claimed that an individual who was "bigger and tougher" than he forced him to write and cash a bad check under threat of bodily harm, and that this person was present in the store when he cashed the check, but store employees testified that defendant came into the store alone, defense of compulsion failed. State v. Lee, 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967).

Knowledge of motel clerk. - Whether motel clerk knew, had been expressly notified or had reason to believe that defendant did not have sufficient funds on deposit in the bank

to insure payment on presentation of the check was for the jury to decide. State v. McKay, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

Information sufficient. - Where information charged defendant with issuing worthless checks contrary to this section and 30-36-5 B NMSA 1978, reference to the latter section was surplusage, since the information was sufficient without reference to the penalty. State v. Ferris, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Malicious prosecution action not maintainable. - One charged with having issued a fraudulent check or draft cannot maintain a malicious prosecution action where he has obtained dismissal of charge by voluntarily paying the claim and costs of prosecution. Marchbanks v. Young, 47 N.M. 213, 139 P.2d 594 (1943).

Court inquiry into defendant's consideration of bankruptcy might constitute reversible error. - In a trial for issuing worthless checks, the court's inquiry into defendant's consideration of bankruptcy might well have detracted from the presumption of innocence to which defendant was entitled, and constituted reversible error, because his answers may have tainted the opinion of the jury in deciding whether or not defendant's disavowals of intent to deceive or knowledge of insufficient funds should be believed in view of his past history as a debtor. State v. Caputo, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 32 Am. Jur. 2d False Pretenses §§ 77 to 87.

False pretense or confidence game through means of worthless check or draft, 35 A.L.R. 344, 174 A.L.R. 173.

Criminal liability of corporate officer who issues worthless check in corporate name, 68 A.L.R.2d 1269.

Reasonable expectation of payment as affecting offense under "worthless check" statutes, 9 A.L.R.3d 719.

Constitutionality of "bad check" statute, 16 A.L.R.4th 631.

35 C.J.S. False Pretenses § 21.

30-36-5. Penalty.

Any person violating Section 30-36-4 NMSA 1978 shall be punished as follows:

A. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for more than one dollar (\$1.00) but less than twenty-five dollars (\$25.00), imprisonment in the county jail for a term of not more than thirty days or a fine of not more than one hundred dollars (\$100), or both such imprisonment and fine;

B. when the amount of the check, draft or order, or the total amount of the checks, drafts or orders, are for twenty-five dollars (\$25.00) or more, imprisonment in the penitentiary for a term of not less than one year nor more than three years or the payment of a fine of not more than one thousand dollars (\$1,000) or both such imprisonment and fine.

History: 1953 Comp., § 40-49-5, enacted by Laws 1965, ch. 114, § 1.

ANNOTATIONS

Repeals and reenactments. - Laws 1965, ch. 114, § 1, repeals 40-49-5, 1953 Comp., relating to penalties for the writing of bad checks, and enacts the above section.

Totaling provisions unconstitutional. - The provisions of this section, concerning the "totaling" of amounts of worthless checks, are so vague that they offend due process and are void. *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

The cumulative provisions in this section relating to penalties are vague, indefinite and uncertain. 1966 Op. Att'y Gen. No. 66-80.

But severable. - While the "totaling" provisions of this section are void, they may be severed from this section, leaving the remaining portion thereof consistent with 30-36-4 NMSA 1978, which makes an offense out of each worthless check issued. *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Frivolous to infer rest of statute unconstitutionally vague. - An inference that because the totaling provision of this section was held unconstitutionally vague, other parts of the Worthless Check Act (30-36-1 to 30-36-9 NMSA 1978) are also unconstitutionally vague was frivolous. *State v. Libero*, 91 N.M. 780, 581 P.2d 873 (Ct. App.), cert. denied, 92 N.M. 180, 585 P.2d 324 (1978).

Quashing of information unwarranted. - The trial court correctly held that defendant could not be punished under Subsection B of this section by "totaling" two checks, but erred in quashing the information, since defendant could still be punished for each worthless check that he had issued. *State v. Conners*, 80 N.M. 662, 459 P.2d 461 (Ct. App. 1969).

Where defendant was convicted of issuing four worthless checks, he could have been sentenced for each offense under the portion of this section remaining after severance of the provisions on totaling; therefore, the trial court erred in dismissing the information. *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Reinstatement of charges not double jeopardy. - Dismissal of the information before the entering of a plea because of the unconstitutional vagueness of the "totaling" provision of this section did not place defendant in jeopardy, and, therefore,

reinstatement of the information did not subject him to double jeopardy. *State v. Ferris*, 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969).

Felony degree for violation of Subsection B. - The offense of issuing a worthless check over \$25.00 is a "felony" but could not constitute a "fourth degree felony" because the minimum sentence imposed for issuing worthless checks is less than the stated sentence for fourth degree felonies. *State v. Muzio*, 105 N.M. 352, 732 P.2d 879 (Ct. App. 1987).

Sentence not severable. - A sentence of six to eight years for utterance of fraudulent checks by habitual criminal could not be considered a sentence of five years for uttering fraudulent checks since judgment was not severable. *Jordan v. Swope*, 36 N.M. 84, 8 P.2d 788 (1932).

Law reviews. - For annual survey of criminal procedure in New Mexico, see 18 N.M.L. Rev. 345 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 C.J.S. False Pretenses § 56.

30-36-6. Exceptions.

The Worthless Check Act does not apply to:

A. any check where the payee or holder knows or has been expressly notified prior to the drawing of the check or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment on its presentation; or

B. any post-dated check.

History: 1953 Comp., § 40-49-6, enacted by Laws 1963, ch. 315, § 6.

ANNOTATIONS

Cross-references. - As to effect of postdating a negotiable instrument, see 55-3-113 NMSA 1978.

Worthless Check Act. - See 30-36-1 NMSA 1978 and notes thereto.

Knowledge of payee as jury question. - Whether motel clerk knew, had been expressly notified or had reason to believe that defendant did not have sufficient funds on deposit in the bank to insure payment on presentation of the check was for the jury to decide. *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

Act inapplicable to postdated check. - Where neither evidence nor inference contradicts testimony that a check was postdated, defendant's motion to dismiss the

charge as to the check should be sustained as the Worthless Check Act does not apply to postdated checks. State v. Downing, 83 N.M. 62, 488 P.2d 112 (Ct. App. 1971).

Check postdated. - Where it was stipulated that the hay sold to defendant was weighed on June 25, and the payee testified that the check was accepted on the date of weighing, while the check was dated June 30, the defendant's motion to dismiss should have been sustained. State v. Downing, 83 N.M. 62, 488 P.2d 112 (Ct. App. 1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Application of "bad check" statute with respect to post dated checks, 52 A.L.R.3d 464.

30-36-7. Intent to defraud; how established.

In the prosecution of offenses under the Worthless Check Act, the following rules of evidence shall govern:

A. if the maker or drawer of a check, payment of which is refused by the bank or depository upon which it is drawn because of no account in the name of the maker or drawer in the bank, proof of the fact that the maker or drawer had no account in the bank or depository upon which the check is drawn shall be prima facie evidence of an intent to defraud and of knowledge of insufficient funds in or credit with the bank or depository with which to pay the draft;

B. if the maker or drawer of a check, payment of which is refused by the bank or depository upon which it is drawn because of insufficient funds or credit in the account of the maker or drawer in the bank or depository, fails, within three business days after notice to him that the check was not honored by the bank or depository, to pay the check in full, together with any protest fees or costs thereon, such failure shall constitute prima facie evidence of a knowledge of the insufficiency of funds in the bank or depository at the time of the making or drawing of the check and of an intent to defraud.

History: 1953 Comp., § 40-49-7, enacted by Laws 1965, ch. 114, § 2; 1979, ch. 8, § 1.

ANNOTATIONS

Cross-references. - For evidentiary rule regarding the use of presumptions in criminal cases, see Rule 11-302.

Repeals and reenactments. - Laws 1965, ch. 114, § 2, repeals 40-49-7, 1953 Comp., relating to establishing intent to defraud, and enacts the above section.

Worthless Check Act. - See 30-36-1 NMSA 1978 and notes thereto.

Purpose of notice. - Under the language of the Worthless Check Act the purpose of notice and of the 10-day period is to make it easier for the state, upon prosecution, to

prove necessary knowledge and intent; such knowledge and intent can, however, be proved without use of the statutory act if desired. 1965-66 Op. Att'y Gen. No. 65-197.

Notice is not condition precedent to maintaining criminal action. 1965-66 Op. Att'y Gen. No. 65-197.

One who had been given a fraudulent check was not required to give notice provided for by former statute before filing his complaint to have the drawer prosecuted. *Marchbanks v. Young*, 47 N.M. 213, 139 P.2d 594 (1943).

Failure to respond to notice merely creates presumption of knowledge and fraudulent intent if a criminal proceeding is instituted. 1965-66 Op. Att'y Gen. No. 65-197.

But prima facie presumption inapplicable without notice. - Where although defendant unquestionably had insufficient funds in his account with a bank to cover a \$35.00 check, the state failed to prove that defendant had received notice of dishonor at least 10 days before trial, the state could not rely on the prima facie evidence rule as to intent to defraud set forth in Subsection B of this section. *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

Prima facie intent to defraud. - Where the only evidence relative to the dishonor of a \$20.00 check was that it was dishonored because defendant had no account in the bank on which it was drawn, there was prima facie intent to defraud under Subsection A. *State v. McKay*, 79 N.M. 797, 450 P.2d 435 (Ct. App. 1969).

Evidence that defendant entered store and after furnishing identification cashed \$25.00 check drawn on a Texas bank with which he had no account or credit was prima facie evidence of an intent to defraud under this section. *State v. Lee*, 78 N.M. 421, 432 P.2d 265 (Ct. App. 1967).

Effect of discharge in bankruptcy. - On its face, this act addresses the passing of worthless checks with the intent to defraud, and a defendant's prosecution for violation of such law is not precluded by filing for or obtaining a discharge in bankruptcy. *State v. Muzio*, 105 N.M. 352, 732 P.2d 879 (Ct. App. 1987).

Threat of prosecution not authorized. - The specific language of 30-22-6 NMSA 1978, relating to compounding a crime, controls over the more general language of the Worthless Check Act by making it a crime to include in the notice of dishonor a threat to institute criminal proceedings unless payment is made within 10 days. 1965-66 Op. Att'y Gen. No. 65-197.

30-36-8. Notice.

Notice as used in the Worthless Check Act shall consist of either notice given to the person entitled thereto in person or notice given to such person in writing. The notice in

writing is presumed to have been given when deposited as certified matter in the United States mail, addressed to the person at his address as it appears on the check.

History: 1953 Comp., § 40-49-8, enacted by Laws 1963, ch. 315, § 8; 1979, ch. 8, § 2.

ANNOTATIONS

Worthless Check Act. - See 30-36-1 NMSA 1978 and notes thereto.

30-36-9. Citizen's complaint; costs.

Where prosecutions are initiated under the Worthless Check Act before any committing magistrate, the party applying for the warrant is liable for costs accruing in the event the case is dismissed at his request or for his failure to prosecute.

History: 1953 Comp., § 40-49-9, enacted by Laws 1963, ch. 315, § 9.

ANNOTATIONS

Worthless Check Act. - See 30-36-1 NMSA 1978 and notes thereto.

Law reviews. - For article, "Automatic Stay Provisions of the Bankruptcy Act of 1978," see 13 N.M.L. Rev. 599 (1983).

30-36-10. District attorney; processing fee.

A. A district attorney is authorized to assess a processing fee against any person who is convicted of violating Section 30-36-4 NMSA 1978 and against any person who acknowledges violation of that section but for whom prosecution is waived by the district attorney. The processing fee assessed pursuant to this section shall not exceed:

(1) five dollars (\$5.00) if the amount of the check, draft or order is less than twenty-five dollars (\$25.00);

(2) ten dollars (\$10.00) if the amount of the check, draft or order is twenty-five dollars (\$25.00) or more but less than one hundred dollars (\$100);

(3) thirty dollars (\$30.00) if the amount of the check, draft or order is one hundred dollars (\$100) or more but less than three hundred dollars (\$300);

(4) fifty dollars (\$50.00) if the amount of the check, draft or order is three hundred dollars (\$300) or more but less than five hundred dollars (\$500); and

(5) seventy-five dollars (\$75.00) if the amount of the check, draft or order is five hundred dollars (\$500) or more.

B. All processing fees collected by a district attorney pursuant to this section shall be transmitted to the administrative office of the district attorneys for credit to the district attorney fund.

History: 1978 Comp., § 30-36-10, enacted by Laws 1984, ch. 110, § 4.

ANNOTATIONS

Cross-references. - As to creation of district attorney fund, see 36-1-27 NMSA 1978.

ARTICLE 37 SEXUALLY ORIENTED MATERIAL HARMFUL TO MINORS

30-37-1. Definitions.

As used in this act:

A. "minor" means any unmarried person who has not reached his eighteenth birthday;

B. "nudity" means the showing of the male or female genitals, pubic area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state;

C. "sexual conduct" means act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be female, breast;

D. "sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal;

E. "sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained;

F. "harmful to minors" means that quality of any description of representation, in whatever form, of nudity, sexual conduct, sexual excitement or sado-masochistic abuse, when it:

(1) predominantly appeals to the prurient, shameful or morbid interest of minors; and

(2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(3) is utterly without redeeming social importance for minors; and

G. "knowingly" means having general knowledge of, or reason to know, or a belief or reasonable ground for belief which warrants further inspection or inquiry or both, of:

(1) the character and content of any material described herein, which is reasonably susceptible of examination by the defendant;

(2) the age of the minor.

History: 1953 Comp., § 40-50-1, enacted by Laws 1973, ch. 257, § 1.

ANNOTATIONS

Cross-references. - For provisions regarding other sexual offenses, see 30-9-10 to 30-9-17 NMSA 1978.

Meaning of "this act". - The term "this act" means Laws 1973, Chapter 257, which appears as 30-37-1, 30-37-2, 30-37-3, 30-37-4 to 30-37-8 NMSA 1978.

Validity of separate classifications for minors and adults for purposes of legislative control has been explicitly recognized. 1973-74 Op. Att'y Gen. No. 73-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297.

Gesture as punishable obscenity, 99 A.L.R.3d 762.

Obscenity prosecutions: statutory exemption based on dissemination to persons or entities having scientific, educational, or similar justification for possession of such materials, 13 A.L.R.5th 567.

30-37-2. Offenses; books; pictures.

It is unlawful for a person to knowingly sell, deliver, distribute, display for sale or provide to a minor, or knowingly to possess with intent to sell, deliver, distribute, display for sale or provide to a minor:

A. any picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body, or any replica, article or device having the appearance of either male or female genitals which depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse and which is harmful to minors; or

B. any book, pamphlet, magazine, printed matter however produced or sound recording which contains any matter enumerated in Subsection A of this section or explicit and

detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors.

History: 1953 Comp., § 40-50-2, enacted by Laws 1973, ch. 257, § 2.

ANNOTATIONS

For comparison of this section with 30-37-2.1 NMSA 1978, see *American Booksellers Ass'n v. Schiff*, 649 F. Supp. 1009 (D.N.M. 1986), rev'd on other grounds, 868 F.2d 1199 (10th Cir. 1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. - In personam or territorial jurisdiction of state court in connection with obscenity prosecution of author, actor, photographer, publisher, distributor or other party whose acts were performed outside the state, 16 A.L.R.4th 1318.

Validity and application of statute exempting nonmanagerial, nonfinancially interested employees from obscenity prosecution, 35 A.L.R.4th 1237.

30-37-2.1. Offenses; retail display.

A. It is unlawful for any person, offering for sale in a retail establishment open to the general public any book, magazine or other printed material the cover of which depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement and which is harmful to minors, to knowingly exhibit that book, magazine or material in that establishment in such a way that it is on open display to, or within the convenient reach of, minors who may frequent the retail establishment. Such books, magazines or printed materials may be displayed behind an opaque covering which conceals the depiction of nudity, sado-masochistic abuse, sexual conduct or sexual excitement, provided that those books, magazines or printed materials are not within the convenient reach of minors who may frequent the retail establishment.

B. It is unlawful for any person, offering for sale in a retail establishment open to the general public any book, magazine or other printed material the content of which exploits, is devoted to or is principally made up of descriptions or depictions of nudity, sado-masochistic abuse, sexual conduct or sexual excitement and which are harmful to minors, to knowingly exhibit that book, magazine or material in that establishment in such a way that it is within the convenient reach of minors who may frequent the retail establishment.

History: 1978 Comp., § 30-37-2.1, enacted by Laws 1985, ch. 13, § 1.

ANNOTATIONS

Compiler's note. - *American Booksellers Ass'n v. Schiff*, 649 F. Supp. 1009 (D.N.M. 1986), appearing in the main pamphlet, was reversed, 868 F.2d 1199 (10th Cir. 1989).

30-37-3. Offenses; motion pictures; plays.

It is unlawful for any person knowingly to exhibit to a minor or knowingly to provide to a minor an admission ticket or pass or knowingly to admit a minor to premises whereon there is exhibited a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

History: 1953 Comp., § 40-50-3, enacted by Laws 1973, ch. 257, § 3.

30-37-3.1. Outdoor theaters; offenses.

A. It is unlawful for the owner or operator of an outdoor motion picture theater to show or exhibit any motion picture which in whole or in part depicts unclothed sexual conduct in an outdoor theater unless the exhibitor can prove that the outdoor screen on which the picture is to be shown cannot be seen by any minor who has not taken extraordinary measures to view the screen or who is not within the area provided for those persons who have been admitted by a ticket or pass.

B. As used in this section, "unclothed sexual conduct" means an act of masturbation, homosexuality, sodomy, sexual intercourse or physical contact with a person's unclothed genitals, pubic area or buttocks.

C. The notice provisions of Section 30-37-4 NMSA 1978 shall not apply to this section.

History: 1978 Comp., § 30-37-3.1, enacted by Laws 1983, ch. 152, § 2.

30-37-4. Notice; prosecution.

A. No prosecution based under this act shall be commenced unless the district attorney of the county in which the offense occurs shall have previously determined that the matter or performance is harmful to minors and the defendant shall have received actual or constructive notice of such determination. Persons shall be presumed to have constructive notice of such determination on the fifth business day following publication of a notice of such determination in a newspaper of general circulation in the county in which the prosecution takes place.

B. Any person adversely affected by such determination may, at any time within thirty days after such notice is given, seek a judicial determination of its correctness. The court shall, unless otherwise agreed by the parties, render judgment not later than two court days following trial. Filing of an action under this section shall stay prosecution until a judicial determination is rendered, but no appeal shall have such effect unless so ordered by the trial court.

C. No criminal action shall be commenced in any other judicial district within this state during the pendency of the civil action authorized by Subsection B of Section 4 [this section] regarding the same matter, exhibition or performance.

History: 1953 Comp., § 40-50-4, enacted by Laws 1973, ch. 257, § 4.

ANNOTATIONS

Meaning of "this act". - See same catchline in notes to 30-37-1 NMSA 1978.

Constitutionality. - The threat of a determination of harmfulness - apart from the possibility of prosecution - was substantial enough to establish standing, insofar as the case and controversy requirement of Article III of the federal constitution was concerned, for publishers, distributors and sellers of printed materials in their action to challenge the constitutionality of this article. *American Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

Burden of proof. - Once the district attorney determines that certain material is harmful to minors, the statute places upon the distributor or retail establishment marketing such material the burden of establishing that the material is not harmful to minors. *American Booksellers Ass'n v. Schiff*, 868 F.2d 1199 (10th Cir. 1989).

30-37-5. Exclusions; defenses.

No person shall be guilty of violating the provisions of this act:

A. where such person had reasonable cause to believe that the minor involved had reached his eighteenth birthday, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor had reached his eighteenth birthday; or

B. if the minor was accompanied by his parent or guardian, or the parent or guardian has in writing waived the application of this act either generally or with reference to the particular transaction; or

C. where such person had reasonable cause to believe that the person was the parent or guardian of the minor; or

D. where such person is a bona fide school, museum or public library, or is acting in his capacity as an employee of such organization, or as a retail outlet affiliated with and serving the educational purposes of such organization.

History: 1953 Comp., § 40-50-5, enacted by Laws 1973, ch. 257, § 5.

ANNOTATIONS

Meaning of "this act". - See same catchline in notes to 30-37-1 NMSA 1978.

30-37-6. Offenses by minor.

A. It is unlawful for any minor to falsely represent to any person mentioned in Section 2 or Section 3 [30-37-2 or 30-37-3 NMSA 1978] of this act, or to his agent, that such minor has reached his eighteenth birthday, with the intent to procure any material set forth in Section 2 [30-37-2 NMSA 1978] of this act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 [30-37-3 NMSA 1978] of this act.

B. It is unlawful for any person to knowingly make a false representation to any person mentioned in Section 2 or Section 3 [30-37-2 or 30-37-3 NMSA 1978] of this act, or to his agent, that he is the parent or guardian of any minor, or that any minor has reached his eighteenth birthday, with the intent to procure any material set forth in Section 2 [30-37-2 NMSA 1978] of this act, or with the intent to procure such minor's admission to any motion picture, show or other presentation, as set forth in Section 3 [30-37-3 NMSA 1978] of this act.

History: 1953 Comp., § 40-50-6, enacted by Laws 1973, ch. 257, § 6.

30-37-7. Penalties.

A. A person violating Section 30-37-2, 30-37-2.1, 30-37-3 or 30-37-3.1 NMSA 1978 is guilty of a misdemeanor.

B. Any person violating the provisions of Section 30-37-6 NMSA 1978 shall be guilty of a petty misdemeanor.

History: 1953 Comp., § 40-50-7, enacted by Laws 1973, ch. 257, § 7; 1983, ch. 152, § 3; 1985, ch. 13, § 2.

ANNOTATIONS

Cross-references. - As to sentencing for misdemeanors, see 31-19-1 NMSA 1978.

30-37-8. Uniform application.

In order to provide for the uniform application of this act to all minors within this state, it is intended that the sole and only regulation of the sale, distribution or provision of any matter described in Section 2 [30-37-2 NMSA 1978], or admission to, or exhibition of, any performance described in Section 3 [30-37-3 NMSA 1978], shall be under this act, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the sale, distribution or provision of any matter described in Section 2 [30-37-2 NMSA 1978], or admission to any performance described in Section 3 [30-37-3 NMSA 1978], including but not limited to criminal

offenses, classification of suitable matter or performances for minors, or licenses or taxes respecting the sale, distribution, exhibition or provision of matter regulated under this act. All such laws, ordinances, regulations, taxes or licenses, whether enacted before or after this act, shall be or become void, unenforceable and of no effect upon the effective date of this act.

History: 1953 Comp., § 40-50-8, enacted by Laws 1973, ch. 257, § 8.

ANNOTATIONS

Meaning of "this act". - See same catchline in notes to 30-37-1 NMSA 1978.

"Effective date of this act". - The phrase "effective date of this act", referred to at the end of this section, means June 15, 1973, the effective date of Laws 1978, Chapter 257.

Preemption by state. - The state has preempted this field as far as it pertains to minors, and no county or municipality may enact ordinances on this subject matter. 1973-74 Op. Att'y Gen. No. 73-54.

Sections 30-37-2 and 30-37-3 NMSA 1978 so fully cover the field that it is not conceivable that a county or municipal ordinance could be drafted that would not offend the prohibitions of this section. 1973-74 Op. Att'y Gen. No. 73-54.

So that there will be uniform application of the state plan regulating sexually oriented material harmful to minors, the state has preempted county and municipal regulation of the field. *American Booksellers Ass'n v. Schiff*, 649 F. Supp. 1009 (D.N.M. 1986), rev'd on other grounds, 868 F.2d 1199 (10th Cir. 1989).

Powers retained by localities. - In enacting Laws 1973, ch. 257, the legislature intended for counties and municipalities to retain any grant of power they have to make ordinances in the obscenity field not inconsistent with the provisions of this section. 1973-74 Op. Att'y Gen. No. 73-54.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Motion pictures: exhibition of obscene motion pictures as nuisance, 50 A.L.R.3d 969.

Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

30-37-9. Legislative findings and purpose.

The legislature finds that children do not have the judgment necessary to protect themselves from harm and that the legislature has the inherent power to control commercial conduct within this state for the protection of minors in a manner that reaches beyond the scope of its authority to protect adults. The legislature also finds

that regulation of content at outdoor theaters does not deprive adults from viewing that content at indoor theaters.

History: Laws 1983, ch. 152, § 1.

30-37-10. Offenses; certain tie-in arrangements unlawful.

A. It is unlawful for any person offering for sale, selling or distributing books, magazines or other printed material to require, as a condition for any such sale or delivery, that the purchaser or receiver of the delivery purchase or accept the delivery of any other book, magazine or other printed matter which contains sexually oriented material harmful to minors as defined in Subsection F of Section 30-37-1 NMSA 1978. Nothing in this subsection prohibits the sale or purchase on a voluntary basis of books, magazines or other printed material containing sexually oriented material.

B. Any person violating the provisions of Subsection A of this section shall be guilty of a misdemeanor.

History: Laws 1985, ch. 134, § 1.

ANNOTATIONS

Cross-references. - As to sentencing for petty misdemeanors, see 31-19-1 NMSA 1978.

ARTICLE 38 EXHIBITING OBSCENE FILMS OUTDOORS

30-38-1. Outdoor motion picture theatres; prohibited from showing obscene films.

A. It is unlawful for the owner or operator of an outdoor motion picture theatre to exhibit any obscene film in an outdoor theatre.

B. For purposes of this section, "obscene film" means a film that:

(1) the average person applying contemporary community standards would find that, when considered or taken as a whole, appeals to the prurient interests;

(2) the material depicts or describes sexual conduct in a patently offensive way by representations of ultimate sexual acts, normal or perverted, actual or simulated; masturbation, excretory functions or lewd exhibitions of the genitals of oneself or another; tactile stimulation of the genitals of oneself or another; and

(3) the work when considered or taken as a whole lacks serious literary, artistic, political or scientific value.

C. It is unlawful for any person to violate the provisions of Subsection A of this section. In the event a person violates the provisions of Subsection A of this section any representative of the local government involved may, upon notice to the offending person, seek an injunction in the district court to enjoin the showing of the offending film.

History: 1953 Comp., § 49-5-23, enacted by Laws 1977, ch. 241, § 1.

ANNOTATIONS

Cross-references. - As to the issuance of injunctions generally, see Rules 1-065 and 1-066.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and application of statute authorizing forfeiture of use or closure of real property from which obscene materials have been disseminated or exhibited, 25 A.L.R.4th 395.

30-38-2. Applicability.

The provisions of Section 1 [30-38-1 NMSA 1978] of this act shall only be enforced in those political subdivisions that have adopted by ordinance the provisions of Section 1 of this act. Any ordinance that has been adopted by a political subdivision that is in conflict with the provisions of Section 1 of this act shall be void. In the event a county adopts by ordinance the provisions of Section 1 of this act, those provisions shall not be enforceable by the county within the territorial boundaries of any incorporated municipality located in the county.

History: 1953 Comp., § 49-5-24, enacted by Laws 1977, ch. 241, § 2.

ARTICLE 39 FALSE REPORTING

30-39-1. False report; penalty.

It is unlawful for any person to intentionally make a report to a law enforcement agency or official, which report he knows to be false at the time of making it, alleging a violation by another person of the provisions of the Criminal Code. Any person violating the provisions of this section is guilty of a misdemeanor.

History: Laws 1979, ch. 145, § 1.

ANNOTATIONS

Criminal Code. - See 30-1-1 NMSA 1978 and notes thereto.

Applicability. - By its plain language, this section applies only if a person falsely alleges a criminal violation by someone other than the person making the allegation. The statute does not apply to situations where an individual falsely assumes the responsibility for a criminal offense. *State v. Gardner*, 112 N.M. 280, 814 P.2d 458 (Ct. App. 1991).

ARTICLE 40

PUBLIC ASSISTANCE

30-40-1. Failing to disclose facts or change of circumstances to obtain public assistance.

A. Failing to disclose facts or change of circumstances to obtain public assistance consists of any person knowingly failing to disclose any material facts known to be necessary to determine eligibility for public assistance or knowingly failing to disclose a change in circumstances for the purpose of obtaining or continuing to receive public assistance to which he is not entitled or in amounts greater than that to which he is entitled.

B. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is one hundred dollars (\$100) or less in any twelve consecutive months is guilty of a petty misdemeanor.

C. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) in any twelve consecutive months is guilty of a misdemeanor.

D. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) in any twelve consecutive months is guilty of a fourth degree felony.

E. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received is more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

F. Whoever commits failing to disclose facts or change of circumstances to obtain public assistance when the value of the assistance wrongfully received exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

History: Laws 1979, ch. 170, § 1; 1987, ch. 121, § 12.

30-40-2. Unlawful use of food stamp identification card or medical identification card.

A. Unlawful use of food stamp identification card or medical identification card consists of the use of a food stamp or medical identification card by any person to whom it has not been issued or who is not an authorized representative for a food stamp allotment.

B. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

C. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

D. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony.

E. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received is more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

F. Whoever commits unlawful use of food stamp identification card or medical identification card when the value of the food stamps or medical services wrongfully received exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

G. For the purpose of this section, the value of the medical assistance received is the amount paid by the human services department for medical services received through use of the card.

History: Laws 1979, ch. 170, § 2; 1987, ch. 121, § 13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability of state or federal government for losses associated with distribution of food stamps, 116 A.L.R. Fed. 457.

30-40-3. Misappropriating public assistance.

A. Misappropriating public assistance consists of any public officer or public employee fraudulently misappropriating, attempting to misappropriate or aiding and abetting in the misappropriation of food stamp coupons, WIC checks pertaining to the special supplemental food program for women, infants and children administered by the health and environment department [department of health], food stamp or medical identification cards, public assistance benefits or funds received in exchange for food stamp coupons.

B. Whoever commits misappropriating public assistance when the value of the thing misappropriated is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

C. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

D. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony.

E. Whoever commits misappropriating public assistance when the value of the thing misappropriated is more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand (\$20,000) is guilty of a third degree felony.

F. Whoever commits misappropriating public assistance when the value of the thing misappropriated exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

G. Whoever commits misappropriating public assistance when the item misappropriated is a food stamp or medical identification card is guilty of a fourth degree felony.

History: Laws 1979, ch. 170, § 3; 1987, ch. 121, § 14.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

30-40-4. Making or permitting a false claim for reimbursement for public assistance services.

A. Making or permitting a false claim for reimbursement of public assistance services consists of knowingly making, causing to be made or permitting to be made a claim for reimbursement for services provided to a recipient of public assistance for services not

rendered or making a false material statement or forged signature upon any claim for services, with intent that the claim shall be relied upon for the expenditure of public money.

B. Whoever commits making or permitting a false claim for reimbursement for public assistance services is guilty of a fourth degree felony.

History: Laws 1979, ch. 170, § 4.

ANNOTATIONS

Effect of conviction. - Where a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

30-40-5. Unlawful seeking [of] payment from public assistance recipients.

A. Unlawful seeking [of] payment from public assistance recipients consists of knowingly seeking payment from recipients or their families for any unpaid portion of a bill for which reimbursement has been or will be received from the human services department or for claims or services denied by the human services department because of provider [the provider's] administrative error.

B. Whoever commits unlawful seeking [of] payment from [a] public assistance recipient is guilty of a misdemeanor.

History: Laws 1979, ch. 170, § 5.

30-40-6. Failure to reimburse the department upon receipt of third-party payment.

A. Failure to reimburse the human services department upon receipt of third party payment consists of knowingly [knowing] failure by a medicaid provider to reimburse the human services department or the department's fiscal agent the amount of payment received from the department for services when the provider receives payment for the same services from any third party.

B. A medicaid provider who commits failure to reimburse the department upon receipt of third party payment when the value of the payment made by the department is one hundred dollars (\$100) or less is guilty of a petty misdemeanor.

C. A medicaid provider who commits failure to reimburse the department upon receipt of third party payment when the value of the payment made by the department is more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor.

D. A medicaid provider who commits failure to reimburse the department upon receipt of third party payment when the value of the payment made by the department is more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony.

E. A medicaid provider who commits failure to reimburse the department upon receipt of third party payment when the value of the payment made by the department is more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

F. A medicaid provider who commits failure to reimburse the department upon receipt of third party payment when the value of the payment made by the department exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

History: Laws 1979, ch. 170, § 6; 1987, ch 121, § 15.

30-40-7. Failure to notify the department of receipt of anything of value from public assistance recipient.

Any employee of the human services department who knowingly receives anything of value, other than as provided by law, from either a recipient of public assistance or from the family of a public assistance recipient shall notify the department within ten days after such receipt on a form provided by the department. Whoever fails to so notify the department within ten days is guilty of a petty misdemeanor.

History: Laws 1979, ch. 170, § 7.

ARTICLE 41 KICKBACK, BRIBE OR REBATE

30-41-1. Soliciting or receiving illegal kickback.

Whoever knowingly solicits or receives any remuneration in the form of any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind from a person:

A. in return for referring an individual to that person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or

B. in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony.

History: Laws 1979, ch. 384, § 1.

ANNOTATIONS

Cross-references. - As to civil penalties for kickbacks or bribes, see 13-1-198 NMSA 1978.

30-41-2. Offering or paying illegal kickback.

Whoever knowingly offers or pays any remuneration in the form of any kickback, bribe, or rebate, directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person:

A. to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part with public money; or

B. to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any goods, facilities, services, or items for which payment may be made in whole or in part with public money, shall be guilty of a fourth degree felony.

History: Laws 1979, ch. 384, § 2.

ANNOTATIONS

Cross-references. - As to civil penalties for kickbacks or bribes, see 13-1-198 NMSA 1978.

30-41-3. Exceptions.

This act [30-41-1 to 30-41-3 NMSA 1978] shall not apply to:

A. a discount or other reduction in price obtained by a provider of services or other entity if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity; or

B. any amount paid by an employer to an employee who has a bona fide employment relationship with such employer for employment in the provision of covered items or services.

History: Laws 1979, ch. 384, § 3.

ANNOTATIONS

Cross-references. - As to civil penalties for kickbacks or bribes, see 13-1-198 NMSA 1978.

ARTICLE 42 RACKETEERING

30-42-1. Short title.

This act [30-42-1 to 30-42-6 NMSA 1978] may be cited as the "Racketeering Act."

History: 1978 Comp., § 30-42-1, enacted by Laws 1980, ch. 40, § 1.

ANNOTATIONS

Law reviews. - For annual survey of New Mexico Criminal Law, see 20 N.M.L. Rev. 265 (1990).

For note, "Criminal Procedure - New Mexico Denies Fifth Amendment Protection to Corporations: John Doe and Five Unnamed Corporations v. State ex rel. Governor's Organized Crime Prevention Commission," see 23 N.M.L. Rev. 315 (1993).

30-42-2. Purpose.

The purpose of the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978] is to eliminate the infiltration and illegal acquisition of legitimate economic enterprise by racketeering practices and the use of legal and illegal enterprises to further criminal activities.

History: 1978 Comp., § 30-42-2, enacted by Laws 1980, ch. 40, § 2.

30-42-3. Definitions.

As used in the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978]:

A. "racketeering" means any act which is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year, involving any of the following cited offenses:

- (1) murder, as provided in Section 30-2-1 NMSA 1978;
- (2) robbery, as provided in Section 30-16-2 NMSA 1978;
- (3) kidnapping, as provided in Section 30-4-1 NMSA 1978;

- (4) forgery, as provided in Section 30-16-10 NMSA 1978;
- (5) larceny, as provided in Section 30-16-1 NMSA 1978;
- (6) fraud, as provided in Section 30-16-6 NMSA 1978;
- (7) embezzlement, as provided in Section 30-16-8 NMSA 1978;
- (8) receiving stolen property, as provided in Section 30-16-11 NMSA 1978;
- (9) bribery, as provided in Sections 30-24-1 through 30-24-3 NMSA 1978;
- (10) gambling, as provided in Sections 30-19-3, 30-19-13 and 30-19-15 NMSA 1978;
- (11) illegal kickbacks, as provided in Sections 30-41-1 and 30-41-2 NMSA 1978;
- (12) extortion, as provided in Section 30-16-9 NMSA 1978;
- (13) trafficking in controlled substances, as provided in Section 30-31-20 NMSA 1978;
- (14) arson and aggravated arson, as provided in Subsection A of Section 30-17-5 and Section 30-17-6 NMSA 1978;
- (15) promoting prostitution, as provided in Section 30-9-4 NMSA 1978;
- (16) criminal solicitation, as provided in Section 30-28-3 NMSA 1978;
- (17) fraudulent securities practices, as provided in the New Mexico Securities Act of 1986 [58-13B-1 to 58-13B-56 NMSA 1978];
- (18) loan sharking, as provided in Sections 30-43-1 through 30-43-5 NMSA 1978; and
- (19) distribution of controlled substances or controlled substance analogues as provided for in Sections 30-31-21 and 30-31-22 NMSA 1978.

B. "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

C. "enterprise" means any sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or any group of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities; and

D. "pattern of racketeering activity" means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4 NMSA 1978; provided at least one of such

incidents occurred after the effective date of the Racketeering Act and the last of which occurred within five years after the commission of a prior incident of racketeering.

History: 1978 Comp., § 30-42-3, enacted by Laws 1980, ch. 40, § 3; 1988, ch. 14, § 4.

ANNOTATIONS

The 1988 amendment, effective July 1, 1988, substituted "the New Mexico Securities Act of 1986" for "Sections 58-13-39 and 58-13-40 NMSA 1978; and" in Subsection A(17), made a minor stylistic change in Subsection A(18), and added Subsection A(19).

"Effective date of the Racketeering Act". - The phrase "effective date of the Racketeering Act", referred to in Subsection D, means the effective date of Laws 1980, Chapter 40, February 28, 1980.

Intent to perform only predicate acts. - The legislature intended the Racketeering Act to have a broad application, so that it covers situations in which a group of individuals associate only to perform predicate criminal acts. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

With respect to the intent requirement, the definition of a "pattern of racketeering activity" is hardly a model of clarity. The intent component of the definition of "pattern of racketeering activity" would be useless if it encompassed nothing more than the intent necessary to commit each of the two incidents of racketeering required by definition. *Naranjo v. Paull*, 111 N.M. 165, 803 P.2d 254 (1990).

"Enterprise". - An "enterprise" as used in the racketeering statute may exist when there is no association above and beyond the acts which form the pattern of racketeering activity. *State v. Wynne*, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

The factors to be considered in determining the existence of an enterprise include the identity of the individuals involved, their knowledge of the relevant activities, the amount of planning required to carry out the predicate acts, the frequency of the acts, the time span between each act, and the existence of an identifiable structure within the association or entity. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

"Association" necessary for "enterprise". - While proof of an association is essential to establishing the elements of an enterprise, the purpose of the association may be as simple as earning money from repeated illegal acts. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

Failure to state two underlying activities. - Complaint alleging racketeering activity was properly dismissed where plaintiffs conceded that dismissed defendants had not committed fraud, and where plaintiffs failed to state two activities underlying their claim as required by Subsection D. *Maxwell v. Wilson*, 108 N.M. 65, 766 P.2d 909 (1988).

Distinct, independent proof of elements not necessary. - Although the state must prove both the existence of an "enterprise" and a "pattern of racketeering activity," proof of these elements need not be, and often will not be, distinct and independent. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

Effect of acquittal on some predicate charges. - Petit jury verdicts of guilty on each fraud count returned by them against defendants constituted a basis to uphold the racketeering verdicts and provided assurance that the jury found defendants guilty of at least two of the predicate acts of fraud as charged in the indictment. Simply because defendants were acquitted of some charges and others were dismissed does not require the racketeering charges to be set aside where the jury returned guilty verdicts on other predicate counts. *State v. Crews*, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

30-42-4. Prohibited activities; penalties.

A. It is unlawful for any person who has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise. Whoever violates this subsection is guilty of a second degree felony.

B. It is unlawful for any person to engage in a pattern of racketeering activity in order to acquire or maintain, directly or indirectly, any interest in or control of any enterprise. Whoever violates this subsection is guilty of a second degree felony.

C. It is unlawful for any person employed by or associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs by engaging in a pattern of racketeering activity. Whoever violates this subsection is guilty of a second degree felony.

D. It is unlawful for any person to conspire to violate any of the provisions of Subsections A through C of this section. Whoever violates this subsection is guilty of a third degree felony.

E. Whoever violates Subsection A, B, C or D of this section in addition to the prescribed penalties shall forfeit to the state of New Mexico:

(1) any interest acquired or maintained in violation of the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978]; and

(2) any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which he has established, operated, controlled, conducted or participated in the conduct of in violation of the Racketeering Act.

F. In any action brought by the state under the Racketeering Act, the district court shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including but not limited to the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

G. Upon conviction of a person under this section, the court shall authorize the attorney general or the district attorney to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper, making due provision for the rights of innocent persons. If a property right or other interest is not exercisable or transferable for value by the convicted person it shall expire and shall not revert to the convicted person.

History: 1978 Comp., § 30-42-4, enacted by Laws 1980, ch. 40, § 4.

ANNOTATIONS

Racketeering Act is not unconstitutionally vague in proscribing clearly enumerated criminal activities which are perpetrated either through legitimate business or illegitimate business activities. *State v. Johnson*, 105 N.M. 63, 728 P.2d 473 (Ct. App. 1986), cert denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

Crime of racketeering constitutes separate and distinct offense apart from enumerated predicate crimes. Thus, a separately imposed punishment for racketeering, apart from the sentences levied for the predicate offenses, does not constitute double jeopardy. *State v. Johnson*, 105 N.M. 63, 728 P.2d 473 (Ct. App. 1986), cert denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

Engaging in "pattern of racketeering activity" is separate element of offense of racketeering, distinct from the existence of the enterprise and the participation of the individual therein. *State v. Johnson*, 105 N.M. 63, 728 P.2d 473 (Ct. App. 1986), cert. denied, 481 U.S. 1051, 107 S. Ct. 2185, 95 L. Ed. 2d 841 (1987).

"Proceeds". - "Proceeds," as used in the racketeering act, includes nonmonetary proceeds. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

Sufficiency of indictment. - Although a corporate defendant may be charged and convicted of the offense of racketeering, it was error to submit the racketeering charge against the corporate defendant to the jury because the corporate defendant was not specifically charged with commission of such crime in the indictment. *State v. Crews*, 110 N.M. 723, 799 P.2d 592 (Ct. App. 1989).

Merger with charge of conspiracy to traffic by manufacturer. - In order for the jury to have convicted defendant of conspiracy to racketeer pursuant to the court's instruction, it was also necessary for the state to prove, and the jury to find, that she and another conspired to traffic by manufacture. Thus, the two offenses for which defendant

was convicted merged under the facts and circumstances of the case. *State v. Wynne*, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

Distinct, independent proof of elements not necessary. - Although the state must prove both the existence of an "enterprise" and a "pattern of racketeering activity," proof of these elements need not be, and often will not be, distinct and independent. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

Evidence held sufficient. - Evidence was sufficient to support conviction for conspiracy to commit racketeering. See *State v. Wynne*, 108 N.M. 134, 767 P.2d 373 (Ct. App. 1988).

There was sufficient proof that defendant used the nonmonetary proceeds of his act of receiving stolen property, i.e., the stolen property itself, in his methamphetamine manufacturing business. *State v. Hughes*, 108 N.M. 143, 767 P.2d 382 (Ct. App. 1988).

Failure to state claim of pattern of racketeering activity. - Complaint alleging that lenders and realtors, in concert with home builder, had injured plaintiffs by representing homes as well built and performing only "windshield inspection", failed to state a claim that lenders and realtors had engaged in a pattern of racketeering activity. *Maxwell v. Wilson*, 108 N.M. 65, 766 P.2d 909 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USCS §§ 1961-1968, 89 A.L.R. Fed. 887.

30-42-5. Enforcement authority.

The attorney general and the district attorneys of New Mexico shall each have authority to enforce the criminal provisions of the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978] by initiating investigations, assisting grand juries, obtaining indictments, filing informations and complaints and prosecuting criminal cases.

History: 1978 Comp., § 30-42-5, enacted by Laws 1980, ch. 40, § 5.

30-42-6. Racketeering; civil remedies.

A. A person who sustains injury to his person, business or property by a pattern of racketeering activity may file an action in the district court for the recovery of three times the actual damages proved and the costs of the suit, including reasonable attorney's fees.

B. The state may file an action on behalf of those persons injured or to prevent, restrain or remedy racketeering as defined by the Racketeering Act [30-42-1 to 30-42-6 NMSA 1978].

C. The district court has jurisdiction to prevent, restrain and remedy racketeering as defined in Subsection A of Section 30-42-3 NMSA 1978 after making provision for the rights of all innocent persons affected by such violation and after hearing or trial, as appropriate, by issuing appropriate orders. Prior to a determination of liability, such orders may include but are not limited to entering restraining orders or prohibitions or taking such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to damages, forfeiture or other restraints pursuant to this section as it deems proper.

D. Following a determination of liability, such orders may include but are not limited to:

(1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;

(2) imposing reasonable restrictions on the future activities or investments of any person;

(3) ordering dissolution or reorganization of any enterprise;

(4) ordering the payment of three times the damages proved to those persons injured by racketeering; and

(5) ordering the payment of all costs and expenses of the prosecution and investigation of any offense included in the definition of racketeering incurred by the state to be paid to the general fund of New Mexico.

History: 1978 Comp., § 30-42-6, enacted by Laws 1980, ch. 40, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Civil action for damages under state Racketeer Influenced and Corrupt Organizations Act (RICO) for losses from racketeering activity, 62 A.L.R.4th 654.

Civil action for damages under 18 USCS § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 USCS §§ 1961 et seq.) for injuries sustained by reason of racketeering activity, 70 A.L.R. Fed. 538.

Recovery of damages for personal injuries in civil action for damages under Racketeer Influenced and Corrupt Organizations Act (18 USCS § 1964(c)), 96 A.L.R. Fed. 881.

Liability, under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS §§ 1961-1968), for retaliation against employee for disclosing or refusing to commit wrongful act, 100 A.L.R. Fed. 657.

ARTICLE 43

LOAN SHARKING

30-43-1. Short title.

This act [30-43-1 to 30-43-5 NMSA 1978] may be cited as the "Loan Sharking Act."

History: 1978 Comp., § 30-43-1, enacted by Laws 1980, ch. 39, § 1.

30-43-2. Definitions.

As used in the Loan Sharking Act [30-43-1 to 30-43-5 NMSA 1978]:

A. "creditor" means any person making an extension of credit or any person claiming by, under or through any person making an extension of credit;

B. "debtor" means any person to whom an extension of credit is made or any person who guarantees the repayment of an extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom an extension is made to repay the same;

C. "extortionate extension of credit" means any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal acts other than petty misdemeanors to cause harm to the person, reputation or property of any person;

D. "extortionate means" means the use, or an express or implicit threat of use, of violence or other criminal acts other than petty misdemeanors to cause harm to the person, reputation or property of any person;

E. "to collect an extension of credit" means to induce in any way any person to make repayment of one extension of credit;

F. "to extend credit" means to make or renew any loan or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid and however arising, may or shall be deferred; and

G. "repayment of any extension of credit" means the repayment, satisfaction or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

History: 1978 Comp., § 30-43-2, enacted by Laws 1980, ch. 39, § 2.

30-43-3. Making extortionate extensions of credit.

A. Any person who makes or conspires or attempts to make an extortionate extension of credit is guilty of a third degree felony.

B. In any prosecution pursuant to this section, if it is shown that all of the following factors were present in connection with the extension of credit, there is prima facie evidence that the extension of credit was extortionate:

(1) the extension of credit was made at a rate of interest in excess of an annual rate of forty-five percent calculated according to the actuarial method of allocating payments on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal;

(2) at the time the extension of credit was made, the debtor reasonably believed either of the following:

(a) one or more extensions of credit by the creditor had been collected by extortionate means or the nonrepayment had been punished by extortionate means; or

(b) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof; and

(3) upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded one hundred dollars (\$100).

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence of the circumstances described in Paragraph (1) of Subsection B of this section and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may, pursuant to the New Mexico rules of evidence, in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

D. Nothing contained in Paragraphs (1) through (3) of Subsection B of this section shall be construed as a requirement for the proof of the existence of an extortionate extension of credit.

History: 1978 Comp., § 30-43-3, enacted by Laws 1980, ch. 39, § 3.

30-43-4. Financing extortionate extensions of credit.

A person who knowingly advances money or property, whether as a gift, loan or investment, to any person with reasonable grounds to believe that it is the intention of

that person to use the money or property so advanced, directly or indirectly, for the purpose of making extortionate extensions of credit is guilty of a third degree felony.

History: 1978 Comp., § 30-43-4, enacted by Laws 1980, ch. 39, § 4.

30-43-5. Collection of extensions of credit by extortionate means.

A. A person who knowingly participates or conspires or attempts to participate in the use of any extortionate means to collect any extensions of credit or to cause harm to the person, reputation or property of any person for the nonpayment thereof is guilty of a third degree felony.

B. In any prosecution pursuant to this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonpayment resulted in the use of extortionate means.

C. In any prosecution pursuant to this section, if evidence has been introduced tending to show the existence at the time the extension of credit in question was made of the circumstances described in Paragraph (1) of Subsection B of Section 30-43-3 NMSA 1978 and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication shown to have been employed as a means of collection in fact carried an express or implicit threat, the court may, pursuant to the New Mexico rules of evidence, in its discretion, allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

History: 1978 Comp., § 30-43-5, enacted by Laws 1980, ch. 39, § 5.

ARTICLE 44 MEDICAID FRAUD

30-44-1. Short title.

This act [30-44-1 to 30-44-8 NMSA 1978] may be cited as the "Medicaid Fraud Act".

History: Laws 1989, ch. 286, § 1.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-2. Definitions.

As used in the Medicaid Fraud Act [30-44-1 to 30-44-8 NMSA 1978]:

A. "benefit" means money, treatment, services, goods or anything of value authorized under the program;

B. "claim" means any communication, whether oral, written, electronic or magnetic which identifies a treatment, good or service as reimbursable under the program;

C. "cost document" means any cost report or similar document which states income or expenses and is used to determine a cost reimbursement based rate of payment for a provider under the program;

D. "department" means the human services department;

E. "great physical harm" means physical harm of a type which causes physical loss of a bodily member or organ or functional loss of a bodily member or organ for a prolonged period of time;

F. "great psychological harm" means psychological harm which causes mental or emotional incapacitation for a prolonged period of time or which causes extreme behavioral change or severe physical symptoms or which requires psychological or psychiatric care;

G. "person" includes individuals, corporations, partnerships and other associations;

H. "physical harm" means an injury to the body which causes pain or incapacitation;

I. "program" means the medical assistance program authorized under Title XIX of the federal Social Security Act, 42 U.S.C. 1396, et seq. and implemented under Section 27-2-12 NMSA 1978;

J. "provider" means any person who has applied to participate or who participates in the program as a supplier of treatment, services or goods;

K. "psychological harm" means emotional or psychological damage of such a nature as to cause fear, humiliation or distress or to impair a person's ability to enjoy the normal process of his life;

L. "recipient" means any individual who receives or requests benefits under the program;

M. "records" means any medical or business documentation, however recorded, relating to the treatment or care of any recipient, to services or goods provided to any recipient or to reimbursement for treatment, services or goods, including any documentation required to be retained by regulations of the program; and

N. "unit" means the medicaid providers fraud control unit or any other agency with power to investigate or prosecute fraud and abuse of the program.

History: Laws 1989, ch. 286, § 2.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-3. Power to investigate and enforce civil remedies and prosecute criminal actions.

A. The attorney general, the district attorneys, the unit and the department have the power and authority to investigate violations of the Medicaid Fraud Act [30-44-1 to 30-44-8 NMSA 1978] and bring actions to enforce the civil remedies established in the Medicaid Fraud Act.

B. The attorney general, the district attorneys and those attorneys who are employees of the unit to whom the attorney general or a district attorney has, by appointment made through a joint powers agreement or other agreement for that purpose, delegated criminal prosecutorial responsibility, shall have the power and authority to prosecute persons for the violation of criminal provisions of the Medicaid Fraud Act and for criminal offenses that are not defined in the Medicaid Fraud Act, but that involve or are directly related to the use of medicaid program funds or services provided through medicaid programs.

History: Laws 1989, ch. 286, § 3; 1991, ch. 79, § 1.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

The 1991 amendment, effective June 14, 1991, rewrote Subsection B which read "The attorney general, the district attorneys and those persons in the unit who have criminal prosecutorial authority under general law have the power and authority to prosecute persons for the violation of criminal provisions of the Medicaid Fraud Act."

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-4. Falsification of documents; defined; penalties.

A. Falsification of documents consists of:

(1) knowingly making or causing to be made a misrepresentation of a material fact required to be furnished under the program or knowingly failing or causing the failure to include a material fact required to be furnished under the program in any record required to be retained in connection with the program pursuant to the Medicaid Fraud Act [30-44-1 to 30-44-8 NMSA 1978] or regulations issued by the department for the administration of the program, or both; or

(2) knowingly submitting or causing to be submitted false or incomplete information for the purpose of receiving benefits or qualifying as a provider.

B. Whoever commits the crime of falsification of documents is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 286, § 4.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-5. Failure to retain records; defined; penalties.

A. Whoever receives payment for treatment, services or goods under the program shall retain all medical and business records relating to:

(1) the treatment or care of any recipient;

(2) services or goods provided to any recipient;

(3) rates paid by the department under the program on behalf of any recipient; and

(4) any records required to be maintained by regulation of the department for administration of the program.

B. Failure to retain records consists of intentionally failing to retain the records specified in Subsection A of this section for a period of at least five years from the date payment was received or knowingly destroying or causing those records to be destroyed within five years from the date payment was received.

C. Whoever commits the crime of failure to retain records:

(1) is guilty of a misdemeanor if the treatment, services or goods for which records were not retained amounts to not more than one thousand dollars (\$1,000) and shall be sentenced pursuant to Section 31-19-1 NMSA 1978;

(2) is guilty of a fourth degree felony if the value of the treatment, services or goods for which records were not retained is more than one thousand dollars (\$1,000) and shall be sentenced pursuant to the provisions of Section 13-18-15 NMSA 1978; and

(3) is guilty of a misdemeanor if the records not retained were used in whole or in part to determine a rate of payment under the program and shall be sentenced pursuant to Section 31-19-1 NMSA 1978.

History: Laws 1989, ch. 286, § 5.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-6. Obstruction of investigation; defined; penalty.

A. Obstruction of investigation consists of:

(1) knowingly providing false information to, or knowingly withholding information from, any person authorized under the Medicaid Fraud Act [30-44-1 to 30-44-8 NMSA 1978] to investigate violations of that act or to enforce the criminal or civil remedies of that act where that information is material to the investigation or enforcement; or

(2) knowingly altering any document or record required to be retained pursuant to the Medicaid Fraud Act or any regulation issued by the department, or both, when the alteration is intended to mislead an investigation and concerns information material to that investigation.

B. Whoever commits obstruction of investigation is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 286, § 6.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-7. Medicaid fraud; defined; penalties.

A. Medicaid fraud consists of:

(1) paying, soliciting, offering or receiving:

(a) a kickback or bribe in connection with the furnishing of treatment, services or goods for which payment is or may be made in whole or in part under the program;

(b) a rebate of a fee or charge made to a provider for referring a recipient to a provider;

(c) anything of value, intending to retain it and knowing it to be in excess of amounts authorized under the program, as a precondition of providing treatment, care, services or goods or as a requirement for continued provision of treatment, care, services or goods; or

(d) anything of value intending to retain it and knowing it to be in excess of the rates established under the program for the provision of treatment, services or goods;

(2) providing with intent that a claim be relied upon for the expenditure of public money:

(a) treatment, services or goods that have not been ordered by a treating physician;

(b) treatment that is substantially inadequate when compared to generally recognized standards within the discipline or industry; or

(c) merchandise that has been adulterated, debased or mislabeled or is outdated; or

(3) presenting or causing to be presented for allowance or payment with intent that a claim be relied upon for the expenditure of public money any false, fraudulent, excessive, multiple or incomplete claim for furnishing treatment, services or goods.

B. Whoever commits medicaid fraud as described in Paragraph (1) or (3) of Subsection A of this section is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits medicaid fraud as described in Paragraph (2) of Subsection A of this section when the value of the benefit, treatment, services or goods improperly provided is:

(1) not more than one hundred dollars (\$100) is guilty of a petty misdemeanor;

(2) more than one hundred dollars (\$100) but not more than two hundred fifty (\$250) is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(3) more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

(4) more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) shall be guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; and

(5) more than twenty thousand dollars (\$20,000) shall be guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Whoever commits medicaid fraud when the fraud results in physical harm or psychological harm to a recipient is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. Whoever commits medicaid fraud when the fraud results in great physical harm or great psychological harm to a recipient is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 286, § 7.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-44-8. Civil penalties; created; enumerated; presumption; limitation of action.

A. Any person who receives payment for furnishing treatment, services or goods under the program, which payment the person is not entitled to receive by reason of a violation of the Medicaid Fraud Act [30-44-1 to 30-44-8 NMSA 1978], shall, in addition to any other penalties or amounts provided by law, be liable for:

(1) payment of interest on the amount of the excess payments at the maximum legal rate in effect on the date the payment was made, for the period from the date payment was made to the date of repayment to the state;

(2) a civil penalty in an amount of up to two times the amount of excess payments;

(3) payment of a civil penalty of five hundred dollars (\$500) for each false or fraudulent claim submitted for providing treatment, services or goods; and

(4) payment of legal fees and costs of investigation and enforcement of civil remedies.

B. Penalties and interest amounts assessed under this section shall be paid into the health care trust fund established in the Health Care Trust Fund Act if that act is in effect, and if it is not, then those amounts shall be remitted to the state treasurer for deposit in the general fund.

C. Any legal fees, costs of investigation and costs of enforcement of civil remedies recovered on behalf of the state shall be remitted to the state treasurer for deposit in the general fund.

D. A criminal action need not be brought against a person as a condition precedent to enforcement of civil liability under the Medicaid Fraud Act.

E. The remedies under this section are separate from and cumulative to any other administrative and civil remedies available under federal or state law or regulation.

F. The department may adopt regulations for the administration of the civil penalties contained in this section.

G. No action under this section shall be brought after the expiration of five years from the date the action accrues.

History: Laws 1989, ch. 286, § 8.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 286, contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

Severability clauses. - Laws 1989, ch. 286, § 9 provides for the severability of the Medicaid Fraud Act if any part or application thereof is held invalid.

ARTICLE 45 COMPUTER CRIMES

30-45-1. Short title.

This act [30-45-1 to 30-45-7 NMSA 1978] may be cited as the "Computer Crimes Act".

History: Laws 1989, ch. 215, § 1.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-45-2. Definitions.

As used in the Computer Crimes Act [30-45-1 to 30-45-7 NMSA 1978]:

A. "access" means to program, execute programs on, intercept, instruct, communicate with, store data in, retrieve data from or otherwise make use of any computer resources, including data or programs of a computer, computer system, computer network or database;

B. "computer" includes an electronic, magnetic, optical or other high-speed data processing device or system performing logical, arithmetic or storage functions and includes any property, data storage facility or communications facility directly related to or operating in conjunction with such device or system. The term does not include an automated typewriter or typesetter or a single display machine in and of itself, designed and used solely within itself for word processing, or a portable hand-held calculator, or any other device which might contain components similar to those in computers but in which the components have the sole function of controlling the device for the single purpose for which the device is intended;

C. "computer network" means the interconnection of communication lines and circuits with a computer or a complex consisting of two or more interconnected computers;

D. "computer program" means a series of instructions or statements, in a form acceptable to a computer, which permits the functioning of a computer system in a manner designed to provide appropriate products from a computer system;

E. "computer property" includes a financial instrument, data, databases, computer software, computer programs, documents associated with computer systems and computer programs, or copies, whether tangible or intangible, and data while in transit;

F. "computer service" includes computer time, the use of the computer system, computer network, computer programs or data prepared for computer use, data contained within a computer network and data processing and other functions performed, in whole or in part, by the use of computers, computer systems, computer networks or computer software;

G. "computer software" means a set of computer programs, procedures and associated documentation concerned with the operation and function of a computer system;

H. "computer system" means a set of related or interconnected computer equipment, devices and software;

I. "data" means a representation of information, knowledge, facts, concepts or instructions which are prepared and are intended for use in a computer, computer system or computer network;

J. "database" means any data or other information classified, processed, transmitted, received, retrieved, originated, switched, stored, manifested, measured, detected, recorded, reproduced, handled or utilized by a computer, computer system, computer network or computer software; and

K. "financial instrument" includes any check, draft, warrant, money order, note, certificate of deposit, letter of credit, bill of exchange, credit or debit card, transaction, authorization mechanism, marketable security or any other computerized representation thereof.

History: Laws 1989, ch. 215, § 2.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-45-3. Computer access with intent to defraud or embezzle.

Any person who knowingly and willfully accesses or causes to be accessed any computer, computer system, computer network or any part thereof with the intent to obtain, by means of embezzlement or false or fraudulent pretenses, representations or promises, money, property or anything of value, where:

A. the money, property or other thing has a value of one hundred dollars (\$100) or less is guilty of a petty misdemeanor;

B. the money, property or other thing has a value of more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

C. the money, property or other thing has a value of more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

D. the money, property or other thing has a value of more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; or

E. the money, property or other thing has a value of more than twenty thousand dollars (\$20,000) is guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 215, § 3.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-45-4. Computer abuse.

Any person who knowingly, willfully and without authorization, or having obtained authorization:

A. directly or indirectly alters, changes, damages, disrupts or destroys any computer, computer network, computer property, computer service or computer system where:

- (1) the damage to the computer property or computer service has a value of one hundred dollars (\$100) or less is guilty of a petty misdemeanor;
- (2) the damage to the computer property or computer service has a value of more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;
- (3) the damage to the computer property or computer service has a value of more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;
- (4) the damage to the computer property or computer service has a value of more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; or
- (5) the damage to the computer property or computer service has a value of more than twenty thousand dollars (\$20,000) is guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; or

B. directly or indirectly introduces or causes to be introduced data which the person knows to be false into a computer, computer system, computer network, computer software, computer program, database or any part thereof with the intent of harming the property or financial interests or rights of any person is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 215, § 4.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-45-5. Unauthorized computer use.

Any person who knowingly, willfully and without authorization, or having obtained authorization, uses the opportunity such authorization provides for purposes to which the authorization does not extend, directly or indirectly accesses, uses, takes, transfers, conceals, obtains, copies, or retains possession of any computer, computer network, computer property, computer service, computer system or any part thereof where:

A. the damage to the computer property or computer service has a value of one hundred dollars (\$100) or less is guilty of a petty misdemeanor;

B. the damage to the computer property or computer service has a value of more than one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978;

C. the damage to the computer property or computer service has a value of more than two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978;

D. the damage to the computer property or computer service has a value of more than two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978; or

E. the damage to the computer property or computer service has a value of more than twenty thousand dollars (\$20,000) is guilty of a second degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1989, ch. 215, § 5.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-45-6. Prosecution.

A. Prosecution pursuant to the Computer Crimes Act [30-45-1 to 30-45-7 NMSA 1978] shall not prevent any prosecutions pursuant to any other provisions of the law where such conduct also constitutes a violation of that other provision.

B. A person found guilty of violating any provision of the Computer Crimes Act shall, in addition to any other punishment, be ordered to make restitution for any financial loss sustained by anyone injured as the direct result of the commission of the crime. Restitution shall be imposed in addition to incarceration, forfeiture or fine, and not in lieu thereof, and may be made a condition of probation. The defendant's present and future

ability to make such restitution shall be considered. In an extraordinary case, the court may determine that the interests of those injured and justice would not be served by ordering restitution. In such a case, the court shall make and enter specific written findings on the record substantiating the extraordinary circumstance presented upon which the court determined not to order restitution. In all other cases, the court shall determine the amount and method of restitution.

History: Laws 1989, ch. 215, § 6.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

30-45-7. Forfeiture of property.

A. The following are subject to forfeiture:

(1) all computer property, equipment or products of any kind which have been used, manufactured, acquired or distributed in violation of the Computer Crimes Act [30-45-1 to 30-45-7 NMSA 1978];

(2) all materials, products and equipment of any kind which are used or intended for use in manufacturing, using, accessing, altering, disrupting, copying, concealing, destroying, transferring, delivering, importing or exporting any computer property or computer service in violation of the Computer Crimes Act;

(3) all books, records and research products and materials involving formulas, microfilm, tapes and data which are used or intended for use in violation of the Computer Crimes Act;

(4) all conveyances, including aircraft, vehicles or vessels, which are used or intended for use to transport or in any manner to facilitate the transportation of property described in Subsection A, B or C of this section for the purpose of violating the Computer Crimes Act;

(5) all property, real, personal or mixed, which has been used or intended for use, maintained or acquired in violation of the Computer Crimes Act; and

(6) all money or proceeds that constitute an instrumentality or derive from a violation of the Computer Crimes Act.

B. Notwithstanding the provisions of Paragraphs (1) through (6) of Subsection A of this section:

(1) no conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party to a violation of the Computer Crimes Act;

(2) no conveyance, computer property, equipment or other material is subject to forfeiture under this section by reason of any act or omission established by the owner to have been committed or omitted without his knowledge or consent;

(3) a conveyance, computer property, equipment or other material is not subject to forfeiture for a violation of law the penalty for which is a misdemeanor or petty misdemeanor; and

(4) a forfeiture of a conveyance, computer property, equipment or material encumbered by a bona fide security interest shall be subject to the interest of a secured party if the secured party neither had knowledge of nor consented to the act or omission.

C. Property subject to forfeiture and disposal under the Computer Crimes Act may be seized by any law enforcement officer upon an order issued by the district court having jurisdiction.

D. Seizure without such an order may be made if:

(1) the seizure is incident to an arrest or search under a search warrant;

(2) the property subject to seizure had been the subject of a prior judgment in favor of the state in an injunction or forfeiture proceeding based upon the Computer Crimes Act; or

(3) the enforcement officer has probable cause to believe that the property, whether real, personal or mixed, was used or intended for use, maintained or acquired in violation of the Computer Crimes Act.

E. In the event of a seizure pursuant to Subsection C or Subsection D of this section, a proceeding under the Computer Crimes Act and the rules of civil procedure for the district courts shall be instituted promptly and not later than thirty days after seizure. The proceeding to forfeit property under the Computer Crimes Act is against the property and not against the owner or any other person. It is in rem wholly and not in personam. It is a civil case and not a criminal proceeding. The forfeiture proceeding is required, not to complete the forfeiture, but to prove the illegal use for which the forfeiture was suffered.

F. Except as otherwise specifically provided by law, whenever any property is forfeited to the state by reason of the violation of any law, the court by which the offender is convicted shall order the sale or other disposition of the property and the proceeds of any such sale as provided for in this section are subject to the court making due

provisions for the rights of innocent persons and the legitimate rights to restitution on behalf of actual victims of the criminal acts.

G. Property taken or detained under this section shall not be subject to replevin but is deemed to be in the custody of the law enforcement agency seizing it subject only to the orders and decrees of the district court. When property is seized under the Computer Crimes Act, the enforcement officer may:

(1) place the property under seal;

(2) remove the property to a place designated by the law enforcement officer or by the district court; or

(3) require the law enforcement agency to take custody of the property and remove it to an appropriate location for disposition in accordance with law.

H. When property is forfeited under the Computer Crimes Act, the law enforcement agency seizing it shall:

(1) deliver custody of the property to the information systems council attached to the general services department. The council, based upon a plan, shall advertise and make available the forfeited property to stated agencies and political subdivisions of the state based upon a demonstrated need and plan of use for that property. The information systems council shall advertise and make the forfeited property available by bid for a minimum of one hundred twenty days and dispose of that property within another sixty days. All proceeds from the sale of forfeited property shall be deposited in the general fund; or

(2) where the court orders the property to be sold, the proceeds of the sale shall be paid into the general fund.

History: Laws 1989, ch. 215, § 7.

ANNOTATIONS

Effective dates. - Laws 1989, ch. 215 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

Severability clauses. - Laws 1989, ch. 215, § 9 provides for the severability of the Computer Crimes Act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Forfeiture of homestead based on criminal activity conducted on premises - state cases, 16 A.L.R.5th 855.

ARTICLE 46

TICKET SCALPING

30-46-1. Ticket scalping.

A. Ticket scalping consists of selling, offering for sale or attempting to sell any ticket, privilege, license, admission or pass to any college athletic event at a price greater than the price charged at the place of admission or printed on the ticket.

B. The sale of each ticket, privilege, license, admission or pass in violation of this section shall constitute a separate offense.

C. Nothing in this section shall prohibit charging a fee for services rendered in connection with the sale of a ticket privilege, license, admission or pass to an event if the fee is permitted pursuant to a contract between the ticket seller and the sponsor or promoter of the event.

D. Whoever commits ticket scalping is guilty of a misdemeanor and upon conviction shall be punished by a fine up to five hundred dollars (\$500) or by imprisonment for a definite term of less than one year, or both.

History: Laws 1989, ch. 142, § 1.

ANNOTATIONS

Emergency clauses. - Laws 1989, ch. 142, § 2 makes the act effective immediately. Approved March 29, 1989.

ARTICLE 47

RESIDENT ABUSE AND NEGLECT

30-47-1. Short title.

This act [30-47-1 to 30-47-10 NMSA 1978] may be cited as the "Resident Abuse and Neglect Act".

History: Laws 1990, ch. 55, § 1.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-2. Purpose.

The purpose of the Resident Abuse and Neglect Act [30-47-1 to 30-47-10 NMSA 1978] is to provide meaningful deterrents and remedies for the abuse, neglect or exploitation of care facility residents and to provide an effective system for reporting instances of abuse, neglect or exploitation.

History: Laws 1990, ch. 55, § 2.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-3. Definitions.

As used in the Resident Abuse and Neglect Act [30-47-1 to 30-47-10 NMSA 1978]:

A. "abuse" means any act or failure to act performed intentionally, knowingly or recklessly that causes or is likely to cause harm to a resident, including:

- (1) physical contact that harms or is likely to harm a resident of a care facility;
- (2) inappropriate use of a physical restraint, isolation or medication that harms or is likely to harm a resident;
- (3) inappropriate use of a physical or chemical restraint, medication or isolation as punishment or in conflict with a physician's order;
- (4) medically inappropriate conduct that causes or is likely to cause physical harm to a resident;
- (5) medically inappropriate conduct that causes or is likely to cause great psychological harm to a resident;
- (6) an unlawful act, a threat or menacing conduct directed toward a resident that results and might reasonably be expected to result in fear or emotional or mental distress to a resident;

B. "care facility" means a hospital; skilled nursing facility; intermediate care facility; care facility for the mentally retarded; psychiatric facility; rehabilitation facility; kidney disease treatment center; home health agency; ambulatory surgical or out-patient facility; home for the aged or disabled; group home; adult foster care home; private residence that provides personal care, sheltered care or nursing care for one or more persons; adult day care center; boarding home; adult residential shelter care home; and any other health or resident care related facility or home but does not include a care facility located at or performing services for any correctional facility;

C. "department" means the human services department or its successor, contractor, employee or designee;

D. "great psychological harm" means psychological harm that causes mental or emotional incapacitation for a prolonged period of time or that causes extreme behavioral change or severe physical symptoms that require psychological or psychiatric care;

E. "great physical harm" means physical harm of a type that causes physical loss of a bodily member or organ or functional loss of a bodily member or organ for a prolonged period of time;

F. "neglect" means, subject to the resident's right to refuse treatment and subject to the caregiver's right to exercise sound medical discretion, the grossly negligent:

(1) failure to provide any treatment, service, care, medication or item that is necessary to maintain the health or safety of a resident;

(2) failure to take any reasonable precaution that is necessary to prevent damage to the health or safety of a resident; or

(3) failure to carry out a duty to supervise properly or control the provision of any treatment, care, good, service or medication necessary to maintain the health or safety of a resident;

G. "person" means any individual, corporation, partnership, unincorporated association or other governmental or business entity;

H. "physical harm" means an injury to the body that causes substantial pain or incapacitation; and

I. "resident" means any person who resides in a care facility or who receives treatment from a care facility.

History: Laws 1990, ch. 55, § 3.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-4. Abuse of a resident; criminal penalties.

A. Whoever commits abuse of a care facility resident that results in no harm to the resident is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

B. Whoever commits abuse of a resident that results in physical harm or great psychological harm to the resident is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits abuse of a resident that results in great physical harm to the resident is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Whoever commits abuse of a resident that results in the death of the resident is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1990, ch. 55, § 4.

ANNOTATIONS

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-5. Neglect of a resident; criminal penalties.

A. Whoever commits neglect of a resident that results in no harm to the resident is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

B. Whoever commits neglect of a resident that results in physical harm or great psychological harm to the resident is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Whoever commits neglect of a resident that results in great physical harm to the resident is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Whoever commits neglect of a resident that results in the death of the resident is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1990, ch. 55, § 5.

ANNOTATIONS

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-6. Exploitation; criminal penalties.

A. Exploitation of a resident's property consists of the act or process, performed intentionally, knowingly or recklessly, of using a resident's property for another person's profit, advantage or benefit without legal entitlement to do so.

B. Whoever commits exploitation of a resident's property when the value of the property exploited is one hundred dollars (\$100) or less is guilty of a petty misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection B of Section 31-19-1 NMSA 1978.

C. Whoever commits exploitation of a resident's property when the value of the property exploited is over one hundred dollars (\$100) but not more than two hundred fifty dollars (\$250) is guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection A of Section 31-19-1 NMSA 1978.

D. Whoever commits exploitation of a resident's property when the value of the property exploited is over two hundred fifty dollars (\$250) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

E. Whoever commits exploitation of a resident's property when the value of the property exploited is over two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

F. Whoever commits exploitation of a resident's property when the value of the property exploited is over twenty thousand dollars (\$20,000) is guilty of a second degree felony and upon conviction shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1990, ch. 55, § 6.

ANNOTATIONS

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-7. Religious practitioners; exception.

No resident who is being treated by a duly accredited religious practitioner shall be considered for that reason alone, abused or neglected.

History: Laws 1990, ch. 55, § 7.

ANNOTATIONS

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-8. Treatment in compliance with the right to die act.

A. Nothing in the Resident Abuse and Neglect Act [30-47-1 to 30-47-10 NMSA 1978] shall be construed to preclude withholding or withdrawing treatment in accordance with the Right To Die Act [24-7-1 to 24-7-11 NMSA 1978], and it shall be an affirmative defense to any charge brought under the Resident Abuse and Neglect Act that the acts complained of were in accordance with the Right To Die Act.

B. To establish an affirmative defense under Subsection A of this section, the person shall show substantial compliance with the provisions of the Right To Die Act.

History: Laws 1990, ch. 55, § 8.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-9. Reporting requirements; failure to report; crime created; criminal penalty; discrimination or retaliation for filing a report prohibited.

A. Any person paid in whole or part for providing to a resident any treatment, care, good, service or medication who has reasonable cause to believe that the resident has been abused, neglected or exploited shall report the abuse, neglect or exploitation in accordance with the provisions of Section 27-7-30 NMSA 1978.

B. Any person required to make a report pursuant to Subsection A of this section who fails to do so is guilty of a misdemeanor and upon conviction shall be sentenced pursuant to the provisions of Subsection A of Section 31-19-1 NMSA 1978.

C. In addition to those persons required to report pursuant to Subsection A of this section, any other person shall make a report if the person has reasonable cause to believe that a patient or resident of a facility has been abused, neglected or exploited.

D. Any person making a report pursuant to Subsection C of this section shall not be liable in any civil or criminal action based on the report if it was made in good faith.

E. No facility shall, without just cause, discharge or in any manner discriminate or retaliate against any person who in good faith makes a report required or permitted by the Resident Abuse and Neglect Act [30-47-1 to 37-47-10 NMSA 1978], or testifies, or is about to testify, in any proceeding about the abuse, neglect or exploitation of a resident in that facility. For the purposes of this section, "retaliate" includes transferring to another facility, without just cause, over the objection of the resident or the resident's guardian, any resident who has reported an incident pursuant to this section.

History: Laws 1990, ch. 55, § 9.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

30-47-10. Regulatory authority.

The department shall issue rules and regulations as necessary to implement the reporting provisions of the Resident Abuse and Neglect Act [30-47-1 to 30-47-10 NMSA 1978].

History: Laws 1990, ch. 55, § 10.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1990, ch. 55 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 16, 1990.

Severability clauses. - Laws 1990, ch. 55, § 11 provides for the severability of the Resident Abuse and Neglect Act if any part or application thereof is held invalid.

ARTICLE 48 SMOKELESS TOBACCO PRODUCTS

(Repealed by Laws 1993, ch. 244, § 13.)

30-48-1 to 30-48-7. Repealed.

ANNOTATIONS

Repeals. - Laws 1993, ch. 244, § 13 repeals 30-48-1 through 30-48-7 NMSA 1978, as enacted by Laws 1991, ch. 210, §§ 1 through 7, concerning smokeless tobacco products, effective July 1, 1993. For present comparable provisions, see § 30-49-1 et seq.

ARTICLE 49 TOBACCO PRODUCTS

30-49-1. Short title.

This act [30-49-1 to 30-49-12 NMSA 1978] may be cited as the "Tobacco Products Act".

History: Laws 1993, ch. 244, § 1.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-2. Definition.

As used in the Tobacco Products Act [30-49-1 to 30-49-12 NMSA 1978], "minor" means an individual who is less than eighteen years of age.

History: Laws 1993, ch. 244, § 2.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-3. Tobacco; prohibited sales.

A. No person shall knowingly sell, offer to sell, barter or give any tobacco product to any minor.

B. No minor shall procure or attempt to procure any tobacco products for his own use or for use by any other minor.

C. No person shall sell, offer to sell or deliver a tobacco product in a form other than an original factory-sealed package.

History: Laws 1993, ch. 244, § 3.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-4. Documentary evidence of age and identity.

Evidence of the age and identity of the person may be shown by any document that contains a picture of the person issued by a federal, state, county or municipal government, including a motor vehicle driver's license or an identification card issued to a member of the armed forces.

History: Laws 1993, ch. 244, § 4.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-5. Refusal to sell tobacco products to person unable to produce identity card.

Any person selling goods at retail or wholesale may refuse to sell tobacco products to any person who is unable to produce an identity card as evidence that he is eighteen years of age or over.

History: Laws 1993, ch. 244, § 5.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-6. Presenting false evidence of age or identity.

No minor shall present any written, printed or photostatic evidence of age or identity that is false for the purpose of procuring or attempting to procure any tobacco products.

History: Laws 1993, ch. 244, § 6.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-7. Vending machines; restrictions on sales of tobacco products.

A. Tobacco products may be sold by vending machines in the following locations only:

(1) in locations not held open to the public, including controlled areas within factories, businesses and offices;

(2) in age-controlled locations where minors are not permitted unless accompanied by a parent or guardian; or

(3) in locations where alcoholic beverages are offered for sale for the purpose of consumption on the premises.

History: Laws 1993, ch. 244, § 7.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

Compiler's note. - As enacted by Laws 1993, ch. 244, § 7, this section does not contain a Subsection B.

30-49-8. Distribution of tobacco products as free samples prohibited; exception.

A. A person who sells, distributes, promotes or advertises tobacco products shall not provide free samples of tobacco products to a minor.

B. The provisions of Subsection A of this section shall not apply to an individual who provides free samples of tobacco products to a family member or to an acquaintance on private property not held open to the public.

History: Laws 1993, ch. 244, § 8.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-9. Signs; point of sale.

A person, firm, corporation, partnership or other entity engaged in the sale at retail of tobacco products shall prominently display in the place where tobacco products are sold and where a tobacco product vending machine is located, a printed sign or decal that reads as follows:

"A PERSON LESS THAN 18 YEARS OF AGE WHO PURCHASES A TOBACCO PRODUCT IS SUBJECT TO A FINE OF UP TO \$1,000.

A PERSON WHO SELLS A TOBACCO PRODUCT TO A PERSON LESS THAN 18 YEARS OF AGE IS SUBJECT TO A FINE OF UP TO \$1,000."

History: Laws 1993, ch. 244, § 9.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-10. Monitored compliance; inspections.

The alcohol and gaming division of the regulation and licensing department and the appropriate law enforcement authorities in each county and municipality shall conduct random, unannounced inspections of facilities where tobacco products are sold to ensure compliance with the provisions of the Tobacco Products Act [30-49-1 to 30-49-12 NMSA 1978].

History: Laws 1993, ch. 244, § 10.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-11. Preemption.

When a municipality or county adopts an ordinance or a regulation pertaining to sales of tobacco products, the ordinance or regulation shall be consistent with the provisions of the Tobacco Products Act [30-49-1 to 30-49-12 NMSA 1978].

History: Laws 1993, ch. 244, § 11.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.

30-49-12. Penalty.

A. Any person who violates any provision of Subsection A [30-49-3A NMSA 1978] of Section 3 or Sections 5, 7, 8 or 9 [30-49-5, 30-49-7, 30-49-8 or 30-49-9 NMSA 1978] of the Tobacco Products Act is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978. Each violation is a separate and distinct offense.

B. Any minor who violates any provision of Subsection B [30-49-3B NMSA 1978] of Section 3 or Section 6 [30-49-6 NMSA 1978] of the Tobacco Products Act shall be punished by a fine not to exceed one hundred dollars (\$100) or forty-eight hours of community service.

History: Laws 1993, ch. 244, § 12.

ANNOTATIONS

Bracketed material. - The bracketed material in this section was inserted by the compiler. It was not enacted by the legislature and is not a part of the law.

Effective dates. - Laws 1993, ch. 244, § 14 makes the act effective on July 1, 1993.