

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2019-014**

March 4, 2019

The UJI-Criminal Committee has recommended the adoption of new UJI 14-631, 14-632, 14-633, 14-634, and 14-6019C NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 3, 2019, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

[NEW MATERIAL]

14-631. Sexual exploitation of children; possession.

For you to find the defendant guilty of sexual exploitation of children (possession) [as charged in Count ____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally possessed a visual or print medium²;
2. The medium depicts a prohibited sexual act² [or simulation of such an act]³;
3. The defendant knew or had reason to know that medium depicts prohibited sexual act [or simulation of such act]³;
4. The defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age;
- [5. The depictions are obscene;⁴]³; and
6. This happened in New Mexico on or about _____, 20__.

USE NOTES

1. Insert the count number if more than one count is charged.
2. If in issue, UJI 14-130 NMRA, " 'Possession' defined," definitions of "visual or print medium" and/or "prohibited sex act" shall be given. *See* NMSA 1978, § 30-6A-2.
3. Instruct with bracketed language only if in issue.

4. Use bracketed material if obscenity is in issue. If this element is instructed a definition of “obscene” shall also be given. *See* NMSA 1978, § 30-6A-2.

5. If the consensual possession defense defined in NMSA 1978, Section 30-6A-3(B) is in issue, UJI 14-634 NMRA must be given.

6. To invoke the sentencing enhancement defined in Section 30-6A-3(A), special interrogatory UJI 14-635 NMRA must be given.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee Commentary. — *See* NMSA 1978, § 30-6A-3(A) (2016).

“The [First Amendment] test for child pornography is separate from the obscenity standard enunciated in *Miller*.” *State v. Myers*, 2009-NMSC-016, ¶ 26, 146 N.M. 128, 207 P.3d 1105 (quoting *New York v. Ferber*, 458 U.S. 747, 764 (1982)). Nevertheless, where New Mexico provides a statutory definition of the term obscene, that definition governs the State’s burden of proof for conviction in New Mexico. *Id.* ¶¶ 34-40 (“[A]lthough we agree with the Court of Appeals that the challenged material must do more than “‘merely depict a naked child’” to run afoul of the contemporary community standard, we disagree that it ‘must be identifiable as hard-core child pornography.’” (quoting *State v. Myers*, 2008-NMCA-047, ¶ 12, 143 N.M. 710, 181 P.3d 702 (quoting *State v. Rendleman*, 2003-NMCA-150, ¶ 44, 134 N.M. 744, 82 P.3d 554))).

Subsection A of Section 30-6A-3 defines the crime of child pornography possession. To commit the crime intentionally, the possession concepts applicable to any contraband material are applicable, and thus UJI 14-130 NMRA should be instructed when intentional possession is in issue. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including “visual or print medium,” “prohibited sex act,” and “obscene.”

While the act of possession itself must be done “intentionally,” the Court of Appeals held that “the scienter requirement in Section 30-6A-3(A) that a person ‘knows or has reason to know’ that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient.” *State v. Adamo*, 2018-NMCA-013, ¶¶ 30-34, 409 P.3d 1002. The Court found sufficient evidence of intentional possession when images were downloaded but later deleted. *Id.* ¶¶ 14-18.

In 2014, the New Mexico Supreme Court held the unit of prosecution for possession offenses under Section 30-6A-3(A) was ambiguous and thus, under the rule of lenity, held that only one count may be punished for multiple images possessed unitarily. *State v. Olsson*, 2014-NMSC-012, ¶¶ 23, 31, 43-47, 324 P.3d 1230. However, the Court of Appeals held that convictions for possession and manufacture-by-recording do not violate double jeopardy if distinct evidence can support a continuing knowing possession after the manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, 41 P.3d 1157.

The Legislature amended Section 30-6A-3(A) in 2016, adding the one-year sentence enhancement for depictions of children under the age of 13, and adding Subsection B, an affirmative defense for consensual possession among teenagers. The unit of prosecution was not altered. 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016).

In 2016, the Legislature also amended the basic sentence from a “fourth-degree felony” to a “fourth-degree felony for sexual exploitation of children” and added new subsections for felonies “for sexual exploitation of children” to NMSA 1978, Section 31-18-15 (2016) (defining basic sentences). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.

[Commentary adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

14-632. Sexual exploitation of children; distribution.

For you to find the defendant guilty of sexual exploitation of children (distribution) [as charged in Count ____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally distributed a visual or print medium²;
2. The medium depicted a prohibited sexual act² [or simulation of such an act]³;
3. The defendant knew or had reason to know that medium depicts prohibited sexual act [or simulation of such act]³;
4. The defendant knew or had reason to know that one or more of the participants in that act is a child under eighteen years of age;
- [5. The depictions are obscene⁴;]³ and
6. This happened in New Mexico on or about _____, 20__.

USE NOTES

1. Insert the count number if more than one count is charged.
2. If in issue, definitions of “visual or print medium” and/or “prohibited sex act” shall be given. *See* NMSA 1978, § 30-6A-2.
3. Instruct with bracketed language only if in issue.
4. If this element is instructed, a definition of “obscene” shall be given. *See* NMSA 1978, § 30-6A-2.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee Commentary. — *See* NMSA 1978, § 30-6A-3(C) (2016).

Subsection C of Section 30-6A-3 defines the crime of child pornography distribution. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including “visual or print medium,” “prohibited sex act,” and “obscene.” While the act of distribution itself must be done “intentionally,” the Court of Appeals held that the additional scienter requirement “that a person ‘knows or has reason to know’ that one or more of the participants depicted in the child pornography is under eighteen, is constitutionally sufficient.” *State v. Adamo*, 2018-NMCA-013, ¶¶ 28-34, 409 P.3d 1002. Because that element is identical for possession and distribution offenses, the holding in *Adamo* is applicable to that particular element of distribution as well.

Distribution may be committed by possessing files in a shared location, but the distribution does not occur—and the crime is not complete—until a third party downloads a file. *See United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012) (“When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred.” (citing *United States v. Shaffer*, 472 F.3d 1219 (10th Cir. 2007))). In *Shaffer*, the Tenth Circuit was able to point to extensive evidence of intent in the factual record. 472 F.3d 1222-24. First, the defendant himself explained that the particular file sharing program he used provided incentive rewards “corresponding to how many images other users downloaded from his computer,” and admitted that he stored his possessed images in the shared folder specifically to receive the incentive rewards. *Id.* at 1222.

Moreover, the defendant admitted that he subjectively knew that “other people had downloaded child pornography from his shared folder.” *Id.* at 1224. Thus the Tenth Circuit concluded he had “openly invited [others] to take, or download, those items.” *Id.* at 1223.

In 2016, the New Mexico Court of Appeals held the unit of prosecution for distribution offenses under Section 30-6A-3 may be ambiguous if committed by shared possession in a peer-to-peer program, noting the lack of a statutory definition for “distribute.” *State v. Sena*, 2016-NMCA-062, ¶¶ 9-19, 376 P.3d 887 (“Notably, Section 30-6A-3(D) defines manufacture somewhat differently than possession and distribution, and Section 30-6A-2(D) provides a more specific and detailed definition for the word ‘manufacture.’”). Thus, the Court held that if a defendant’s distribution conduct is not itself distinct, only one count may be punished for multiple images acquired from the defendant by third parties. *Id.* ¶¶ 15-16 (citing *State v. Olsson*, 2014-NMSC-012, ¶¶ 20-29, 32, 324 P.3d 1230 and *State v. Leeson*, 2011-NMCA-068, ¶ 17, 149 N.M. 823, 255 P.3d 401).

The Legislature amended Section 30-6A-3 in 2016, recompiling distribution as Subsection C. *See* 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016). The Legislature also amended the basic sentence from a “third-degree felony” to a “third-degree felony for sexual exploitation of children,” and added new subsections for felonies “for sexual exploitation of children” to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

14-633. Sexual exploitation of children; manufacture.

For you to find the defendant guilty of sexual exploitation of children (manufacture) [as charged in Count ____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant intentionally manufactured a visual or print medium²;
2. The medium depicts a prohibited sexual act² [or simulation of such act]³;
3. One or more of the participants in that act is a child under eighteen (18) years of age;
- [4. The depictions are obscene⁴;]³ and
5. This happened in New Mexico on or about _____, 20__.

USE NOTES

1. Insert the count number if more than one count is charged.
2. If in issue, the statutory definitions of “manufacture,” “visual or print medium” and/or “prohibited sex act” shall be given. *See* NMSA 1978, § 30-6A-2.
3. Instruct with bracketed language only if in issue.
4. If this element is instructed, a definition of “obscene” shall be given. *See* NMSA 1978, § 30-6A-2.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* NMSA 1978, § 30-6A-3(E) (2016).

Subsection E of Section 30-6A-3 defines the crime of child pornography manufacture. UJIs were not created for statutory definitions that are contained in NMSA 1978, Section 30-6A-2 (2001), including “manufacture,” “visual or print medium,” “prohibited sex act,” and “obscene.”

The New Mexico Court of Appeals held that “copying the information from a computer to

an external drive to another computer” falls within the statutory definition of manufacture as “copying by any means.” *State v. Smith*, 2009-NMCA-028, ¶¶ 14-15, 145 N.M. 757, 204 P.3d 1267.

In 2011, the New Mexico Court of Appeals held that the unit of prosecution of manufacture was unambiguous so that each act of taking a photograph constituted a count of manufacture. *State v. Leeson*, 2011-NMCA-068, ¶ 17, 149 N.M. 823, 255 P.3d 401 (“A violation of the statute occurs where a criminal defendant intentionally produces or copies a photograph, electronic image, or video that constitutes child pornography.”); *see also* § 30-6A-2(D) (defining “manufacture” to include “the production, processing, copying by any means, printing, packaging or repackaging” of exploitation materials). The Supreme Court subsequently distinguished *Leeson* to find the units of prosecution for possession and distribution ambiguous and that only one count could be punished for multiple images if the defendant acted unitarily. *State v. Olsson*, 2014-NMSC-012, ¶¶ 23, 31, 43-47, 324 P.3d 1230; *see also State v. Sena*, 2016-NMCA-062, ¶¶ 3-4, 9-19, 376 P.3d 887. The Court of Appeals held that convictions for possession and manufacture-by-recording do not violate double jeopardy if distinct evidence can support a continuing knowing possession after the manufacture crime was complete. *State v. Gwynne*, 2018-NMCA-033, ¶¶ 12-15, 417 P.3d 1157.

The Legislature amended Section 30-6A-3 in 2016, recompileing distribution as Subsection E. *See* 2016 N.M. Laws Ch. 2, § 1 (eff. Feb. 25, 2016). The Legislature also amended the basic sentence from a “second-degree felony” to a “second-degree felony for sexual exploitation of children,” and added new subsections for felonies “for sexual exploitation of children” to NMSA 1978, Section 31-18-15 (2016). *See* 2016 N.M. Laws Ch. 2, §§ 1, 2.

[Adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

14-634. Consensual possession defense.¹

In evaluating the elements of sexual exploitation of children (possession) [as charged in Count ____]², it is a defense to the crime that a teenager possessed depictions of another teenager, consensually created and consensually possessed. If you find the following elements satisfied, you must find the defendant not guilty:

1. The defendant was under the age of eighteen (18) when the defendant possessed the depiction(s);
2. The depicted child was aged fourteen (14) to eighteen (18) at the time the image was captured;
3. The depicted child knowingly and voluntarily consented to the image’s creation; and
4. The depicted child knowingly and voluntarily consented to the defendant’s possession of the image.

USE NOTES

1. For use with UJI 14-631 NMRA when the consensual possession defense defined in NMSA 1978, Section 30-6A-3(B) is in issue.

2. Insert the count number if more than one count is charged.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee Commentary. — *See* NMSA 1978, § 30-6A-3(B) (2016).

The Legislature amended Section 30-6A-3 in 2016, adding Subsection B, an affirmative defense for consensual possession among teenagers. 2016 N.M. Laws ch. 2, § 1 (eff. Feb. 25, 2016).

Under New Mexico law, consent to the image’s creation may be withdrawn at any time before the creation, and presumably consent to the possession can also be withdrawn. *Cf. State v. Pizio*, 1994-NMCA-152, ¶ 38, 119 N.M. 252, 889 P.2d 860 (“A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself.”); *accord State v. McCormack*, 1984-NMCA-042, ¶ 13, 101 N.M. 349, 682 P.2d 742 (stating that criminal trespass is established if the defendant “entered or remained without authorization or permission, knowing that consent to enter had been denied or withdrawn”). [Commentary adopted by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

14-6019C. Sexual exploitation of children; under 13; special verdict.¹

(Style of Case)

If you find the defendant guilty of sexual exploitation of children (possession) [as charged in Count ____]², then you must determine if a child depicted in the visual or print medium was under the age of thirteen (13). You must complete the special form to indicate your finding. For you to make a finding of “yes,” the State must have proven [it] the following two elements to your satisfaction beyond a reasonable doubt. Do you unanimously find beyond a reasonable doubt that:

1. A child depicted in the visual or print medium was under the age of thirteen (13); and
2. The defendant knew or had reason to know that a child depicted in the visual or print medium was under the age of thirteen (13)?

_____ (Yes or No)

FOREPERSON

USE NOTES

1. This verdict form is to be used in conjunction with UJI 14-631 NMRA when the State seeks to enhance a defendant’s sentence under NMSA 1978, Section 30-6A-3(A).
2. Insert Count number if more than one (1) count is charged.

[Adopted by Supreme Court Order No. _____, effective _____.]

Committee Commentary. — *See* NMSA 1978, § 30-6A-3(A) (2016).

The Legislature amended Section 30-6A-3(A) in 2016, adding the one (1)-year sentence enhancement for depictions of children under the age of 13. 2016 N.M. Laws ch. 2, § 1 (eff. Feb. 25, 2016). This enhancement is applicable to possession offenses only. *Id.*

See generally Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that any fact that increases the permissible penalty range for a crime must be submitted to a jury and proved beyond a reasonable doubt).

[Commentary adopted by Supreme Court Order No. _____, effective _____.]



New Mexico
Courts

Terri Saxon <suptls@nmcourts.gov>

Rule Proposal Comment Form

1 message

mailservices@sks.com <mailservices@sks.com>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov

Wed, Apr 3, 2019 at 11:32 AM

Your Name
RoxeAnne B. Esquibel

Phone Number
5754373640

Email
resquibel@da.state.nm.us

Proposal Number
2019-014

Comment

Relating to the proposed special verdict : 14-6019C, the second element includes the requirement that the defendant knew or had reason to know the child depicted was under 13. This is not in the statute and the State should not be required to prove elements at trial which are not in the statute.

Clearly that requirement was not contemplated by the legislature as they left that out while requiring that the defendant know or have reason to know that a child depicted in the material possessed, distributed or manufactured is under the age of 18.

RoxeAnne Esquibel
Deputy District Attorney
12th Judicial District Attorney's Office

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