

1 **14-1689. Fraudulent use of credit cards obtained in violation of law; essential elements.**

2 For you to find the defendant guilty of fraudulent use of a credit card [as charged in Count
3 _____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the
4 following elements of the crime:

5 1. The defendant used a credit card² to obtain _____ (*describe money,*
6 *goods or services obtained with the credit card*);

7 2. These goods or services had a market value³ [over _____;]⁴

8 3. The defendant intended to deceive or cheat;

9 4. [The credit card was taken from the person, possession, custody or control of
10 another with the intent to permanently deprive the cardholder of possession of the credit card;]⁵ or
11 [The credit card was stolen, and possession was transferred to another person who intended to use,
12 sell or transfer the credit card;] or

13 [The credit card had been lost, mislaid or delivered under a mistake as to the identity
14 or address of the cardholder, and was retained by someone with the intent to use, sell or transfer
15 the credit card to another person other than the cardholder or issuer]; or

16 [The credit card was given to someone other than the cardholder with the intent to
17 deceive or cheat;] or

18 [The credit card was received by someone who intended to deceive or cheat;] or

19 [The credit card was acquired by the making of a false statement about identity or
20 financial condition;] or

21 [The credit card was forged with the intent to deceive or cheat;] or

22 [The credit card was signed by someone other than the cardholder with the intent
23 to deceive or cheat;]

1 card.^[1] *State v. Salazar*, 1982-NMCA-077, 98 N.M. 70, 644 P.2d 1059~~[-(Ct. App. 1982)]~~. In
2 *Salazar*, the defendant was convicted of seven counts of fraudulent use of a credit card under
3 ~~[Section 30-16-33A(4)]~~Section 30-16-33(A)(4). The total value of all things received by this
4 fraudulent use was \$109.66, therefore, ~~[he]~~defendant could not be tried under Subsection B which
5 provides for a ~~[third degree]~~third-degree felony if the total value is over \$300.00. Instead, Salazar
6 received seven separate fourth degree felony convictions under Subsection A.

7 The committee is of the opinion that Subsection B is not unconstitutional under the ruling in *State*
8 *v. Ferris*, 1969-NMCA-093, 80 N.M. 663, 459 P.2d 462~~[-(Ct. App. 1969)]~~, where ~~[totalling]~~tolling
9 provisions of the Worthless Check Act, ~~[Section 40-49-5 NMSA 1953 [30-36-5 NMSA~~
10 ~~1978]]~~NMSA1978, Section 30-36-5 were held to be so vague as to offend due process, and were,
11 therefore, declared void. However, Subsection B to Section 30-16-33, *supra*, is not so vague that
12 ~~[“[men][people]~~ of common intelligence must necessarily guess at its meaning and differ as to
13 its application.^[1] *State v. Ferris*, ~~[80 N.M. at 665, 459 P.2d at 464]~~1969-NMCA-093, ¶ 5.
14 Moreover, it does not fail to ~~[“]~~convey a sufficiently definite warning of the proscribed
15 conduct.^[1] *Id.* Subsection B is explicit in its language, and no ambiguities are inherent in its
16 interpretation.

17 Although as of yet there is no case law in New Mexico interpreting the constitutionality of
18 Subsection B, a 1973 Idaho case is on point. In *State v. Boyenger*,~~[95 Idaho 396,]~~ 509 P.2d 1317
19 (Idaho 1973), a similar provision was upheld as being within the police power of the state ~~[“]~~to
20 protect the people of Idaho from fraud and deceit by the use of credit cards. . . .^[1] *Id.* at 1324.
21 The statute in question provided for a misdemeanor penalty for fraudulent use of a credit card, but
22 if the value of goods or services obtained through a violation of . . . this act amounts to the sum of
23 \$60.00 or more, or if the value of the goods or services obtained through a series of violations . . .

1 committed within a period not exceeding six (6) months amounts in the aggregate to the sum of
2 \$60.00 or more, any such violation or violations shall constitute a felony. . .

3 Idaho Code Section 18-3119.

4 In *Boyenger*, the defendant was charged under the aggregation clause, and ~~[he]~~defendant appealed
5 alleging that this provision was unconstitutional. The court upheld the statute stating [“]“the
6 distinction between felony and misdemeanor based on value of goods obtained is a rational
7 distinction based on the police power of the state and therefore is not a violation of equal protection
8 of the laws.[”]” *State v. Boyenger, supra*, at 1324. This is analogous to our ~~[Section 30-16-~~
9 ~~33B]~~Section 30-16-33(B) which differentiates between a ~~[third and fourth degree]~~third- and
10 fourth-degree felony based on the value of things obtained by the fraudulent use of credit cards.
11 Therefore, the committee is of the opinion, using the reasoning in *State v. Salazar, supra*, and *State*
12 *v. Boyenger, supra*, that if an individual[’]’s fraudulent use of a credit card results in obtaining
13 goods of a value less than \$300.00, each individual use should be charged under the applicable
14 subparagraph of ~~[Section 30-16-33A]~~Section 33-16-33(A). If a single use or the aggregation of
15 amounts is over \$300.00, the charge should be brought under Subsection B. It would seem that if
16 an individual made two separate charges of \$350.00 each, ~~[he]~~defendant could only be charged
17 with one violation of Subsection B, unless these transactions occurred in a time span of over six
18 months apart.

19 The committee is of the opinion that more than one of the alternatives set forth in Element 4 may
20 be given. *See* UJI 14-1686 NMRA.

21 [As amended by Supreme Court Order No. S-1-RCR-2025-00126.]