

1 **14-5140. Excusable homicide.**

2 Evidence has been presented that the killing of _____ (*name of victim*) by
3 defendant occurred by accident or misfortune

4 [while defendant was _____ (*describe facts*)]₂, with usual and
5 ordinary caution and without any unlawful intent]

6 [upon any sudden and sufficient provocation against defendant]

7 [upon a sudden combat, with no undue advantage taken by defendant, nor any
8 dangerous weapon used and the killing was not done in a cruel or unusual manner].

9 If you determine that the defendant killed _____ (*victim*)]₂ by accident or
10 misfortune you must find ~~[him]~~ the defendant not guilty.

11 USE NOTES

12 No instruction on this subject shall be given.

13 [As amended by Supreme Court Order No. S-1-RCR-2025-00126, effective for all cases pending
14 or filed on or after December 31, 2025.]

15 **Committee commentary.** — The language of this instruction is derived from the statute on
16 excusable homicide, Section 30-2-5 NMSA 1978. In *State v. Bailey*, 27 N.M. 145, 198 P. 529
17 (1921), a prosecution for first degree murder, the court held that the district court had properly
18 refused an instruction which simply listed all of the various elements in the statute. The court said
19 that the instruction tendered in the language of the statute was inapplicable as an abstract statement
20 of the law. The court goes on to say that the statute contains at least three identifiable defenses.
21 *See also State v. Welch*, 37 N.M. 549, 555, 25 P.2d 211 (1933).

1 A comparison of the elements of the statute with the elements of involuntary manslaughter
2 indicates that the excusable homicide statute merely provides that in the absence of the elements
3 of involuntary manslaughter, the defendant cannot be found guilty of involuntary manslaughter.
4 The instruction on involuntary manslaughter requires the jury to find the elements of the crime
5 before it can find the defendant guilty. In argument and through the presentation of defense
6 witnesses or cross-examination of prosecution witnesses, the defendant will undoubtedly, where
7 the defense is misfortune or accident, bring out the absence of the elements of involuntary
8 manslaughter or will attempt to create a reasonable doubt. Consequently, the committee believed
9 that no separate instruction on the defense was either necessary or proper.