14-986. "Physical force or physical violence" defined.[1]

"Physical force or physical violence" simply means that the victim did not consent. In establishing that physical force or physical violence occurred for purposes of Count[s] _____[2], the State does not need to prove that a significant amount of strength or exertion was used, nor that the victim protested or physically resisted. Instead, the State must prove that the defendant was aware of, and consciously disregarded, a substantial and unjustifiable possibility that the victim did not consent at the time of the alleged sexual offense.

USE NOTES

1. This instruction should be given when, for purposes of sexual offenses contained in NMSA 1978, Section 30-9-10 through NMSA 1978, Section 30-9-16, the issue of physical force or physical violence (as a part of the element of "force or coercion") is in issue. *See* NMSA 1978, § 30-9-10(A)(1) (defining the "physical force or physical violence" alternative of the "force or coercion" element in sexual offenses).

2. Insert the appropriate Count or Count numbers.

[Adopted by Supreme Court Order No. S-1-RCR-2025-00135, effective for all cases pending or filed on or after December 31, 2026.]

Committee commentary. — In *State v. Apodaca*, 2025-NMSC-015, ¶ 37, 572 P.3d 913, the New Mexico Supreme Court clarified that the "physical force or physical violence" alternative of the force or coercion element in sexual offenses "does not require the State to prove that a significant amount of strength or exertion was used to perpetrate the sexual penetration." Instead, the Court explained that "the question is not whether the victim protested or physically resisted but rather whether the defendant was aware of, and consciously disregarded, a substantial and unjustifiable possibility that [the penetration] was being conducted without [the victim's] consent."

Id. (internal citation omitted). The Committee drafted this definitional instruction for use when physical force or physical violence is in issue in such cases. *See* NMSA 1978, § 30-9-10(A)(1) (2005).

The New Mexico Supreme Court has not extended the *Apodaca* definition to cases involving the "use of threats to use physical violence or physical force" alternative of the force or coercion element. *See* § 30-9-10(A)(2). The view of the Committee is that the definition in *Apodaca* and UJI 14-986 NMRA does not apply to the "use of threats" alternative. It is unclear what a threat to consciously disregard a substantial possibility that the victim did not consent would entail, leaving it open to confusion and potentially disparate interpretation and enforcement. *State v. Quintin C.*, 2019-NMCA-069, ¶ 9, 451 P.3d 901 (recognizing that it is a "fundamental role of constitutional law that crimes must be defined with appropriate definiteness"). Because of these concerns, the Committee does not believe that UJI 14-986 should be used with the "use of threats" alternative of the force or coercion element.

[Adopted by Supreme Court Order No. S-1-RCR-2025-00135.]