

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

2 2. UJI 14-251 NMRA must also be used if causation is in issue.

3 [As amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as
4 amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed
5 on or after December 31, 2019.]

6 **Committee commentary.** — In New Mexico, depraved mind murder is classified
7 as first-degree murder. *See* NMSA 1978, § 30-2-1(A)(3) (1994). Depraved mind murder
8 requires “outrageously reckless conduct performed with a depraved kind of wantonness or
9 total indifference for the value of human life.” *State v. Reed*, 2005-NMSC-031, ¶ 24, 138
10 N.M. 365, 120 P.3d 447[~~—See~~]; *see State v. Ibn Omar-Muhammad*, 1985-NMSC-006, 102
11 N.M. 274, [278;] 694 P.2d 922[~~—926 (1985)~~]. [~~Wayne R. LaFave further explains depraved~~
12 ~~mind murder:—~~

13 ~~———Extremely negligent conduct, which creates what a reasonable man would~~
14 ~~realize to be not only an unjustifiable but also a very high degree of risk of~~
15 ~~death or serious bodily injury to another or to others— though unaccompanied~~
16 ~~by any intent to kill or do serious bodily injury—and which actually causes the~~
17 ~~death of another~~

18 ~~2 Wayne R. LaFave, Substantive Criminal Law § 14.4, at 436-7 (2d ed. 2003).~~] “[O]ne way
19 our courts have distinguished depraved mind murder is by the number of persons exposed
20 to danger by a defendant’s extremely reckless behavior.” *Reed*, 2005-NMSC-031, ¶ 22[~~—~~
21 ~~See~~]; *see State v. Brown*, 1996-NMSC-073, ¶ 14, 122 N.M. 724, 931 P.2d 69. Generally, in
22 New Mexico, “depraved mind murder convictions have been limited to acts that are
23 dangerous to more than one person.” *Reed*, 2005-NMSC-031, ¶ 22. “Such condemned

1 behavior is required to be extremely dangerous and fatal conduct performed without specific
2 homicidal intent but with a depraved kind of wantonness: for example, shooting into a
3 crowd, placing a time bomb in a public place, or opening the door of the lions' cage in the
4 zoo." *State v. Johnson*, 1985-NMCA-074, 103 N.M. 364, [368;] 707 P.2d 1174[;1178 (Ct.
5 App. 1985)]. Other types of conduct that have been held to involve a "very high degree of
6 unjustifiable homicidal danger" include "starting a fire at the front door of an occupied
7 dwelling, shooting into the caboose of a passing train or into a moving automobile
8 necessarily occupied by human beings," and "driving a car at very high speeds along a main
9 street." [~~2 LaFave, *supra*, § 14.4, at 440~~] 2 Wayne R. LaFave, *Substantive Criminal Law* §
10 14.4, at 440 (2d ed. 2003). LaFave cites additional examples imaginable, including "throwing
11 stones from the roof of a tall building onto the busy street below" and "piloting a speedboat
12 through a group of swimmers." *Id.* at 441.

13 "In addition to the number of people endangered, [New Mexico] has construed
14 depraved mind murder as requiring proof that the defendant had 'subjective knowledge' that
15 his act was greatly dangerous to the lives of others." *Reed*, 2005-NMSC-031, ¶ 23[~~-See~~]; see
16 *State v. McCrary*, 1984-NMSC-005, ¶ 9, 100 N.M. 671, [673;] 675 P.2d 120[;122 (1984)].
17 "The required mens rea element of 'subjective knowledge' serves as proof that the accused
18 acted with a 'depraved mind' or 'wicked or malignant heart' and with utter disregard for
19 human life." *Brown*, 1996-NMSC-073, ¶ 16. "[T]he legislature intended the offense of
20 depraved mind murder to encompass an intensified malice or evil intent." *Reed*,
21 2005-NMSC-031, ¶ 24 (quoting *Brown*, 1996-NMSC-073, ¶ 15). "[O]ne way to distinguish

1 depraved mind murder from manslaughter when an underlying act involves extremely
2 reckless conduct is by identifying an element of viciousness” *Reed*, 2005-NMSC-031,
3 ¶ 24 (citing Rollin M. Perkins & Ronald N. Boyce, *Criminal Law*, 60 (3d ed.1982)).
4 “Obviously, mere negligence or recklessness will not do.” *Reed*, 2005-NMSC-031, ¶ 23.

5 Therefore, this instruction sets forth a subjective test for depraved mind murder.
6 “The defendant must know his act is greatly dangerous to the lives of others.” *Johnson*, [~~103~~
7 ~~N.M. at 368, 707 P.2d at 1178]~~ 1985-NMCA-074, ¶ 11. But, “[a] defendant does not have
8 to actually know that his victim will be injured by his act.” *Ibn Omar-Muhammad*, [~~102~~
9 ~~N.M. at 278, 694 P.2d at 926. See]~~1985 -NMSC- 006, ¶ 21; *see also McCrary*, [~~100~~ N.M.
10 ~~at 673, 675 P.2d at 122]~~; 1984-NMSC-005, ¶¶ 9-10. In *McCrary*, the defendant had attended
11 a carnival in Hobbs and felt he was cheated out of sixty-four dollars. *Id.* ¶ 2. He and a
12 co-defendant claimed that they decided to get revenge by shooting the tires of the carnival
13 trucks. *Id.* They discharged about twenty-five shots into several tractor-trailers and cabs. Not
14 a single tire was shot. *Id.* ¶ 11. The victim was in a sleeper cab of one of the trucks and was
15 killed by one of these bullets. *Id.* ¶ 3. The Court stated, “Defendants did not have to actually
16 know that [victim] was in the sleeper compartment. Rather, sufficient subjective knowledge
17 exists if Defendants’ conduct was very risky, and under the circumstances known to
18 Defendants they should have realized this very high degree of risk.” *Id.* ¶ 9. The fact that no
19 tires were shot and there were twenty-five bullet holes in the upper parts of the vehicles was
20 substantial evidence of the defendants’ knowledge of the risk. *Id.* ¶ 11. The Court also
21 pointed out the fact that the defendants contemplated slashing the tires but rejected it for fear

1 of being caught, indicating that defendants had reason to know people were in the area. *Id.*
2 The Court held that in light of the surrounding circumstances known to defendants, there was
3 substantial evidence for a jury to find that defendants had subjective knowledge of the risk.
4 *Id.* ¶ 11.

5 The Supreme Court has held that “a fact finder may consider evidence of extreme
6 intoxication when determining whether a defendant possessed the requisite mental state of
7 ‘subjective knowledge’ for first-degree depraved mind murder.” *See Brown*,
8 1996-NMSC-073, ¶ 1.

9 Also note that the existence of an intent to kill a particular individual does not remove
10 the act from this class of murder. *See State v. Sena*, 1983-NMSC-005, 99 N.M. 272, 657 P.2d
11 128 [(1983)]. In *Sena*, the defendant, a woman, and another man entered a bar through the
12 front entrance. The woman was holding a drink and the doorman did not allow her to enter
13 with the drink. A dispute arose and the defendant hit the doorman. The doorman then sprayed
14 defendant with mace, hit him with a flashlight, and threw him out of the door. Within a few
15 seconds the defendant returned with a gun. He then opened fire on the doorman, who
16 immediately turned and ducked. The defendant fired four or five times. The first shot hit the
17 doorman in the face, but the other shots missed. One of these shots struck and killed an
18 innocent bystander. The Court held, “By firing at the doorman in a room containing other
19 persons within the line of fire, [defendant] committed an act ‘greatly dangerous to the lives
20 of others’ which falls within the depraved mind theory. It is irrelevant whether he intended
21 only to kill the doorman” *Id.* [at 274, 657 P.2d at 130] ¶ 9.

1 ~~[As LaFave explains, “[I]t is what the defendant should realize to be the degree of~~
2 ~~risk, in the light of the surrounding circumstances which he knows, which is important,~~
3 ~~rather than the amount of risk as an abstract proposition of the mathematics of chance.”~~²
4 ~~LaFave, *supra*, § 14.4, at 439. Here is an example:—~~

5 ~~—— The risk is exactly the same when one fires his rifle into the window of what appears~~
6 ~~to be an abandoned cabin in a deserted mining town as when one shoots the same bullet into~~
7 ~~the window of a well-kept city home, when in fact in each case one person occupies the room~~
8 ~~into which the shot is fired. In the deserted cabin situation it may not be, while in the~~
9 ~~occupied home situation it may be, murder when the occupant is killed. *Id.*]~~

10 Additionally, it must also be unjustifiable for the defendant to take the risk. Here is
11 an example:

12 If [a defendant] speeds through crowded streets, thereby endangering
13 other motorists and pedestrians, in order to rush a passenger to the hospital
14 for an emergency operation, he may not be guilty of murder if he
15 unintentionally kills, though the same conduct done solely for the purpose of
16 experiencing the thrill of fast driving may be enough for murder.

17 ~~[*Id.*]~~² LaFave, *supra*, § 14.4, at 439. As said in a simpler way, “the extent of the defendant’s
18 knowledge of the surrounding circumstances and the social utility of his conduct” are to be
19 considered. *Id.*

20 ~~[In contrast, the second-degree murder instruction provides an objective test. See~~
21 ~~NMSA 1978, § 30-2-1(B) (1994);² [and] UJI 14-210 NMRA[2005]. “The sole difference~~
22 ~~[between the two instructions] rests with the requirement in the depraved mind murder~~
23 ~~instruction that the jury find Defendant’s act indicated a depraved mind without regard for~~

1 human life” ~~Reed, 2005-NMSC-031, ¶ 21[. See]; see also Brown, 1996-NMSC-073,~~
2 ~~¶ 17 (recognizing that “[t]he instruction for first-degree depraved murder sets forth a~~
3 ~~subjective test, whereas the instruction for second-degree murder requires only an objective~~
4 ~~test”).]~~
5 [As amended by Supreme Court Order No. 08-8300-060, effective February 2, 2009; as
6 amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed
7 on or after December 31, 2019.]