



1 (1966)), the statement is admitted and the jury is instructed to determine that the statement  
2 is voluntary before considering it as substantive evidence. *See, e.g., State v. Burk,*  
3 1971-NMCA-018, ¶¶ 16-21, 82 N.M. 466, [469-70,] 483 P.2d 940[-943-44, (Ct. App.)],  
4 *cert. denied*, 404 U.S. 955[-92 S. Ct. 309, 30 L. Ed. 2d 271] (1971).

5 Although required under New Mexico precedents, submission of the question of  
6 voluntariness to the jury is not required under federal constitutional law. *Lego v. Twomey,*  
7 404 U.S. 477[-92 S. Ct. 619, 30 L. Ed. 2d 618] (1972). Under New Mexico law, failure to  
8 submit the voluntariness question is harmless error if the defendant substantially admits the  
9 facts that are contained in the confession. *State v. Barnett, 1973-NMSC-056, ¶¶ 16-17, 85*  
10 *N.M. 301, 512 P.2d 61 [(1973)], rev'g 1972-NMCA-159, 84 N.M. 455, 504 P.2d 1088[(Ct.*  
11 *App. 1972)].*

12 [~~Under Rule 11-801 NMRA, a nonverbal “assertion” may be admissible. The federal~~  
13 ~~committee drafting the Rules of Evidence did not include any special provisions for an~~  
14 ~~“admission by silence” made during custodial interrogation. The federal committee appears~~  
15 ~~to doubt that the admission would be admissible under federal constitutional law. See 56~~  
16 ~~F.R.D. 183, 298 (1973). Cf. United States v. Hale, 442 U.S. 171[, 95 S. Ct. 2133, 45 L. Ed.~~  
17 ~~2d 99] (1975). Consequently, the language of this instruction is based on the assumption that~~  
18 ~~the statement is an oral or written assertion and not an admission by silence.]~~

19 The ultimate question is whether the defendant’s “will has been overborne” and the  
20 defendant’s “capacity for self-determination critically impaired.” *Culombe v. Connecticut,*  
21 367 U.S. 568, 602 (1961). While involuntariness requires police coercion, this instruction

1 was updated to include the jury’s consideration of the defendant’s mental capacity in its  
2 assessment of voluntariness. The bracketed language is applicable in cases in which  
3 otherwise common and non-coercive police interrogation tactics may have unduly coercive  
4 effects due to a particular defendant’s vulnerabilities. See *State v. LaCouture*,  
5 2009-NMCA-071, ¶ 11, 146 N.M. 649, 213 P.3d 799 (the totality of the circumstances for  
6 voluntariness includes “the physical and mental state of the Defendant as a context affecting  
7 what might be coercive and overreaching”); *State v. Martinez*, 1999-NMSC-018, ¶ 18, 127  
8 N.M. 207, 979 P.2d 718 (adopting totality of circumstances factors from NMSA 1978,  
9 Section 32A-2-14(E) (2009), for analyzing adult confessions, which includes the mental and  
10 physical condition of the defendant). Accord *State v. Aguilar*, 1988-NMSC-004, ¶¶ 10-13,  
11 106 N.M. 798, 751 P.2d 178 (finding a confession involuntary due to evidence of subnormal  
12 intelligence and mental illness, causing defendant’s inability to understand the implications  
13 of interrogation techniques).  
14 [As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or  
15 filed on or after December 31, 2019.]