

1 **5-607. Order of trial.**

2 The order of trial shall be as follows:

3 A. a qualified jury shall be selected and sworn to try the case;

4 B. initial instructions as provided in [UJ] Rule Set 14 NMRA, Uniform Jury  
5 Instructions - Criminal shall be given by the court;

6 C. the state may make an opening statement. The defense may then make an opening  
7 statement or may reserve [~~such~~] its opening statement until after the conclusion of the state's case;

8 D. the state shall submit its evidence;

9 E. out of the presence of the jury, the court shall determine the sufficiency of the  
10 evidence, whether or not a motion for directed verdict is made;

11 F. the defense may then make an opening statement, if reserved;

12 G. the defense may submit its evidence;

13 H. the state may submit evidence in rebuttal;

14 I. the defense may submit evidence in surrebuttal;

15 J. at any time before submission of the case to the jury, the court may, for good cause  
16 shown, permit the state or defense to submit additional evidence;

17 K. out of the presence of the jury, the court shall determine the sufficiency of the  
18 evidence, whether or not a motion for directed verdict is made;

19 L. the instructions to be given shall be determined in accordance with Rule 5-608  
20 NMRA. The court shall then instruct the jury;

21 M. the state may make [~~the opening~~] a closing argument;

22 N. the defense may make [~~its~~] a closing argument;

23 O. the state may make a rebuttal argument [~~only~~].

1 [As amended by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed  
2 on or after December 31, 2021.]

3 **Committee commentary.** — ~~[The New Mexico Court of Appeals has held that]~~ Nothing  
4 in the provisions of Paragraph [D] E of this rule [did not change the] alters long-settled law  
5 [holding] that a defendant, by presenting evidence, [waives a] “waive[s a] claim that the evidence  
6 [presented by the state] at the close of the State’s case [is] insufficient [by proceeding to introduce  
7 evidence on his own behalf.] for submission to the jury.” *State v. Lard*, 1974-NMCA-004, ¶ 4, 86  
8 N.M. 71, 519 P.2d 307[~~(Ct. App. 1974)~~]. However, under Paragraph [F] K of this rule the  
9 defendant need no longer move for a directed verdict at the close of all of the evidence to preserve  
10 a claim that the evidence was insufficient to allow the case to go to the jury. [*State v. Lard*, ~~supra.~~  
11 1974-NMCA-004, at ¶ 6; *see State v. Hernandez*, 1993-NMSC-007, ¶ 66, 115 N.M. 6, 946 P.2d  
12 312 (pointing to Rule 5-607(K) in holding that a trial court’s “procedural lapse” in failing to rule  
13 on the sufficiency of the evidence at the close of all evidence itself “preserves the issue of  
14 sufficiency of the evidence for appellate review”).

15 The 1975 amendments to this rule inserted a new Paragraph B [~~of this rule~~] to allow for  
16 instructions at the outset of the trial as provided in [~~UJI~~] Rule Set 14 NMRA, Uniform Jury  
17 Instructions - Criminal. In addition, a new Paragraph L of this rule alerts the court and counsel that  
18 the procedure for settling instructions at the close of the evidence is provided for in Rule 5-608  
19 NMRA.

20 [As amended by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed  
21 on or after December 31, 2021.]