

14-202. Felony murder; essential elements.

For you to find the defendant _____ (*name of defendant*) guilty of felony murder, which is first degree murder, [as charged in Count ____]¹, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant _____ (*name of defendant*) [committed]² [attempted to commit] the crime of _____³ (*name of felony*) [under circumstances or in a manner dangerous to human life]⁴;

2. _____ (*name of defendant*) caused⁵ the death of _____ (*name of deceased*) during [the commission of]² [the attempt to commit] _____ (*name of felony*);

3. _____ (*name of defendant*) intended to kill or knew that [his] [her] acts created a strong probability of death or great bodily harm;

[4. The defendant did not act as a result of sufficient provocation;]⁶

5. This happened in New Mexico on or about the ____ day of _____, ____.

USE NOTES

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

2. Use applicable alternative or alternatives.

3. Unless the court has instructed on the essential elements of the felony or attempted felony, these elements must be given in a separate instruction[~~; generally worded as follows: “For you to find that the defendant committed or attempted to commit _____, the state must prove to your satisfaction beyond a reasonable doubt that _____” (add elements of the felony or attempt unless they are set out in another essential elements instruction).~~ To instruct on the elements of an uncharged offense, UJI 14-140 NMRA must be used.

4. Use bracketed phrase unless the felony is a first degree felony.

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

6. This element is to be given only when provocation is an issue. In that circumstance UJI 14-221A NMRA, voluntary manslaughter; lesser included offense of felony murder, should be given.

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — Felony murder consists of a second-degree murder committed in the course of a dangerous felony. NMSA 1978, § 30-2-1(A)(2) (1994); *see State v. Montoya*, 2013-NMSC-020, ¶ 15, 306 P.3d 426, *see also State v. Nieto*, 2000-NMSC-031, ¶¶ 13-14, 129 N.M. 688, 12 P.3d 442 [~~eting~~] (citing *State v. Campos*, 1996-NMSC-043, ¶ 17, 122 N.M. 148, 921 P.2d 1266).

See [§] Section 30-2-1A(2). Proof of malice aforethought or deliberate intention is not required as an element of felony murder. *State v. Welch*, 1933-NMSC-084, 37 N.M. 549, 25 P.2d 211[~~-(1933)~~]. The defense of “inability to form specific intent” does not apply to the murder element of felony murder because felony murder does not include the element of deliberate intention to take the life of another. *See* UJI 14-5110 NMRA. However, the felony which forms the basis for the felony murder may include a specific intent and the defense could apply to that element. *See* UJI 14-5111 NMRA.

Before a defendant can be convicted of felony murder, he or she must be given notice of the precise felony involved in the charge. The notice may be in the indictment or information, or

1 otherwise furnished to the defendant in sufficient time to enable ~~[him]~~ the defendant to prepare
2 ~~[his]~~ a defense. *State v. Stephens*, 1979-NMSC-076, ¶ 10, 93 N.M. 458, 601 P.2d 428; *State v.*
3 *Hicks*, 1976-NMSC-069, ¶ 8, 89 N.M. 568, ~~[571,]~~ 555 P.2d 689. Rule 5-303 NMRA of the Rules
4 of Criminal Procedure for the District Courts would seem to indicate that the proper procedure
5 may be to amend the indictment or information. The state must prove each element of the
6 underlying felony [or attempt], otherwise it is improper to submit felony murder. *State v.*
7 *DeSantos*, 1976-NMSC-034, ¶ 8, 89 N.M. 458, ~~[461,]~~ 553 P.2d 1265. Felony murder may be
8 charged as part of an open count of murder by also charging the underlying felony. *Stephens*, 1979-
9 NMSC-076, ¶ 11. However, when a jury convicts a defendant of both felony murder and the same
10 felony upon which the felony murder conviction is predicated, the predicate felony is vacated
11 because it is subsumed within the felony murder conviction. *State v. Torrez*, 2013-NMSC-034, ¶
12 15, 305 P.3d 944.

13 “In New Mexico, the underlying felony must be a first degree felony, an inherently
14 dangerous lesser degree felony, or a lesser degree felony committed under inherently dangerous
15 circumstances.” *State v. Smith*, 2001-NMSC-004, ¶ 12, 130 N.M. 117, 19 P.3d 254 (citing *State v.*
16 *Harrison*, 1977-NMSC-038, ¶ 14, 90 N.M. 439, 564 P.2d 1321). There is a presumption of inherent
17 dangerousness “in a felony murder case where the predicate felony is a first-degree felony, but not
18 where the felony is of a lesser degree.” *State v. Mora*, 1997-NMSC-060, ¶ 21, 124 N.M. 346, 950
19 P.2d 789, *overruled on other grounds by State v. Frazier*, 2007-NMSC-032, ¶ 1, 142 N.M. 120,
20 164 P.3d 1. For lesser felonies, “both the nature of the felony and the circumstances surrounding
21 its commission may be considered to determine whether it was inherently dangerous to human
22 life.” *Smith*, 2001-NMSC-004, ¶ 12. This is a factual matter “for the jury to decide in each case,
23 subject to review by the appellate courts.” *Id.*

1 In *Harrison*, the Court made it clear that New Mexico follows the general rule that the
2 felony must be independent of or collateral to the homicide. 1977-NMSC-038, ¶ 9.

3 “[T]o charge felony murder for a killing in the commission of or attempt to commit a
4 felony, the felony must be either a first degree felony (in [“]which case the [“]‘res gestae[”]’ test
5 must be used) or the lesser degree felony must be inherently dangerous or committed under
6 circumstances that are inherently dangerous.” *State v. Ortega*, 1991-NMSC-084, ¶ 17, 112 N.M.
7 554, 817 P.2d 1196, *abrogated on other grounds by Frazier*, 2007-NMSC-032, ¶ 1. “[F]or the
8 homicide to come within the res gestae, the felony and the homicide must be part of one continuous
9 transaction and closely connected in point of time, place and causal connection. . . . [C]ausation
10 must be the acts of defendant leading to the homicide without an independent force intervening.”
11 *State v. Martinez*, 1982-NMCA-053, ¶ 17, 98 N.M. 27, 644 P.2d 541 (citing *Harrison*, 1977-
12 NMSC-038, ¶ 11). If there is sufficient evidence to raise the issue of causation, the question must
13 be left to the jury under this instruction and the causation instruction, UJI 14-251 NMRA.

14 In a felony murder prosecution where the evidence supports a conviction for either second-
15 degree murder or voluntary manslaughter, the felony murder essential elements jury instruction
16 must include the defining requirement that the accused did not act in the heat of passion as a result
17 of the legally adequate provocation that would reduce murder to manslaughter. *See Montoya*,
18 2013-NMSC-020, ¶ 3.

19 [As amended by Supreme Court Order No. 14-8300-005, effective for all cases filed or
20 pending on or after December 31, 2014; as amended by Supreme Court Order No. 21-8300-25,
21 effective for all cases pending or filed on or after December 31, 2021.]