

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2022-028**

September 1, 2022

The Uniform Jury Instructions - Criminal Committee has recommended amendments to UJI 14-1401, 14-1402, and 14-1410 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before September 30, 2022, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

14-1401. Criminal trespass; public property; essential elements.

For you to find the defendant guilty of criminal trespass [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 entered _____ (*identify lands or structure entered*); [the least intrusion constitutes an entry;]²
2. This property was not open to the public at that time;
3. The defendant knew [~~or should have known~~] that he did not have permission to enter;
4. 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 bracketed phrase if entry is in issue.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

Committee commentary. — [~~UJI 14-1401 is limited to criminal trespass of public property. UJI 14-1402 and UJI 14-1403 apply to criminal trespass of private or state or local government property.~~]

In *State v. Cutnose*, 87 N.M. 300, 532 P.2d 889 (Ct. App. 1975), Chief Judge Wood carefully traced the history of New Mexico's criminal trespass statutes. It is helpful to review this decision, and subsequent statutory enactments in deciding which statute is applicable to public and private property criminal trespasses. In *Cutnose*, Judge Wood concluded that former Section 40A-14-1 NMSA 1953 (now Section 30-14-1 NMSA 1978) did not apply to remaining upon public property and that since Paragraph (2) of Subsection A of Section 40A-14-5 NMSA 1953 (now Section 30-14-4 NMSA 1978) had previously been declared unconstitutional in *State v. Jaramillo*, 83 N.M. 800, 498 P.2d 687 (Ct. App. 1972) there was no statute dealing with remaining on public property without consent.

In 1975, presumably following Judge Wood's opinion in *State v. Cutnose*, the New Mexico legislature enacted Chapter 52, Laws 1975. Section 1 of this 1975 act enacted a new Subsection B to Section 40A-14-1 NMSA 1953 (now Subsection B of 30-14-1 NMSA 1978). As amended by the 1981 legislature, present Section 30-14-1 NMSA 1978 provides that criminal trespass also includes unlawfully entering or remaining upon lands owned by the state or any of its political subdivisions knowing that consent to enter or remain is denied or withdrawn by the custodian of the lands.

In addition to adding a new Subsection B to present Section 30-14-1 NMSA 1978, Chapter 52, Laws 1975 also amended former Section 40A-20-10 NMSA 1953 (now Section 30-20-13 NMSA 1978) prohibiting interference with the lawful use of public property. Subsection C of present Section 30-20-13 NMSA 1978 also provides that it is criminal trespass for a person to willfully refuse or fail to leave the property of, or any building owned by, the state or its political subdivisions. This would seem to apply to the same unlawful conduct covered by Subsection B of Section 30-14-1 NMSA 1978; however, Section 30-20-13 adds a further element that the trespasser must also threaten to commit or incite others to commit any act which would disrupt the lawful mission, processes, procedures or function of the property, building or facility involved.

Prior to the 1975 amendment to Section 30-20-13 NMSA 1978 this section applied only to institutions of higher education and was enacted in 1970 as a part of a bill appropriating \$1.00 to district attorneys.

It is assumed that the 1975 session of the legislature was responding to the court of appeals decision in *Cutnose*, supra, when it amended both Sections 30-14-1 and 30-20-13 NMSA 1978 to make both sections of the law applicable to property owned or under the control of the state or its political subdivisions. The legislature is also presumed to have been aware that Section 30-20-13 NMSA 1978 had been found to be constitutional in *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974). These two sections have been construed together as creating separate offenses. See UJI 14-1401.

Section 30-14-4 NMSA 1978 also governs unlawfully entering a public building. The provisions of this section, which were not ruled unconstitutional in *Cutnose*, supra, are deemed by the committee to have been superseded by Sections 30-14-1 and 30-20-13 NMSA 1978 insofar as they relate to buildings owned or under the control of governmental entities. Section 30-14-4 NMSA 1978 is thought to be the applicable law for "wrongful use" of property owned or controlled by private educational institutions, religious organizations, charitable organizations and recreational associations, even though the elements of the crime are identical to Section 30-14-1 NMSA 1978.

Section 30-14-6 governs trespass cases when the property is not owned or controlled by the state or a political subdivision, but is posted or fenced.

"Lands" as used in Section 30-14-1 NMSA 1978 includes buildings and fixtures. *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980).

A criminal trespass is a lesser included offense of the crime of burglary. *See State v. Ruiz, supra.*]

Committee Commentary. — *See* NMSA 1978, § 30-14-1 (1995); NMSA 1978, § 30-20-13 (1981). UJI 14-1401 NMRA is limited to criminal trespass of lands or buildings owned or controlled by a state agency or political subdivision of the state when the person has been denied permission to enter the premises or where previous permission has been withdrawn. UJI 14-2001 NMRA should be used instead of UJI 14-1401 if there is sufficient evidence that the failure or refusal to leave a state or local government building is accompanied by the impairment or interference with or obstruction of the lawful processes, procedures or functions of the property. In 1975, the Legislature amended NMSA 1978, Sections 30-14-1 and 30-20-13 to make both sections applicable to property owned or under the control of the state or its political subdivisions. These two sections create separate offenses, with Section 30-20-13 requiring an additional element of willfully impeding or interfering. *See* § 30-12-13 (B)-(D).

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. NMSA 1978, Section 12-6-2 (2009) defines "political subdivisions." "State" generally includes all three branches of government. *See* § 12-6-2.

"Lands" as used in Section 30-14-1 includes buildings and fixtures. *See State v. Ruiz*, 1980-NMCA-123, ¶ 45, 94 N.M. 771, 617 P.2d 160. A criminal trespass may be a lesser-included offense of the crime of burglary of a dwelling house. *See id.* ¶ 50; *see also State v. Romero*, 1998-NMCA-057, ¶¶ 18, 21, 125 N.M. 161, 958 P.2d 119 (concluding that criminal trespass could be a lesser included offense of aggravated burglary where the facts supported a trespass based solely on unlawful entry and not on unlawfully remaining without permission).

The mens rea required for criminal trespass is actual, subjective knowledge that permission to enter or remain had been denied or withdrawn. *See State v. Ancira*, _____-NMCA-_____, ¶¶ 18-20, P.3d _____ (A-1-CA-38173, March 23, 2022) (holding the plain language of Section 30-14-1(B) requires proof of not what a reasonable person would have understood, but actual knowledge that permission to enter had been denied).

[As amended by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

14-1402. Criminal trespass; private or state or local government property; essential elements.

For you to find the defendant guilty of criminal trespass [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 entered or remained _____ (*identify lands or structure entered*) without permission from the [owner]² [occupant] [custodian] of that property; [the least intrusion constitutes an entry];³
2. The defendant knew [~~or should have known~~] that permission to enter or remain had been [denied]² [withdrawn];

3. 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 only the applicable alternative. If custodian is used, give UJI 14-1420 NMRA, Custodian; definition.
3. Use bracketed phrase if entry is in issue.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

Committee Commentary. —See NMSA 1978, § 30-14-1 (1995); NMSA 1978, § 30-20-13 (1981). UJI 14-1402 NMRA is a general criminal trespass instruction. It applies to trespass of lands or buildings owned or controlled by a state agency or political subdivision of the state when the person has been denied permission to enter the premises or where previous permission has been withdrawn. It also applies to trespass onto private property. UJI 14-2001 NMRA should be used instead of UJI 14-1402 if there is sufficient evidence that the failure or refusal to leave a state or local government building is accompanied by the impairment or interference with or obstruction of the lawful processes, procedures or functions of the property.

The mens rea required is actual, subjective knowledge that permission to enter or remain had been denied or withdrawn, See State v. Ancira, _____ -NMCA-, ¶¶ 18-20, _____ P.3d _____ (A-1-CA-38173, March 23, 2022) (holding the plain language of Section 30-14-1(B) requires proof of not what a reasonable person would have understood, but actual knowledge that permission to enter had been denied).

Whether the property is owned or controlled by the state or any of its political subdivisions is a question of law. [~~See Section 12-6-2 NMSA 1978~~] NMSA 1978, Section 12-6-2 (2009) defines [for a definition of] "political subdivisions." "State" generally includes all three branches of government. See § 12-6-2.

[As amended by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

14-1410. Breaking and entering; essential elements.

For you to find the defendant guilty of breaking and entering [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 entered _____ (*identify lands, vehicle or structure*) without permission; [the least intrusion constitutes an entry;]²
2. The entry was obtained by [fraud]³ [deception] [the breaking of _____]⁴ [the dismantling of _____]⁴⁵;
3. The defendant knew the entry was without permission⁶;

[~~3-~~] 4. 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 bracketed phrase if entry is in issue.

3. If the jury requests a definition of "fraud," a dictionary definition of this term should be given.
4. Insert the property or device which was broken or dismantled in order to secure entry of the lands, vehicle or structure. Example: "[by the breaking of a window]"
5. Use the applicable alternative.
6. See Commentary.

[Adopted, effective April 27, 1983; as amended by Supreme Court Order No. _____; effective for all cases pending or filed on or after _____.]

~~[Committee commentary.—The territory of New Mexico passed New Mexico's first "breaking and entering" statute in 1876 (Laws 1876, ch. 9, § 4) which was codified as § 1524 in the 1915 Code. This original statute dealt with unlawfully entering into an occupied home "by breaking or piercing the wall, or without breaking the same, climb upon any roof or in any other manner . . ." (1915 Code § 1524). This section remained exactly the same until its repeal in 1963 (Laws 1963, ch. 303, § 30-1) except for a change in title from "Unlawfully entering house" to "Entering house without consent—Breaking with intent to enter."~~

~~Breaking and entering as a separate offense undoubtedly arose out of common law burglary. To constitute burglary at common law, the following elements had to have been proven: (1) breaking and; (2) entering of; (3) a dwelling house; (4) of another; (5) in the nighttime; (6) with intent to commit a felony therein. The requirements of breaking and entering have remained the same while dwelling house has been expanded to include "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable" (30-16-3 NMSA 1978); the requirement that the act take place in the nighttime has been eliminated in most jurisdictions (New Mexico included), and; the intent to commit a felony has been changed in New Mexico to include "the intent to commit a felony or theft therein." (30-16-3 NMSA 1978.)~~

~~"Statutory burglary" is the term used to describe acts which are similar to, but do not include all the requirements of, common law burglary. Such legislative expansion of the common law crime of burglary was necessary because that social interest intended to be protected by common law burglary, i.e., privacy of one's home and belongings, was not adequately protected by strict adherence to the common law burglary requirements.~~

~~Common types of statutory burglary involve unlawful invasions which would be common law burglary except that they do not require one or more or any of the following: That the misconduct (1) occur during the nighttime, or (2) include a breaking, or (3) involve a dwelling or building within the curtilage, or (4) an intended crime which constitutes a felony or petty larceny.~~

~~R. Perkins, Perkins on Criminal Law, 2nd Ed., Ch. 3, § 1H, pp. 215-16.~~

~~New Mexico's breaking and entering statute is a type of statutory burglary. It requires no intent to commit a crime upon entering, only the breaking and entering need be shown. The doctrine of "breaking," however, appears to be more specific than when used in the context of burglary. In burglary, "the breaking need not involve force or violence. Thus, the opening of a door or window which was closed but not locked in any way was a sufficient breaking." LaFave & Scott, Criminal Law, Ch. 8, § 96, p. 708. The breaking and entering statute specifically requires "the breaking or dismantling of any part . . . or breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure." (30-14-8 NMSA 1978). To put it another way, if a person opens an unlocked door or window to enter a dwelling with the intent~~

merely to go in and lie down, that person would be guilty of neither burglary nor breaking and entering. It would not be burglary since lying down does not constitute a felony or theft, and it would not be breaking and entering since the door was not locked and no breaking or dismantling occurred. In this instance, the individual would most likely be guilty of criminal trespass.

As in burglary, though, the use of fraud or deception to gain entrance into the dwelling, aircraft, watercraft, vehicle, or other structure will be deemed constructive entry. The theory behind this is that there was actually no consent to enter given since the consent was based on fraud or deception. Also, the mere intrusion of a finger will constitute enough of an entry. LaFave & Scott, *supra*, p. 710.

It is unclear why the legislature failed to reenact a breaking and entering provision in the new Criminal Code adopted in 1963. Perhaps they surmised that if the crime committed did not meet all of the requirements of burglary (e.g., no intent to commit a felony or theft), then the criminal trespass statute (30-14-1 NMSA 1978) would be an adequate offense to charge. However, the 1980 case, *State v. Ruiz*, 94 N.M. 771, 617 P.2d 160 (Ct. App. 1980), pointed out the need for a law making it an offense to break and enter where there is no intent to commit a felony or theft, or where, because of some impairment, it was impossible for the defendant to form the requisite intent to commit a felony or theft.

In *Ruiz*, the issue was whether the defense should have been allowed to introduce hospital records to support the defendant's contention that he had ingested PCP (phencyclidine, aka "angel dust") just prior to committing the alleged burglary. This introduction of evidence should have been allowed, said the court of appeals, because it was crucial to the defendant's "no intent" defense to the burglary charge. Intoxication may be shown to negate the specific intent required to prove burglary under 30-16-3 NMSA 1978. *State v. Gonzales*, 82 N.M. 388, 482 P.2d 252 (Ct. App. 1971). The question of actual intoxication, and further, whether such intoxication prevented the defendant from being able to form the specific intent required for burglary are for the jury to answer.

In *Ruiz*, it was determined that an instruction on criminal trespass should have been given, since the court held that criminal trespass is a lesser included offense of burglary of a dwelling. *See* UJI 14-1401 through 14-1403 for criminal trespass instruction. (Criminal trespass is *not* a lesser included offense when the burglary is of a vehicle, watercraft or aircraft, since they are not real property within the meaning of Section 30-14-1 NMSA 1978). However, breaking and entering does encompass vehicles, watercraft and aircraft, so this instruction may be used as a lesser included offense of burglary, if intent is at issue. Furthermore, while criminal trespass is a misdemeanor offense, breaking and entering is a fourth degree felony with a more severe penalty than trespass.]

Committee commentary. — See NMSA 1978, § 30-14-8 (1981).

New Mexico's breaking and entering statute is "grounded in common law burglary" and is "a type of statutory burglary." *State v. Holt*, 2016-NMSC-011, ¶15, 368 P.3d 409 (internal quotation marks and citations omitted). It protects the "right to exclude" and "entry" constitutes any penetration of the interior space, however slight. *Id.* ¶¶ 16-19 (holding putting one's fingers behind a window screen is an entry).

Although the statute uses the phrase “unauthorized entry,” this instruction’s use of “without permission” is a long-standing, permissible variation. See State v. Rubio, 1999-NMCA-018, ¶¶ 4-7, 126 N.M. 579, 973 P.2d 256.

Where entry is obtained by fraud, deceit, or pretense, such entry is unauthorized. See State v. Ortiz, 1978-NMCA-074, ¶¶ 6, 13-15, 92 N.M. 166, 584 P.2d 1306 (upholding a burglary conviction and the trial court’s instructing the jury that entry by fraud, deceit, or pretense constitutes entry without authorization or permission). Where entry was made by fraud or deceit, a similar instruction about lack of permission may be appropriate.

“[T]he mental state which accompanies the ‘without permission’ element of breaking and entering is knowledge of the lack of permission.” State v. Contreras, 2007-NMCA-119, ¶ 17, 142 N.M. 518, 167 P.3d 966. The “knowledge” mens rea required is actual, subjective knowledge that permission to enter has not been granted, See State v. Ancira, ____-NMCA-____, ¶¶ 28-31, ____ P.3d ____ (A-1-CA-38173, March 23, 2022) (concluding that failure of UJI 14-1410 to require the State to prove defendant’s actual knowledge of lack of permission was an error, but not fundamental error).

[As amended by Supreme Court Order No. ____; effective for all cases pending or filed on or after ____.]

**No Comments
Received**