VERMONT TRIAL COURT CRIMINAL JURY INSTRUCTION PROJECT
Accompanying Notes as of April 8, 2025

Notes of General Application

These model instructions have been drafted by a committee which began meeting on August 3, 2001. The original members were District Court Judge Paul F. Hudson and Attorneys Dan M. Davis, Matthew I. Levine, Kathleen M. Moore, and Thomas A. Zonay, with Judson D. Burnham as the committee reporter. In the fall of 2006, District Court Judge Walter M. Morris Jr. replaced Judge Hudson as chair. In the spring of 2007, Attorneys Kevin W. Griffin and Nancy J. Waples joined the committee, replacing Attorneys Moore and Zonay. In the spring of 2008, Attorney Tracy Kelly Shriver joined the committee, replacing Attorney Davis. In the fall of 2013, Attorney Mary Kay Lanthier joined the committee, replacing Attorney Griffin. In the fall of 2015, Attorney Allison N. Fulcher joined the committee, replacing Attorney Waples. In the spring of 2018, Attorney Evan Meenan joined the committee, replacing Attorney Levine. In the summer of 2019, Superior Court Judge Kevin W. Griffin replaced Judge Morris as chair. Also in the summer of 2019, Attorney Dickson Corbett joined the Committee, replacing Attorney Meenan. In the fall of 2023, Attorney Evan Meenan rejoined the committee, replacing Attorney Corbett. In the fall of 2024, Attorneys Avi Springer and Ian Sullivan joined the committee, replacing Attorneys Lanthier and Shriver. The current reporter is Michael Csere. Judson D. Burnham continued to serve as reporter *emeritus* until the fall of 2023.

Beginning in the summer of 2003, the committee consulted with language expert Peter M. Tiersma, a professor of law at Loyola Law School in Los Angeles, California, and the author of the book Legal Language (University of Chicago Press 1999). He has assisted the committee with its efforts to draft instructions that are easier for jurors to understand.

The instructions are intended as models that may be used in Vermont criminal trials. They have not been adopted by the Vermont Supreme Court, and there is no requirement that they be used as drafted. Judges and attorneys are encouraged to tailor their instructions to fit the circumstances.

The committee encourages practitioners to use the name of the defendant instead of the words "the defendant." The instructions provide a blank with the designation (Def)_____. Exactly 15 blanks are used, so that a judge may use a "find and replace" function to insert the defendant's name. In most instructions, gender words such as "him" or "her" are placed in brackets; it is preferable to simplify the instructions by using only the words that fit the circumstances. The use of actual names makes the instructions easier to follow, and it also avoids negative connotations from the word "defendant." For similar reasons, judges, lawyers and witnesses (especially police) should refer to the victim by name instead of using the word "victim." See State v. Wigg, 2005 VT 91, 179 Vt. 65 (where the commission of a crime is in dispute and the core issue is credibility, it is error for a trial court to permit a police detective to refer to the complainant as the "victim").

To some extent, the committee has drafted the instructions in a modular fashion, and some instructions refer to separate modules. This approach allows for consistency, and it also encourages the drafter to tailor the instructions to fit the circumstances.

Many instructions include bracketed material. Generally this means that the bracketed instruction will be appropriate for some trials but not for others. For example, the homicide instructions contain bracketed material giving additional instructions on the meaning of "unlawful killing." If the unlawfulness of the killing is not an issue in the case, then it is better to give the shorter instruction. If the unlawfulness of the killing is an issue in the case, then the attorneys might want to request a more detailed instruction.

Sometimes the brackets indicate a choice. For example, when the State charges a defendant with simple assault, causing bodily injury, under 13 V.S.A. § 1023(a)(1), there is a choice between charging purposely, knowingly, or recklessly causing the bodily injury. The instruction CR22-021 provides the choices in brackets. The third essential element is that the defendant caused the injury [purposely] [knowingly] [recklessly]. The instruction anticipates that the State will charge one of the choices, and that the instructions will be tailored to reflect the State's election.

In some instances there is a choice, in brackets, between a reference to a [mental state] or [intent]. The committee suggests referring to intent when the mental element is intentionally, purposely, knowingly, or wilfully, and referring to the mental state when the mental element is of a lesser degree, such as recklessly or negligently.

The model instructions encourage the use of specific instructions when specific acts are charged. When the information specifies the conduct that forms the basis of the charge, it narrows the charge that the State must prove, and specific instructions are appropriate. State v. Aiken, 2004 VT 96, 177 Vt. 566; State v. Brown, 2005 VT 104, 179 Vt. 22. In many instructions the statement of the elements will include a space for specific acts. (*e.g.* "(Def)_____ caused bodily injury to (victim)_____, by (specific acts)_____.") Generally the discussion of the elements will also provide for a statement of the specific allegations, as follows: "Here the State alleges that (Def)_____ caused bodily injury to (victim)_____, by (specific acts)_____." The committee recognizes that prosecutors do not always allege specific acts, and that a statement of the specific acts is not always required. However, when the information charges specific acts, it helps to remind the jurors of the specific acts that are charged.

General Notes Concerning Legal Sufficiency of Jury Instructions:

(1) It is "the duty of the trial court to instruct the jury on all material issues raised by the evidence and the pertinent law. . . . The charge to the jury must be full, fair and correct on all issues, theories and claims within the pleadings." State v. McLaren, 135 Vt. 291, 296 (1977).

(2) The defendant is entitled to instructions appropriate to the case made by his or her evidence. The court has a duty to present the issues to the jury squarely, even in the absence of a request, "for it is always the duty of the court to charge fully and correctly upon each point indicated by the evidence, material to a decision of the case, whether requested or not." State v. Brisson, 119 Vt. 48, 53 (1955); *see also* State v. Gokey, 136 Vt. 33, 36 (1978) (The court must charge "fully and correctly upon each point indicated by the evidence [and] material to a decision of the case.").

(3) However, a party excepting to the court's instructions must "fairly and reasonably indicate to the court the particulars in which such instructions [are] claimed to be in error, or sufficiently apprise the court of the specific instruction he [or she] desire[s] on the subject matter." State v. Crosby, 124 Vt. 294, 297 (1964).

(4) Moreover, under the "invited error doctrine," a party cannot "induc[e] an erroneous ruling" as to a jury instruction "and later seek[ ] to profit from the legal consequences of having the ruling set aside." State v. Morse, 2019 VT 58, ¶ 7 (quotation omitted) (defendant waived challenge to instruction by agreeing during trial court proceedings that proposed charge was an accurate statement of the law).

(5) The court has discretion to tailor the wording of the jury instructions to fit the circumstances at hand: "Within the parameters of the law, the trial court may exercise its discretion in the wording of the jury charge." State v. Snow, 2013 VT 19, ¶ 8, 193 Vt. 390.

(6) "In charging the jury, the trial court 'has a duty to avoid confusing the issues by "over definition," particularly when the word in question is one of plain meaning and may well be understood by its context.'" State v. Dow, 2016 VT 91, ¶ 16, 202 Vt. 616 (quoting State v. Audette, 128 Vt. 374, 378 (1970). "Therefore, the court 'may decline to enlarge upon or redefine a phrase or a term whose meaning may be taken to be plain and of common understanding.'" Id. (quoting Audette, 128 Vt. at 379).

(7) Regarding special verdict forms, " 'criminal defendants do not have a right to have special interrogatories submitted to the jury, and indeed . . . the practice is disfavored.' " State v. Phillips, 2024 VT 10, ¶ 16 (quoting State v. Jones, 2008 VT 67, ¶ 26, 184 Vt. 150).

Notes Regarding Chapters and Sections:

Chapter 1: Introductory General Instructions

01-011. Questions to ask Jurors at Start of Trial, or During Trial

These questions might be helpful in a high profile case; they are not necessary in every case. Reasons for inquiry are discussed in State v. Onorato, 142 Vt. 99, 105-07 (1982).

01-021. Juror Note Taking -- Introduction

If jurors are allowed to take notes, the court must give them a brief introduction. The procedures may vary from one court to another. The model instruction is drafted in generic language, because in some cases "the record" may involve a stenographic recording, whereas in other cases it may involve audiotape or videotape.

01-031. Juror Prohibitions, Including Use of Electronic Devices

The instruction follows the guidance set forth in State v. Abdi, 2012 VT 4, ¶ 25, 191 Vt. 162, and is meant to be read at the beginning of the trial. A shorter version of the instruction for use as part of the jury charge is also included as CR03-051. Courts should explicitly instruct the jury not to discuss the case amongst themselves until deliberations begin, along with an instruction not to communicate with others about the case. State Cameron, 2016 VT 134, ¶¶ 32–33 nn. 5–8. Courts must investigate after learning of the possibility of jury taint. State v. Kandzior, 2020 VT 37, ¶ 27 ("the failure to investigate possible jury taint and establish an evidentiary basis for determining if the jury was fair and unbiased amounts to plain error").

01-032. Juror Prohibitions, Including Juror Use of Electronic Devices, Upon Separation Following Voir Dire and Before the Start of Trial

Courts must investigate after learning of the possibility of jury taint. State v. Kandzior, 2020 VT 37, ¶ 27 ("the failure to investigate possible jury taint and establish an evidentiary basis for determining if the jury was fair and unbiased amounts to plain error").

01-101. Introduction

This is a short, generic instruction that may be used to introduce the closing instructions.

01-501. American Sign Language Interpreters

If a case requires the use of interpreters, the judge must explain their use early in the case. The committee recommends discussing potential issues at least as early as the jury draw. For example, the judge and the attorneys will want to know whether any jurors understand the language that is being interpreted, and some consideration should be given to the potential problem of jurors disagreeing with an interpretation that is given.

01-511. Spanish Language Interpreters

Instruction CR01-511 may be used as an instruction for any foreign language interpreters. It can be converted for use with another language by substituting for the word "Spanish."

Chapter 2: Miscellaneous General Instructions

02-021. Reading of the Charge

The instructions on the essential elements should begin with the reading of the charge. For the sake of clarity, the committee recommends focusing on the charge itself, and not on the underlying statute. The information controls. It is dangerous and confusing to read or paraphrase the statute, which often includes concepts that are not part of the case.

02-061. At or About

The court should give this instruction only if the location of the offense is a material issue in the case.

Chapter 3: Concluding General Instructions

03-011. Jury Deliberations

The instructions on jury deliberations, including the requirement of unanimity, are usually given at the conclusion of the closing instructions. Note that the unanimity instruction here is a "general unanimity instruction," which "informs the jury generally that they must agree unanimously on the verdict." State v. Robitille, 2019 VT 36, ¶ 48. Case circumstances may dictate that a more specific unanimity instruction also be given, for instance, when there is more than one act that might support the offense charged. *See* id. In such cases, courts and attorneys should consider CR04-081.

03-021. Juror Note Taking

If jurors are allowed to take notes, they should be reminded that they should pay equal attention to all jurors, whether or not they have taken notes. The concern is that a juror who has taken notes might exercise undue influence on others.

03-041. Foreperson's Duties

Although the practice varies, the committee recommends that the judge announce the appointment of the foreperson toward the end of the closing instructions. An earlier announcement could cause unnecessary distraction.

03-051. Juror Prohibitions, Including Use of Electronic Devices During Deliberations

Following State v. Abdi, 2012 VT 4, 191 Vt. 162, the committee has established a long version of the instruction on juror prohibitions, including juror use of electronic devices, to be read at the beginning of the trial, and which may be found at CR01-031. This shorter version is meant to be included in the final jury instructions, but some judges may wish to use the longer

instruction as part of the final instructions. Judges may also consider ordering the collection of all electronic devices from the jurors during deliberations. Courts must investigate after learning of the possibility of jury taint. State v. Kandzior, 2020 VT 37, ¶ 27 ("the failure to investigate possible jury taint and establish an evidentiary basis for determining if the jury was fair and unbiased amounts to plain error").

03-061. Dismissal During Trial of Some Charges Against Single Defendant

The court may give this instruction if one or more of the original charges of which the jury was initially informed has been removed from the case, whether through plea or dismissal, and where other charges remain for the jury's consideration. This instruction derives from State v. Sawyer, No. 197-2-18 Rdcr (Zonay, J.). Several other states and federal appellate courts have similar model instructions. *See, e.g.*, Ariz. Pattern Jury Instr., Standard Crim. Instr. 31; Cal. Crim. Jury Instr. § 205; Third Cir. Model Crim. Jury Instructions § 2.31; 8th Cir. § 2.11; 9th Cir. § 2.14; *see also* 3 Sand, et al., Modern Federal Jury Instructions—Criminal ¶ 2.15 (2019 ed.) ("Dismissal of Some Charges Against Defendant"). The comment to the Third Circuit's model instruction explains:

> This instruction may be given during the trial when charges are dismissed, most likely after the close of the government's case-in-chief. If those charges were called to the jury's attention in the preliminary instructions or opening statements, or if evidence was introduced that relates only to those charges, the jury may expect the defendant to respond to the charges or to the evidence offered to establish the charges. This instruction explains to the jury that the charges are no longer part of the trial and thereby lets the jurors know why there will be no response to those aspects of the government's case.

The Eighth and Ninth Circuits have also explicitly approved of such instructions in caselaw. *See* United States v. Kelley, 152 F.3d 881, 888–89 (8th Cir. 1998); United States v. de Cruz, 82 F.3d 856, 864–65 (9th Cir. 1996) (concluding that district court's instruction adequately informed the jury that the dismissed counts were not before them, that defendant was on trial only for remaining counts, and that the evidence could only be considered as it related to the charged counts or as it related to defendant's intent).

The Vermont Supreme Court has not considered whether the use of this instruction is required. The comments to the Eighth and Ninth Circuit model instructions note that this instruction should not be given unless specifically requested by the defense. A usage note accompanying the Arizona pattern instruction recommends giving this instruction both during trial (after the dismissal of charges) and again in the final instructions.

03-101. Hung Jury Charge

This is a version of the so-called "Allen charge," a term that derives from Allen v. United States, 164 U.S. 492, 501 (1896), where the U.S. Supreme Court upheld a supplemental jury instruction to continue deliberations. Many states, including Vermont, have since rejected the traditional Allen charge as impermissibly coercive and instead adopted ABA Standard 15-5.4. State v. Rolls, 2020 VT 18, ¶¶ 13–15. "[A] trial court may issue a supplemental jury instruction to encourage a jury to continue deliberations when they cannot agree on a verdict" and "[p]roviding such an instruction is a matter within the court's sound discretion." Id. ¶ 17. However, a court "may not issue" such an instruction "that coerces the jury into arriving at a verdict." Id. Nor may it issue "a traditional Allen charge or any instruction that substantially deviates from ABA Standard 15-5.4." Id.

While an instruction that adheres to the ABA Standard "will not be inherently coercive, . . . whether such an instruction is coercive in a particular case will depend on the facts of that case" and may require a court to consider "the language of the instruction [and] its surrounding circumstances," including "the timing of the instruction and verdict, errors in the proceedings, and whether the court has imposed an artificial time limit on the length of deliberations." Id. ¶¶ 16–17; *see also* id. ¶¶ 18–20 (trial court's supplemental instruction to continue deliberations was a "permissible, noncoercive charge that mirrored the ABA standards"); State v. Perry, 131 Vt. 337, 339–41 (1973) (same).

This instruction is intended to adhere to the applicable ABA Standard as discussed in Rolls, 2020 VT 18 and Perry, 131 Vt. 337. Use this instruction with caution, and only after reviewing Rolls and Perry. The judge should discuss this instruction with the attorneys before giving it to the jury.

03-106. Partial Verdict Charge

This variation on the hung-jury charge is meant for those situations in which there are multiple counts and the jury has indicated that they cannot agree, but it is not clear whether the jury cannot agree on any count or only on some of the counts. As with the hung-jury charge, CR03-101, this instruction should be used with caution, and the judge should discuss it with the attorneys before giving it to the jury. State v. Perry, 131 Vt. 337, 339 (1973). This instruction is meant for cases involving multiple counts, as opposed to cases in which the jury has been asked to consider lesser-included offenses.

Chapter 4: Burden of Proof

04-021. Proof of Essential Elements

This instruction, or one like it, is appropriately included after the substantive instructions on the elements of the charge. The court must instruct the jury that one of the possible verdicts is that the defendant is not guilty of any crime. *See* State v. Camley, 140 Vt. 483 (1981) (plain

error found where judge failed to list a general not guilty verdict along with the other possibilities).

04-041. Separate Counts

In a complicated case, this instruction may help to emphasize that multiple counts must be considered separately. In most cases, it will help to tailor the instruction to the circumstances.

04-051. Multiple Defendants

This instruction, which derives from the jury instructions given in State v. White, Nos. 661/662-6-16 Rdcr (Zonay, J.), aims to prevent guilt by association in cases involving more than one defendant. The bracketed language applies when there is evidence admitted against one defendant but not the other.

04-061. Presumption of Innocence

The Vermont Supreme Court discussed the presumption of innocence in State v. Duff, 150 Vt. 329 (1988), and clarified the doctrine in State v. Powell, 158 Vt. 280 (1992). The presumption of innocence is a piece of evidence which the jury should consider in the defendant's favor. It works in two ways, as a presumption with regard to each essential element, and as a presumption with regard to the degree of offense. However, "[a]s long as a court specifically instructs the jury as to each offense charged that it must not convict unless it is convinced of the defendant's guilt beyond a reasonable doubt, the 'reasonable doubt between offenses' instruction is not required." Id. at 286. While the trial court should instruct on the presumption of innocence both preliminarily and in its final instructions, the failure to repeat this instruction as part of the final instructions by itself does not necessarily constitute reversible error. *See* State v. Redmond, 2020 VT 36, ¶¶ 41–49, 212 Vt. 242.

04-081. Unanimous Verdict (where evidence might tend to show multiple acts)

This instruction addresses a potential problem with jury unanimity. The problem may appear in various forms. For examples, see Woodmansee v. Stoneman, 133 Vt. 449 (1975), where the jury was presented with two separate theories of accomplice liability, and State v. Couture, 146 Vt. 268 (1985), where the jury was told it could convict the defendant of kidnapping, for confining any one of five alleged victims, but where there was no instruction to ensure unanimity regarding the essential element that the defendant had confined a particular person.

The problem appeared again when the State introduced evidence of three separate sexual acts in support of one count of sexual assault. State v. Martel, 164 Vt. 501 (1995). The court instructed the jury that each juror had to agree as to which of the three sexual acts constituted the "sexual act" element of the crime, and that they would have to look to the evidence of that

individual act in order to convict. The defendant was convicted of sexual assault, and the Supreme Court affirmed, noting that the instruction eliminated much of the potential prejudice that had existed because of the absence of an election. Id. at 504.

The instruction on jury unanimity, CR04-081, represents an attempt to deal with the Couture problem by giving an instruction. It is still preferable for the State to make an election. If the instruction is used, it should be tailored to fit the circumstances of the case.

The instructions on accomplice liability, CR09-301 and -305, comply with the constitutional requirement of jury unanimity. The State may prove that the defendant committed the crime *either* as an accomplice *or* as the principal actor. State v. Green, 2006 VT 64, 180 Vt. 544. The jury must still reach a unanimous verdict on the essential elements of the crime.

For further, more recent discussion of juror unanimity instructions, see State v. Nicholas, 2016 VT 92, ¶¶ 25, 28 n.6, 203 Vt. 1; State v. Albarelli, 2016 VT 119, ¶¶ 25-30, 203 Vt. 551; State v. Robitille, 2019 VT 36, ¶¶ 47–50, 210 Vt. 202; State v. Redmond, 2020 VT 36, ¶¶ 25–34, 40, 212 Vt. 242; State v. Blanchard, 2021 VT 13, ¶ 34, 214 Vt. 225; State v. Phillips, 2024 VT 10, ¶ 16.

04-101. Burden of Proof -- Beyond a Reasonable Doubt

In a criminal case, the state must prove each of the essential elements of the offense beyond a reasonable doubt. State v. Derouchie, 140 Vt. 437, 442 (1981) (citing In re Winship, 397 U.S. 358, 364 (1970)). When describing the standard of proof beyond a reasonable doubt, brevity is a virtue. State v. Francis, 151 Vt. 296 (1989). Unless there is a request for elaboration, the instruction should be brief, and the words will carry their plain meaning. State v. McMahon, 158 Vt. 640 (1992); *see also* State v. Redmond, 2020 VT 36, ¶ 39, 212 Vt. 242 ("we have recognized that 'attempting to define reasonable doubt is a hazardous undertaking,' and we 'discourage trial judges from trying such an explanation.'") (quoting State v. Levitt, 2016 VT 60, ¶ 14, 202 Vt. 193). The jury's role is to determine whether the state has proven the charge beyond a reasonable doubt. The instruction tells the jury that, if the jury has a reasonable doubt, then it must find the defendant not guilty even if it thinks that the charge is probably true. State v. Giroux, 151 Vt. 361, 365 (1989).

In 2005, the committee modified its instruction in two ways: First, the instruction was redrafted to avoid using the phrase "(Def)_____'s guilt," which might suggest that he or she is in fact guilty. Second, it was simplified by eliminating the word "real" from the sentence that begins, "A reasonable doubt is a real doubt based on reason . . ." This change responds to a suggestion in State v. Carr, No. 2004-304 (Vt. April 2005) (unpub. mem.). The Court approved the instruction on reasonable doubt, but suggested that it would be better to avoid using the word "real."

The last sentence of the instruction states that if the jury is convinced of the defendant's guilt beyond a reasonable doubt, then it must find the defendant guilty. The committee rejected

suggestions that the jury be told it should find the defendant guilty, or that it may find the defendant guilty. Vermont follows the majority rule that jurors are not given instructions on jury nullification. State v. Findlay, 171 Vt. 594 (2000). Jurors are told that they must apply the law as it is given to them in the instructions.

There may be circumstances where the jury should acquit even where the state has proven the essential elements beyond a reasonable doubt, such as where the defendant proves the elements of an affirmative defense. That issue is dealt with in the instructions concerning the affirmative defense. The jury will be told that if the defendant proves the elements of an affirmative defense by a preponderance of the evidence, then the jury must find the defendant not guilty.

04-121. Proof by a Preponderance of the Evidence

This instruction applies to issues that are to be decided by a preponderance of the evidence. In most cases, it should suffice to instruct that proof by a preponderance of the evidence means that the defense is more likely true than not true, and that this burden of proof is less than the burden of proof beyond a reasonable doubt. The instruction also includes a paragraph analogizing this burden to a balance scale, for use when the judge believes the analogy would help with the explanation.

04-151. Burden of Proof on Self-Defense

"Once evidence raising the issue of self-defense appears in the case, the burden is on the State to prove, beyond a reasonable doubt, that appellant's actions were not in self-defense." State v. Bartlett, 136 Vt. 142, 144 (1978) (assault context). In a homicide case, the State's burden of proving that the killing was unlawful may also require proof beyond a reasonable doubt that the defendant did not act in self-defense. State v. Rounds, 104 Vt. 442, 450-51 (1932).

04-201. Affirmative Defense -- Burden of Proof

This instruction provides a framework for introducing a defense to the jury. When an affirmative defense is presented, the defendant bears the burden of proving it by a preponderance of the evidence. The court need not tell the jury that the defense is an "affirmative" defense.

Chapter 5: Evidence

05-031. Statements by the Attorneys

The model instructions refer to the attorneys as "attorneys." The committee concluded that "counsel" is too obscure, and that "lawyers" is too informal.

05-051. Circumstantial Evidence

The committee has simplified and shortened the instruction on circumstantial evidence. The Supreme Court has approved similar instructions in State v. Baird, 2006 VT 86, 180 Vt. 243. A full discussion of the use of circumstantial evidence in criminal cases is set forth in State v. Godfrey, 2010 VT 29, ¶¶ 18–23, 187 Vt. 495.

This instruction is unusual in that it provides an example. Most judges prefer to give an example of circumstantial evidence, although some would use a different example, such as an overnight snowfall. It is not necessary to use the example of cow tracks, which might not be understood by all audiences.

The Supreme Court has emphasized in dicta that the State need not disprove every possible hypothesis of innocence; rather, there must be sufficient evidence to allow a jury by a process of rational inference to conclude beyond a reasonable doubt that the defendant committed the charged acts. State v. Vuley, 2013 VT 9, ¶ 35. Of course, the particular instruction given should be tailored to the circumstances of the case at hand.

05-061. Credibility of Witnesses

This is a generic instruction on credibility of witnesses. The model does not include an instruction on reconciling testimony, although it does tell the jury that it may consider inconsistencies or discrepancies. There are potential problems with instructing the jury that it must try to reconcile conflicting testimony, because that might suggest that witnesses are presumed to tell the truth. *See* State v. Percy, 156 Vt. 468, 472-73 (1991).

05-081. Hearsay of Child (V.R.E. 804a)

See, e.g., State v. Hoch, 2011 VT 4, 189 Vt. 560; State v. Spooner, 2010 VT 75, 188 Vt. 356; State v. Willis, 2006 VT 128, 181 Vt. 170; State v. Tester, 2006 VT 24, 179 Vt. 627 (mem.); State v. Oscarson, 2004 VT 4, 176 Vt. 176; State v. LaBounty, 168 Vt. 129 (1998); State v. Gallagher, 150 Vt. 341, 348 (1988).

05-091. Number of Witnesses

The instruction on number of witnesses will generally appear after the instruction on the burden of proof. The purpose is to point out that the evidence of one side or the other is not stronger merely because that side may have presented more witnesses.

05-111, 121, 131. Witnesses Testifying under Plea Agreement, or Grant of Immunity, or Both

These instructions must be tailored to the circumstances of each case, because agreements with witnesses come in many varieties. The model instructions include one for plea agreements, one for grants of immunity, and one for both.

05-141. Limited Relevance of Agreements With the State

This instruction should be used only in rare circumstances where the jury is told the terms of a witness's plea agreements with the state, and where the defendant is charged with participating in the same serious crime. The instruction derives from State v. Marallo, No. 1468-10-98 RdCr.

05-161. Police Witnesses

The emphasis of this instruction is that the jury should not give greater or lesser weight to the testimony of a witness *merely* because the witness is a police officer. Despite this emphasis, the jury may consider the officer's testimony in light of the officer's training and experience.

05-251. Prior Inconsistent Statements

If there is testimony about prior inconsistent statements by the witness which were not made under oath, then the out-of-court statements are introduced for impeachment only, under V.R.E. 613. However, if the out-of-court statements were under oath and subject to penalties of perjury, then they may be admitted as substantive evidence, under V.R.E. 801(d)(1). Statements are subject to perjury only if the person is lawfully required to depose the truth in a proceeding in a court of justice. 13 V.S.A. § 2901. Deposition testimony may be admitted as substantive evidence if the deponent is unavailable for trial, or if the witness gives testimony at the trial that is inconsistent with his or her deposition. *See* V.R.Cr.P. 15(e). Prior inconsistent statements by the defendant may be admitted as substantive evidence against him or her, as admissions under V.R.E. 801(d)(2). The model instruction attempts to cover the various possibilities, but the court might have to tailor it to fit the specific circumstances of each case.

05-301. Defendant Not Testifying

It is the defendant's choice of whether the court will give this instruction, and the defendant also has some discretion in choosing the language to be used. The following statute applies:

13 V.S.A. § 6601: Respondent as witness

> In the trial of complaints, informations, indictments and other proceedings against persons charged with crimes or offenses, the person so charged shall, at his own request and not otherwise, be deemed a competent witness. The credit to be given to his testimony shall be left solely to the jury, under the instructions of the court but the failure of such person to testify shall not be a matter of comment

> to the jury by either the court or the prosecutor and shall not be considered by the jury as evidence against him.

The Vermont Supreme Court has indicated that the defendant has the right to decide whether or not an instruction will be given. The trial court asks: Defendant, do you desire that the court comment on your failure to take the stand? If the answer is no, say nothing. If the answer is yes, then get the defendant's request on the record.

> We are of the firm opinion that the better procedure is for the trial court to ascertain the position of a respondent who has not testified to determine whether he desires that the instruction be given and then give the instruction only when it is requested by him. This places the burden of choice on the respondent rather than the court to decide whether the jury shall be instructed as to the respondent's rights under the statute. This decision is where it should rest in fairness to the respondent. He may feel that under the facts appearing in his case such an instruction would be prejudicial or, on the other hand, that it might be helpful or favorable to him if given. It should be for him to elect whether or not the instruction shall be given to the jury.

State v. Emrick, 129 Vt. 330, 333 (1971).

05-311. Defendant as Witness

This instruction may be appropriate in a case where the defendant testifies as a witness, but the court should give the instruction only if the defendant requests it.

05-321. Pro Se Defendant

This instruction, intended for use when a defendant is not represented by an attorney at trial, derives from the instruction given in State v. Ronald Davis, 2270-7-18 Cncr (Judge Maley), and from the Third Circuit and Ninth Circuit model instructions. Courts should modify this instruction as necessary to fit the circumstances.

05-351. Defendant's Out-of-Court Statements

See State v. Kolts, 2018 VT 131, ¶¶ 39–41 (finding no error with trial court's instruction regarding voluntariness of confession).

05-501. Evidence of Flight by the Defendant

This revised instruction is based on the "[b]est practice" as suggested in State v. Welch, 2020 VT 74, ¶ 16, where the Supreme Court identified the need for "more specificity" in the instruction to ensure that guilty verdicts are "not based solely on the flight evidence." Id.; *but see*

State v. Stephens, 2020 VT 87, ¶ 37 (2020) (failure to give *unrequested* limiting instruction when admitting evidence of flight not plain error as a matter of law); State v. Murphy, 2023 VT 8, ¶¶ 20–26 (same). The Court had earlier discussed evidence of flight in State v. Alexander, 2005 VT 25, ¶ 5, 178 Vt. 482; State v. Carter, 164 Vt. 545, 548 (1996); State v. Giroux, 151 Vt. 361 (1989); and in State v. Unwin, 139 Vt. 186 (1980). See also the reporter's notes on the state's introduction of evidence of a false or fictitious alibi as showing consciousness of guilt (CR09-021).

05-511. Prior Bad Acts Evidence

Generally, before evidence of prior bad acts is admitted, the trial court must determine the purposes for which the evidence is admitted. A preliminary hearing under V.R.E. 104 and V.R.E. 403 would generally seem advisable, but more recent cases have begun suggesting that the issue be reserved for trial, when the relevance of the acts can be better determined. State v. Connor, 2011 VT 23, 189 Vt. 587 (mem.); State v. Williams, 2010 VT 77, 188 Vt. 405. In any event, any limiting instruction must be tailored to fit the circumstances of the case. Prior bad acts have been admitted as part of a concerted scheme or plan of molestation, e.g., State v. Catsam, 148 Vt. 366, 380-81 (1987), as "signature" evidence to show identity, e.g., State v. Bruyette, 158 Vt. 21 (1992); as context for statutory rape, e.g., State v. Searles, 159 Vt. 525 (1993), to rebut a claim of fabrication, e.g., State v. Brown, 2010 VT 103, 189 Vt. 88, and to establish the defendant's propensity to engage in sexual conduct with his daughter in State v. Forbes, 161 Vt. 327, 331 (1994). Other recent cases have included evidence of drug use by the complaining witness, State v. Faham, 2011 VT 55 (mem.); State v. Memoli, 2011 VT 15, 189 Vt. 237, and evidence of the defendant's history of domestic violence to show context for the relationship, State v. Mead, 2012 VT 36; State v. Connor, 2011 VT 23, 189 Vt. 587 (mem.), State v. Williams, 2010 VT 77, 188 Vt. 405.

05-601. Identification Testimony

Most criminal cases will include identity as the first essential element, with a short instruction such as CR09-011. If the case is one in which the issue of identity turns on eyewitness identification, it may be appropriate to include a longer instruction. Instruction CR05-601 derives from State v. Seifert, 151 Vt. 66 (1989). *Also see* Devitt and Blackmer, Fed. Jury Inst. Vol 1. § 15.19; State v. Kasper, 137 Vt. 184, 192-93 (1979). Instruction CR05-605 addresses testimony about identification in a line-up. Instruction CR05-611 is designed to address the very specific circumstances of identification based on signature conduct. *See* State v. Bruyette, 158 Vt. 21 (1992).

Instruction CR05-601 has been shortened from the one given in Seifert. The model instruction does not include a list of factors that could affect a witness's opportunity to observe a suspect. In Seifert, the list of factors was approximately as follows:

(a) How much time was available for the observation?
(b) How close was the witness to the person being observed?

(c) How good were the lighting conditions?
(d) Was the witness paying attention to the other person?
(e) How accurate was the witness's prior description of the alleged perpetrator?
(f) How certain was the witness in making the identification?
(g) How much time passed between the alleged offense and the witness's identification?
(h) Had the witness seen or known the other person in the past?

The committee cautions against using a longer instruction on eyewitness identification. One concern is that the jury might interpret a lengthy instruction as reflecting the judge's views on the identification, without any firm basis in law. Another concern is that the traditional views about factors to consider (such as the level of certainty) may conflict with modern research. This is an evolving area of the law, and the court should consider attorneys' requests for instructions in particular cases. There is a developing body of research, and the general approach to eyewitness identification may be evolving. *See* the article by Atul Gawande, "Under Suspicion – The fugitive science of criminal justice," The New Yorker (January 8, 2001) at 50.

05-801. Lost Evidence

Vermont law recognizes that an instruction on lost evidence, or "spoliation," may be appropriate to explain missing evidence in a civil trial. *See, e.g.*, In re Campbell's Will, 102 Vt. 294 (1929). The idea is to explain inferences that jurors may draw. There are cases from other states holding that a "lost evidence" instruction may be appropriate in criminal trials, as a remedy short of dismissal. *See* People v. Zamora, 28 Cal.3d 88, 615 P.2d 1361, 167 Cal.Rptr. 573 (Cal. 1980). The Vermont Supreme Court has held that the trial court is not required to give a Zamora instruction where the loss of evidence does not prejudice the defendant's constitutional right to a fair trial. State v. Smith, 145 Vt. 121, 129 (1984). For cases discussing circumstances that could support outright dismissal, see State v. Devine, 168 Vt. 566 (1998), and State v. Delisle, 162 Vt. 293 (1994). For the most recent discussion by the Vermont Supreme Court, where the defendant was not entitled to any remedy beyond an instruction to the jury, see State v. Gibney, 2003 VT 26, 175 Vt. 180.

The lost evidence instruction is designed to allow an inference in favor of the defendant, where a loss or destruction of evidence has prejudiced the defendant's ability to defend himself or herself, but where the evidence of police misconduct is insufficient to support a dismissal. The instruction should be given only where the missing evidence would have been material to the case, and the circumstances show a violation of due process. With or without the instruction, the attorneys may comment on the evidence in their closing arguments, and defense counsel may argue that the missing evidence would have helped the defendant. If the police are guilty of egregious misconduct, the defendant may argue to the court for a dismissal.

Chapter 6: Mental Elements

06-001. Circumstantial Evidence of Intent or Mental State

This instruction guides the jury regarding the use of circumstantial evidence to determine the defendant's mental state. The committee recently shortened it from three sentences to two. The change was made in the interest of brevity, and not because of any perceived error.

Nevertheless, the change eliminated a sentence that the Supreme Court has criticized in State v. Brunelle, 2008 VT 87, 184 Vt. 589 (mem.). The sentence in question states: "A person ordinarily intends the natural and probable consequences of his or her voluntary acts, knowingly done." Although this is a permissible inference that the jury may draw, the Court suggested that it "may have been plain error" for the judge to give the instruction. Id. at ¶ 18. In the past, the Court has held that it is error to instruct this inference as a *presumption*, as in: "A person is presumed to intend the natural and probable consequences of his acts." State v. Martell, 143 Vt. 275, 278 (1983) (citing Sandstrom v. Montana, 442 U.S. 510, 518-19 (1979)); accord State v. Myers, 2011 VT 43. The Brunelle decision indicates that the court should be wary of suggesting the inference. In light of Brunelle and Myers, the committee has eliminated the questionable sentence from all of its instructions.

For a recent example of an instruction explaining circumstantial evidence in the context of determining the defendant's intent or mental state, *see* State v. Dow, 2016 VT 91, ¶ 11, 202 Vt. 616.

06-011. Specific Intent

In most cases, the jury instruction will state the specific intent that must be proven, but it is not necessary to refer to the mental state as a "specific intent." *See, e.g.*, State v. Dow, 2016 VT 91, ¶¶ 11–14, 202 Vt. 616. When this project began, the committee used modules to refer to instructions within this chapter, but as the project has evolved, the trend is to spell out the intent to be proven within each separate instruction.

06-111. Intentionally

The Supreme Court has clarified that acting "intentionally" means to act "purposely" or with a specific "conscious object." State v. Jackowski, 2006 VT 119, 181 Vt. 73. A charge that the defendant acted "intentionally" is not shown by "knowing" conduct, i.e. where the defendant was "practically certain" to cause a specific result. The committee has reviewed its instructions on "intentional" conduct, to ensure consistency with the holding of Jackowski.

The model instruction for "intentionally," CR06-111, includes a space for stating the specific harm that is alleged to have been caused. At some point the instruction must identify the intent that must have been proven. The committee notes that not every case includes an allegation of harm to a victim. For some crimes, the allegation is that the defendant has harmed society.

06-121. Purposely

The model instruction for "purposely," CR06-121, is very similar to the instruction for "intentionally," CR06-111. As suggested by State v. Jackowski, 2006 VT 119, 181 Vt. 73, the two words have essentially the same meaning.

06-131. Knowingly

To act "knowingly" means to engage in conduct that will cause, or that will be practically certain to cause, a specific harmful result. As the Supreme Court explained State v. Jackowski, 2006 VT 119, 181 Vt. 73, this is somewhat different from acting "intentionally" or "purposely."

06-141. Recklessly

The instruction on recklessness derives from the Model Penal Code, § 2.02(c), as recognized by the Supreme Court in State v. Amsden, 2013 VT 51, ¶ 23, 194 Vt. 128. *See also* State v. Brooks, 163 Vt. 245, 251 (1995); State v. O'Connell, 149 Vt. 114, 115 n. 1 (1987); State v. Hoadley, 147 Vt. 49, 55 (1986). Note that a prior version of CR06-141 included an additional sentence that is not part of the MPC definition: "You may find that (Def)_____ acted recklessly if [he] [she] acted without regard to the possible consequences of [his] [her] actions." In 2020, the Committee considered whether that language had any continuing viability given the Supreme Court's express adoption of the MPC definition.

While some trial courts have used that additional language in non-homicide cases, it has not been directly addressed or approved by the Supreme Court outside of the homicide context. *See, e.g.*, State v. Carter, 2017 VT 32, ¶ 11, 204 Vt. 383 (quoting trial court's definition of recklessly in context of aggravated domestic assault charge—"[a] person acts recklessly if he acts without regard to the possible consequences of his actions"—but not addressing that precise issue); State v. Rollins, No. 2009-482, 2010 WL 7799810, at *3–4 (Vt. Oct. 21, 2010) (unpub. mem.) (describing trial court's domestic assault instruction, which defined recklessly using the "possible consequences" language, as "full, fair, and correct" in rejecting defendant's "theory of the case" argument, but not addressing propriety of "possible consequences" language). Thus, the Committee's current approach to CR06-141 follows Amsden, which expressly endorsed the MPC definition without the additional "possible consequences" language in the context of a disorderly conduct charge. Amsden, 2013 VT 51, ¶ 23. This does not necessarily mean that the prior version of the instruction (using "possible consequences") cannot be given in certain cases, as the Court has never expressly found error with that instruction.

Note that the Court has used the "possible consequences" terminology to describe recklessness in the homicide context. *See, e.g.*, State v. Shabazz, 169 Vt. 448, 455 (1999) ("Whereas the recklessness pertaining to involuntary manslaughter is conduct that disregards the *possible* consequence of death resulting, the wantonness pertaining to voluntary manslaughter is extremely reckless conduct that disregards the *probable* consequence of taking human life.") (emphasis in original).

The Committee's current approach to CR06-141 also eliminates the word "known," which had appeared in a prior version of the instruction ("consciously ignored a *known,* substantial and unjustifiable risk") but which does not appear in the MPC definition. The Committee concluded that the word "known" was superfluous, because the language "consciously ignored" already implies that the risk must be known.

06-151. Wilfully

Although the mental state of "willfulness" has been given different definitions under different circumstances over time, 1 LaFave, Substantive Criminal Law § 5.1 n.9 (2d ed.), the Vermont Supreme Court has taken the view that willfulness "cannot well mean less than intentionally and by design." In re Appeal of Chase, 2009 VT 94, ¶ 26, 186 Vt. 355; *see also* State v. Bean, 2016 VT 73, ¶¶ 11–12, 202 Vt. 361; State v. Coyle, 2005 VT 58, ¶ 15, 178 Vt. 580 (mem.); State v. Penn, 2003 VT 110, ¶ 9, 176 Vt. 565 (mem.); State v. Parentau, 153 Vt. 123, 125 (1989); State v. Audette, 128 Vt. 374, 379 (1970); Wendell v. Union Mut. Fire Ins. Co., 123 Vt. 294, 297 (1963); State v. Sylvester, 112 Vt. 202, 206 (1941); State v. Williams, 94 Vt. 423, 430 (1920); State v. Burlington Drug Co., 84 Vt. 243 (1911). In 2012, the committee revised all of the definitions of "willfulness" throughout the model instructions to equate willfulness with an intentional act, and to clarify that the mental element of acting "willfully" cannot be met by evidence that the defendant acted "knowingly." *See also* State v. Jackowski, 2006 VT 119, ¶ 7, 181 Vt. 73.

06-161. Criminal Negligence

For discussions of criminal negligence, see State v. Free, 170 Vt. 605 (2000); State v. Beayon, 158 Vt. 133, 136 (1992); and State v. Stanislaw, 153 Vt. 517, 525 (1990).

Notes Concerning General Intent:

The concept known as "general intent" means that the defendant generally knew what he or she was doing. *See* LaFave and Scott, Substantive Criminal Law (1986), § 3.5(e) ("Criminal," "Constructive," "General," and "Specific" Intent). "[W]here the definition of a crime requires some forbidden act by the defendant, his [or her] bodily movement, to qualify as an act, must be voluntary. To some extent, then, all crimes of affirmative action require something in the way of a mental element – at least an intention to make the bodily movement which constitutes the act which the crime requires." Id. at 314. The most common distinction between "general intent" and "specific intent" is that "specific intent" designates a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime. Id. at 315. In short, it is fair to say that all crimes require some sort of "general intent." However, it does not follow that an instruction on general intent will be helpful to the jury.

The committee believes that "general intent" is rarely an essential element of a crime, and that giving the instruction rarely adds to the jury's understanding of the case. In the unusual case where the defendant had no idea what was going on, then the defendant might have a valid

defense that the charged act was involuntary. However, in most cases charging "general intent" crimes, there is no issue over the defendant's intent in doing the act that the law has declared to be a crime. If a case does present such an issue, the court should consider instructions proposed by the attorneys.

For further discussion of this issue, see the notes regarding CR22-301 (Violation of Abuse Prevention Order). Also see the notes regarding CR27-031, where the committee has included a general intent instruction in the instructions for lewd and lascivious conduct under 13 V.S.A. § 2601. The Supreme Court has held that there is no essential element of specific intent for lewd or lascivious conduct, but it may be appropriate to include an instruction on general intent.

Chapter 7: Defenses

07-101. Self-defense

Although characterized as a defense, self-defense is something the State must disprove once it is presented in the case. However, the defendant is not entitled to an instruction on self-defense until there is prima facie evidence to support the defense. State v. Albarelli, 2016 VT 119, ¶¶ 12–18 (insufficient evidence to support self-defense charge where there was lack of evidence showing that defendant believed he was "in peril of imminent bodily harm," and where defendant failed to show that his belief of imminent bodily harm was reasonable); State v. Little, 167 Vt. 577, 577-78 (1997) (mem.) (evidence did not support a charge); State v. Darling, 141 Vt. 358, 361-62 (1982) (any error in the charge was harmless, where the evidence did not support the charge); State v. Cantrell, 151 Vt. 130, 135-36 (1989) (in order to be entitled to an instruction on a defense, defendant must establish a prima facie case on its elements).

The committee has discussed this instruction with Prof. Tiersma. Instruction CR07-101 follows the traditional approach of explaining what self-defense is, and then explaining that the State must prove that the defendant did not act in self-defense.

Self-defense is measured against the act of the crime. The use of deadly force requires greater justification than the use of a lesser force. A court should exercise caution in selecting the appropriate instruction to use in a particular case. The general rules are summarized in State v. Rounds, 104 Vt. 442 (1932). Other cases discussing self-defense include State v. Hoadley, 147 Vt. 49, 54 (1986); State v. Barrett, 128 Vt. 458, 460-61 (1970); State v. Dragon, 128 Vt. 568, 572 (1970); State v. Wilson, 113 Vt. 524, 527 (1944).

07-091. The Aggressor and Self-Defense

CR07-091 reflects the general rule that an "aggressor" may not act in lawful self-defense or defense of another. Note, however, that "when the aggressor starts the fight using only nondeadly force, and is then met with unjustified deadly force . . . , the aggressor may reasonably

defend himself against the unjustified deadly force." State v. Trombley, 174 Vt. 459, 464 (2002); *see also* W. LaFave, 2 Subst. Crim. L. § 10.4(e) (2d ed. Oct. 2017 update). Depending on the evidence presented, it may be necessary to account for that exception in the instructions.

07-111. Self-defense (use of deadly force)

The instruction on the use of deadly force in self-defense, CR07-111, includes an instruction that under certain circumstances, the law does not require the defendant to retreat. See State v. Hatcher, 167 Vt. 338, 348 (1997).

07-121. Self-defense, and defense of another (context of homicide)

The instruction for self-defense, and defense of another, CR07-121, derives from the trial court's instructions in State v. Verrinder, 161 Vt. 250 (1993). However, these instructions have been shortened significantly. One of the changes is to eliminate an instruction on duty to retreat. In State v. Hatcher, 167 Vt. 338 (1997), the trial court instructed the jury that if the defendant honestly and reasonably believed "it was immediately necessary to use deadly force to protect himself from an imminent threat of death or bodily injury, the law does not require him to retreat." Id. at 348.

The committee notes that "defense of another" provides justification for a homicide only if the necessary relationship exists. *See* 13 V.S.A. § 2305(1).

07-131. Defense of Property

The Vermont Supreme Court has recognized defense of property as a legal defense. The components derive from case law. The instruction is drafted in generic form. It should be tailored to fit the circumstances of each case.

07-153, 07-156, and 07-159. Intoxication and Diminished Capacity

Evidence of intoxication, or other condition of impairment, may be relevant to a variety of claims. A defendant may claim, for example, (1) that he or she was legally insane at the time of the alleged acts, (2) that he or she suffered from a diminished capacity to form the requisite mental state, or (3) that, because of the impairment, he or she did not form the requisite mental state. The Vermont Supreme Court has explained the concept of "diminished capacity" as follows, in State v. Smith, 136 Vt. 520, 527–28 (1978):

> The concept is directed at the evidentiary duty of the State to establish those elements of the crime charged requiring a conscious mental ingredient. There is no question that it may overlap the insanity defense in that insanity itself is concerned with mental conditions so incapacitating as to totally bar criminal responsibility. The distinction is that diminished capacity is legally applicable to disabilities not amounting to insanity, and its consequences, in homicide cases,

> operate to reduce the degree of the crime rather than to excuse its commission. Evidence under this rubric is relevant to prove the existence of a mental defect or obstacle to the presence of a state of mind which is an element of the crime, for example: premeditation or deliberation.

"Evidence of reduced mental capacity is not a defense on which a defendant bears a burden of proof. . . . The mental state of a defendant must be proved by the State." State v. Duff, 150 Vt. 329, 333 (1988) (citing State v. Messier, 145 Vt. 622, 629 (1985)). However, if the defendant formed the requisite mental state before becoming intoxicated, and if he or she then drank to brace himself or herself to prepare for committing the act, or if he or she became intoxicated knowing that it would predispose him or her to violence, then the reduced mental capacity does not excuse the criminal conduct. State v. Pease, 129 Vt. 70, 76 (1970).

Often the judge must assess the evidence in deciding how to instruct the jury. See, e.g., State v. Kinney, 171 Vt. 239, 243–44 (2000) (court should normally give the charge, if it is supported by the evidence, but evidence of alcohol consumption will not by itself require the instructions). Where the evidence supports the elements of the crime charged, but where there is also evidence of diminished capacity that may cut against the State's evidence of specific intent, the issue is properly decided by the jury verdict. State v. Kennison, 149 Vt. 643, 651–53 (1987); State v. Pease, 129 Vt. 70 (1970). The court may refuse to instruct on diminished capacity where there is insufficient evidence to justify it. *See*, *e.g.*, State v. Taylor, 2023 VT 60, ¶¶ 9–19; State v. Duford, 163 Vt. 630, 630–31 (1995) (mem.).

The relevance of diminished capacity evidence requires examination of the *mens rea* element of the charge. "When specific intent is an element of a crime, evidence of either voluntary or involuntary intoxication may be introduced to show that the defendant could not have formed the necessary intent." State v. Joyce, 139 Vt. 638, 639–40 (1981) (citing State v. D'Amico, 136 Vt. 153, 156 (1978)). In Joyce, the defendant was charged with a crime which included an element of specific intent, namely aggravated assault, by attempting to cause serious bodily injury to another, under 13 V.S.A. § 1024(a). In contrast, intoxication does not negate recklessness, which is often charged as the mental element of simple assault under 13 V.S.A. § 1023(a)(1). State v. Galvin, 147 Vt. 215, 216 (1986) (citing State v. Murphy, 128 Vt. 288, 293 (1970)). In State v. Bolio, 159 Vt. 250 (1992), the Supreme Court indicated that the defense of diminished capacity could be applied to a charge of aggravated assault (attempting to cause or purposely or knowingly causing bodily injury to another with a deadly weapon, under 13 V.S.A. § 1024(a)(2)), to possibly reduce the degree of crime to the lesser included offense of simple assault under § 1023, because the element of recklessness (which is not affected by diminished capacity) is necessarily included within the element of specific intent. Id. at 252–54.

Diminished capacity may be employed to negate the knowledge element found within a charge of simple assault on a police officer under 13 V.S.A. § 1028. State v. Galvin, 147 Vt. 215 (1986). On the other hand, diminished capacity does not apply to the mental element of aggravated assault when a defendant is charged with causing serious bodily injury recklessly

under circumstances manifesting extreme indifference to the value of human life, under 13 V.S.A. § 1024(a)(1). State v. Allen, 169 Vt. 615 (1999).

Diminished capacity does not apply where the charge does not include an essential element of intent. State v. Gadreault, 171 Vt. 534 (2000) (cruelty to animals). It also does not apply to a charge of DUI, where diminished capacity is an essential element of the crime. State v. Godfrey, 137 Vt. 159 (1979).

In the homicide context, diminished capacity is recognized as a mitigating circumstance that may reduce a killing from murder to manslaughter. State v. Sexton, 2006 VT 55, 180 Vt. 34. However, diminished capacity cannot operate to reduce second-degree murder to voluntary manslaughter, because the *mens rea* elements for those two crimes are the same. State v. Congress, 2014 VT 129. "[A] defendant who defeats the State's burden with respect to the state-of-mind element for second-degree murder cannot be convicted of *any* degree of homicide more serious than involuntary manslaughter. Id. ¶ 33 (original emphasis).

For discussion on the interaction between diminished capacity and insanity, *see* State v. Webster, 2017 VT 98, ¶ 20, 206 Vt. 178 ("Diminished capacity and insanity are related concepts pertaining to defendant's state of mind at the time of the offense"; however, while defendant must prove affirmative defense of insanity, diminished capacity "is an attempt to defeat the State's obligation to show the necessary intent to commit the crime"); State v. Bourgoin, 2021 VT 15, ¶¶ 25–27 (trial court did not err by not instructing jury on its own motion that State's expert's sanity opinion was irrelevant to defendant's claimed diminished capacity, where "State never claimed . . . that [expert's] ultimate opinion on defendant's sanity was relevant to whether defendant had the requisite intent to commit second-degree murder" and where "both defendant . . . and the trial court . . . emphasized the distinction between determining whether defendant was insane and determining whether he had the requisite intent to commit second-degree murder").

07-176. Insanity

The statute, 13 V.S.A. § 4801, places the burden of proof on the defendant. The Supreme Court upheld the constitutionality of the statute in State v. Messier, 145 Vt. 622 (1985). The statute does not relieve the State's burden of proving all of the essential elements – including any mental element, beyond a reasonable doubt.

In 2024, the Committee revised the insanity instruction to better track the statutory language, as reflected in Judge Pacht's jury instructions in State v. Aita Gurung, 3261-9-19 Cncr. The revised instruction now uses the language "lacked adequate capacity."

For discussion on the interaction between diminished capacity and insanity, *see* State v. Webster, 2017 VT 98, ¶ 20, 206 Vt. 178 ("Diminished capacity and insanity are related concepts pertaining to defendant's state of mind at the time of the offense"; however, while defendant must prove affirmative defense of insanity, diminished capacity "is an attempt to defeat the State's obligation to show the necessary intent to commit the crime"); State v. Bourgoin, 2021

VT 15, ¶¶ 25–27 (trial court did not err by not instructing jury on its own motion that State's expert's sanity opinion was irrelevant to defendant's claimed diminished capacity, where "State never claimed . . . that [expert's] ultimate opinion on defendant's sanity was relevant to whether defendant had the requisite intent to commit second-degree murder" and where "both defendant . . . and the trial court . . . emphasized the distinction between determining whether defendant was insane and determining whether he had the requisite intent to commit second-degree murder").

07-301. Necessity Defense

The Vermont Supreme Court has recognized the necessity defense on numerous occasions, although it appears that the defense rarely succeeds. See State v. Warshow, 138 Vt. 22 (1979) (long-term hazards of nuclear power plant are not "imminent"); State v. Shotton, 142 Vt. 558 (1983) (defendant entitled to raise defense that she drove out of necessity, to escape from husband and drive to hospital); State v. Squires, 147 Vt. 430 (1986) (driving while intoxicated not justified where defendant's own conduct created the emergency); State v. Sullivan, 154 Vt. 437 (1990) (insufficient evidence of necessity where hunter said he didn't affix tag to deer because he was afraid it would come off in transport); State v. Baker, 154 Vt. 411 (1990) (defendant, who bears burden of proving necessity, failed to persuade jury that his driving while license suspended was necessary due to medical emergency); State v. Cram, 157 Vt. 466 (1991) (defendant not entitled to raise defense of necessity, for criminal trespass onto range where GE tested Gatling guns, because he could not have reasonably believed that his actions would abate the harm); State v. Thayer, 2010 VT 78, 188 Vt. 482 (defendant not entitled to raise necessity defense where she was growing marijuana for her children for medicinal purposes, but had not complied with state laws regulating such growth); State v. Myers, 2011 VT 43 (defendant not entitled to instruction on necessity where he created the emergency by driving his truck on the complaining witness's property).

The elements of the defense derive from LaFave & Scott, Handbook on Criminal Law § 50 (1972) (cited in State v. Warshow, 138 Vt. at 22). The elements are restated in State v. Cram, 157 Vt. 466, 469 (1991).

The necessity defense is not available if the legislature has excluded it from consideration. State v. Pollander, 167 Vt. 301 (1997) (context of DUI civil suspension proceedings).

In the case known as the "Trial of the Winooski 44," the necessity defense was successfully invoked by protesters who had refused to leave Senator Stafford's office until he agreed to hold a public discussion about the government's involvement with the war in Nicaragua. The case is official known as State v. Keller *et al.*, No. 1372-4-84 CnCr. Judge Frank Mahady instructed the jury that the State bore the burden of proving beyond a reasonable doubt that the necessity did not exist or apply. See the book Por Amor Al Pueblo: Not Guilty! (Front Porch Publishing 1986). Also see the article by Linda Vance, Esq., "The Necessity Defense in Political Trials: An Appraisal," which appeared in The Vermont Bar Journal & Law Digest, Vol. 12, No. 2, April 1986.

07-403. Entrapment

As discussed most recently in State v. Atwood, No. 2016-203, 2017 WL 2963080, at *3 (Vt. June 26, 2017) (unpub. mem.), the test for entrapment is an objective one that is generally for the jury:

> The question of entrapment is determined by the trial court as a matter of law unless there is a dispute as to the facts or the inferences to be drawn from those facts. State v. Hayes, 170 Vt. 618, 619–20 (2000). Because the purpose of the entrapment defense "is to deter improper governmental activity in the enforcement of the criminal laws," this Court, like many other courts, has adopted an objective test that focuses on the conduct of government agents rather than the predisposition of the defendant. Wilkens, 144 Vt. at 28–29. In Wilkens, we adopted the objective test articulated in the Model Penal Code:
>
> > A public law enforcement official or a person acting in cooperation with such an official perpetuates an entrapment if for the purpose of obtaining evidence of the commission of an offense, [he or she] induces or encourages another person to engage in conduct constituting such offense by ... employing methods of persuasion or inducement [that] create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

144 Vt. at 29 (quoting Model Penal Code § 2.13(1)(b) (Proposed Official Draft 1962)).

Thus while the defendant's interactions with police are undoubtedly relevant to whether police actions would have induced a person who was not ready to commit the offense, any "predisposition" to commit to the offense is not relevant. *See* State v. Wilkins, 144 Vt. 22 (1983) for a greater discussion of this issue:

> Justice Frankfurter also argued that by concentrating on the defendant's predisposition rather than on the conduct of the police, the subjective test leads to different results depending on the identity of the defendant. Justice Frankfurter objected to this inconsistency:
>
> > Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition.

Id. at 27 (citing Sherman v. United States, 356 U.S. 369, 383 (1958)).

As one court articulated the objective test:

> If the law enforcement methods create the substantial risk that the offense will be committed by persons other than those who are ready to commit them, entrapment may exist, although the actor himself may have been predisposed. When official conduct inducing crime is so egregious or outrageous as to impugn the integrity of the judicial processes, predisposition of a defendant becomes irrelevant.

State v. Rockholt, 186 N.J. Super. 539, 547, 453 A.2d 258, 262 (App. Div. 1982), aff'd, 96 N.J. 570, 476 A.2d 1236 (1984).

07-503. Duress

The instruction on duress, CR07-503, attempts to provide a simple explanation of some complicated issues. Readers should be aware that duress does not function as a complete defense to all crimes. When the crime in question is an intentional killing, duress may serve to mitigate the crime to manslaughter. *See* 2 LaFave & Scott, Substantive Criminal Law, § 7.11(c) ("Imperfect" Defense of Coercion or Necessity).

07-821. Inability to Carry Out Threat Defense to Criminal Threatening

Note that it is an affirmative defense to a charge of criminal threatening that the defendant "did not have the ability to carry out the threat." 13 V.S.A. § 1702(f). The defendant has the burden to prove the affirmative defense by a preponderance of the evidence. Id.

Chapter 9: Other General Concepts

09-011. Identity of Defendant as First Element

Most criminal charges include identity as the first essential element, with a short instruction such as CR09-011. In some cases it may be appropriate to elaborate, such as where the issue of identity turns on eyewitness identification. See CR05-601 and the accompanying notes. The essential element of identity may be shown by circumstantial evidence. State v. Erwin, 2011 VT 41; State v. Hoch, 2011 VT 4; State v. Danforth, 2008 VT 69, 184 Vt. 122.

09-021. Alibi

The instruction explains that the jury should return a verdict of not guilty if they have a reasonable doubt as to whether defendant was present at the time and place alleged. State v. Ovitt, 148 Vt. 398, 402–03 (1987). The defendant does not bear any burden of proving an alibi, because it is always the burden of the state to prove that the defendant was the one who committed the charged offense. Id.; Stump v. Bennett, 398 F.2d 111, 114–15 (8th Cir. 1968). Even if the defendant does not persuade the jurors that he or she was at some other specific place

at the time of the alleged offense, the jurors may still question whether the state's evidence proved beyond a reasonable doubt that the defendant was the one who committed the charged offense.

In some cases, however, the state may introduce affirmative evidence showing that the defendant's evidence of alibi is not only unworthy of belief but actually fabricated or false. In these cases, the judge may decide to instruct the jurors that if they find the alibi evidence to be actually fabricated or false beyond a reasonable doubt, then they may consider the attempt to fabricate evidence to be some evidence of consciousness of guilt that may be considered along with all of the other evidence in the case. State v. Forty, 2009 VT 118, 187 Vt. 79; State v. Ovitt, 148 Vt. 398, 402–03 (1987); State v. Ladabouche, 127 Vt. 171, 177 (1968); State v. Conley, 107 Vt. 72, 76 (1935); State v. Ward, 61 Vt. 153, 194 (1888).

Use of the "false or fictitious alibi" language requires a distinction between actual fabrication of evidence and mere failure to establish an alibi. An instruction that suggests that the jurors may infer guilt if the defendant offers an alibi defense but fails to prove it is impermissible because it "implies a shifting of the burden of proof from the state to the defendant, and as such, violates due process." Ovitt, 148 Vt. at 402. Use of the "false or fictitious alibi" instruction, therefore, is best limited to cases in which the state has introduced affirmative evidence tending to show the outright falsity of the alibi. Forty, 2009 VT 118, ¶ 18.

Additional caution is warranted because "consciousness of guilt" evidence (e.g., evidence of flight, or false exculpatory explanations offered to a police officer) has limited probative value and is not sufficient by itself to support a conviction. State v. McAlister, 2008 VT 3, ¶¶ 28, 32–33, 183 Vt. 126 (Dooley, J., dissenting); State v. Onorato, 171 Vt. 577, 578–79 (2000) (mem.); State v. Unwin, 139 Vt. 186, 193 (1980). The judge may decide whether to give the "false or fictitious alibi" instruction based on the circumstances of the case and the arguments of counsel.

09-051. Causation

In most cases, the court should not elaborate on the meaning of causation, because jurors already understand it. The description of "efficient intervening cause" is appropriate only if there is evidence supporting it. Nevertheless, there will be cases in which elaboration is desirable and appropriate. In such cases the lawyers should raise the issue with the judge.

The Vermont Supreme Court has indicated approval of a short, simple explanation of causation, in State v. Johnson, 158 Vt. 508, 512 (1992). The Court has affirmed that the defendant's actions must be a cause, rather than the cause of the harm. State v. Martin, 2007 VT 96, ¶ 40, 182 Vt. 377. Martin disapproved of a statement from State v. Yudichak, 151 Vt. 400, 403(1989), that the defendant's acts had to have been the cause of the harm, and reaffirmed the earlier explanation of causation from State v. Rounds, 104 Vt. 443, 453 (1932), that "respondent's unlawful acts need not be the sole cause of death; it is sufficient if they were a contributory cause."

However, statutory enactments may impose a requirement of direct causation.

The Court affirmed the trial court's causation instruction on DUI-death resulting in State v.Sullivan, 2017 VT 24, ¶¶ 12–23, 204 Vt. 328. In construing the particular statute in issue (23 V.S.A. § 1210(f)(1)), the Court observed that "[w]here the statute involves a specified result that is caused by conduct, it must be shown, as a minimal requirement, that the accused's conduct was an antecedent 'but for' which the result in question would not have occurred." Sullivan, 2017 VT 24, ¶ 19 (citing 1 Wharton's Criminal Law § 26 (15th ed. 2016)). So, in a prosecution for DUI-death resulting,

> a jury instruction . . . must require findings that: (1) the defendant operated a vehicle on a highway; (2) he or she did so while under the influence of intoxicating liquor; and (3) his or her intoxication while operating the vehicle caused the victim's death. A mere violation of §1201, standing alone, is insufficient to meet the requirement that the death result from the violation of the statute.

Id. ¶ 19 (emphasis in original).

09-201. Attempt

The instruction recognizes that an attempt requires an act coupled with a specific intent. Some of the language derives from State v. Morse, 130 Vt. 92, 94 (1971). For further, more recent discussion of criminal attempt, see State v. Boutin, 133 Vt. 531, 533 (1975); State v. Synnott, 2005 VT 19, ¶ 22, 178 Vt. 66; and State v. Sawyer, 2018 VT 43, ¶¶ 12–22. In Sawyer, the Supreme Court reaffirmed Vermont's longstanding attempt analysis, observing that the unavailability of an abandonment defense differentiates Vermont's law on attempt from the Model Penal Code's "substantial-step" analysis. Id. ¶¶ 20–22.

Note that the Legislature subsequently adopted the MPC's "substantial step" analysis for the crime of "domestic terrorism." 2018, No. 135, § 2 (codified at 13 V.S.A. § 1703).

09-301, 305. Accomplice Liability

The instruction on accomplice liability states the general rule from State v. Barr, 126 Vt. 112 (1966), and State v. Orlandi, 106 Vt. 165 (1934). The Supreme Court has re-stated and clarified the rule in the context of felony murder, in the companion cases State v. Bacon, 163 Vt. 279 (1995), and State v. Hudson, 163 Vt. 316 (1995). The requirement that the defendant must have acted with the same intent as that of the principal perpetrator is discussed in Bacon, 163 Vt. at 289. *See* State v. Doucette, 143 Vt. 573 (1983) (reinterpreting Vermont's felony murder statute, 13 V.S.A. § 2301).

These instructions note that State has charged the defendant as an accomplice. If the evidence is unclear about who was the principal actor, the instructions should explain that the

State may prove that the defendant committed the crime *either* as an accomplice, *or* as the principal actor. In State v. Green, 2006 VT 64, 180 Vt. 544, the Supreme Court held that it was not plain error for the court to instruct, on the *actus reus* element, that "the defendant or his accomplice" must have sold the heroin. The instruction meets the constitutional requirement that the jury reach a unanimous verdict on the essential elements of the crime. Compare State v. Couture, 146 Vt. 268 (1985) (where the jury was told it could convict the defendant of kidnapping, for confining any one of the five alleged victims, but where there was no instruction to ensure unanimity regarding the essential element that the defendant had confined a particular person).

Accomplice liability may be shown by encouragement by someone who was present at the scene. *See* State v. Orlandi. However, the committee questions whether a defendant may be convicted of accomplice liability based on encouragement by someone who was not present at the scene. For that reason, "encouragement" is included in CR09-301, but not in CR09-305.

The committee recognizes that the jurors might be unfamiliar with the term "express agreement." The following definitions appear in Black's Law Dictionary (6th ed.):

> **Express.** Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms, set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with "implied." [citations omitted].

09-331. Accessory After the Fact

By its terms, the Accessory After the Fact statute does not criminalize acts assisting family members or certain other related persons to escape prosecution. While many other states have repealed this exemption, the Vermont Legislature has not. See State v. Williams, 142 Vt. 81, 86 (1982). Thus, in Williams, the Supreme Court noted that the statute does not remove this exemption if the defendant's sibling committed the underlying felony with others, absent evidence of independent assistance to the non-related co-defendant. Id. at 85–86. Furthermore, conviction for the underlying felony is not required; instead, "commission of an act which constitutes a felony is the predicate to liability for assisting the offender." Id. at 86 (statute would still apply to defendant's actions in assisting juvenile who could not be punished as an adult, as long as act which juvenile committed was a felony). Whether the underlying crime actually constitutes a felony is a question of law on which the court should instruct the jury.

09-601, 606. Territorial Jurisdiction

This instruction should be given only if the territorial jurisdiction is a material issue in the case. See, e.g., State v. Pellerin, 164 Vt. 376 (1995), and State v. Mosher, 143 Vt. 197 (1983). The pertinent statute provides the following:

13 V.S.A. § 2. Crimes committed partly outside state.

> A person who, with intent to commit a crime, does an act within this state in execution or part execution of such intent, which culminates in the commission of a crime either within or without this state, shall be punished for such crime in this state in the same manner as if the same had been committed entirely within this state. A crime committed by means of an electronic communication, including a telephonic communication, shall be considered to have been committed at either the place where the communication originated or the place where it was received.

The statute, and the instruction, include some difficult concepts. The committee recommends tailoring the instruction to the circumstances of the case. The instruction given should use the defendant's name, and it probably should also name any other locations that might be involved.

Instruction CR09-606 provides a simpler version of the instruction on territorial jurisdiction. It was drafted for use in a case where a single act was alleged, and where the act might have occurred in either New Hampshire or Vermont.

Chapter 10: Definitions

10-211. Definition of "Deadly Weapon"

See 13 V.S.A. § 1021(a)(3); State v. Kuzawski, 2017 VT 118, ¶¶ 8–18, 206 Vt. 351; State v. Longley, 2007 VT 101, 182 Vt. 452.

10-311. Definition of "Family Member"

Although the definition of "family member" sounds simple, there are a number of unresolved issues, having to do with past marriages, distant relatives, *etc*. For recent guidance from the Vermont Supreme Court, see Embree v. Balfanz, 174 Vt. 560 (2002).

10-321. Definition of "Firearm"

The committee's understanding is that the word "firearm" should be construed broadly to include guns, pistols, revolvers, rifles, etc. The definition in CR10-321 derives from 13 V.S.A. § 3019. Although the statute limits the use to the particular section of the criminal code, there is no indication that the word "firearm" should be construed more narrowly in other contexts.

10-418. Definition of "Harassing" (in context of violation of condition of release)

The definition derives from various dictionary definitions. Black's Law Dictionary (6th

ed.) provides the following discussion:

> **Harassment.** . . . Term is used in variety of legal contexts to describe words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person. . . . A person commits a petty misdemeanor if, with purpose to harass another, he (1) makes a telephone call without purpose of legitimate communication; or (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or (4) subjects another to an offensive touching; or (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor. Model Penal Code, § 250.4.

Note that there are alternative definitions of "harassment" in CR10-421, CR22-301, and CR27-611.

10-421. Definition of "Harassing" (in context of stalking)

Note that there are alternative definitions of "harassment" in CR10-418, CR22-301, and CR27-611. (02/03/06)

10-751. Definition of "Serious Bodily Injury" (context of assault)

The revised definition of "serious bodily injury," derived from 13 V.S.A. § 1021(2), reflects the legislative determination that strangulation constitutes serious bodily injury. Because the statute's structure sets out Subsections 1021(2)(A) and (2)(B) as separate, alternative definitions, the updated instruction includes brackets to indicate that the entire definition may not be appropriate in all cases. For instance, where no evidence of strangulation is presented, there is no reason to instruct the jury on the definition of strangulation as provided in Subsection (2)(B). Conversely, in cases where the only evidence is of strangulation, there is no reason to instruct the jury on the definition in Subsection (2)(A) or, for that matter, the definition of "bodily injury."

The Committee recognizes that some cases might present evidence of both types of serious bodily injury (strangulation and non-strangulation). In those cases, it may be appropriate to instruct the jury on the entire statutory definition, and the jury would likely have to reach a unanimous decision as to either Subsection (2)(A) or (2)(B). Unlike the three "ascending mental states" for second degree murder, which are applied as a hierarchy, see State v. Boglioli, 2011 VT 60, ¶¶ 11–12, 190 Vt. 542; State v. Bolio, 159 Vt. 250, 253-54 (1992), the two definitions of serious bodily injury are presented as alternatives where one does not necessarily subsume the other.

Chapter 20: Arson and Burning (Title 13, chapter 11)

The act of arson is described under the statute in various ways, applying, for example, to someone who "burns" or "sets fire to" or "causes [a structure] to be burned." The terms "burn" and "set fire to" are essentially synonymous. State v. Babcock, 51 Vt. 570, 576-77 (1879).

An actual burning need not occur for the crime of attempted arson. *See* 13 V.S.A. § 509 (attempts); State v. Dennin, 32 Vt. 158 (1859). In one case where the defendant was found kneeling in the middle of the floor, matches in hand, together with a cone-shaped roll of newspaper, with a jar of paint thinner beside him and in the presence of a strong odor of gasoline, while the apartment was dark, and the striking of a match would have consummated the crime, this evidence supported a conviction for attempted arson. State v. Woodmansee, 124 Vt. 387, 391 (1964). In another case, where the defendant had supplied flammable material, and disabled a sprinkler system which would have stopped the fire, the evidence sufficed to prove that he had participated in the planning of the illegal act, and had furthered the act. State v. Polidor, 130 Vt. 34, 36 (1971). It is a crime to procure an attempted burning as well as an actual burning. State v. Ciocca, 125 Vt. 64 (1965).

The definition of "structure" derives from the statutes on municipal and regional planning and development, 24 V.S.A. § 4303(11).

The word "willfully," as used in the statute, means intentionally and by design. While the Vermont Supreme Court has not explicitly defined "maliciously" in the arson context, most courts recognize that to act "maliciously" for purposes of committing arson means to act intentionally and without legal justification, and does not necessarily require personal hate or ill will. *See* 3 C. Torcia, Wharton's Criminal Law § 33:4 & n.6 (16th ed. Sept. 2022 update) ("The burning must be 'malicious.' But, again, as a result of case-law development over the years, malice in a literal sense is not required; a defendant may act maliciously even though the defendant harbors no 'malevolence or ill-will' toward the owner or occupant."); 3 W. LaFave, Substantive Criminal Law § 21.3(e) (3d ed. Oct. 2022 update) (For common law arson, "[t]here was not . . . any need to show 'malevolence or ill will'"); 5 Am. Jur. 2d Arson and Related Offenses § 7 (2d ed. Feb. 2023 update) (With arson, "malice is inferred from willfulness. . . . 'Malicious,' as in the requirement of a malicious burning as used in defining arson, is quite different from its literal meaning. It need not take the form of revenge or ill will."). Note, however, that in other contexts, the word "maliciously" ordinarily has a darker meaning, and requires in addition a deliberate and evil intention. *See* State v. Sylvester, 112 Vt. 202, 206 (1941); State v. Muzzy, 87 Vt. 267, 268–69 (1913); *see also, e.g.*, CR28-171, -173, -175 (aggravated animal cruelty instructions). For an exhaustive analysis of how the statutory law of arson has developed in the United States, see J. Poulos, The Metamorphosis of the Law of Arson, 51 Mo. L. Rev. 295, 405 (1986) (observing that, for the states with arson statutes similar to Vermont's, "the cases do hold, without exception, that an intentional burning of the *property of another* without justification or excuse is a malicious burning under these statutes. . . . [T]he statutory phrase 'willfully and maliciously' should be interpreted in accordance with the common law.") (emphasis in original).

After discussion, the committee has included the instruction on a presumption that a fire was the result of an accident or some natural cause, as long as it is balanced by the instruction that an intentional burning may be proven by circumstantial evidence. These two concepts are discussed together in State v. Bessette, 129 Vt. 87, 89-90 (1970).

"[I]n order to prove the corpus delicti of arson it is not sufficient to show a burning, which may have been the result of an accident. It must be proved beyond a reasonable doubt that the burning was not accidental, but was wilfully and maliciously caused by some person who was morally responsible for his [or her] actions." State v. Teitle, 117 Vt. 190, 205 (1952).

Chapter 21: Assault and Robbery (Title 13, chapter 13)

21-011, et seq. Assault and Robbery

The instructions on Assault and Robbery, 13 V.S.A. § 608, should be tailored to the specific evidence in the case. The "assault" which is part of "assault and robbery" incorporates the elements of simple assault under §§ 1021 and 1023. State v. Reynolds, No. 2008-452 (Vt. Nov. 2009) (unpub. mem.); State v. Francis, 151 Vt. 296 (1989). Any instructions on identity or causation may be expanded or contracted, depending on the significance of those issues in the case. The definition of "bodily injury" is found in 13 V.S.A. § 1021(1). The definition of "dangerous weapon" derives from State v. Deso, 110 Vt. 1, 8 (1938). A gun may be considered a "dangerous weapon" whether or not it is loaded. State v. Parker, 139 Vt. 179 (1980). Other relevant cases include State v. Powell, 158 Vt. 280 (1992); State v. Dennis, 151 Vt. 223, 224 (1989); State v. Murphy, 128 Vt. 288, 291-92 (1970); and State v. McClellan, 82 Vt. 361 (1909).

As to the "robbery" part of "assault and robbery," the statute applies where one, when assaulting another, "robs, steals, or takes from his or her person or in his or her presence money or other property which may be the subject of larceny." 13 V.S.A. § 608(a).

For a discussion of the "property which may be the subject of larceny" element, see State v. Trowell, 2015 VT 96, ¶¶ 20–22 (rejecting defendant's contention that trial court erred in not expressly instructing that the money taken must have been the "property of another"; defendant's theory was that the money he took from victim was actually owed to him, and thus was not the "property of another").

Chapter 22. Breach of the Peace; Disturbances (title 13, chapter 19)

22-011, et seq. Simple Assault

There are many options within the simple assault statute, 13 V.S.A. § 1023. The committee has separated attempting to cause bodily injury (CR22-011) from causing bodily injury (CR22-021).

The definition of "recklessly" derives from State v. Hoadley, 147 Vt. 49, 55 (1986) (quoting the Model Penal Code definition of "recklessly"); and State v. O'Connell, 149 Vt. 114, 115-16 (1987) (applying the definition in case involving § 1023(a)(1)).

"Bodily injury" is defined in 13 V.S.A. § 1021(1). "Serious bodily injury" is defined in 13 V.S.A. § 1021(2). "Deadly weapon" is defined in 13 V.S.A. § 1021(3). *Also see* State v. Dennis, 151 Vt. 223 (1989); State v. Kennison, 149 Vt. 643 (1987); State v. Galvin, 147 Vt. 215, 216-18 (1986); State v. Martel, 142 Vt. 210 (1982); State v. Blakeney, 137 Vt. 495, 501 (1979); and State v. D'Amico, 136 Vt. 153 (1978).

Depending on the formulation of the charge, simple assault may be a lesser included offense of misdemeanor domestic assault. *See, e.g.*, State v. Bean, 2016 VT 73, ¶¶ 6–10, 202 Vt. 361. "The State may request a lesser-included instruction, even over the defendant's objections," and "this request must be granted if supported by the evidence. Id. ¶ 14; *see also* 13 V.S.A. § 14(a).

22-036. Simple Assault (with a deadly weapon)

The term "deadly weapon" is defined in 13 V.S.A. § 1021(3). Research indicates that the test is an objective one, as explained in the following case from New Hampshire:

> The term "known" is commonly understood as meaning "generally recognized." *Webster's Third New International Dictionary* 1253 (unabridged ed. 1961). Thus, the legislature clearly intended to limit the definition of deadly weapon to those instruments which are *objectively* understood to be capable of causing death or serious bodily injury in the manner in which they are used, intended to be used, or threatened to be used. . . .

State v. Hatt, 740 A.2d 1037, 1038 (N.H. 1999) (original emphasis).

In a recent Vermont case, there was sufficient evidence that the knife used was a deadly weapon, because the stabbing manner in which it was used to inflict injury was known by defendant to be capable of producing serious bodily injury. State v. Turner, 2003 VT 73, 175 Vt. 595.

22-041. Simple Assault (physical menace)

If the defendant used a gun, the State need not prove that the gun had a present ability to fire. An apparent ability to inflict serious bodily injury is sufficient. State v. Riley, 141 Vt. 29, 32 (1982). The State must prove that the defendant intended to place the victim in fear of serious bodily injury. The jury may determine intent from the defendant's conduct and all the surrounding circumstances. State v. Godfrey, 131 Vt. 629 (1973). The State need not prove that the victim actually was in fear of serious bodily harm. State v. Gagne, 2016 VT 68, ¶ 32 ("the

instruction as a whole properly placed the focus on the objective character of defendant's words or acts—whether they conveyed an intent to inflict physical injury upon another person—rather than the reaction of the specific targets of those words or acts").

22-046. Simple Assault by Mutual Consent

See 13 V.S.A. § 1023(b); State v. Sturgeon, 140 Vt. 240, 244 (1981).

22-071, -081. Aggravated Assault

The revised definition of "serious bodily injury," derived from 13 V.S.A. § 1021(2), reflects the legislative determination that strangulation constitutes serious bodily injury. Because the statute's structure sets out Subsections 1021(2)(A) and (2)(B) as separate, alternative definitions, the updated instruction includes brackets to indicate that the entire definition may not be appropriate in all cases. For instance, where no evidence of strangulation is presented, there is no reason to instruct the jury on the definition of strangulation as provided in Subsection (2)(B). Conversely, in cases where the only evidence is of strangulation, there is no reason to instruct the jury on the definition in Subsection (2)(A) or, for that matter, the definition of "bodily injury."

The Committee recognizes that some cases might present evidence of both types of serious bodily injury (strangulation and non-strangulation). In those cases, it may be appropriate to instruct the jury on the entire statutory definition, and the jury would likely have to reach a unanimous decision as to either Subsection (2)(A) or (2)(B). Unlike the three "ascending mental states" for second degree murder, which are applied as a hierarchy, see State v. Boglioli, 2011 VT 60, ¶¶ 11–12, 190 Vt. 542; State v. Bolio, 159 Vt. 250, 253-54 (1992), the two definitions of serious bodily injury are presented as alternatives where one does not necessarily subsume the other.

In cases involving evidence of strangulation, the state may proceed either upon a theory that the defendant recklessly caused serious bodily injury to the victim or that the defendant intentionally strangled the victim by intentionally impeding normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. As suggested in State v. Carter, 2017 VT 32, ¶ 16, 204 Vt. 383, the state should elect between those two options, and the instructions should not blend or commingle the two separate definitions.

"Circumstances manifesting an extreme indifference to the value of human life" are those events surrounding the imposition of serious bodily injury which demonstrate a blatant disregard for the victim's life. State v. Joseph, 157 Vt. 651 (1991); State v. Saucier, 512 A.2d 1120, 1125 (N.H. 1986).

Simple assault is not always a lesser-included offense of aggravated assault. See State v. Russell, 2011 VT 36 (mem.) (simple assault is a lesser included offense of aggravated assault charged under § 1024(a)(2)); State v. Myers, 2011 VT 43 (simple assault is not a lesser-included

offense of aggravated assault charged under § 1024(a)(4)).

22-098. Aggravated Assault (threat to use deadly weapon)

The definition of "deadly weapon" is found in 13 V.S.A. § 1021(a)(3), and the explanation of the required element of intent derives from State v. Bourn, 2012 VT 71, 192 Vt. 270; *see also* State v. Kriskov, No. 2011-150 (Vt. Dec. 2011) (unpub. mem.). Unlike a charge for reckless endangerment, an unloaded and inoperable gun may be considered a deadly weapon for purposes of an aggravated assault charged under § 1024(a)(5). Bourn, 2012 VT 71, ¶ 3 n.2; *see also* State v. Longley, 2007 VT 101, 182 Vt. 452 (holding that an unloaded gun is a "deadly weapon" for purposes of a first-degree aggravated domestic assault charged under 13 V.S.A. § 1043(a)(2)). For further discussion of the definition of "deadly weapon," see State v. Kuzawski, 2017 VT 118, ¶¶ 8–18, 206 Vt. 351 (box cutter is a deadly weapon).

Whether conduct amounts to a threat is "generally discerned from the perspective of a reasonable person under similar circumstances." State v. Gagne, 2016 VT 68, ¶ 23; *see also* State v. Cahill, 2013 VT 69, ¶ 18, 194 Vt. 335 (trial court's instruction "correctly directed the jury to measure the effect of defendant's communication according to the perception of a reasonable person, rather than the subjective fearlessness of the [victim]").

In State v. Dow, 2016 VT 91, ¶ 16, 202 Vt. 616, the Supreme Court affirmed the trial court's refusal to instruct the jury that "threaten" means "to express one's intent to harm or kill someone," as the defendant requested. The Court explained that there was a danger that including the proffered definition would confuse the jury as to the element of intent. The trial court had rejected the defendant's suggestion as confusing because "the charge was that defendant intended to threaten the officer, not that he intended to harm anyone."

22-121, 22-126. Reckless Endangerment

Based on case law, the State must prove actual danger. If the charge is that the defendant pointed a firearm at the victim, the firearm must have been operational. *See* State v. Longley, 2007 VT 101, 182 Vt. 452; State v. Emilo, 146 Vt. 277 (1985); State v. McLaren, 135 Vt. 291 (1977) (overruling part of State v. Cushman, 133 Vt. 121 (1974)).

The statute, 13 V.S.A. § 1025, was amended in 2000 by the addition of the phrase "and whether or not the firearm actually was loaded." Thus, the State need not prove that the firearm was loaded. However, the State still must prove that it was operational or operable. State v. Messier, 2005 VT 98, 178 Vt. 412. The word "operational" means that the firearm was capable of operation. It need not be loaded and cocked.

Even though the statute describes a presumption, the model instruction is drafted to describe a permissive inference, to avoid a potential problem with conclusive presumptions under Sandstrom v. Montana, 442 U.S. 510, 514 (1979).

When a defendant is charged with reckless endangerment under 13 V.S.A. § 1025 for aiming an unloaded firearm, the judge and the attorneys should be aware of another statute, 13 V.S.A. § 4011, under which the aiming of a firearm may be punished by a fine not exceeding $50. The existence of § 4011 may affect a judge's interpretation of § 1025 when the charge is based on aiming an unloaded firearm.

To better track the Model Penal Code, the definition of "recklessly" eliminates the sentence about "possible consequences of one's actions" and the word "known" that had appeared in a prior version of this instruction. For more information on the Committee's approach to defining recklessly, see the Reporter's Note for the general definition of recklessly, CR06-141.

22-151, -156, -161, -166, and -171. Disorderly Conduct

Under the introductory language of the statute, 13 V.S.A. § 1026, the state may charge that the defendant either (1) acted with intent to cause public inconvenience or annoyance, or (2) recklessly created a risk thereof. If the defendant is charged with an intent to cause public inconvenience, the State must prove that the defendant acted purposely, with the conscious object of causing public inconvenience. State v. Jackowski, 2006 VT 119, 181 Vt. 73.

22-151. Disorderly Conduct (violent, tumultuous or threatening behavior)

The word "threaten" includes an element of volition. A threat is a communicated intent to inflict harm on person or property. Threatening behavior is behavior that communicates the requisite intent. (Black's Law Dictionary). The statute requires some aspect of intent. *See* State v. Cole, 150 Vt. 453, 456 (1988).

The committee revised the instruction in 2011 to make clear that "threatening behavior" must be evaluated by an objective standard. State v. Albarelli, 2011 VT 24.

In State v. Morse, 2019 VT 58, the trial court instructed the jury that "statements and words" were sufficient to constitute tumultuous behavior for purposes of disorderly conduct. Id. ¶ 6. On appeal, defendant asserted, for the first time and directly contrary to her position below, that her conviction for disorderly conduct must be reversed because speech alone was insufficient to constitute tumultuous behavior. The Court assumed without deciding that defendant's reading of the disorderly conduct statute on appeal was correct, but held that defendant had waived her challenge under the "invited error doctrine." Id. ¶ 7.

22-161. Disorderly Conduct (abusive or obscene language)

CR22-161 is designed for a charge of disorderly conduct based on abusive or obscene language under 13 V.S.A. § 1026(3). The scope of the statute is narrowed by judicial gloss, to protect free speech under the first amendment. The committee drafted this instruction following the Supreme Court's decision in State v. Allcock, 2004 VT 52, 177 Vt. 467. Earlier the Court

had recognized, in State v. Read, 165 Vt. 141 (1996), that the statute may only be applied to the "fighting words" exception described in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

In Allcock, a 3-2 majority of the Court upheld the defendant's conviction based on recklessness (as opposed to a more specific intent), and CR22-161 is drafted with recklessness as an option. The committee also agrees with a point made in Justice Dooley's dissent, that the "fighting words" requirement is an essential element to be proven, and not just a synonym for "abusive language." See Allcock, 2004 VT 52, ¶ 23.

In State v. Tracy, 2015 VT 111, the Supreme Court held that a defendant's act of calling a youth basketball coach a "bitch" and angrily uttering profanity while asking the coach why his daughter had not played in a game did not constitute the utterance of "fighting words," and could not be used to support a conviction for disorderly conduct by abusive language. While the defendant's expression was "vulgar, boorish, and just plain rude," it was not "reasonably expected to cause the average listener to respond with violence." Id. ¶ 39. He did not "lob heinous accusations against the coach, or taunt her to fight him." Id. The Court observed that defendant uttered some of the offending statements as he walked away from the coach, which rendered them "especially unlikely to incite an immediate violent response." Id.

The power to constitutionally prohibit "obscene" expression extends only to expression that is, "in some significant way, erotic." Tracy, 2015 VT 111, ¶ 21 n.13 (citing Cohen v. California, 403 U.S. 15, 20 (1971)). In Long v. L'Esperance, the Court considered a civil suit against a police officer for unlawful arrest brought by a plaintiff who had been arrested for disorderly conduct by "abusive or obscene language" after he told a police officer at a DUI roadblock that he was irritated to have to wait "in this fucking traffic for so long." 166 Vt. 566, 569 (1997). The comment was not obscene because it was not designed to appeal to the prurient interest. Id. at 573. Though the comment might have been vulgar, "it was entirely unrelated to sexual activity or sexual desire." Id. Nor could the comment be punished as "fighting words" because it did not "inflict injury or tend to incite an immediate breach of the peace." Id.

22-166. Disorderly Conduct (disturbing a lawful assembly)

CR22-166 is designed for a charge of disorderly conduct based on disturbing a lawful assembly without lawful authority, under 13 V.S.A. § 1026(4). The model instruction derives from the charge given in State v. Maunsell, No. 489-4-05 Wrcr. It includes a brief description of first amendment rights, explaining that there are limits to the right to free speech, and that one person does not have a right to exercise free speech in a way that prevents others from exercising their own rights of free association and discussion. The fifth element was added in 2009 in response to the decisions in State v. Colby and State v. Wardinski, 2009 VT 28, 185 Vt. 464.

22-176, -181, -186, and -191. Aggravated Disorderly Conduct

Constitutionally protected activity is not included within the meaning of "course of conduct." See 13 V.S.A. § 1021(4). Whether an act or expression is constitutionally protected is a matter of law for the court to determine before sending the case to the jury.

22-201. Disturbing the Peace by Telephone or Other Electronic Communications

The statute is written in the disjunctive, and the prosecution must select the specific act or acts which make up the crime so that the defendant can be sufficiently apprised of the charges against which he or she must defend. V.R.Cr.P. 7(b); State v. Hastings, 133 Vt. 118 (1974). It is not enough that a threat is made during a phone call. The intent element must exist at the time the telephone call is made. State v. Wilcox, 160 Vt. 271, 275 (1993). The statute, 13 V.S.A. § 1027(b), authorizes the court to instruct the jury on drawing inferences regarding the defendant's intent.

22-231, et seq. Simple Assault on Law Enforcement Officer

There is an essential element of constructive knowledge, which is satisfied if the defendant knew or should have known that the victim was a law enforcement officer. State v. Roy, 151 Vt. 17, 22 (1989); State v. Galvin, 147 Vt. 215 (1986); State v. Peters, 141 Vt. 341, 348 (1982). The term "law enforcement officer" is defined in V.R.Cr.P. 54(c)(6). The element of performing a lawful duty is discussed in State v. Hart, 149 Vt. 104 (1987); and State v. Desjardins, 142 Vt. 255, 258 (1982). Excessive force is discussed in Peters, 141 Vt. at 347.

22-301. Violation of Abuse Prevention Order

The instruction contains an element of general intent. The text of the statute, 13 V.S.A. § 1030, does not refer to any mental element of specific intent. The State does not have to prove that the defendant intended to violate the order, or even that the defendant knew his or her conduct would violate the order. State v. Crown, 169 Vt. 547 (1999). A person who is served with an abuse prevention order "has the responsibility to read and understand the order and conform his [or her] conduct to it." State v. Mott, 166Vt. 188, 197 (1997).

In Mott, the Supreme Court expressed approval of the instruction the trial court had given on the *mens rea*. Id. at 197 ("trial court correctly charged on the *mens rea* element"). That instruction, which is quoted on pages 195-96, essentially requires a showing that the defendant knew he was sending his letter, and that it wasn't a mistake, an accident, or a misunderstanding. The concept that the defendant knew what he was doing reflects the requirement of "general intent."

The prior version of this instruction, dating back to 2005, did not explicitly include a general intent element because the text of the statute at that time did not refer to any mental element. After the legislature added the word "intentionally" in a 2017 amendment, *see* 2017, No. 44, § 3, the Committee explicitly incorporated a general intent element to track the statutory language. This should solve the problem presented by cases where, for example, a defendant

innocently violates an order by inadvertently encountering the other person on the street, and where the order prohibits coming within a certain distance of the other.

The definition of "harassing" derives from 13 V.S.A. § 1061(4) (as it existed prior to its amendment in 2015, Adj. Sess., No. 162, § 5, eff. July 1, 2016), the former statutory definition in the context of stalking. *See* State v. Waters, 2013 VT 109, ¶ 27, 195 Vt. 233 (concluding that "in the absence of any elaboration in the RFA order regarding the intended definition of 'harassment' or the type of conduct prohibited, the most appropriate touchstone for defining the term in the context of a VAPO prosecution is the definition in Vermont's stalking statute"). This definition is more specific, and requires a greater showing than the broad definition which the Supreme Court criticized in State v. Goyette, 166 Vt. 299 (1997). There are alternative definitions of "harassing" in CR10-418, CR10-421, and CR27-611. The definition of "following" derives from State v. Malshuk, 2004 VT 54, 177Vt. 475.

22-311, 312. Interference With Access to Emergency Services

The statute requires a predicate offense. See 13 V.S.A. § 1031 (explaining that the interference must occur "during or after the commission of a crime"). In most cases, the predicate offense will be charged as a separate crime. It is therefore best to give the instruction on interference with access to emergency services after the instruction on the predicate offense, with a transition instruction explaining that the jurors need not consider the instruction on interference with access to emergency services if they return a verdict of not guilty on the predicate offense. If the state has not charged the predicate offense, the fourth element of the instruction must include a complete instruction on the crime that allegedly occurred during or before the charged interference.

22-321, et seq. Domestic Assault

The definition of "household member," and an explanation of "dating," derive from the statute at 15 V.S.A. § 1101(2).

CR22-321, -331, -336. Misdemeanor Domestic Assault and Lesser Included Offense of Simple Assault

Depending on the formulation of the charge, simple assault may be a lesser included offense of misdemeanor domestic assault. *See*, *e.g.*, State v. Bean, 2016 VT 73, ¶¶ 6–10, 202 Vt. 361. "The State may request a lesser-included instruction, even over the defendant's objections," and "this request must be granted if supported by the evidence. Id. ¶ 14; *see also* 13 V.S.A. § 14(a).

22-336. Domestic Assault -- Fear of Imminent Serious Bodily Injury

It is not clear under Vermont law whether the court should instruct the jury with regard to the reasonableness of the victim's apprehension. As a penal statute, 13 V.S.A. § 1042 is to be

accorded a strict construction, and the "rule of lenity" applies. However, the statute appears to have been enacted to address the unique dynamic of domestic assault cases, where one party knows about traits of the other party which may be subject to exploitation in a manner that would not be operative in a case involving assaults among strangers. This dynamic is known as "pushing buttons."

The case State v. Riley, 141 Vt. 29 (1982), discussed the matter of apprehension, indicating that Vermont adheres to the civil notion of assault by menace, but the decision does not address the question of whether the standard is one of reasonableness or a purely subjective test ("a threat of immediate battery resulting in apprehension, even when intended only as a bluff, is so likely to result in a breach of the peace that it should be a punishable offense"). One may argue that, in codifying the offense of domestic assault, the legislature did not intend the application of an objective standard. A subjective standard might be appropriate, given the unique circumstances of violence within the family and other close relationships, and the operative effects of such phenomena as patterned abuse and battered women's syndrome.

Under the common law of civil assault, apprehension of imminent battery is subject to an objective test of reasonableness: The apprehension must be one which would normally be aroused in the mind of a reasonable person. However, there is authority to the contrary, the theory being that "if the defendant has knowledge of the plaintiff's peculiar and abnormal timidity, and intends to act upon it, there should be a right to recover." Prosser and Keeton, Law of Torts, § 10. Prosser also notes that the Restatement of Torts (Second) § 27 provides that reasonableness of the victim's apprehension is irrelevant, as long as the defendant acts with intent to place the other in apprehension of immediate bodily harm.

In at least one case, the trial court declined to instruct the jury as to either standard, over objection of both the State and Defendant, who had each requested instructions favorable to their respective theories. The court indicated that no instruction would be given as to the standard for assessment of apprehension unless, upon deliberation, the jury requested clarification. The court also pointed out that the jury would be instructed that each of the elements, including fear of imminent serious bodily injury, would have to be established beyond a reasonable doubt, and that the jurors were obliged to consider all pertinent evidence and surrounding circumstances in their assessment of proof of the element of placing another in fear of imminent harm as well as all other elements.

22-346, -351. First Degree Aggravated Domestic Assault (Attempted to Cause Serious Bodily Injury) (Caused Serious Bodily Injury)

The revised definition of "serious bodily injury," derived from 13 V.S.A. § 1021(2), reflects the legislative determination that strangulation constitutes serious bodily injury. Because the statute's structure sets out Subsections 1021(2)(A) and (2)(B) as separate, alternative definitions, the updated instruction includes brackets to indicate that the entire definition may not be appropriate in all cases. For instance, where no evidence of strangulation is presented, there is no reason to instruct the jury on the definition of strangulation as provided in Subsection (2)(B).

Conversely, in cases where the only evidence is of strangulation, there is no reason to instruct the jury on the definition in Subsection (2)(A) or, for that matter, the definition of "bodily injury."

The Committee recognizes that some cases might present evidence of both types of serious bodily injury (strangulation and non-strangulation). In those cases, it may be appropriate to instruct the jury on the entire statutory definition, and the jury would likely have to reach a unanimous decision as to either Subsection (2)(A) or (2)(B). Unlike the three "ascending mental states" for second degree murder, which are applied as a hierarchy, see State v. Boglioli, 2011 VT 60, ¶¶ 11–12, 190 Vt. 542; State v. Bolio, 159 Vt. 250, 253-54 (1992), the two definitions of serious bodily injury are presented as alternatives where one does not necessarily subsume the other.

In cases involving evidence of strangulation, the state may proceed either upon a theory that the defendant recklessly caused serious bodily injury to the victim or that the defendant intentionally strangled the victim by intentionally impeding normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. As suggested in State v. Carter, 2017 VT 32, ¶ 16, 204 Vt. 383, the state should elect between those two options, and the instructions should not blend or commingle the two separate definitions.

22-351, -356. First Degree Aggravated Domestic Assault and Transition to Domestic Assault

Defendants have a right to choose a "hard" or a "soft" transition between offenses. State v. Powell, 158 Vt. 280, 284 (1992). The hard transition requires a verdict on the highest offense before the jury considers the lesser included offenses. The soft transition allows jurors to consider the lesser offenses if they are unable to agree upon a verdict on the higher offense "after all reasonable efforts to reach a unanimous verdict." State v. Duff, 150 Vt. 329, 336-37 (1988). Where a defendant "does not choose either transition instruction, it is within the discretion of the trial court to decide which instruction to provide." State v. Rolls, 2020 VT 18, ¶ 9 (trial court did not err in providing both hard and soft transition instructions, rather than one or the other, in the absence of defendant's request). The committee's instructions generally contain soft transitions, because most defendants prefer them. However, for defendants who prefer a hard transition, the committee offers the following example:

> You must first consider the charge of first degree aggravated domestic assault. If the State has proven each of the essential elements of that charge, then you must find (Def)_____ guilty of that charge, and you will be done with your deliberations. If you decide that the State has not proven each and every one of the essential elements of first degree aggravated domestic assault, then you must find (Def)_____ not guilty of that charge, and then you must consider whether [he] [she] is guilty of the offense of domestic assault.

22-361, -362, -363. First Degree Aggravated Domestic Assault (Used Deadly Weapon)

(Attempted to Use Deadly Weapon) (Threatened to Use Deadly Weapon)

The instructions on first degree aggravated domestic assault, under 13 V.S.A. § 1043, illustrate the difficulty of deciding whether to charge an explicit element of intent. On one hand, CR22-361 (used deadly weapon) includes an explicit element of intent because the charge would be vague without it. The terms "using" and "deadly weapon" are both vague unless they are put into context, and thus it is helpful to examine the defendant's intent. *See* State v. Stanislaw, 153 Vt. 517, 523-24 (1990) (describing factors to consider in determining implied elements of *mens rea*). On the other hand, instruction CR22-363, charging that the defendant threatened to use a deadly weapon, does not include an explicit element of intent, because to "threaten" means *to communicate an intent* to inflict harm upon the other person. It is not necessary to charge a separate explicit element of intent.

The jury must be unanimous as to whether the defendant threatened the complainant with the weapon or used the weapon. *See* State v. Phillips, 2024 VT 10, ¶ 16 ("The criminal division properly apprised the jury that all twelve members would have to agree that defendant either threatened complainant with the weapon or attempted to use it on her for the State to satisfy its burden. This was adequate to instruct the jury on the requirement of unanimity and does not rise to the level of plain error.").

Note that while CR22-363 (threatened to use deadly weapon) includes an explicit element that the defendant "was armed with a deadly weapon," the model instructions for use and attempted use of a deadly weapon (CR22-361 and -362) do not include that element. This distinction tracks the statutory language and is supported by State v. Phillips, 2024 VT 10, ¶ 11.

The definition of "deadly weapon" is found in 13 V.S.A. § 1021(a)(3), and the explanation of the required element of intent derives from State v. Bourn, 2012 VT 71, 192 Vt. 270; *see also* State v. Kriskov, No. 2011-150 (Vt. Dec. 2011) (unpub. mem.). Unlike a charge for reckless endangerment, an unloaded and inoperable gun may be considered a deadly weapon for purposes of an aggravated assault. Bourn, 2012 VT 71, ¶ 3 n.2; *see also* State v. Longley, 2007 VT 101, 182 Vt. 452 (holding that an unloaded gun is a "deadly weapon" for purposes of a first-degree aggravated domestic assault charged under 13 V.S.A. § 1043(a)(2)). For further discussion of the definition of "deadly weapon," *see* State v. Kuzawski, 2017 VT 118, ¶¶ 8–18, 206 Vt. 351 (box cutter is a deadly weapon).

22-371, -372. Second Degree Aggravated Domestic Assault -- Violation of Court Order

The statute at 13 V.S.A. § 1044(a)(1) does not specifically require notice of the court order, and the model instruction does not include an element that the defendant received a copy of the order. (Also see CR22-506, aggravated stalking under 13 V.S.A. § 1063(a)(1)). In contrast, the statute for violation of an abuse prevention order (13 V.S.A. § 1030) specifically requires notice. Notwithstanding this difference, the committee notes that, in the rare case when the defendant has not received notice of the order, it would be unfair to consider violation of the

order as an aggravating factor. In such cases, the element of notice must be proven.

There are two versions of this instruction, CR22-371 and CR22-372. The first version includes violation of a criminal court order as the fifth essential element, whereas the second version treats that element as an enhancement element that must be proven in the second phase of a bifurcated proceeding. Bifurcation is appropriate when the prejudice arising from the introduction of an existing criminal court order outweighs any relevance that the order might have to the charged offense. State v. Brillon, 2010 VT 25, ¶ 12, 187 Vt. 444. A judge may select from the two instructions, based on the circumstances of the case and arguments of counsel.

22-501, -502, -503. Stalking (2018 Revision)

The stalking statutes were originally enacted in 1993, and were subsequently amended in 1999, 2005, 2013, and most recently in 2015. All of the current instructions incorporate the 2015 amendment, which took effect on July 1, 2016. If you have reason to need pre-2016 instructions, please contact the reporter by email (see link at bottom right). See State v. van Aelstyn, 2007 VT 6, 181 Vt. 274 (upholding conviction based on prior statute).

The original stalking statute, § 1062, prohibiting intentional stalking, was ambiguous regarding the specific intent that needed to be proven. Applying the rule of lenity, the committee interpreted the statute as requiring proof that the defendant intended to cause the specific harm (i.e. the defendant intended to cause the victim to fear for his or her physical safety, or the defendant intended to cause the victim substantial emotional distress). However, the 2005 amendments to the definitions section (§ 1061) changed the meaning of "stalk" to a more objective standard. Whereas the earlier definition required a course of conduct which "causes the person to fear for his or her physical safety or causes the person substantial emotional distress," the 2005 definition required a course of conduct which "would cause a reasonable person to fear for his or her physical safety or would cause a reasonable person substantial emotional distress." 2005, No. 83, § 4.

Based on the 2005 amendments to the statute, the committee amended the mental element for stalking to reflect the view that the State must show that the defendant's intentional conduct would cause a reasonable person to fear for his or her physical safety, or that it would cause a reasonable person substantial emotional distress.

The committee amended CR22-502 again in 2009 in response to State v. Hinchliffe, 2009 VT 111, 186 Vt. 487, and State v. Ellis, 2009 VT 74, 186 Vt. 232, which suggested that stalking is not a specific intent crime. The 2009 amendment to the instruction also clarified that the third essential element involves an objective standard that is "measured by examining whether a reasonable person in the victim's circumstances would be afraid." Hinchliffe, 2009 VT 111, ¶ 25.

The Legislature again revised the stalking statutes in 2015. See 2015, Adj. Sess., No. 162, § 5, eff. July 1, 2016; see also 13 V.S.A. § 1061. This most recent amendment redefines "course

of conduct," and eliminates the prior requirement that the conduct must "serve[] no legitimate purpose." However, the provision of the former statute that "Constitutionally protected conduct is not included within the meaning of "course of conduct" was retained. The amendment also eliminates statutory definitions for "following," "harassing," and "lying in wait," adds a definition for "emotional distress," and further clarifies that "[r]easonable person" means "a reasonable person in the victim's circumstances." Finally, the amendment revises the mental element by providing a new alternative by which to prove the mental element that the defendant knows or should know that his or her conduct "would cause a reasonable person to fear for . . . *the safety of another* . . . ." 13 V.S.A. § 1061(4) (emphasis added). The current instructions reflect the 2015 legislative amendment.

The State need not prove that all the essential elements of stalking occurred at the same time. A defendant may still be convicted of stalking even if his or her actions do not cause fear or serious emotional distress until some later point. See In re Hoch, 2013 VT 83, ¶¶ 11–14, 194 Vt. 575 (upholding conviction based on prior statute).

22-506, -507. Aggravated Stalking -- Violation of Court Order

The statute at 13 V.S.A. § 1063(a)(1) does not specifically require notice of the court order, and the model instruction does not include an element that the defendant received a copy of the order. (Also see CR22-371, second degree aggravated domestic assault, under 13 V.S.A. § 1044(a)(1)). In contrast, the statute for violation of an abuse prevention order (13 V.S.A. § 1030), specifically requires notice. Notwithstanding this difference, the committee notes that, in the rare case when the defendant has not received notice of the order, it would be unfair to consider violation of the order as an aggravating factor. In such cases, the element of notice must be proven.

Chapter 23: Burglary

23-101. Burglary of an Occupied Dwelling, 13 V.S.A. § 1201

After considering an ambiguity in the statute, the committee concludes that the term "occupied dwelling" means that the building is used as a place of residence. Accordingly, the State need not prove that someone was physically present in the building at the time of the entry. Resolving the ambiguity is a matter of statutory construction. The Vermont statute, § 1201, classifies buildings or structures according to whether or not they are occupied dwellings. There is no alternative category consisting of "unoccupied dwellings." Under these circumstances, the committee agrees with the following interpretation by the Michigan Court of Appeals:

> Under Michigan law, a residence need not in fact be occupied when the offense takes place in order for the offense to constitute a breaking and entering of an occupied dwelling. . . .

> Any dwelling house habitually used as a place of abode, whether or not an occupant is physically present at the time of the breaking and entering, is an occupied dwelling within the meaning of the statute under which defendant was convicted. When an inhabitant intends to remain in a dwelling as his residence, and has left it for a temporary purpose, such absence does not change the dwelling into an unoccupied one in the eyes of the law. The intent to return following an absence controls; the duration of the absence is not material. . . .

People v. Traylor, 298 N.W.2d 719, 722 (Mich. App. 1980) (citations omitted). *See also* People v. Abarrategui, 761 N.Y.S.2d 632, 634 (N.Y. A.D. 2003) (hotel was a "dwelling" for purposes of the burglary statute, even if no guests were physically present); *cf*. State v. Jones, 2011 VT 90, ¶ 13, 190 Vt. 586 ("the elements of burglary of an occupied dwelling are satisfied regardless of whether the occupants are awake or asleep, and regardless o[f] whether there is any direct interaction between the burglar and the victims"). In a case reaching a different result, the statute distinguished between an "inhabited dwelling house" and an "uninhabited dwelling house." Given that distinction, the Alabama Supreme Court held that an "inhabited dwelling house" requires the physical presence of an occupant in the building. Reeves v. State, 16 So.2d 699 (Ala. 1943).

A "building or structure," for purposes of the burglary statute, need not have a roof. State v. Lampman, 2017 VT 114, ¶ 15, 206 Vt. 323 (concluding that "a jury instruction that defines 'building or structure' to include enclosures that lack a roof is consistent with the plain language of § 1201(a)").

Chapter 24: Homicide

The task of drafting model instructions for homicide cases has presented the committee with difficult and complex issues. Areas of concern have included (1) the detail to be included in the explanation for the term "unlawful killing," (2) explanations for the various mental elements for each degree of homicide, including the lesser included offenses, and (3) proper treatment of transitions. In recent years, the Supreme Court has addressed some of the difficult issues, and the committee has responded by modifying its model instructions. It is now clear that, when the evidence supports theories of sudden passion or provocation, a conviction for second-degree murder requires proof beyond a reasonable doubt that the accused *did not* kill under the influence of passion or provocation. State v. Bolaski, 2014 VT 36, 196 Vt. 277. *See* CR 24-302 and accompanying notes. It is also clear that diminished capacity cannot properly be considered as an "extenuating circumstance" that would reduce second-degree murder to voluntary manslaughter. State v. Congress, 2014 VT 129, 198 Vt. 241.

Where an instruction refers to the element of "unlawful killing," bracketed text is provided for use in cases where the evidence supports a claim that the killing was justified. *See*

13 V.S.A. § 2305. The shorter instruction is recommended for cases lacking evidence of justification. Any additional explanation should be tailored to fit the evidence.

The homicide instructions are unusual in that the mental elements are often described in different terms for the different degrees. As one example, first-degree murder might require proof of a willful, deliberate and premeditated killing under 13 V.S.A. § 2301, whereas the mental element for involuntary manslaughter is generally stated as criminal negligence as described in State v. Stanislaw, 153 Vt. 517, 525 (1990). Usually the instructions for first-degree murder do not include an instruction for criminal negligence, unless the manslaughter instruction is given as a lesser included offense. The idea is that deliberation and premeditation are higher mental states, and proof of the higher mental states will necessarily include proof of any lower mental states. *See* State v. Bolio, 159 Vt. 250, 253-54 (1992) (discussion of lower mental states included within higher mental states, in context of aggravated assault).

A slightly different confusion could arise in the context of second-degree murder (or voluntary manslaughter), where the mental element may be satisfied by any one of three forms of intent, namely an intent to kill, or an intent to do great bodily harm, or a wanton disregard of the likelihood that death or great bodily harm would result. *See* State v. Johnson, 158 Vt. 508, 518 (1992). It is now clear that these three mental states form a hierarchy, so that proof of the higher mental states will also establish the lower mental states. "As long as all jurors [are] unanimous on the ultimate issue of intent, which of the three alternative methods used to inform each decision as to intent is immaterial." State v. Boglioli, 2011 VT 60, ¶ 12, 190 Vt. 542, 545.

The distinction between second-degree murder and voluntary manslaughter does not lie in the mental state requirement. The intent component of voluntary manslaughter is the same as that required for second-degree murder. State v. Blish, 172 Vt. 265, 272 (2001). Instead, the distinction is that "[v]oluntary manslaughter is an intentional killing committed under extenuating circumstances that may negate willfulness, such as sudden passion or provocation that would cause a reasonable person to lose control." Blish at 270 (*quoting* State v. Hatcher, 167 Vt. 338, 345 (1997)). Because such circumstances play a crucial mitigating role, "[w]here passion or provocation is implicated, the court must instruct the jury that to establish murder the State must prove beyond a reasonable doubt that the accused did not kill under the influence of passion or provocation." State v. Bolaski, 2014 VT 36, ¶ 18, 196 Vt. 277, 286 (*quoting* Hatcher at 345-46); In re Sharrow, 2017 VT 69, ¶ 14 (defense counsel's failure to object to instruction that did not require State to prove absence of passion or provocation was ineffective assistance of counsel that prejudiced defendant). These instructions must be given regardless of whether the parties focus their arguments on the passion or provocation evidence. Bolaski, 2014 VT 36, ¶ 22 (*citing* State v. Yoh, 2006 VT 49A, 180 Vt. 317).

In State v. Congress, the shared mental element for second-degree murder and voluntary manslaughter also led the Supreme Court to conclude that diminished capacity, which can negate an actor's ability to form a required mental element, cannot be used to reduce second-degree murder to voluntary manslaughter. Rather, "a defendant who defeats the State's burden with respect to the state-of-mind element for second-degree murder cannot be convicted of *any* degree

of homicide more serious than involuntary manslaughter." Congress, 2014 VT 129, ¶ 33 (emphasis in original). The committee has adjusted the transition and diminished capacity instructions to account for this clarification.

The committee drafted CR 24-302, in response to State v. Bolaski, 2014 VT 36, 196 Vt. 277, for use in cases where the evidence supports instructions on passion and provocation. The current version of CR24-301 has been modified for use in cases where there is no evidence to support passion or provocation, and where voluntary manslaughter is not available as a lesser-included offense. CR24-302 includes an essential element that "(Def)_____'s mental state was not influenced by extenuating circumstances, such as sudden passion or great provocation, that would have caused a reasonable person to lose self-control." The trial court should consider the following four factors when determining whether a manslaughter instruction is supported by evidence: (1) adequate provocation, (2) inadequate time to regain self-control or "cool off," (3) actual provocation, and (4) actual failure to "cool off." State v. Perez, 2006 VT 53, ¶ 14, 180 Vt. 388, 393.

Defendants have a right to choose a "hard" or a "soft" transition between offenses. State v. Powell, 158 Vt. 280, 284 (1992). The hard transition requires a verdict on the highest offense before the jury considers the lesser included offenses. The soft transition allows jurors to consider the lesser offenses if they are unable to agree upon a verdict on the higher offense "after all reasonable efforts to reach a unanimous verdict." State v. Duff, 150 Vt. 329, 336-37 (1988). Where a defendant "does not choose either transition instruction, it is within the discretion of the trial court to decide which instruction to provide." State v. Rolls, 2020 VT 18, ¶ 9 (trial court did not err in providing both hard and soft transition instructions, rather than one or the other, in the absence of defendant's request). The committee's instructions generally contain soft transitions, because most defendants prefer them. However, for defendants who prefer a hard transition, the committee offers the following example:

> You must first consider the charge of first-degree murder. If the State has proven each of the essential elements of that charge, then you must find (Def)_____ guilty of that charge, and you will be done with your deliberations. If you decide that the State has not proven each and every one of the essential elements of first-degree murder, then you must find [him] [her] not guilty of that charge, and then you must consider whether [he] [she] is guilty of the offense of second-degree murder.

24-011. First Degree Murder By Means Of Poison

Under the statute, 13 V.S.A. § 2301, murder by means of poison is defined as first degree murder. LaFave and Scott have explained the nature of this crime as follows:

It is not necessarily murder by poison to kill another person with poison, as where one administered poison innocently and for a lawful purpose and yet produces a death. The homicide

must first amount to murder, either because the defendant had an intent to kill or do serious bodily injury, or because his conduct evinced a depraved heart, or because the death by poison resulted from the defendant's commission or attempted commission of a felony. A poison is not necessarily something administered internally; it may be inhaled or injected.

2 LaFave and Scott, Substantive Criminal Law (1986), § 7.7 at 243 (footnotes omitted). One of the cases cited in the footnotes defines "poison" as meaning "any substance introduced into the body by any means which by its chemical action is capable of causing death." State v. Jeffers, 661 P.2d 1105, 1126 (Ariz. 1983) (cited in LaFave and Scott, § 7.7 at 243, footnote 49). Jeffers held that heroin is considered a poison in the criminal context. Id.

There are few Vermont cases dealing with, or discussing, murder by poison. See Rogers v. State, 77 Vt. 454 (1905) (murder by chloroform); State v. Sargood and Doyle, 77 Vt. 80 (1904) (poisoning colts and attempting to poison two persons); State v. Meaker, 54 Vt. 112 (1881) (murder by poison); State v. McDonnell, 32 Vt. 491 (1860) ("Killing by poison indicates malice, where the poison is given in such quantities as ordinarily to produce death."). The State must show a state of mind sufficient to prove murder. State v. Bacon, 163 Vt. 279 (1995) (context of felony murder).

Cases from other jurisdictions provide interesting reading, and also illustrate some of the difficulties that may arise when the proof is by circumstantial evidence. See People v. Hanei, 403 N.E.2d 16 (Ill. App. 1980), cert. denied, 450 U.S. 927 (thalium on a doughnut); Langham v. State, 11 So.2d 131 (Ala. 1942) (insufficient evidence to show death by poison); Edge v. State, 164 S.W.2d 677 (Texas Cri. App. 1942) (insufficient evidence that wife murdered husband by putting strychnine in the peregoric); State v. Koontz, 183 S.E. 680 (W. Va. 1936) (proof by circumstantial evidence that defendant gave kids candy she had made with arsenic); Cassell v. Commonwealth, 59 S.W.2d 544 (Ky. App. 1933) (question was whether death by poison was murder or suicide); State v. Hyde, 136 S.W. 316 (Mo. 1911) (questions sufficiency of evidence that the defendant had provided "fever pills" containing strychnine and possibly cyanide); Commonwealth v. Danz, 60 A. 1070 (Pa. 1905) (poisoning with a form of arsenic labeled as "Rough on Rats"); State v. Nesenhener, 65 S.W. 230 (Mo. 1901) (not clear that wife had administered morphine to her husband, or that he had died from morphine poisoning); Johnson v. State, 15 S.W. 647 (Texas App. 1890) (charge of murder by strychnine in the water bucket; case discusses difficulty of explaining burdens of proof).

24-021. First Degree Murder By Lying in Wait

Under 23 V.S.A. § 2301, a murder committed "by lying in wait" is murder in the first degree. There is little or no discussion of this provision in Vermont case law. In the instruction, CR24-011, the definition of "lying in wait" derives from Black's Law Dictionary (6th ed.), and from 2 LaFave and Scott, Substantive Criminal Law (1986), § 7.7 at 242. Similar language may be found in cases from other jurisdictions, including United States v. Shaw, 701 F.2d 367 (5th Cir. 1983); People v. Ward, 27 Cal.App.3d 218, 103 Cal.Rptr. 671 (Cal.App. 1972); State v. Brooks, 445 P.2d 831 (Ariz. 1968); People v. Thomas, 261 P.2d 1, 3 (Cal. 1953).

In a variety of cases, courts have held that watching and waiting alone will not satisfy the element of "lying in wait" if there has been no attempt at concealment or secrecy. *See* State v. Brooks, 445 P.2d 831 (Ariz. 1968) (it was not lying in wait to stand outside building with shotgun in hand waiting for victim); People v. Kahn, 198 Cal.App.2d 326, 17 Cal.Rptr. 793 (1961) (there was no element of concealment, where defendant waited for victim in his living room, at the invitation of victim's family); People v. Merkouris, 297 P.2d 999, 1012 (Cal. 1956) (not lying in wait to sit in parked car across street from victim's shop).

24-051, -052. First Degree Felony Murder

Felony murder may be predicated on the commission of one of the felonies enumerated in the statute: arson, sexual assault, aggravated sexual assault, robbery, or burglary. 13 V.S.A. § 2301. However, "[i]n addition to proving the defendant's intent to commit one of the enumerated felonies, the State must also establish that the defendant had one of the mental states for second-degree murder: the intent to kill, the intent to do great bodily harm, or a wanton disregard for human life with respect to the murder itself." State v. Baird, 2017 VT 78, ¶ 4 (quotation omitted). For further discussion of felony murder in Vermont, see Baird, 2017 VT 78, ¶¶ 3–5; State v. Bacon, 163 Vt. 279, 291–93 (1995); and State v. Doucette, 143 Vt. 573, 577–83 (1983).

The Committee has prepared two sets of instructions for felony murder. CR24-051 is for use where the defendant acted alone. CR24-052 is for when the defendant acted with an accomplice.

24-101. Second-Degree Murder

The instruction CR24-101 is drafted for use in a case charging second-degree murder, without a lesser included offense of voluntary manslaughter. In a case lacking sufficient evidence of passion or provocation, it is not necessary to include "lack of provocation" as an essential element. *See, e.g.*, State v. Webster, 2017 VT 98, ¶¶ 35–43 (trial court properly declined to instruct on voluntary manslaughter and provocation); State v. Blish, 172 Vt. 265 (2001) (lack of provocation not always considered as an essential element). However, where the evidence tends to show passion or provocation, the absence of extenuating circumstances becomes an essential element that the State must prove beyond a reasonable doubt. In re Sharrow, 2017 VT 69, ¶ 14; State v. Bolaski, 2014 VT 36, ¶ 18, 196 Vt. 277, 286 (citing State v. Hatcher, 167 Vt. 338, 345-46 (1997)). For an instruction that includes a lack of extenuating circumstances as an essential element of second-degree murder, along with transitions to lesser-included offenses, see CR24-302 (first-degree murder, with transitions to lesser-included offenses).

24-201. Voluntary Manslaughter

Voluntary manslaughter "is an intentional killing committed under extenuating circumstances that may negate willfulness, such as sudden passion or provocation that would

cause a reasonable person to lose control." State v. Blish, 172 Vt. 265, 270 (2001) (quoting State v. Hatcher, 167 Vt. 338, 345 (1997)). This definition is in accord with a majority of states which recognize voluntary manslaughter as a distinct crime:

> Voluntary manslaughter in most jurisdictions consists of an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing. The principal extenuating circumstance is the fact that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation (*i.e.*, a provocation which would cause a reasonable man to lose his normal self-control).

Id. at 271 (quoting Vol. 2, LaFave and Scott, Substantive Criminal Law (1986), § 7.10 (Heat-of-Passion Voluntary Manslaughter) at 252).

The LaFave and Scott treatise, cited in Blish for the definition of manslaughter, provides a helpful explanation of the historical reasoning behind the provocation doctrine:

> **7.10(h) Rationale of Voluntary Manslaughter.** Why is it that there exists such a crime as voluntary manslaughter to aid one who kills when provoked into a passion, yet there is no crime like, say, voluntary theft or voluntary mayhem to aid others who, reasonably provoked into a passion, steal from or maim their tormenters? The answer is historical. With most crimes other than murder the English court came to have discretion as to the punishment and so could take extenuating circumstances into account in the sentencing process; but with murder the penalty remained fixed at death, without the possibility of making any allowance for the extenuating fact that the victim provoked the defendant into a reasonable passion. "The rule of law that provocation may, within narrow bounds, reduce murder to manslaughter, represents an attempt by the courts to reconcile the preservation of the fixed penalty for murder with a limited concession to natural human weakness." [note 109]
>
> This, of course, "fails to explain the doctrine's continued viability," [note 110] and courts have by and large failed to articulate a modern rationale. It has been suggested, however, that the present rationale for heat-of-passion manslaughter is that when
>
> > the provocation is so great that the ordinary law abiding person would be expected to lose self-control so that he could not help but act violently, yet he would still have sufficient self-control so that he could avoid using force likely to cause death or great bodily harm in response to the provocation, then . . . the actor's moral blameworthiness is found not in his violent response, but in his *homicidal* violent response. He did not control himself as much as he *should* have, or as much as common experience tells us he

> *could* have, nor as much as the ordinary law abiding person *would* have. [note 111]

Vol. 2, LaFave and Scott, Substantive Criminal Law (1986), § 7.10(h), at 270. [Note 109 refers to the Report of the Royal Commission on Capital Punishment 52-53 (1953). Note 110 refers to Dressler, Rethinking Heat of Passion: A Defense in Search of a Rationale, 73 J.Crim.L. & C. 421, 423 (1983). Note 111 refers to the Dressler article at 466-67.]

24-251. Involuntary Manslaughter

The instruction on involuntary manslaughter includes a bracketed choice between two mental states. These are recklessness, as that term is defined in State v. Brooks, 163 Vt. 245, 250–51 (1995), and criminal negligence, as defined in State v. Stanislaw, 153 Vt. 517, 525 (1990). A person acts recklessly by *consciously* disregarding a substantial and unjustifiable risk that death or serious bodily injury will result from his or her conduct. Brooks, 163 Vt. at 251 (citing Model Penal Code § 2.02(2)(c)). In contrast, criminal negligence occurs when the actor *should* be aware that a substantial and unjustifiable risk exists or will result from his or her conduct. Id. (citing Stanislaw). Proof of the higher culpable mental state will include proof of the lower included mental state. *See* State v. Bolio, 159Vt. 250, 253-54 (1992) (context of aggravated assault). Recent discussions on this topic can be found in State v. McCarthy, 2012 VT 34, 191 Vt. 498, and State v. Viens, 2009 VT 64, 186 Vt. 138.

Note the distinction between recklessness pertaining to involuntary manslaughter (reckless conduct disregarding "the *possible* consequence of death resulting"), and wantonness pertaining to voluntary manslaughter ("extremely reckless conduct that disregards the *probable* consequence of taking human life"). State v. Blish, 172 Vt. 265, 273 (2001) (quoting State v. Shabazz, 169 Vt. 448, 455 (1999)) (emphasis in original); *see also* State v. Baird, 2017 VT 78, ¶ 13 (emphasizing "probable" in defining wantonness).

CR24-301 and CR24-302. First-Degree Murder, with Transitions to Lesser Offenses

Often, when a defendant is charged with first-degree murder, the court also instructs the jury on all of the lesser included degrees of homicide. Either party may request such instructions, if they are supported by the evidence. 13 V.S.A. § 14(a); *see also* State v. Bean, 2016 VT 73, ¶ 14, 202 Vt. 361 ("The State may request a lesser-included instruction, even over the defendant's objections," and "this request must be granted if supported by the evidence.). These two instructions differ on the issue of whether to include voluntary manslaughter as one of the lesser offenses. CR24-301 is designed for cases without sufficient evidence to support instructions for sudden passion or great provocation. Without such evidence, there is probably no basis for an instruction on a lesser included offense of voluntary manslaughter. See State v. Congress, 2014 VT 129.

After Congress, sudden passion or great provocation remains as the only obvious type of "extenuating circumstance" that can mitigate second-degree murder to voluntary manslaughter.

However, in the Committee's view, Congress left open the possibility of advancing novel theories of extenuating circumstances. The basis for the Committee's view is that the Court in Congress reiterated its holding in Johnson, and continued using the language: "Voluntary manslaughter is an intentional killing committed under extenuating circumstances that would mitigate, but not justify, the killing, *such as* provocation that would cause a reasonable person to lose self control." Congress, 2014 VT 129, ¶ 25 (emphasis added). The Court then posed the question "whether this is the *only* type of extenuating circumstance recognized by our law." Id., at ¶ 26 (emphasis added). The Court never directly answered that question, but ruled that diminished capacity was *not* one such extenuating circumstance. While the Committee does not know of other possible extenuating circumstances that might be recognized by our law, it would be up to the defendant in an appropriate case to argue for a modified 24-302 instruction to reflect an extenuating circumstance other than sudden passion or great provocation.

CR24-302 is designed for cases that include sufficient evidence to show sudden passion or great provocation. "Where passion or provocation is implicated, the court must instruct the jury that to establish murder the State must prove beyond a reasonable doubt that the accused did not kill under the influence of passion or provocation." State v. Bolaski, 2014 VT 36, ¶ 18, 196 Vt. 277, 286 (quoting State v. Hatcher, 167 Vt. 338, 345-46 (1997)).

The trial court should consider the following four factors when determining whether a voluntary manslaughter instruction is supported by the evidence: (1) adequate provocation, (2) inadequate time to regain self-control or "cool off," (3) actual provocation, and (4) actual failure to "cool off." State v. Perez, 2006 VT 53, ¶ 14, 180 Vt. 388, 393.

24-511. Aggravated Murder (In Custody For Murder)

The instructions to be given following the close of evidence point out that a person need not be confined within a correctional facility in order to be in custody under sentence. As an example, a prisoner on furlough is still "in custody under sentence." See In re Stewart, 140 Vt. 351, 358–60 (1981) (interpreting that phrase in the post-conviction relief context).

24-556. Aggravated Murder (Effecting Escape)

Under the statute, 13 V.S.A. § 2311(a)(5), a murder may be aggravated murder if it is committed for the purpose of "effecting an escape by any person from lawful custody of a law enforcement officer." The committee notes an anomaly, in that this section probably does not apply where a prisoner murders a *corrections officer* for the purpose of effecting an escape. Corrections officers are not usually considered as "law enforcement officers," but they are sometimes employed to transport prisoners to and from court hearings. See 20 V.S.A. § 2358(d)(1).

Chapter 25: Kidnapping (Title 13, chapter 55)

25-141. Unlawful Restraint of a Mentally Incompetent Person

The statute, 13 V.S.A. § 2406(a)(2), proscribes the taking or enticing of a "mentally incompetent person" without the consent of the custodian. If the complaining witness is a mentally incompetent adult, and therefore legally unable to consent, it is not clear whether the State must prove an adjudication of incompetency, or whether the State may simply prove that the person is mentally incompetent.

Chapter 26: Larceny and Embezzlement (Title 13, chapter 57)

26-051. Grand Larceny

The Supreme Court explained the definition of grand larceny in State v. Reed, 127 Vt. 532 (1969). "A person steals if he takes property from one in lawful possession without right, with the intention to keep it wrongfully." Id. at 538 (citing Morissette v. United States, 342 U.S. 246). The question of criminal intent is for the jury to consider according to all the circumstances brought before them. Id. at 538 (citations omitted).

Larceny requires proof that the defendant "intended to permanently separate the owner from his [or her] property, or at least deliberately act so as to make it unlikely that the owner and his [or her] property would be reunited." State v. Hanson, 141 Vt. 228, 232 (1982). "Larceny specifically requires an intent to steal at the very moment the property in question is taken into possession by the defendant." Id. at 232. The State need not prove that the defendant intended to steal an item of particular value. State v. Houle, 157 Vt. 640 (1991).

The instructions have a bracketed explanation for fair market value. The discussion of fair market value is not necessary in cases charging larceny of cash.

26-071. Petit Larceny

When the defendant is charged with petit larceny under 13 V.S.A. § 2502, at issue is whether the property stolen had some monetary value. It should not be necessary for the State to prove that the value of the property does not exceed $500. See State v. Nelson, 91 Vt. 168 (1917) (evidence showed that the stolen chickens had some value). Compare State v. Persons, 117 Vt. 306 (1952), where the Court reversed the conviction for petit larceny, and remanded the case for a jury to determine the value and whether it was over or under $50, and where, upon remand to the trial court, the State dropped the charge of petit larceny and charged defendant with grand larceny. State v. Persons, 117 Vt. 556 (1953).

Where the money or property need only have "some value," the jury need not find any particular value, and there is no need to discuss "fair market value."

26-081. Larceny From the Person

The Vermont Supreme Court discussed the limits of "larceny from the person" in State v. Brennan, 172 Vt. 277 (2000). Mr. Brennan, a hitchhiker who stole money from the purse in the back seat of the car, was not guilty of larceny from the person. The item stolen need not be touching the owner, but it must be immediately within the owner's control or presence. In State v. Setien, 173 Vt. 576 (2002), the defendant committed the crime of larceny from the person when he ripped a necklace off the victim's neck.

26-201. Embezzlement

The Vermont Supreme Court has recently reinterpreted the embezzlement statute, 13 V.S.A. § 2531, in the three companion cases State v. Willard-Freckleton, State v. Tanner, and State v. Orfanidis, 2007 VT 67, 183 Vt. 26. Previously the Court had defined embezzlement as "the fraudulent conversion of the property of another by one who is already in lawful possession of it." State v. Ward, 151 Vt. 448 (1989). It was not embezzlement when Mr. Ward took money out of his employer's cash drawer, because the money was in the constructive possession of the owner. Also see State v. Rathburn, 140 Vt. 382 (1981). The new case recognizes the significance of language in the statute to the effect that the money could be in defendant's possession, or it could be "under his [or her] care," by virtue of his or her employment. Willard-Freckleton, 2007 VT 67, ¶ 10.

The instruction minimizes any emphasis on the type of organization, based on the Supreme Court's observation that the statutory list exhausts the universe of possible principals. The precise status of the principal "is a technical distinction that is not an essential element of the crime." State v. Joy, 149 Vt. 607, 616 (1988). Based on Willard-Freckleton, the committee has amended the instruction to apply when the defendant has "care" of the money but not necessarily "possession."

26-411. Retail Theft (taking merchandise of some value)

In a situation similar to that of petit larceny, the essential element concerning value is that the merchandise taken must have some value. The State should not need to prove that the value of the property does not exceed $100.

26-551, -553, -561, -563. Theft of Rented Property

The statute, 13 V.S.A. § 2591, is complicated, and the instruction is drafted with seven elements. CR26-551 and CR26-561 are drafted in the usual format, with a statement of all the elements followed by explanations for all the elements. Because of the large number of elements, the committee has also drafted alternative instructions, which discuss the elements in order without repeating them in a separate discussion. Prof. Tiersma has pointed out that this alternative formulation, allowing for shorter instructions, is used in some other states.

Chapter 27: Sex Crimes (Title 13, chapters 59 and 72)

27-031. Lewd and Lascivious Conduct

The instruction for lewd and lascivious conduct, under 13 V.S.A. § 2601, contains an element of general intent. The instruction does not elaborate upon intent, because there is no specific intent element (i.e. that the defendant intended to achieve a specific harm or result), and it is not clear whether it is necessary to give any instruction on intent. The judicial guidance concerning this statute derives from State v. Millard, 18 Vt. 574 (1846), where the Court explained: "The common sense of community, as well as the sense of decency, propriety, and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it." Id. at 577. The Court also concluded that the conduct in question there was sufficient to support the conviction, as follows (at 577-78):

> That the conduct of the respondent, in this case, was lewd and lascivious is beyond question. A public exposure of himself to a female, in the manner this respondent did, with a view to excite unchaste feelings and passions in her and to induce her to yield to his wishes, is lewd, and is gross lewdness, calculated to outrage the feelings of the person, to whom he thus exposed himself, and to show, that all sense of decency, chastity, or propriety of conduct, was wanting in him, and that he was a proper subject for the animadversion of criminal jurisprudence.

More recently, the Court has held that § 2601 does not contain an element of specific intent on the part of the defendant that he or she be seen committing the act. State v. Maunsell, 170 Vt. 543, 544 (1999). The Court explained that, if the Legislature had intended to include a specific intent to achieve a precise harm or result, it would have done so in § 2601, as it did in § 2602. Id. at 544 (citing State v. Grenier, 158 Vt. 153, 156 (1992)); *see also* State v. Gabert, 152 Vt. 83, 85 (1989) (court need not discuss specific intent as part of Rule 11 colloquy when accepting guilty plea for lewd and lascivious conduct). In an unpublished opinion, the Supreme Court held that specific intent is not an element of § 2601. *See* State v. Gall, No. 2001-512 (unp. decision, December 2002).

The model instruction, CR27-031, includes an element that the defendant intentionally engaged in the conduct alleged in the charge. This is designed as a general intent instruction; it has been modified from an earlier version to make clear that there is no essential element of specific intent. This is one of the few instructions from this project containing a general intent instruction. See notes under Chapter 6.

The instructions as drafted address the difference between lewd and lascivious conduct, under 13 V.S.A. § 2601, and lewdness under 13 V.S.A. § 2601a. The conduct under § 2601

must be lewd and lascivious, whereas the conduct under § 2601a need only be lewd. For an instruction on lewdness under § 2601a, see CR27-041, which includes lewdness as a lesser included offense to lewd and lascivious conduct under § 2601.

For further discussion and examples of what might constitute lewd and lascivious behavior under 13 V.S.A. § 2601, see State v. Discola, 2018 VT 7, ¶¶ 19–22 (evidence sufficient to support finding that defendant's unwanted grabbing of victim's buttocks was criminally offensive under community standards of decency and morality, as required to support conviction for lewd and lascivious conduct).

27-041. Transition to Lesser Included Lewdness
27-046. Lewdness

In In re K.A., 2016 VT 52, ¶ 21, 202 Vt. 86, the Supreme Court declared that lewdness not "relating to prostitution" was not an operative offense under 13 V.S.A. § 2632(a)(8). However, the Legislature amended the statute in 2017 to establish lewdness not related to prostitution as an offense. *See* 13 V.S.A. § 2601a.

Note that CR27-041 is presented as a lesser-included offense of lewd and lascivious conduct. In the event that only the lesser charge is presented to the jury, CR27-046 would apply. Note also that lewdness—as formerly construed under the prohibited acts statute, 13 V.S.A. § 2632(a)(8)—is not a lesser included offense of aggravated sexual assault, *see* State v. Memoli, 2011 VT 15, ¶¶ 32–34, 189 Vt. 237, nor is it a lesser included of lewd and lascivious conduct with a child. *See* State v. Beaudoin, 2008 VT 133, ¶¶30–39, 185 Vt. 164.

It remains an open question whether certain conduct that is not sexually explicit in nature, such as public urination, could be considered lewd. In State v. Penn, 2003 VT 110, ¶ 12, 176 Vt. 565, the Supreme Court quoted approvingly a jury instruction that lewd and lascivious behavior means "behavior that is sexual in nature, lustful, or indecent, that which offends the common social sense of the community, as well as its sense of decency and morality." Yet, the Court has not directly addressed whether the statute applies to indecent but nonsexual conduct. The reported decisions have involved overtly sexual behavior, generally in the context of the lewd and lascivious conduct statute. *See*, *e.g.*, Penn, 2003 VT 110, ¶¶ 9–12 (evidence sufficient for two separate lewd and lascivious conduct convictions where defendant licked victim's toes and tried to get inside her shorts, and proceeded to unbutton and unzip another victim's pants in full view of that victim's ten-year-old daughter); State v. Purvis, 146 Vt. 441 (1985) (statute prohibiting lewd and lascivious conduct not void for vagueness as applied to defendant charged with exposing himself to three young girls after knocking on his window to attract their attention before he revealed himself; defendant was not prosecuted for mere nudity because he drew attention to himself before exposure, indicating criminal intent).

Defendants have a right to choose a "hard" or a "soft" transition between offenses. State v. Powell, 158 Vt. 280, 284 (1992). The hard transition requires a verdict on the highest offense before the jury considers the lesser included offenses. The soft transition allows jurors to

consider the lesser offenses if they are unable to agree upon a verdict on the higher offense "after all reasonable efforts to reach a unanimous verdict." State v. Duff, 150 Vt. 329, 336-37 (1988). Where a defendant "does not choose either transition instruction, it is within the discretion of the trial court to decide which instruction to provide." State v. Rolls, 2020 VT 18, ¶ 9 (trial court did not err in providing both hard and soft transition instructions, rather than one or the other, in the absence of defendant's request). The committee's instructions generally contain soft transitions, because most defendants prefer them. However, for defendants who prefer a hard transition, the committee offers the following example:

> You must first consider the charge of lewd and lascivious conduct. If the State has proven each of the essential elements of that charge, then you must find (Def)_____ guilty of that charge, and you will be done with your deliberations. If you decide that the State has not proven each and every one of the essential elements of lewd and lascivious conduct, then you must find (Def)_____ not guilty of that charge, and then you must consider whether [he] [she] is guilty of the offense of lewdness.

27-051. Lewd or Lascivious Conduct with a Child

A charge of lewd or lascivious conduct with a child, under 13 V.S.A. § 2602, can involve any part of the victim's body. The actual lewd "act upon or with" the body of a child cannot be viewed in isolation from the context in which the touching occurs and, in particular, the intent of the perpetrator. State v. Squiers, 2006 VT 26, 179 Vt. 388. "[T]he determination of whether an act is 'lewd' under § 2602 depends on the nature and quality of the contact, judged by community standards of morality and decency, in light of all the surrounding circumstances, accompanied by the requisite, specific lewd intent on the part of the defendant." Id. ¶ 11; *see also, e.g.*, State v. Discola, 2018 VT 7, ¶¶ 23–24, 207 Vt. 216 (jury could reasonably infer that defendant touched minor victims' buttocks with requisite "lustful intent").

Misdemeanor lewdness, now codified at 13 V.S.A. § 2601a, is not a lesser-included offense of lewd or lascivious conduct with a child under § 2602. State v. Beaudoin, 2008 VT 133, ¶¶ 30–39, 185 Vt. 164. Additionally, a three-justice panel has held that lewd or lascivious conduct with a child is not a lesser-included offense of aggravated sexual assault. State v. Grant, 2024 WL 167139, at *3–5 (Vt. Jan. 12, 2024) (unpub. mem.).

Lewd Act/Prohibited Conduct

In In re K.A., 2016 VT 52, ¶ 21, 202 Vt. 86, the Supreme Court declared that lewdness not "relating to prostitution" was not an operative offense under 13 V.S.A. § 2632(a)(8). However, the Legislature amended the statute in 2017 to establish lewdness not related to prostitution as an offense. *See* 13 V.S.A. § 2601a. The model instruction for lewdness, CR27-046, is available on the Lewd and Lascivious Conduct page of this website.

27-108. Engaging in Prostitution

The model instruction for engaging in prostitution, 13 V.S.A. § 2632(a)(8), focuses on "the offering or receiving of the body for sexual intercourse for hire," under § 2631. The committee is not aware of any prosecution under that section for "the offering or receiving of the body for indiscriminate sexual intercourse without hire." The committee's understanding is that the statutory reference to "sexual intercourse" is limited to the insertion of a man's erect penis into a woman's vagina. *See* The Oxford Dictionary and Thesaurus (American Edition 1996), at 1388. The scope of the statute is limited to the ordinary meaning of the term, under the rule of lenity. This interpretation is consistent with the discussion of prostitution in State v. George, 157 Vt. 580 (1991).

27-135. Inducing Female to Live Life of Prostitution

This instruction, like the instruction for "engaging in prostitution," focuses on sexual intercourse for hire. A prosecution for inducing a female to engage in indiscriminate sexual intercourse without hire is unlikely. Compare State v. Corologos, 101 Vt. 300 (1928) (prosecution for indiscriminate sale of ice cream and beverages on Sunday).

27-211. Sexual Assault (lack of consent)

In 2021, the legislature revised and reformulated the sexual assault statutes. *See* 2021, No. 68 (eff. July 1, 2021). The revision removed the element of "compulsion" from § 3252(a) and refined the definition of "consent," among other changes. The current instructions reflect these changes.

Sexual Act. Where the State's information specifies the type of sexual act alleged, the trial court should use the term "the alleged sexual act" rather than "a sexual act" when instructing the jury on the essential elements. State v. Stephens, 2020 VT 87, ¶ 19, 213 Vt. 253. Additionally, to avoid juror confusion, the court should instruct on the specific sexual act charged, rather than identifying all the statutorily defined types of sexual acts when explaining the elements of sexual assault. Id.

Lack of Consent. Lack of consent may be shown without proof of resistance. Evidence that the victim's cooperation arose out of fear may show lack of consent. State v. Desautels, 2006 VT 84, 180 Vt. 189.

27-411, -461, -471. Aggravated Sexual Assault

Sexual Act. Where the State's information specifies the type of sexual act alleged, the trial court should use the term "the alleged sexual act" rather than "a sexual act" when instructing the jury on the essential elements. State v. Stephens, 2020 VT 87, ¶ 19, 213 Vt. 253. Additionally, to avoid juror confusion, the court should instruct on the specific sexual act charged, rather than identifying all the statutorily defined types of sexual acts when explaining the elements of sexual assault. Id.

CR27-411, -461, -471: Serious Bodily Injury. The revised definition of "serious bodily injury," derived from 13 V.S.A. § 1021(2), reflects the legislative determination that strangulation constitutes serious bodily injury. Because the statute's structure sets out Subsections 1021(2)(A) and (2)(B) as separate, alternative definitions, the updated instruction includes brackets to indicate that the entire definition may not be appropriate in all cases. For instance, where no evidence of strangulation is presented, there is no reason to instruct the jury on the definition of strangulation as provided in Subsection (2)(B). Conversely, in cases where the only evidence is of strangulation, there is no reason to instruct the jury on the definition in Subsection (2)(A) or, for that matter, the definition of "bodily injury."

The Committee recognizes that some cases might present evidence of both types of serious bodily injury (strangulation and non-strangulation). In those cases, it may be appropriate to instruct the jury on the entire statutory definition, and the jury would likely have to reach a unanimous decision as to either Subsection (2)(A) or (2)(B). Unlike the three "ascending mental states" for second degree murder, which are applied as a hierarchy, see State v. Boglioli, 2011 VT 60, ¶¶ 11–12, 190 Vt. 542; State v. Bolio, 159 Vt. 250, 253-54 (1992), the two definitions of serious bodily injury are presented as alternatives where one does not necessarily subsume the other.

In cases involving evidence of strangulation, the state may proceed either upon a theory that the defendant recklessly caused serious bodily injury to the victim or that the defendant intentionally strangled the victim by intentionally impeding normal breathing or circulation of blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person. As suggested in State v. Carter, 2017 VT 32, ¶ 16, 204 Vt. 383, the state should elect between those two options, and the instructions should not blend or commingle the two separate definitions.

CR27-421 ("Joined by Others"). *See* State v. Wilder & Campbell, 2010 VT 17, 187 Vt. 383.

27-521, -526. Sexual Exploitation of a Minor, 13 V.S.A. § 3258

The statute criminalizing sexual exploitation of a minor "is intended to protect minors between the ages of sixteen and eighteen who are the victims of sex acts perpetrated by persons who are in a position of power, authority, or supervision over the minors by virtue of specified undertakings, thereby creating an imbalance in the relationship that effectively deprives the minors of being able to consent to the sex acts." State v. Graham, 2016 VT 48, ¶ 15, 202 Vt. 43. The defendant must have been in the position of power, authority, or supervision at the time of the sex act. Id. ¶¶ 14–19 (charges against defendant-teacher properly dismissed because they occurred with high school student during summer break when defendant was between school employment contracts). *See also* State v. Nelson, 2020 VT 94, ¶ 35 (listing elements of crime). The statute defines both a felony and a misdemeanor offense. The Committee has prepared model instructions for both.

The statute contains no explicit intent element, and the same is true of the model instructions. In listing the elements of this crime in Nelson, the Supreme Court did not include an intent element. Id. However, the Court has also recognized a "presumption in favor of requiring an element of mens rea in criminal statutes." State v. Richland, 2015 VT 126, ¶ 9, 200 Vt. 401; *see also* State v. Stanislaw, 153 Vt. 517, 523 (1990) (explaining that "the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence[,] . . . [and] unless *expressly provided otherwise* by the legislature, . . . a crime is composed of an act and an intent, which concur at a point in time") (emphasis added) (quotations and citations omitted); State v. Beayon, 158 Vt. 133, 135 (1992) (observing that we often have "implied guilty intent as an element when none was expressly provided by the statute"). Additionally, the Court has recognized a felony/misdemeanor distinction in deciding whether an offense requires an intent element or is instead a strict liability offense. *See* State v. Witham, 2016 VT 51, ¶ 14, 202 Vt. 97 (describing "the severity of the punishment" as the most important factor). Without further direction from the Supreme Court as to whether the sexual exploitation of a minor statute requires an intent element (as to either its felony or misdemeanor version), the Committee leaves it to the trial courts to decide this issue in appropriate cases.

27-611. Disclosure of Sexually Explicit Images Without Consent, 13 V.S.A. § 2606(b)(1)

Courts should exercise caution with respect to the third element, which contains five distinct types of intent. In cases where the State has not made an election, a unanimity instruction may be required. *See* State v. Nicholas, 2016 VT 92, ¶¶ 13–33. For a model unanimity instruction, see CR04-081. Courts should exercise caution with respect to the third element, which contains five distinct types of intent. In cases where the State has not made an election, a unanimity instruction may be required. *See* State v. Nicholas, 2016 VT 92, ¶¶ 13–33. For a model unanimity instruction, see CR04-081. Note that there are alternative definitions of "harassment" in in CR10-418, CR10-421, and CR22-301.

The fourth element of the model instruction reflects the Supreme Court's decision in State v. Van Buren, 2018 VT 95, ¶¶ 97–103, holding that the State must prove that there was a reasonable expectation of privacy in the image(s). Although the statute's structure suggests that the reasonable-expectation-of-privacy requirement is a defense, the Court concluded that it is actually an "essential ingredient which constitutes the offense" as well as "central to the statute's constitutionality and purpose" and, therefore, an "element of the crime." Id. ¶¶ 98–101 (quotation and alterations omitted).

Note that the reasonable-expectation-of-privacy standard is "purely objective," and this determination accordingly "should be based on what a reasonable person would think, not what the person depicted thought. Id. ¶ 105 (citing State v. Albarelli, 2011 VT 24, ¶ 14, 189 Vt. 293).

27-631, -636, -641. Voyeurism, 13 V.S.A. § 2605

The voyeurism statute applies to "a person who intentionally views, photographs, films, or records the intimate areas of a person as part of a security or theft prevention policy or

program at a place of business." 13 V.S.A. § 2605(f). However, the statute contains exemptions for law enforcement officers engaged in official law enforcement business pursuant to state or federal law, and certain official activities of the Department of Corrections, law enforcement agencies, the Agency of Human Services, and courts.

Additionally, bona fide private investigators and bona fide security guards engaged in otherwise lawful activities within the scope of their employment are exempt from liability under subsection (d) (surveillance of person in a home). Note that this exemption applies only to subsection (d). The statute does, however, establish an *affirmative defense* for certain bona fide private investigators and security guards under subsection (b) (viewing or recording of intimate areas), which the Committee has included in the model instruction for that subsection. The statute also provides that it is not intended to infringe on the First Amendment freedom of the press to gather and disseminate news. 13 V.S.A. § 2605(h).

The Committee elected not to draft an instruction for subsection (c) of the voyeurism statute, which provides: "No person shall display or disclose to a third party any image recorded in violation of subsection (b), (d), or (e) of this section." 13 V.S.A. § 2605(c).

27-701, -741. Using a Child in a Sexual Performance, 13 V.S.A. § 2822; Possession of Child Pornography, 13 V.S.A. § 2827

The list of circumstances to consider in determining whether the exhibition was lewd are the same factors articulated by a federal district court in United States v. Dost, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom., United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987). Those factors, while not comprehensive or necessarily applicable in every case, have been applied by federal courts throughout the country. *See, e.g.*, United States v. Amirault, 173 F.3d 28, 31 (1st Cir. 1999); United States v. Rivera, 546 F.3d 245, 249 (2d Cir. 2008); United States v. Brown, 579 F.3d 672, 680 (6th Cir. 2009); United States v. Moore, 215 F.3d 681, 686 (7th Cir. 2000); United States v. Goodale, 831 F. Supp. 2d 804, 809–14 (D. Vt. 2011).

Note that 13 V.S.A. § 2827 (possession of child pornography) refers to a "clearly lewd exhibition," while 13 V.S.A. § 2822 (use of a child in a sexual performance) refers only to a "lewd exhibition" and omits the word "clearly." The model instructions are consistent with the statutory language.

27-761. Luring a Child, 13 V.S.A. § 2828

The definitions of "solicit" and "entice" are derived from Black's Law Dictionary (10th ed. 2014) (WL). The definition of "lure" is based on Merriam-Webster's Dictionary (online). Note that the definition of "entice" is different in the unlawful restraint context. *See* CR25-131, *et seq.*

Chapter 28: Other Crimes Under Title 13

28-041. Endeavoring to Incite a Felony, 13 V.S.A. § 7

Endeavoring to incite a felony differs from an attempt. State v. Hudon, 103 Vt. 17 (1930). Endeavoring may be punished as a crime under § 7, whether or not there is any attempt, and whether a resulting attempt succeeds or fails. State v. Ciocca, 125 Vt. 64 (1965). The Supreme Court has referred to endeavoring as the crime of solicitation. The crime of endeavoring may be completed whether or not the crime solicited is actually completed. See State v. Brown, 147 Vt. 324, 326-27 (1986), where the defendant was convicted as a principal under the doctrine of innocent agent, but where he could have been prosecuted for endeavoring to incite the crime under § 7.

The instruction calls for the insertion of the elements of the incited crime. Where a defendant is charged with endeavoring to incite a felony, it is probably necessary to list all of the essential elements. However, the amount of additional description of the felony may depend upon the facts of the specific case. For a discussion about the appropriate amount of "detailing" see State v. Davignon, 152 Vt. 209 (1989).

28-061. Habitual Criminal, 13 V.S.A. § 11

When the state seeks to penalize a defendant as an habitual criminal, it must provide notice by filing a separate charge. The defendant is entitled to a bifurcated proceeding, including a jury trial on the second phase to consider (1) the sufficiency of the record alleged as to the prior convictions, and (2) the defendant's identity as the person previously convicted. *See* State v. Angelucci, 137 Vt. 272, 281 (1979); State v. Cameron, 126 Vt. 244, 249 (1967).

The defendant is not entitled to a jury determination as to whether a previous conviction constitutes a felony, because that issue presents a pure question of law. The court's determinations as to whether crimes committed in other states would have been felonies in Vermont are reviewed as questions of law. Angelucci at 285. This approach avoids the need to ask jurors to compare Vermont statutes with foreign statutes, to match essential elements.

The instruction states: "To be convicted means to be found guilty of a crime and sentenced." Under V.R.Cr.P. 32(b), "[a] judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence or conditions of deferment thereof." The reporter's notes explain that "[t]he rule provides for the entry by the clerk of a formal 'judgment of conviction' after the sentencing of the defendant." V.R.Cr.P. 32(b), reporter's notes to 1980 amendment, at 182.

The Vermont Supreme Court has held that a judgment of guilt pursuant to a deferred sentence is considered a "conviction" for purposes of reporting a sex offense to the Department of Public Safety for inclusion in the sex offender registry. *See* State v. Stoddert and State v. Thompson, 174 Vt. 172 (2002). The committee believes that Stoddert and Thompson is limited to issues of registration, and does not alter the general rule that to be "convicted" means to be found guilty of a crime and sentenced.

28-104. Cruelty to a Child (misdemeanor), 13 V.S.A. § 1304(a)

Where the statute refers to a person who "wilfully assaults, ill treats, neglects or abandons or exposes [the] child," the instruction ties the element of wilfulness to each of the possible specific allegations. The Vermont Supreme Court has stated, in reviewing a complaint of abandonment: "It was essential that the complaint allege that the abandonment was wilful and that it was done in a manner to cause the child unnecessary suffering or to endanger its health." State v. Greenough, 116 Vt. 277, 281 (1950). In this context, "neglect" is not synonymous with "negligence." *See also* the instruction on corporal punishment as a defense to a charge of cruelty by assault.

The previous version of the statute referred to "a child under ten years of age," but in the most recent amendment to the statute, the Legislature removed the "under ten years of age" language and left the term "child" undefined. *See* 2015, No. 60, § 25, eff. July 1, 2015. Given that there is no other definition of "child" in the statutes that explicitly applies to 13 V.S.A. § 1304, it is unclear at what age one qualifies as a "child" for purposes of this crime. The revised instructions follow the statutory language. In a case where the child's age is an issue, the court will need to determine if further elaboration is necessary.

Based on the statutory language, the State need not prove that the defendant's conduct actually caused harm to the child. *See, e.g.*, State v. Amsden, 2013 VT 51, ¶¶ 30–36, 194 Vt. 128. However, there has been no definitive ruling on this point. The model instruction tracks the statutory language.

28-111. Cruelty to a Child (felony), 13 V.S.A. § 1304(b)

The felony version of the crime was added by the Legislature to cover situations where the child dies, suffers serious bodily injury, or is subject to sexual conduct. *See* 2015, No. 60, § 25. In appropriate cases, further elaboration of legal causation may be necessary. In that event, the court might consider inserting the general instruction on causation, CR09-051.

28-161. Cruelty to Animals

Parts of this instruction were drafted in connection with the trial in State v. Stevens, 1481-11-01 Wrcr (DiMauro, J.). Ms. Stevens was charged under 13 V.S.A. § 352(4), which is a strict liability offense. *See* State v. Gadreault, 171 Vt. 534 (2000). She was found not guilty on all counts.

28-166. Cruelty to Animals – Jury Interrogatories

These jury interrogatories were drafted in connection with the trial in State v. Stevens, 1481-11-01 Wrcr (DiMauro, J.). The form derives from the earlier case State v. Gadreault, 171 Vt. 534 (2000), where Judge Cheever presided over the trial. When the State charges the

defendant with various options under the statute, stated in the disjunctive, either the State must prove all of the options beyond a reasonable doubt, or the jury must complete jury interrogatories to insure that any verdict is unanimous. For discussion of this issue, see State v. McDermott, 135 Vt. 47, 50-52 (1977). The form may be repeated and used for multiple counts.

28-171, -173, -175. Aggravated Cruelty to Animals

The definitions of "animal" and "torture" are from the statute. 13 V.S.A. § 351(1) and (10). The definition of "maliciously" is derived from State v. Sylvester, 112 Vt. 202, 206 (1941) and State v. Muzzy, 87 Vt. 267, 268–69 (1913) (holding that "maliciously" has a "darker meaning" than the term "willfully," and requires "a deliberate and evil intention").

28-187, -189. Escape by Failing to Return from Furlough.

In 2019, the legislature decriminalized escape from most types of furlough. *See* 2019, No. 77, § 10. Then, in 2020, it recriminalized escape in certain circumstances. *See* 2020, No. 148; *see also* 13 V.S.A. § 1501(b)(1)(B). The 2020 amendment also added an intent requirement for escape from furlough that was imposed pursuant to 28 V.S.A. § 723. S*ee* 13 V.S.A. § 1501(b)(3). The new instruction, CR28-189, incorporates an intent requirement. Where intent need not be proven, CR28-187 should be used.

Note that CR28-189 is drafted to address only those furloughs authorized pursuant to 28 V.S.A. § 723 (community supervision furlough). While 13 V.S.A. § 1501(b)(3) purports to also add an intent requirement for escape from furloughs imposed under 28 V.S.A. §§ 808(e) (medical furlough) and 808a (treatment furlough), such furloughs do not appear in 13 V.S.A. § 1501(b)(1)(A)—(D). Thus, this instruction is limited to § 723 furloughs.

28-206. False Public Alarm

The definition of "public alarm" derives, in part, from discussion of the term in People v. Kim, 630 N.W.2d 627 (Mich. App. 2001), and in State v. Chakerian, 900 P.2d 511 (Or. App. 1995). The Michigan Court of Appeals observed that a defendant causes public terror or alarm "any time a segment of the public is put in fear of injury either to their persons or their property." Kim, 630 N.W.2d at 630 (quoting from People v. Garcia, 187 N.W.2d 711 (Mich. App. 1971)). The Oregon Court of Appeals noted that the term "alarm" is defined as "fear or terror resulting from a sudden sense of danger." Chakerian, 900 P.2d at 516 (quoting from State v. Moyle, 705 P.2d 740 (Or. 1985)). The Oregon Court of Appeals also observed that "Public alarm is collective and communal, rather than individual and innately idiosyncratic." Chakerian, 900 P.2d at 517.

28-261, -266, -271, -276. False Pretenses and False Tokens

The instructions do not cover all possible violations of the statute, but rather address the more common situations that might arise. See, e.g., State v. Agosta, 173 Vt. 97 (2001); State v.

Allen, 146 Vt. 569 (1986); State v. Bissonette, 145 Vt. 381 (1985); State v. Foley, 140 Vt. 643 (1982).

28-301. Home Improvement Fraud (Effective May 1, 2015)

In 2016, the Committee added a new instruction for home improvement fraud, which reflects significant revisions made to the statute. *See* 2015, No. 13, §§ 1–2, eff. May 1, 2015. In accordance with the revised statute, the new instruction omits the "knowingly" requirement from certain elements of the offense, and removes the permissive inference, among other changes. The Committee has retained the old instruction on this website for cases in which the old statute may apply.

28-306. Home Improvement Fraud (Effective until April 30, 2015)

The model instruction includes the permissive inference formerly set forth in 13 V.S.A. § 2029(c), and does not include the typographical error referenced in State v. Rounds, 2011 VT 39, ¶ 30, and State v. Amidon, 2011 VT 126, ¶ 4. The jury should not be instructed on the permissive inference, however, unless there is sufficient evidence to establish each of the basic facts beyond a reasonable doubt. Rounds, 2011 VT 39, ¶ 29.

Additionally, in drafting the instruction, some members of the committee noted concern that operation of the inference might be overbroad or vague as applied in some circumstances. Trial counsel should consider whether to raise the issue in a particular case.

28-401. Hindering an Officer

"A person 'hinders' an officer when the person's actions illegally interfere with the officer's ability to perform duties within the scope of the officer's authority." State v. Berard, 2019 VT 65, ¶ 9, 211 Vt. 39 (citing State v. Harris, 152 Vt. 507, 509 (1989). The Vermont Supreme Court has "consistently defined 'hinder' in this context as 'to slow down or to make more difficult someone's progress towards accomplishing an objective; to delay, or impede or interfere with that person's progress[.]' " State v. Blanchard, 2021 VT 13, ¶ 26 (citing State v. Berard, 2019 VT 65, ¶ 9, 211 Vt. 39; State v. Neisner, 2010 VT 112, ¶ 20, 189 Vt. 160; State v. Stone, 170 Vt. 496, 499 (2000); State v. Dion, 154 Vt. 420, 423 (1990)).

Nevertheless, it can be difficult to draw a line between what constitutes a hindrance and what does not. Several elements of the Court's discussion in Blanchard may offer some guidance. First, the Court has "cast doubt on the notion that § 3001 criminalizes 'any unlawful action, no matter how slight or brief, that for any moment delays or interferes with the lawful execution of an officer's duties.' " Blanchard, 2021 VT 13, ¶ 27 (quoting Berard, 2019 VT 65, ¶ 13). This suggests that a de minimus delay or interference is not sufficient to constitute a hindrance. Second, the Court has "required that a defendant's conduct actually hinder or impede an officer in order to qualify as hindering under § 3001," Id. ¶ 26 (emphasis in original) (citing Berard, 2019 VT 65, ¶ 10; Neisner, 2010 VT 112, ¶ 14), while at the same time noting that "the

very decisions that have required 'actual' hindrance contemplate that a defendant may 'actually hinder' an officer by delaying or interfering with the officer's progress." Id. (citing Berard, 2019 VT 65, ¶ 9; Neisner, 2010 VT 112, ¶ 20). Finally, the Court has "implicitly recognized that the significance of the hindrance may be relevant to the question of whether a defendant 'actually hinders' an officer, in that the impeding convictions we have upheld involved 'substantial interference' or actions that 'significantly impeded' an officer. Id. ¶ 27 (quoting Berard, 2019 VT 65, ¶ 9).

In the absence of objection, a failure to instruct on "actual hindrance" or the significance of the interference does not necessarily constitute plain error where the case does not involve "momentary and inconsequential interference with an officer's actions." Blanchard, 2021 VT 13, ¶ 27. As a matter of practice, however, it might be advisable to instruct on such principles.

28-503. Endeavoring to Obstruct Justice

The term "endeavored" does not require success in a defendant's attempt to obstruct justice; instead, a mere effort satisfies that element. See State v. Wiley, 2007 VT 13, ¶ 15, 181 Vt. 300. In State v. Fucci, 2015 VT 39, ¶ 8, the defendant argued that, under Wiley, an "endeavor" is synonymous with an "attempt." The Court clarified that it had used "attempt" for its ordinary connotation rather than its special legal meaning, as defined in 13 V.S.A. § 9(a). While acknowledging that other courts have held that the effort necessary to fulfill the actus reus element of the federal obstruction-of-justice statute is less than that for attempt, the Court declined to decide in Fucci "whether under Vermont law the steps necessary for an endeavor are the same as for an attempt."

28-531. Perjury

The model instruction contains an essential element of wilfulness. The requirement that the false testimony be given "wilfully" was included as a supplemental instruction in State v. Wood, 99 Vt. 490, 498 (1926). The jury was told that false testimony given "wilfully" means that it was given knowingly and understandingly. Id. at 498.

When a defendant is charged with perjury under 13 V.S.A. § 2901, the State must prove that he or she made the false statement in a proceeding in a court of justice. The model instruction also requires that the defendant made the false statement when he or she was lawfully required to depose the truth, even though it may be presumed that an oath had been administered as required by law. State v. Lawrence, 134 Vt. 373, 375 (1976) (citing State v. Chamberlin, 30 Vt. 559 (1859)).

"A false statement under oath generally may be punished as perjury only if it was material to an issue in the proceeding in which it was made." State v. LaCourse, 168 Vt. 162, 163-64 (1998). The Supreme Court suggested, without deciding, that the question of materiality is an essential element of the charge that must be submitted to the jury. Id. at 164 (citing United States v. Gaudin, 515 U.S. 506 (1995)).

Perjury must be proven "by the testimony of two witnesses, or by the testimony of one witness with independent corroborating evidence." State v. Tinker, 165 Vt. 548 (1996) (quoting State v. Wheel, 155 Vt. 587, 607 (1990)). The testimony of one witness, corroborated by the testimony of another or by circumstances, is sufficient, "if thereby the crime is proved beyond a reasonable doubt." State v. Woolley, 109 Vt. 53, 57 (1937). "The independent corroborating evidence must be equal in weight to the testimony of another witness, and it must be, by itself, inconsistent with the innocence of the defendant." State v. Tonzola, 159 Vt. 491, 497 (1993) (quoting People v. Fueston, 717 P.2d 978, 980 (Colo. App. 1985), rev'd on other grounds, 749 P.2d 952 (Colo. 1988)). The Vermont Supreme Court recently affirmed the requirement of corroborating evidence in State v. Hutchins, 2005 VT 47, 178 Vt. 551.

28-551. Resisting Arrest

The statute specifies that the attempt to prevent the arrest must take place "when it would reasonably appear that the latter is a law enforcement officer." 13 V.S.A. § 3017. The instruction explains that the element is satisfied by a standard of objective reasonableness, i.e. under all the circumstances, it would have appeared to an objective reasonable observer that the person attempting to make the arrest was in fact a law enforcement officer.

The crime of resisting arrest requires proof that the defendant was attempting to prevent a "lawful arrest." Compare State v. Peters, 141 Vt. 341, 347 (1982) (explaining that for the crime of simple assault on a police officer, the state must show only that the officer was performing a lawful duty at the time of the arrest) with 13 V.S.A. § 3017 (explaining that for the crime of resisting arrest, the arrest itself must be lawful). In some cases, the state may need to prove that a warrantless arrest was proper under Vermont Criminal Procedure Rule 3, such as by showing that the arresting officer had probable cause to make an arrest. In such a case, the explanation of the term "lawful arrest" should be expanded to include a fact-specific instruction asking the jury whether or not the officer had probable cause to believe that the specified predicate acts had been committed. See Arthur v. State, 24 A.3d 667, 676–77 (Md. 2011) (explaining issue under nearly-identical state statute).

28-606. Hate Crime

It is not clear whether the legislature intended the hate crime statute to function as a penalty enhancement or a separate crime. As a practical matter, it seems prudent to treat it as a separate crime with a potential lesser-included offense. Bifurcation would probably not be appropriate because evidence that the defendant was motivated by the victim's "protected category" would, in virtually all cases, be necessarily included in the State's case-in-chief for the underlying crime.

Under the model instruction, simple assault charged as a hate crime, for example, would be charged as "hate-motivated simple assault," and the last essential element the State must prove would be the applicable "hate-motivated" factor from 13 V.S.A. § 1455. If supported by

the evidence, a charge on the lesser-included offense of simple assault (without the hate-motivating factor) would then follow.

The definition of "motivated" is derived from the American Heritage Dictionary (5th ed. 2017) (online). The original version of the statute required that the defendant's conduct be "maliciously" motivated. The legislature deleted the "maliciously" requirement in a 2021 revision, and clarified that the conduct can be motivated "in whole or in part" by the victim's protected category. 2021, No. 34, § 1 (eff. May 18, 2021). The revision also states that the victim's protected category "need not be the predominant reason or the sole reason for the defendant's conduct." Id.

Note that as of the 2021 amendment, the statute speaks in terms of the victim's "protected category", 13 V.S.A. § 1455(a), and then defines "protected category" to include several characteristics. Id. § 1455(c). In keeping with plain language, the model instruction does not use the term "protected category" and instead contemplates that courts will refer directly to the applicable characteristics listed in subsection (c) in a case-specific manner.

If the alleged motivating factor is the victim's disability, the hate crime statute prescribes that the term is as defined at 21 V.S.A. § 495d(5), and that definition is to be used in instructions to the jury. If further explanation of that term is necessary, courts should refer to the additional definitions provided in 21 V.S.A. § 495d(7)–(11).

28-641. Criminal Threatening

The model instruction is based on instructions given by the trial courts in State v. Benson, 61-8-16 Gicr (Apr. 18, 2017) (Harris, J.) and State v. Steele, 750-8-18 Wrcr (May 23, 2019) (Tomasi, J.).

The Vermont Supreme Court has observed that "the Legislature may have enacted § 1702 based on a concern that the disorderly conduct statute would not prohibit pure speech," and that § 1702 thus "specifically addresses threatening speech and acknowledges that such a crime can extend only as far as the First Amendment allows." State v. Schenk, 2018 VT 45, ¶¶ 26–27. The Court inferred from the "presence" of § 1702 that "'threatening behavior,' as criminalized in § 1026(a)(1) [the disorderly conduct statute] should not extend to threatening speech." Id.

The criminal threatening statute "expressly excludes constitutionally protected activity from the definition of '[t]hreat' and 'threaten.' " State v. Blanchard, 2021 VT 13, ¶ 10 (quoting 13 V.S.A. § 1702(d)(2)). Thus, the statute "can only punish constitutionally unprotected 'true threats.' " Id. (citing Hinkson v. Stevens, 2020 VT 69, ¶¶ 43-44). Trial courts may need to address and elaborate on this point and the "true threat" doctrine in cases where constitutionally protected activity is potentially at issue. *See* id. ¶ 17 (concluding that a jury could find that, "considering the context of defendant's overall conduct, his statement 'I have an AR-15 right fucking here. Do we need that?' would cause a reasonable person to fear unlawful violence" and

therefore constituted a "true threat" that did not fall outside the scope of the criminal threatening statute); *see also* State v. Noll, 2018 VT 106, ¶¶ 24–25, 208 Vt. 474 (discussing concept of "true threats" in stalking context).

Note that it is an affirmative defense to a charge of criminal threatening that the defendant "did not have the ability to carry out the threat." 13 V.S.A. § 1702(f). The defendant has the burden to prove the affirmative defense by a preponderance of the evidence. Id.

28-661. Domestic Terrorism

The legislature established the crime of domestic terrorism in response to the Supreme Court's decision in State v. Sawyer, 2018 VT 43, ¶¶ 22–26, 207 Vt. 636.

The definition of "threaten" derives from State v. Gagne, 2016 VT 68, ¶ 25, 202 Vt. 255 and State v. Cahill, 2013 VT 69, ¶ 17, 194 Vt. 335. *See also* State v. Cole, 150 Vt. 453, 456 (1988) ("A threat is a communicated intent to inflict harm on person or property.") (citing Black's Law Dictionary 1327 (5th ed. 1979)). The definition of "civilian population" derives from Cambridge Dictionary.

28-801, et seq. Unlawful Mischief

Unlawful mischief is a specific intent crime. The State must prove that the defendant caused damage purposely or knowingly, but no showing of malice is required. State v. Patch, 145 Vt. 344, 351-52 (1985).

The several subsections of the statute, 13 V.S.A. § 3701, relate to the amount of the damage inflicted and the penalties that may be imposed. The word "value" refers to the amount of the damage inflicted, not the value of the property which is damaged. State v. Breznick, 134 Vt. 261, 266 (1976). According to the statutory language, § 3701(c) applies to damages "not exceeding $250.00," but the committee concludes that § 3701(c) actually applies to damages "of some monetary value." This interpretation is supported by Breznick, and by reading the various subsections in pari materia. The State need not prove that the value of the damages did not exceed $250, and the instructions need not mention the figure of $250. Where the defendant is charged under § 3701(c), the State may not amend the information during trial to a charge that the damages exceeded $250, under § 3701(b). State v. Verge, 152 Vt. 93 (1989).

Subsection 3701(d) applies to damages caused "by means of an explosive." The definition of "an explosive" derives from 13 V.S.A. § 1603(2).

28-851, -856. Unlawful Trespass (land).

The third essential element—the license element—does not contain an implied notice requirement. *See* State v. Richards, 2021 VT 40, ¶ 26 (affirming trial court's jury instructions).

The fourth essential element requires proof that the defendant had received notice against trespass. The State can prove notice by "actual communication," which is a "subjective standard." State v. MacFarland, 2021 VT 87, ¶ 34 (concluding that trial court "should have considered defendant's actual subjective experience of the encounter with the bouncer; it is not enough to conclude that defendant 'refused' to leave the bar without explaining, to some extent, how that related to her state of mind at the time"). Alternatively, "[t]he statute allows notice to be proven with objective evidence of reasonable notice through signage and without showing that a defendant subjectively saw and understood the signs." State v. Pixley, 2018 VT 110, ¶ 13. The instructions given in Pixley "properly directed the jury that it could find defendant received notice 'if the owner, or the owner's agent posted signs or placards that were designated and situated in a manner that provided reasonable notice,'" and thus "accurately reflected the notice element . . . ." Id. ¶ 16.

28-871. Unlawful Trespass (dwelling house)

The unlawful trespass statute, 13 V.S.A. § 3705(d), derives from the Model Penal Code. State v. Fanger, 164 Vt. 48, 52 (1995) (citing State v. Kreth, 150 Vt. 406, 409 (1988); Model Penal Code § 221.2(1)). The third essential element requires proof of the defendant's subjective knowledge that he or she was neither licensed nor privileged to do so. This element may be satisfied by circumstantial evidence. State v. Cram, 2008 VT 55, ¶¶ 7–13, 184 Vt. 531 (mem.).

Chapter 30: DUI

30-011. Definition of "Alcohol Concentration" -- 23 V.S.A. § 1200(1)

Under the statutory definition, the "alcohol concentration" may be stated as a number, without corresponding units. Thus the number 0.15 may refer to 0.15 grams of alcohol per 100 milliliters of blood, or it may refer to 0.15 grams of alcohol per 210 liters of breath. Although the "alcohol concentration" may roughly correspond to the percentage of alcohol in the blood by weight, it is potentially confusing, and incorrect under the statutory definition, to refer to the number as a percentage, such as 0.15 %.

30-031. Under the Influence of Alcohol

The Supreme Court has repeatedly upheld an instruction that a driver was "under the influence" if he or she was affected "in the slightest degree" by intoxicating liquor. This so-called "Storrs instruction," based on State v. Storrs, 105 Vt. 180, 185 (1933), is appropriate "in cases where testimony supports a claim of loss of control of physical and mental faculties, [but] not where the evidence deals solely with the chemical level of alcohol." State v. Carmody, 140 Vt. 631, 638 (1982).

A layperson may testify about his or her observations supporting a conclusion that the defendant was under the influence. State v. Baldwin, 140 Vt. 501, 515 (1981). "Recognition of

the fact of intoxication requires no particular scientific knowledge or training." State v. Coburn, 122 Vt. 102, 107 (1960).

30-101. DUI: Under the Influence of Alcohol -- 23 V.S.A. § 1201(a)(2)

DUI has been heavily litigated over many years. Although DUI law continues to evolve, the basic elements of DUI under 23 V.S.A. § 1201(a)(2) are well established.

The element of operation is defined broadly under 23 V.S.A. § 4(24). Operation may consist of turning the ignition switch, State v. Storrs, 105 Vt. 180 (1933), sitting behind the steering wheel with the engine running, State v. Hedding, 122 Vt. 379 (1961), directing the vehicle while it descends a hill by the use of gravity, State v. Lansing, 108 Vt. 218 (1936), attempting to steer the vehicle while it is being towed, State v. Tacey, 102 Vt. 439 (1930), or attempting to extricate the vehicle from a ditch, State v. Parkhurst, 121 Vt. 210 (1959). The element of operation may be established by the defendant's admission that he or she had been driving, together with the officer's observation of the defendant behind the steering wheel. State v. Constantine, 148 Vt. 629 (1987). In the DUI context, a charge of "attempting to operate a motor vehicle" means essentially the same thing as "operating a motor vehicle." State v. Parker, 123 Vt. 369, 371-72 (1963).

A defendant may be found to have been in actual physical control of a motor vehicle on a highway if the defendant had the potential to operate the vehicle; an "immediate potential" to operate the vehicle is not required. State v. Stevens, 154 Vt. 614 (1990). A defendant may be found to have been in "actual physical control" even if he or she only intended to roll up the car windows. State v. Kelton, 168 Vt. 629 (1998). A defendant also may be in "actual physical control" despite being asleep or unconscious. State v. Blaine, 148 Vt. 272 (1987); State v. Trucott, 145 Vt. 274 (1984); State v. Godfrey, 137 Vt. 159 (1979). The defendant need not have been inside the vehicle and behind the steering wheel. State v. Stevens, 154 Vt. 614 (1990). Moreover, conviction of being in actual physical control does not require a demonstration that the defendant's vehicle was fully operable. State v. Garber, 156 Vt. 637 (1991).

"Motor vehicle" is defined in 23 V.S.A. § 4(21), as modified by 23 V.S.A. § 1200(6). The model instruction contains virtually all of the language deriving from § 4(21), but the exceptions are bracketed because they will not be relevant in the usual case involving an automobile or truck. In unusual cases it may be necessary to modify the instruction by reference to § 1200(6) or other statutes.

"Highway" is defined in 23 V.S.A. § 4(13), as modified by 23 V.S.A. § 1200(7). Here, too, the model instruction contains most of the statutory language, but some of the words are bracketed because they will not be relevant in the usual case. In some cases it may be necessary to modify the instruction by reference to § 1200(7) or other statutes.

"Alcohol" is defined in 23 V.S.A. § 1200(4) to include "alcohol, malt beverages, spirits, fortified wines, and vinous beverages, as defined in 7 V.S.A. § 2, and any beverage or liquid containing any of them. The model instruction is more succinct than the statutory definition, and defines "alcohol" to "include[] liquor, beer, wine, or any combination of those beverages." If it becomes necessary to further define "alcohol," see 7 V.S.A. § 2. Note that the statute previously used the term "intoxicating liquor" until the Legislature substituted the word "alcohol" in a 2017 amendment. 2017, No. 83, § 153.

The instruction on the meaning of "under the influence of alcohol" (formerly "intoxicating liquor") derives from State v. Storrs, 105 Vt. 180 (1933), and its progeny. See notes to instruction CR30-031.

30-151. Driving Under the Influence of Other Drug, or Under Combined Influence

In comparison to 23 V.S.A. § 1201(a)(2), there have been relatively few cases interpreting § 1201(a)(3), the charge of operating under the influence of a drug other than alcohol, or under the combined influence of alcohol and another drug. The most significant difference is that, under § 1201(a)(3), the connection between the impairment and the influence of any drug must be proven by expert testimony. This difference is explained in State v. Rifkin, 140 Vt. 472 (1981). Also see the cited cases, State v. Tiernan, 302 A.2d 561 (N.J. County Court 1973), and Smithhart v. State, 503 S.W.2d 283 (Texas Crim. App. 1973). A later New Jersey case concluded that it is not always necessary to identify the drug. State v. Tamburro, 346 A.2d 401 (1975).

DUI: Serious Bodily Injury and Death Resulting. The causation instruction is from State v.Sullivan, where the Court affirmed the trial court's causation instruction on DUI-death resulting. 2017 VT 24, ¶¶ 12–23, 204 Vt. 328. In construing 23 V.S.A. § 1210(f)(1), the Court observed that "[w]here the statute involves a specified result that is caused by conduct, it must be shown, as a minimal requirement, that the accused's conduct was an antecedent 'but for' which the result in question would not have occurred." Sullivan, 2017 VT 24, ¶ 19 (citing 1 Wharton's Criminal Law § 26 (15th ed. 2016)). So, in a prosecution for DUI-death resulting,

> a jury instruction . . . must require findings that: (1) the defendant operated a vehicle on a highway; (2) he or she did so while under the influence of intoxicating liquor; and (3) his or her intoxication while operating the vehicle caused the victim's death. A mere violation of §1201, standing alone, is insufficient to meet the requirement that the death ***result from*** the violation of the statute.

Id. ¶ 19 (emphasis in original).

30-171. DUI: Second Offense under § 1201(a)(2), Phase II Proceeding

When the state seeks to penalize a defendant as a repeat offender, he or she is entitled to a bifurcated proceeding, including a jury trial on the second phase to consider (1) the sufficiency of the record alleged as to the prior convictions, and (2) the defendant's identity as the person previously convicted. *See* State v. Angelucci, 137 Vt. 272, 281 (1979); State v. Cameron, 126 Vt. 244, 249 (1967). Bifurcated proceedings have been used to address repeat DUI convictions, under 23 V.S.A. § 1210, in State v. Carpenter, 170 Vt. 371 (2000); State v. Porter, 164 Vt. 515 (1996); and State v. Baril, 155 Vt. 344 (1990).

To the extent there may be issues over the use of a prior conviction based on a prior law, or based on a conviction from another state, the defendant is not entitled to a jury determination on whether the prior conviction is sufficient under Vermont law. Those issues present pure questions of law. Accordingly, it is the Court's duty to instruct the jury as to nature and effect of out of state convictions as a matter of law, i.e., whether the elements of the out of state conviction under the other jurisdiction's law are the equivalent of the Vermont offense. See 23 V.S.A. § 1211 and State v. Pecora, 2007 VT 41, 181 Vt. 627.

30-221. DUI: Evidence of Alcohol in the Blood

This instruction derives from State v. Bushey, 149 Vt. 378 (1988). Although it may be rare, it can happen in a prosecution under 23 V.S.A. § 1201(a)(2) that the numerical result of an evidentiary test is excluded, where the State has obtained an evidentiary test but is unable to relate the test result back to the time of operation. *See* State v. Dumont, 146 Vt. 252, 255 (1985).

In Bushey, the State did not introduce the test result, but the State introduced expert testimony about the amount of drinks the defendant would have had in order to achieve the test result. The Supreme Court found that the procedure was acceptable, and that it avoided the specific prejudice identified in Dumont. State v. Bushey, 149 Vt. at 381 (citing State v. McQuillen, 147 Vt. 386, 388 (1986), and State v. Dumont, 146 Vt. 252, 255 (1985)).

Chapter 31: DLS

31-051, -056. Driving with License Suspended or Revoked -- 23 V.S.A. § 674

Notice. The statute, 23 V.S.A. § 674, does not require notice or knowledge of suspension on the part of the offender, and actual notice is not required. State v. Hebert, 124 Vt. 377, 379 (1964). The required notice may be satisfied by evidence that the written notice had been sent at least three days earlier, by registered mail or by certified mail. The statute at 23 V.S.A. § 204 states that a *suspension* shall be deemed to be in effect three days after deposit in the United States mails, and a reasonable interpretation of that statute is that a *notice* will be effective three days after mailing.

The Supreme Court approved an instruction on notice, similar to the model instruction, in State v. Cattanach, 129 Vt. 57 (1970). Where the commissioner had mailed the notice more than

three days prior to the offense, "[t]he defendant's failure to receive delivery of the notice of suspension is not sufficient to bar his conviction for operating a motor vehicle after the revocation went into full force and effect." Id. at 61. A driver has a continuing duty to inform the commissioner of any change of address. State v. Chicoine, 154 Vt. 653 (1990).

Although § 204 suggests that notice of the suspension will be effective three days after mailing by first class mail, the above cases involved convictions based on certified mail. It is not clear whether mailing by first class mail would sustain a conviction.

Reason for Suspension. Note that the statute provides for certain mandatory minimum sentencing terms if the license was suspended or revoked for a DUI as compared with suspensions for other reasons. *Compare* § 674(a) *with* § 674(b). As such, the model instruction contemplates that the reason for the suspension or revocation is an element of the offense, but the state need not reprove the merits of the underlying suspension or revocation. *See* State v. Longe, 170 Vt. 35, 41 (1999) (holding that evidence of defendant's failure to satisfy requirements of alcohol and driving education program under 23 V.S.A. § 1209a was sufficient to establish reason for underlying license suspension in § 674(b) prosecution and that "the instructions, when read in their entirety, required the jury to find that defendant's license was suspended for failing to comply with § 1209a"); State v. Putnam, 137 Vt. 410, 413, (1979) (defendant cannot collaterally attack underlying license suspension in DLS prosecution except as to jurisdictional issues; State v. Mohr, 146 Vt. 193, 194 (1985) (same); State v. Bacon, 137 Vt. 414, 415 (1979) (same).

Courts should tailor the language of this element to fit the particular circumstances of the case. Bifurcation of the prior conviction that resulted in the license suspension or revocation may not be proper if the remaining elements would not establish a complete crime. *See* State v. Brillon, 2010 VT 25, ¶ 28, 187 Vt. 444 ("Without a complete crime to present to the jury, bifurcation may result in confusion for jurors and may influence the results of the initial phase of trial.").

Permissive Inference. As part of the State's case, "the court shall accept as evidence a printout attested to by the law enforcement officer as the person's motor vehicle record showing convictions and resulting license suspensions." 23 V.S.A. § 674(g). That record "shall establish a permissive inference" that the defendant "was under suspension on the dates and time periods set forth in the record." Id. A certified copy from the Department of Motor Vehicles is not required to establish the permissive inference. Id. However, the jury is not required to draw any inference from the printout.

Chapter 32. Negligent Operation

32-121. Grossly Negligent Operation, with Transition to Negligent Operation

Defendants have a right to choose a "hard" or a "soft" transition between offenses. State v. Powell, 158 Vt. 280, 284 (1992). The hard transition requires a verdict on the highest offense

before the jury considers the lesser included offenses. The soft transition allows jurors to consider the lesser offenses if they are unable to agree upon a verdict on the higher offense "after all reasonable efforts to reach a unanimous verdict." State v. Duff, 150 Vt. 329, 336-37 (1988). Where a defendant "does not choose either transition instruction, it is within the discretion of the trial court to decide which instruction to provide." State v. Rolls, 2020 VT 18, ¶ 9 (trial court did not err in providing both hard and soft transition instructions, rather than one or the other, in the absence of defendant's request). The committee's instructions generally contain soft transitions, because most defendants prefer them. However, for defendants who prefer a hard transition, the committee offers the following example:

> You must first consider the charge of grossly negligent operation of a motor vehicle. If the State has proven each of the essential elements of that charge, then you must find (Def)_____ guilty of that charge, and you will be done with your deliberations. If you decide that the State has not proven each and every one of the essential elements of grossly negligent operation of a motor vehicle, then you must find (Def)_____ not guilty of that charge, and then you must consider whether [he] [she] is guilty of the offense of negligent operation of a motor vehicle.

Chapter 33: Eluding a Police Officer

33-071. Eluding a Police Officer

This instruction omits any knowledge element based on the Vermont Supreme Court's decision in State v. Roy, 151 Vt. 17, 25-27 (1989). The instruction was modified from the earlier CR33-061 based on legislative changes that took effect in 2003.

Former instruction CR33-081 (attempting to elude a police officer by other means) tried to address subsection 1133(e)(1) added by the legislature in 2003, No. 47, § 1. This subsection broadens the definition of "operator" with the apparent intent to broaden the prohibited conduct to include leaving the vehicle in an attempt to elude the officer. In 2020, the Committee combined this instruction with CR33-071, which can now be used when eluding is charged under either subsection 1133(a) or 1133(e)(1).

The Committee further revised the above instructions to conform with a legislative amendment that substitutes "Eluding" for "Attempting to Elude" in the section catchline. 2011, No. 42.

Chapter 34: Operating Without Owner's Consent

34-031. Operating Without Owner's Consent -- 23 V.S.A. § 1094

The Vermont Supreme Court has noted a requirement of general intent, i.e. that the defendant knew or should have known that he or she was operating the vehicle without the owner's permission. In State v. Day, 150 Vt. 119 (1988), the trial court did not instruct the jury on any separate element of knowledge or intent, but the Supreme Court affirmed the conviction on the ground that the consent instruction sufficiently covered defendant's lack-of-consent theory. Id. at 123–24.

Chapter 35: LSA

35-051, -056, -061. Leaving the Scene of an Accident -- 23 V.S.A. § 1128(a)–(c)

The statute requires both knowledge of an accident and knowledge of resultant injury to either the person or property of another. State v. Sidway, 139 Vt. 480, 484, 486 (1981). The level of knowledge required for each, however, is different. While *actual* knowledge of the *accident* is required, *constructive* knowledge of the *resultant injury* is sufficient to impose liability. Id.

Constructive knowledge entails "what an objective examination of the facts would reveal to a reasonable person." State v. Keiser, 174 Vt. 87, 93 (2002). Thus, a defendant could be imputed with knowledge that a "reasonable person would have gathered from the circumstances of the accident or impact, i.e., what a reasonable evaluation of the circumstances would reveal." Id. (citing Sidway, 139 Vt. at 485–86). Therefore, the trial's court instruction on constructive knowledge in Keiser, which allowed the jury to impute to the defendant knowledge that a reasonable investigation of the circumstances of the accident would reveal, was consistent with Sidway, and was not reversible error. Limiting jurors to considering only the impact itself, the Court explained, would mean that jurors could consider "only that information an individual who was in an accident, but failed to stop, would have available." Id. at 94. This would discourage individuals from stopping to investigate an impact, because they "might acquire actual knowledge placing them in a poorer position than the defendant who kept going." Id.

The model instructions include two alternative bracketed options to explain the knowledge element. In a given case with circumstances that do not seem to fit either option, counsel should suggest additional alternative language to the court.

Chapter 40: Possession and Control of Regulated Drugs -- Title 18, Chapter 84

Mental Element (as to drug crimes other than fentanyl, xylazine, and prescription drugs)

As part of the mental element, the State must prove that the defendant knew that what he or she sold contained the specific regulated drug at the time he or she sold it. *See* State v. Rillo, 2020 VT 82, ¶ 12, 213 Vt. 193 ("The 'knowing' element of the alleged crime required proof that

defendant knew the drug contained fentanyl at the time he committed the crime.") (emphasis in original).

Mental Element (as to fentanyl, xylazine, and prescription drugs)

Note that, in 2024, the legislature created a new definition of "knowingly" that applies exclusively to 18 V.S.A. §§ 4233a (selling or dispensing fentanyl), 4233b (selling or dispensing xylazine), and 4234(b) (selling or dispensing depressant, stimulant, or narcotic drugs other than fentanyl, heroin, or cocaine). *See* 2024, No. 125 (S.58). This definition does not apply to other sections of Title 18. The [fentanyl] [xylazine] [prescription drug] model instructions incorporate this definition.

Units of Measurement

The statutes within title 18, chapter 84, are inconsistent in that they do not all use the same system of measurement. For example, under 18 V.S.A. § 4231(a)(3), cocaine is measured in ounces, which is a unit of weight or force in the English system, whereas under 18 V.S.A. § 4231(a)(2), the cocaine is measured in grams, which is a unit of mass in the metric system. Sometimes it is necessary to ask the expert witnesses to convert their measurements into the appropriate units. The committee suggests that the drug statutes should be amended to provide for consistent use of the metric system, which is preferred for scientific measurement and calculations.

"Dispensing"

The word "dispense" is defined under 18 V.S.A. § 4201(7) to include "distribute, leave with, give away, dispose of, or deliver." It is the committee's understanding that "dispensing" a regulated drug necessarily involves a transfer to another individual. One who disposes of regulated drugs by flushing them down the toilet is not thereby guilty of dispensing. While it may be a crime to possess the drug, it is not a crime to dispossess oneself of the drug so long as the dispossession does not involve selling or dispensing. State v. Harris, 152 Vt. 507, 509 (1989).

"Heroin"

"Heroin" is defined by statute, 18 V.S.A. § 4201(36). The State may have to present evidence that a substance has been designated as heroin by a rule adopted by the board of health, and the court may have to address the preliminary question of whether the rule has been adopted by following the Vermont Administrative Procedure Act.

40-391. Xylazine (18 V.S.A. § 4233b)

Note that 18 V.S.A. § 4233b(b) outlines certain "permitted activities related to xylazine." Courts may need to instruct on these exceptions in an appropriate case.

40-411 to 40-471. Depressant, Stimulant, or Narcotic Drugs (18 V.S.A. § 4234)

The statute prohibits possession, selling, or dispensing a depressant, stimulant or narcotic drug, other than heroin or cocaine. There are lengthy statutory definitions for "depressant or stimulant drug" under 18 V.S.A. § 4201(6), and for "narcotic drug" under § 4201(16). The model instructions provide a choice of how to instruct on whether the charged substance fits into the statutory definitions. The State must prove to the jury that the defendant possessed the substance that is charged. In some cases the court will decide whether the charged substance is one that is regulated by the statutes. This determination is best done by stipulation. If there is a real question about the issue, the model instructions allow for reading the statutory definition to the jury, and letting the jury decide whether the charged substance falls within the statute.

"Deceit"

"Deceit" is not defined by statute. In State v. Erwin, 2011 VT 41, ¶ 19, 189 Vt. 502, the Supreme Court approved of the definition of deceit ("intentionally giving a false impression") used in the model instructions.

40-801. Permissive Inference of Drug Possession (presence in automobile)

In drug possession cases, "[t]he presence of a regulated drug in an automobile . . . is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found . . . ." 18 V.S.A. § 4221(b). While the statute uses the term "presumption," this is better described as a "permissive inference." *See* State v. Goyette, 156 Vt. 591, 600 (1991) (citing V.R.E. 303; State v. McBurney, 145 Vt. 201, 205 (1984)). "A permissive inference . . . allows rather than requires the trier of fact to find the inferred fact and places no burden on the defendant; this is not unconstitutional." McBurney, 145 Vt. at 205.

The model instruction CR40-801 largely derives from the trial court's instruction as quoted in Goyette, 156 Vt. at 600–04, and also includes language from State v. Scales, 2019 VT 7, ¶¶ 11–13. Note that the statute provides three exceptions for which the inference does not apply. 18 V.S.A. § 4221(b)(1)–(3). It might not be necessary to instruct on all three exceptions in every case.

40-901. Selling or Dispensing a Regulated Drug (death resulting)

As part of the mental element, the State must prove that the defendant knew that what he sold contained the specific regulated drug at the time he sold it. *See* State v. Rillo, 2020 VT 82, ¶ 12, 213 Vt. 193 ("The 'knowing' element of the alleged crime required proof that defendant knew the drug contained fentanyl at the time he committed the crime.") (emphasis in original).

Note that, in 2024, the legislature added the following language to 18 V.S.A. § 4250(b): "The fact that a dispensed or sold substance contains more than one regulated drug shall not be a

defense under this section if the proximate cause of death is the use of the dispensed or sold substance containing more than one regulated drug." The model instruction includes that language.

The specific statutory drug definitions applicable here may present confusion. Note that cocaine and heroin as specifically defined in 18 V.S.A. §§ 4201(35) and (36), respectively, appear to be different than what is contemplated by the definition of "regulated drug" in § 4201(29). The "regulated drug" definition does not define cocaine or heroin directly, but instead includes "narcotic drug[s]," which has its own definition. *See* 18 V.S.A. § 4201(16). It may be helpful to consult the applicable Department of Health rules adopted pursuant to § 4202 and referenced throughout § 4201.

Chapter 50: Illegal Taking of Game

50-023. Taking. 10 V.S.A. § 4001(23)

The statutory definition of "taking" lists various lesser acts prohibited by the statutes. Thus a person may be charged with shooting at a wild animal whether or not the animal is killed. A person may also be charged with "disturbing," "harrying," "worrying," etc.

50-256. Shooting at Wild Animal From Within 10 ft. of a Public Highway - 10 V.S.A. § 4705(c)

This instruction derives from Judge Hudson's instructions in State v. David Borry, No. 2-1-02 Wrfw (6/26/02). Shooting at a wild animal falls within the definition of taking or attempting to take a wild animal, under the broad language of 10 V.S.A. § 4001(23).

Chapter 60: All Other Crimes

60-111. Abuse of a Vulnerable Adult. 33 V.S.A. § 6913(a)

The legislature amended this section generally in 2005. Whereas the section once defined certain crimes, it now provides for administrative penalties. Abuse of a vulnerable adult is now proscribed as a crime under 13 V.S.A. § 1376(a). See CR28-911.

60-206. Enabling Consumption of Alcohol by a Minor. 7 V.S.A. § 658(a)(2)

In State v. Richland, 2015 VT 126, ¶¶ 5–21, the Supreme Court held that, for the offense of enabling the consumption of alcohol by a minor, the term "knowingly" modifies the age element of 7 V.S.A. § 658(a)(2), and therefore the State must prove that the defendant knew the minor was under age 21. Thus, while furnishing or selling alcohol to a minor is a strict liability

offense, *see* State v. Kerr, 143 Vt. 597, 605 (1983); 7 V.S.A. § 658(a)(1); CR60-201, the crime of enabling is not.