

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS  
FOR CRIMINAL CASES  
PROPOSAL 2017-037**

The Uniform Jury Instructions for Criminal Cases Committee has recommended amendments to UJI 14-1633 NMRA for the Supreme Court's consideration.

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

Joey D. Moya, Clerk  
New Mexico Supreme Court  
P.O. Box 848  
Santa Fe, New Mexico 87504-0848  
[nmsupremecourtclerk@nmcourts.gov](mailto:nmsupremecourtclerk@nmcourts.gov)  
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 5, 2017, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

---

**14-1633. Possession of burglary tools; essential elements.**

For you to find the defendant guilty of possession of burglary tools [as charged in Count \_\_\_\_\_]<sup>1</sup>, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant had in his possession<sup>2</sup> \_\_\_\_\_ (*name of tools or devices*) [~~which are designed for or commonly used in the commission of a burglary~~];

2. \_\_\_\_\_ (*tools or devices*) [could be used to facilitate the commission of a burglary]<sup>3</sup> [or] [[is][are] designed for or commonly used in the commission of a burglary];

[2] 3. The defendant intended that [~~these~~] the \_\_\_\_\_ (*tools or devices*) be used for the purpose of committing a burglary;

[3] 4. This happened in New Mexico on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

USE NOTE

1. Insert the count number if more than one count is charged.  
2. See UJI 14-130 for definition of "possession," if the question of possession is in issue.

3. Use applicable alternative or alternatives.

4. The jury should be instructed on the elements of burglary following this instruction.

See UJI 14-1630 NMRA.

[As amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Committee commentary.** — See NMSA 1978, § 30-16-5 [NMSA 1978]. No New Mexico appellate decision defines burglary tools. See generally Annot., 33 A.L.R.3d 798 (1970).

Possession of burglary tools is a separate offense from the crime of burglary. A defendant does not need to be convicted of the crime of burglary in order to be held liable for possession of burglary tools. *State v. Barragan*, 2001-NMCA-086, 131 N.M. 281, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110

An individual can be “exposed to criminal sanctions if one: (1) possesses an instrumentality or device, (2) the instrumentality or device is designed or commonly used to commit burglary, and (3) the instrumentality or device is possessed under circumstances evincing an intent to use the instrumentality or device in committing burglary.” *State v. Najera*, 1976-NMCA-088, 89 N.M. 522, 554 P.2d 983. The statute is therefore not void for vagueness. *Id.*

Whether an item is commonly used for burglaries is a factual determination for a jury. *State v. Jennings*, 1984-NMCA-051, 102 N.M. 89, 691 P.2d 882 (upholding a conviction of possession of burglary tools for a flashlight and a screwdriver based on a reasonable inference that the tools were actually used as burglary tools and therefore a finding that flashlights and screwdrivers are “commonly used” as burglary tools was unnecessary.)

Constructive possession is sufficient for conviction of possession of burglary tools. *State v. Langdon*, 1942-NMSC-034, 46 N.M. 277, 127 P.2d 875 [~~(1942)~~]; *see also, State v. Garcia*, 1969-NMCA-039, 80 N.M. 247, 453 P.2d 767 (burglary tools do not have to be on the person of the defendant in order to be possessed). [Cf. Annot., 51 A.L.R.3d 727, 810 (1973):]  
[As amended by Supreme Court Order No. \_\_\_\_\_, effective \_\_\_\_\_.]

**Your Name**  
Cherylinn Gunning

**Phone Number**  
5053693600

**Email**  
Cherylinn.gunning@lopdnm.us

**Proposal Number**  
2017-037

**Comment**

The second element adds a definition of a burglary tool as a device that "could be used to facilitate the commission of a burglary". The commentary provides no authority for this definition. This is not the statutory definition, and I have found no case law with this definition. This language is much broader than the language of the statute. The purpose of jury instructions is to clearly explain the law, not amend or modify the law. The proposed language is a modification of the law.

SUPREME COURT OF NEW MEXICO  
FILED

MAR 20 2017

A handwritten signature in black ink, appearing to be the initials 'JG' followed by a horizontal line.

**Your Name**  
**Doug Wilber**

**Phone Number**  
**5052192866**

**Email**  
**douglas.wilber@lopdm.us**

**Proposal Number**  
**2017-37**

**Comment**

comment attached

**SUPREME COURT OF NEW MEXICO**  
**FILED**

**MAR 30 2017**

A handwritten signature in black ink, appearing to be 'DW', with a horizontal line extending to the right.

I am befuddled by the proposed language of this UJI. The statute clearly states that the items(s) must be designed for or commonly used in the commission of burglary. This is *already* in the second element, but the proposed new language adds an entirely *new* theory--that the items *could* be used to *facilitate* the commission of a burglary.

This is an inexplicable and enormous expansion of the scope of this crime and bears no relation to the statute. Literally anything could be contorted to be conceivably used to facilitate the commission of a burglary: a possible getaway car, the car keys, the shoes used to walk to the potential burglary site.

This change would explicitly invite juries to speculate, guess, and conjecture. "Use your imagination" is the new prosecution closing argument with this alternative. This proposal almost looks like an attempt to sanction the sort of unwarranted expansion that New Mexico saw in the burglary statute before it was corrected by the *Archuleta* decision. I cannot see how this can be supported by the statute or any case law, which the use notes acknowledge does not exist. This statute is already vast in scope—it does not need a *sub rosa* expansion via jury instruction.

SUPREME COURT OF NEW MEXICO  
FILED

MAR 30 2017

A handwritten signature in black ink, appearing to be the initials 'JPA' followed by a horizontal line.

**Your Name**  
**Jonathan L. Ibarra**

**Phone Number**  
**5053693600**

**Email**  
**jonathanl.ibarra@lopdnm.us**

**Proposal Number**  
**2017-037**

**Comment**

Please accept this as my commentary on Proposal 17-037

I think that splitting up the elements is obviously correct, and I like the added commentary.

I haven't looked at every single case on burglary tools, but it seems to me that Ms. Gunning's comment is correct that it adds a manner of finding that something is a burglary tool without any support in the case law that I was able to find, and it isn't explained in the commentary. Indeed, the commentary would seem to imply that it wasn't appropriate, since the case law cited only has the other option.

Either there needs to be justification for this addition in the commentary, or it needs to be removed.

Thank you for your consideration.

Jonathan L. Ibarra

SUPREME COURT OF NEW MEXICO  
FILED

APR 5 - 2017

A handwritten signature in black ink, appearing to be 'JL Ibarra', with a horizontal line extending to the right.