

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS
FOR CRIMINAL CASES
PROPOSAL 2017-038**

The Uniform Jury Instructions for Criminal Cases Committee has recommended amendments to UJIs 14-2820, -2821, and -2822 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
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.

14-2820. Aiding or abetting; accessory to crime of attempt.¹

The defendant may be found guilty of an attempt even though he himself did not do the acts constituting the attempt, if the state proves to your satisfaction beyond a reasonable doubt [~~that~~] each of the following elements:

1. The defendant intended that another person commit the crime [~~be committed~~];
2. [~~An attempt~~] Another person attempted to commit the crime [~~was committed~~]; and
3. The defendant helped, encouraged or caused the attempt to commit the crime.

[This instruction does not apply to the charge of felony murder.]²

USE NOTE

1. For use if the evidence supports liability of the defendant as an aider or abettor [~~or co-conspirator regardless of whether conspiracy is charged,~~] for any crime of attempt. This instruction should not be used for felony murder. The essential elements of the attempt or attempts must also be given.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury. [As amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See Section 30-1-13 NMSA 1978.

See commentary to UJI 14-2822.

This instruction sets out the theory of liability as an aider or abettor for crimes of attempt to commit a felony. It may be used if the defendant is charged as a principal, as an aider and abettor, or as both.

This instruction does not define “attempt,” and therefore it is necessary that UJI 14-2801, the essential elements of attempt, be given along with this instruction on aiding and abetting. Further, since UJI 14-2801 is incomplete without the essential elements of the felony that was

attempted, those essential elements must also be given to make this instruction complete. Therefore, when this instruction is given, UJI 14-2801 should also be given, and the essential elements of the felony attempted should be given in some form.

14-2821. Aiding or abetting; accessory to felony murder.¹

The defendant _____ (*name of defendant*) may be found guilty of felony murder [as charged in Count _____]², even though the defendant did not commit the murder if the state proves to your satisfaction beyond a reasonable doubt ~~[that]~~ each of the following elements:

1. The defendant _____ (*name of defendant*) intended that another person commit the felony of _____ (*name of felony*);

[+] 2. ~~[The]~~ Another person committed [or] [attempted]³ the felony of _____ [~~was committed~~ [or] [attempted]³] [under circumstances or in a manner dangerous to human life]³;

[2] 3. The defendant _____ (*name of defendant*) helped, encouraged or caused the felony of _____⁴ (*name of felony*) to be committed [or attempted];

[3. ~~The defendant _____ (*name of defendant*) intended that the _____ (*name of felony*) be committed;~~]

4. During the [commission] [attempted commission] of the felony _____ (*name of deceased*) was killed;

5. The defendant _____ (*name of defendant*) helped, encouraged or caused⁵ the killing to be committed;

6. The defendant _____ (*name of defendant*) intended the killing to occur or knew that [he] [she] was helping to create a strong probability of death or great bodily harm; and

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

USE NOTE

1. For use if the evidence supports liability as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for felony murder.

2. Insert the count number to which this instruction is applicable if more than one count is submitted to the jury on any theory.

3. Use applicable alternatives.

4. The essential elements of this felony or these felonies must also be given unless they are otherwise covered by the instructions.

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

[As amended, effective March 15, 1995; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — See Sections 30-1-13 and 30-2-1A(2) NMSA 1978.

This instruction sets out the theory of liability as an aider or abettor for a felony murder. A separate instruction was appropriate because the requisite intent in felony murder is different from that in other crimes. See committee commentary to UJI 14-202 (felony murder).

See also the committee commentary to UJI 14-2822.

This instruction is considerably different from UJI 14-2822, because under that instruction the defendant must have intended the crime that was committed, and in this instruction on felony

murder, the defendant need only intend that the underlying felony be committed. *State v. Smelcer*, 30 N.M. 122, 125, 228 P. 183 (1924). *See also* Perkins, Criminal Law 37-44 (2d ed. 1969). In order to make that distinction, the committee merged into this instruction the essential elements of felony murder from UJI 14-202.

14-2822. Aiding or abetting; accessory to crime other than attempt and felony murder.

The defendant may be found guilty of a crime even though he himself did not do the acts constituting the crime, if the state proves to your satisfaction beyond a reasonable doubt ~~[that]~~ each of the following elements:

1. The defendant intended that another person commit the crime ~~[be committed];~~
2. ~~[The]~~ Another person committed the crime ~~[was committed];~~
3. The defendant helped, encouraged or caused the crime to be committed.

[This instruction does not apply to the charge of felony murder.]²

USE NOTE

1. For use if the evidence supports liability of the defendant as an aider or abettor or co-conspirator regardless of whether conspiracy is charged, for any crime except attempt and felony murder. This instruction should not be used for attempt or felony murder. The essential elements of the crime or crimes must also be given.

2. Use the bracketed sentence if a charge of felony murder is also submitted to the jury. [As amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — *See* Section 30-1-13 NMSA 1978.

This instruction sets out the theory of liability as an aider and abettor for crimes other than attempt or felony murder. It may be used if the defendant is charged as a principal, as an aider or abettor or as both.

One who aids or abets the commission of a crime is guilty as a principal. It is not necessary that there be a charge of aiding or abetting. The distinction between principal and accessory has been abolished. *State v. Nance*, 1966-NMSC-207, 77 N.M. 39, 419 P.2d 242 ~~[(+1966)]~~, *cert. denied*, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967).

~~[The aider and abettor must share the criminal intent required for the conviction of the principal.]~~ “[A]n accessory must share the criminal intent of the principal.” *See State v. Jim*, 2014-NMCA-089, ¶ 10, 332 P.3d 870 (quoting *State v. Carrasco*, 1997-NMSC-047, ¶ 7, 124 N.M. 64, 946 P.2d 1075); *see also State v. Ochoa*, 1937-NMSC-051, 41 N.M. 589, 72 P.2d 609 ~~[(+1937)]~~. While a shared criminal intent for accomplice liability may be proved by circumstances “as broad and varied as are the means of communicating thought from one individual to another, ... [i]n mere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient.” *State v. Johnson*, 2004-NMSC-029, ¶ 34, 136 N.M. 348, 98 P.3d 998 (quoting *Ochoa*, 1937-NMSC-051, ¶ 31).

~~[However, the]~~ The element of intent must be evaluated independently for each party charged with participation in criminal conduct. The liability of the aider and abettor for the crime depends upon his own acts and intent, and not upon the intent of the other, entertained without knowledge of the aider and abettor. *State v. Wilson*, 1935-NMSC-044, ¶ 11, 39 N.M. 284, 46 P.2d 57 ~~[(+1935)]~~; *accord State v. Gaitan*, 2002-NMSC-007, ¶ 19, 131 N.M. 758, 42 P.3d 1207 (procuring a beating that inadvertently results in death satisfies accessory intent that a crime be committed, but “amount[s] to the lesser included offense of accessory to involuntary manslaughter.”) (citing *State v. Holden*, 1973-NMCA-092, ¶¶ 11-14, 85 N.M. 397, 512 P.2d 970 (upholding conviction for accessory to involuntary manslaughter for procuring a misdemeanor battery by a third party who

instead shot and killed the victim and was convicted of voluntary manslaughter)). Where “the intent required for conviction as an accessory is the same level of intent contained in the element instruction for the underlying crime. . . . ‘we presume that the jury looked to the element instruction for each crime in order to determine the intent required for the underlying crime.’” *Jim*, 2014-NMCA-089, ¶ 10 (quoting *Carrasco*, 1997-NMSC-047, ¶¶ 45-56).

In all cases the aider and abettor must share the intent of the principal, but the essential element of intent is stated differently in the three types of cases: 1) felony murder; 2) attempts; and 3) completed offenses other than felony murder. In felony murder, the intent of the aider and abettor is that the felony be committed, not that the crime (felony murder) be committed. In attempts, the intent of the aider and abettor is that the crime that was attempted be committed, rather than that the crime charged (attempt) be committed. By reason of these different intent requirements, and the difficulty of setting them all out in the alternative in one instruction, the committee prepared three different instructions. This instruction covers the completed crimes except for felony murder; UJI 14-2820 covers the attempts; and UJI 14-2821 covers felony murder.

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