

**PROPOSED INSTRUCTIONS APPROVED BY THE CRJI COMMITTEE  
ON DECEMBER 16, 2011**

**Instruction 23.10 – Fraudulent Schemes and Artifices**

~~The crime of fraudulent schemes and artifices requires proof that the defendant:~~

~~knowingly participated in a scheme or artifice to defraud; *and*  
obtained any benefit by means of false or fraudulent pretenses,  
representations, promises or material omissions.~~

**The crime of fraudulent schemes and artifices requires proof that the defendant knowingly:**

- 1. used false or fraudulent pretenses, representations, promises or material omissions; *and***
- 2. acted pursuant to a scheme or artifice to defraud; *and***
- 3. as a result, obtained any benefit.**

**“Scheme or artifice to defraud” [means a plan to mislead another person for the purpose of gaining some benefit or for the purpose of inducing any person to part with property or to change position and] [means to form a plan, device or trick to perpetrate a fraud upon another] [means a scheme or artifice to deprive a person of the intangible right of honest services].**

**The State must prove that the scheme or artifice to defraud was intended to defraud, meaning it was intended to mislead another person for the purpose of gaining some benefit.**

Reliance on the part of any person is not required to prove this offense.

~~[“Scheme or artifice to defraud” includes a scheme or artifice to deprive a person of the intangible right of honest services.]~~

“Benefit” means anything of value or advantage, present or prospective.

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**SOURCE:** A.R.S. §§ 13-2310 (statutory language as of January 1, 1994); 13-105 (statutory language as of ~~September 21, 2006~~ January 1, 2009).

**USE NOTE:** Use the bracketed as appropriate to the facts of the case.

The court shall instruct on the culpable mental state.

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.056(b)).

If the offense involved a benefit of \$100,000.00 or more, the defendant is not eligible for suspension of sentence, probation, pardon or release from prison except pursuant to A.R.S. § 31-233(A) or (B), until the sentence has been served, the defendant is eligible for release pursuant to A.R.S. § 41-1604.07 or the sentence is commuted. A.R.S. § 13-2310(C). Whether the jury must decide the value of the benefit or whether the judge may make the finding is a decision for the trial judge.

**COMMENT:** “[A] ‘scheme’ is a ‘plan,’ while an ‘artifice’ is an ‘evil or artful strategy.’ Thus, a ‘scheme or artifice’ is some ‘plan, device, or trick’ to perpetrate a fraud.” *Ness v. Western Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) (citing *State v. Haas*, 138 Ariz. 413, 675 P.2d 673 (1983)).

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## NON-CRIMINAL 28.661

### LEAVING THE SCENE OF AN INJURY OR FATAL ACCIDENT

The crime of leaving the scene of an injury or fatal accident requires proof that the defendant:

1. Was driving a vehicle involved in an accident resulting in injury to or death of any person; *and*
2. [Failed to **immediately** stop **the vehicle** at the scene **of the accident**, or as close **to the accident scene** as possible and immediately return **to the accident scene**.]

[Failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in injury or death.]

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**SOURCE:** A.R.S. §§ 28-661 & -663 (statutory language as of October 1, **1997** **2011**).

**USE NOTE:** Definitions of “physical injury” and “serious physical injury” should be given from A.R.S. § 13-105, if at issue.

This instruction should be given with Instruction 28.663, Driver’s Duty to Give Information and Assistance.

This instruction shall also be followed by the instruction concerning knowledge of injury, if that is at issue – Instruction 28.6611. *See State v. Blevins*, 128 Ariz. 64, 68, 623 P.2d 853, 857 (App. 1981) (holding that failure to instruct the jury on the issue of defendant’s knowledge of the personal injury was fundamental, reversible error when defendant’s personal knowledge was at issue).

**COMMENT:** The term “accident” is broadly construed to include any vehicular incident resulting in injury or death, whether or not such harm was intended. *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995) (holding that

statute applied when passenger in defendant driver's vehicle jumped from moving car and was struck and killed by another car).

Leaving the scene is one crime, regardless of the number of persons injured. *State v. Powers*, 200 Ariz. 363, 26 P.3d 1134 (2001).

The verdict form for this jury instruction is based on *State v. Milligan*, 87 Ariz. 165, 171, 349 P.2d 180, 184 (1960).

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## NON-CRIMINAL.28.6611

### KNOWLEDGE OF INJURY

The State must prove that the defendant actually knew of the injury to another or that the defendant possessed knowledge that would lead to a reasonable anticipation that such injury had occurred. ~~[Circumstantial evidence may be used to prove such knowledge.]~~

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**SOURCE:** *State v. Porras*, 125 Ariz. 490, 493, 610 P.2d 1051, 1054 (App. 1980).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.661.

Failure to instruct the jury on the issue of defendant's knowledge of the personal injury of the victim is fundamental, reversible error. *State v. Blevins*, 128 Ariz. 64, 68, 623 P.2d 853, 857 (App. 1981).

~~Use the bracketed language if appropriate.~~

~~COMMENT: The reference to circumstantial evidence in the text of the previous RAJI was removed, given the standard instruction on direct and circumstantial evidence.~~

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**NON-CRIMINAL 28.6612**

**LEAVING THE SCENE OF AN INJURY OR FATAL ACCIDENT – FORM OF VERDICT**

We, the jury, duly impaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, on the charge of Leaving the Scene of an Injury or Fatal Accident (check only one):

\_\_\_\_\_ Not Guilty

\_\_\_\_\_ Guilty

(Complete this portion of the verdict form only if you found the defendant “guilty” of Leaving the Scene of an Injury or Fatal Accident: **and that the defendant failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in injury or death.**)

**We, the jury duly impaneled and sworn in the above-entitled action do find beyond a reasonable doubt that the defendant involved in the accident resulting in an injury to a person (check each that applies):**

[ \_\_\_ Failed to give the defendant’s name and address and the registration number of the vehicle the driver was driving to a person injured in the accident.]

[ \_\_\_ On request, failed to exhibit the defendant’s driver license to a person injured in the accident.]

[ \_\_\_ Failed to render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.]

We, the jury duly impaneled and sworn in the above-entitled action do find beyond a reasonable doubt that (check only one):

\_\_\_\_\_The defendant was driving a vehicle involved in an accident resulting in injury to any person, other than death or serious physical injury.

\_\_\_\_\_The defendant was driving a vehicle involved in an accident resulting in the death, or serious physical injury, of any person.

(Complete this portion of the verdict form only if you decided that the defendant was driving a vehicle involved in an accident resulting in the death or serious physical injury of any person.)

We, the jury duly impaneled and sworn in the above-entitled action do find beyond a reasonable doubt on the allegation that the defendant caused the accident (check only one):

\_\_\_\_\_Proved the defendant caused the accident.

\_\_\_\_\_Not proved the defendant cause the accident.

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**SOURCE:** A.R.S. § 28-661(B) & (C) (statutory language as of 2002 2011).

**USE NOTE:**

Use bracketed language as appropriate

The verdict form is based on *State v. Milligan*, 87 Ariz. 165, 171, 349 P.2d 180, 184 (1960).

“Physical injury” is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0529).

“Serious physical injury” is defined in A.R.S. §13-105 (Statutory Definitional Instruction 1.0534).

**COMMENT:** The findings contained in the interrogatories determine the class of felony.

“A driver who is involved in an accident resulting in death or serious physical injury as defined in ~~§ section~~ 13-105 and who fails to stop or to comply with the requirements of ~~§ section~~ 28-663 is guilty of a class ~~4 3~~ felony, except that if a driver caused the accident the driver is guilty of a class ~~3 2~~ felony.” A.R.S. § 28-661(B).

“A driver who is involved in an accident resulting in an injury other than death or serious physical injury as defined in ~~§ section~~ 13-105 and who fails to stop or to comply with the requirements of ~~§ section~~ 28-663 is guilty of a class ~~6 5~~ felony.” A.R.S. § 28-661(C).

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## NON-CRIMINAL 28.662

### LEAVING THE SCENE OF AN ACCIDENT

The crime of leaving the scene of an accident resulting only in damage to a vehicle that is driven or attended by a person requires proof that the defendant:

1. Was driving a vehicle involved in an accident resulting in damage to a vehicle that is driven or attended by a person; *and*
2. [Failed to **immediately stop the vehicle** at the scene **of the accident**, or as close **to the accident scene** as possible and immediately return **to the accident scene.**]

[Failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident resulting in damage to a vehicle driven or attended by a person.]

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**SOURCE:** A.R.S. §§ 28-662 & -663 (statutory language as of October 1, **1997** **2011**).

**USE NOTE:** This instruction should be given with Statutory Non-Criminal Instruction 28.663 - Driver's Duty to Give Information and Assistance.

**COMMENT:** The term "accident" is broadly construed to include any vehicular incident resulting in injury or death, whether or not such harm was intended. *State v. Rodgers*, 184 Ariz. 378, 380, 909 P.2d 445, 447 (App. 1995) (holding that statute applied when passenger in defendant driver's vehicle jumped from moving car and was struck and killed by another car).

~~Leaving the scene is one crime, regardless of the number of persons injured. *State v. Powers*, 200 Ariz. 363, 26 P.3d 1134 (2001).~~

The verdict form for this jury instruction is based on *State v. Milligan*, 87 Ariz. 165, 171, 349 P.2d 180, 184 (1960).

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**NON-CRIMINAL 28.6622  
LEAVING THE SCENE OF AN ACCIDENT – FORM OF VERDICT**

**We, the jury, duly empaneled and sworn in the above-entitled action upon our oaths, do find the defendant, on the charge of Leaving the Scene of an Accident (check only one):**

**\_\_\_\_\_ Not Guilty**

**\_\_\_\_\_ Guilty**

**(Complete this portion of the verdict form only if you found the defendant “guilty” of Leaving the Scene of an Accident and that the defendant failed to remain at the scene of the accident until the defendant fulfilled the duties required by law of a driver involved in an accident.)**

**We, the jury, duly empaneled and sworn in the above-entitled action do find beyond a reasonable doubt that the defendant involved in the accident (check each that applies):**

**[ \_\_\_\_\_ Failed to give the defendant’s name and address and the registration number of the vehicle the driver was driving to a person whose vehicle was damaged.]**

**[ \_\_\_\_\_ On request, failed to exhibit the defendant’s driver’s license to a person whose vehicle was damaged.**

\_\_\_\_\_

**COMMENT: This suggested interrogatory to a jury is patterned after a similar interrogatory for a charge of leaving the scene of an injury or fatal accident, but removes the language of A.R.S. § 28-663(A)(3), which generally would not be applicable. This suggested interrogatory is based on *State v. Milligan*, 87 Ariz. 165, 171, 349 P.2d 180, 184 (1960).**

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## NON-CRIMINAL 28.663

### DRIVER'S DUTY TO GIVE INFORMATION AND ASSISTANCE

The driver of a vehicle involved in an accident resulting in injury to or death of a person or damage to a vehicle that **is** driven or attended by a person shall:

1. Give the driver's name and address and the registration number of the vehicle the driver was driving; *and*
2. On request, exhibit the person's driver license to the person struck or the driver or occupants of, or person attending, a vehicle collided with; *and*
3. Render reasonable assistance to a person injured in the accident, including making arrangements for the carrying of the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if the carrying is requested by the injured person.

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**SOURCE:** A.R.S. § 28-663 (statutory language as of October 1, ~~1997~~ 2011).

**USE NOTE:** This instruction must be given in conjunction with Instructions 28.661 and/or 28.662.

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## CHAPTER 4

### Prefatory Use Note:

*This user note applies to all of the justification instructions.*

Justification defenses under Chapter 4 of A.R.S. Title 13 are ~~not longer affirmative defenses for crimes occurring on or after April 24, 2006, pursuant to legislative enactment. However for crimes occurring before this date, they remain affirmative defenses. See State v. Montes, 572 Ariz. Adv. Rep. 4, \_\_\_ P.3d \_\_\_ 226 Ariz. 194, 245 P.3d 879 (2011). In such cases, the court shall delete the last paragraph of the justification instruction and instruct on affirmative defense so as to inform the jury on the burden of proof. Accordingly, for crimes occurring before April 24, 2006, the court should use the affirmative defense instruction, Statutory Criminal 2.025:~~

~~The defendant has raised the affirmative defense of [\_\_\_\_\_] with respect to the charged offense[s] of [\_\_\_\_\_]. The burden of proving each element of the offense[s] beyond a reasonable doubt always remains on the State. However, the burden of proving the affirmative defense of [\_\_\_\_\_] is on the defendant. The defendant must prove the affirmative defense of [\_\_\_\_\_] by a preponderance of the evidence. If you find that the defendant has proven the affirmative defense of [\_\_\_\_\_] by a preponderance of the evidence you must find the defendant not guilty of the offense[s] of [\_\_\_\_\_].~~

~~An affirmative defense must be shown by a preponderance of the evidence. Preponderance of the evidence is defined in Standard Criminal Instruction 5b(2).~~

~~Justification defenses contained in Chapter 4 of Title 13 do not apply to criminal prosecutions for criminal offenses under Title 28. See State v. Fell, 203 Ariz. 186, 188-89, 52 P.3d 218, 220-21, ¶¶8, 9 (App. 2002) (holding that Title 13 justification defenses do not apply to Title 28 violations).~~

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#### 4.06 – Justification for Defense of a Third Person

A defendant is justified in using or threatening physical force in defense of a third person if the following two conditions existed:

1. A reasonable person in the situation would have believed that physical force was **immediately** necessary to protect against another's [use] [attempted use] **[apparent attempted use]** [threatened use] of unlawful physical force against a third person; *and*
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the situation.

A defendant may use deadly physical force in defense of a third person only to protect against another's [use] [attempted use] **[apparent attempted use]** [threatened use] of deadly physical force.

Defense of a third person justifies the use or threat of physical force or deadly physical force only while the danger continues, and it ends when the danger ends. The force used may not be greater than reasonably necessary to defend against the danger.

Actual danger is not necessary to justify the use of physical force or deadly physical force in defense of a third person.

The use of physical force or deadly physical force is justified if a reasonable person in the situation would have reasonably believed that immediate physical danger appeared to be present.

You must decide whether a reasonable person in a similar situation would believe that:

1. Physical force was **immediately** necessary to protect against another's [use] [attempted use] **[apparent attempted use]** [threatened use] of unlawful physical force against a third person;
2. Deadly physical force was **immediately** necessary to protect against another's [use] [attempted use] **[apparent attempted use]** [threatened use] of unlawful physical force against a third person.

You must measure the defendant's belief against what a reasonable person in the situation would have believed.

The State has the burden of proving beyond a reasonable doubt that the defendant did not act with such justification. If the State fails to carry this burden, then you must find the defendant not guilty of the charge. *[The user is directed to the Prefatory Use Note regarding the applicability of this paragraph.]*

**SOURCE:** A.R.S. §§ 13-404 ~~and -405~~ (statutory language as of October 1, 1978); ~~and -405 (statutory language as of October 1, 1978), A.R.S. §§ 13-405 (statutory language as of July 29, 2010); A.R.S. § 13-406 (statutory language as of July 20, 2011)~~ and 13-205 (statutory language as of April 24, 2006); *State v. Grannis*, 183 Ariz. 52, 60-61, 900 P.2d 1, 9-10 (1995); *State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989); *State v. Noriega*, 142 Ariz. 474, 482, 690 P.2d 775, 783 (1984), *overruled on other grounds*, *State v. Burge*, 167 Ariz. 25, 28 n.7, 804 P.2d 754, 757 n.7 (1990) (overruling only on *Noriega's* holding that a grand jury's allegation of dangerousness in an indictment is insufficient to invoke § 13-604's sentence enhancement allegations).

**USE NOTE:** Use the language in brackets as appropriate to the facts.

If there have been past acts of domestic violence as defined in A.R.S. § 13-3601, subsection A, against the defendant by the victim, the state of mind of a reasonable person shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence. A.R.S. § 13-415.

**When defendant's residential structure or occupied vehicle is involved, the presumption set forth in A.R.S. § 13-419 may apply.**

"Physical Force" and "Deadly Physical Force" are defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0528 and 1.059).

**COMMENT:** This instruction modifies the 1989 RAJI version of Statutory Criminal Instruction 4.06 in light of modifications to Statutory Criminal Instruction 4.04. An instruction that was almost identical to former 4.04 was held reversible error in *Grannis*: "A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force." 183 Ariz. at 61, 900 P.2d at 10. Furthermore, "[u]nder A.R.S. §§ 13-404 and -405, *apparent* deadly force can be met with deadly force, so long as defendant's belief as to apparent deadly force is a reasonable one. An instruction on self-defense is required when a defendant acts under a reasonable belief; actual danger is not required." (Emphasis in the original).

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### 11.03A1 – Manslaughter (Reckless)

The crime of manslaughter requires proof that the defendant:

1. caused the death of another person; *and*
2. was aware of and showed a conscious disregard of a substantial and unjustifiable risk of death.

The risk must be such that disregarding it was a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

[It is no defense that the defendant was unaware of the risk solely by reason of voluntary intoxication as a result of the ingestion of alcohol or drugs.]

[Second degree murder and manslaughter may both result from recklessness. The difference is that the culpable recklessness involved in manslaughter is less than the culpable recklessness involved in second degree murder.]

[If you determine that the defendant is guilty of either second degree murder or manslaughter but you have a reasonable doubt as to which it was, you must find the defendant guilty of manslaughter.]

**SOURCE:** A.R.S. § 13-1103(A)(1) (statutory language as of August 12, 2005).

**USE NOTE:** Include the first bracketed paragraph only if there is evidence that the defendant was intoxicated.

Use both the second and third bracketed paragraphs if this instruction is given as a lesser-included offense instruction.

**COMMENT:** The statute provides that it “applies to an unborn child in the womb at any stage of its development” and then gives three exceptions to its application. *See* A.R.S. § 13-1103(B).

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Caption approved by the Committee on December 16, 2011  
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## 11.04 – Second Degree Murder

The crime of second-degree murder requires proof of one of the following:

1. The defendant intentionally caused the death of [another person] [an unborn child];

*or*

2. The defendant caused the death of [another person] [an unborn child] by conduct which the defendant knew would cause death or serious physical injury;

*or*

3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death of [another person] [an unborn child]. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done; ~~or~~.

[The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.]

[If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.].

[If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant not guilty of second-degree murder.]

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**SOURCE:** A.R.S. § 13-1104 (statutory language as of ~~August 12, 2005~~ January 1, 2009).

**USE NOTE:** The court shall instruct on the culpable mental state.

Use Statutory Definition Instruction 1.056(b) defining “knowingly.”

Use Statutory Definition Instructions 1.056(a)(1) and 1.056(a)(2) defining “intent” and “intent – inference.”

Use Statutory Definition Instruction 1.056(c) defining “reckless.”

Use the **first and/or second** bracketed language if this instruction is given as a lesser-included offense instruction of first-degree murder.

Use the **third bracketed language only when there is a claim that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.**

**COMMENT:** The statute provides that it “applies to an unborn child in the womb at any stage of its development” and gives three exceptions to its application. *See* A.R.S. § 13-1104(B).

If the victim was under fifteen years of age or an unborn child, the crime is a “dangerous crime against children” and sentencing is pursuant to A.R.S. § 13-604.01. *See* A.R.S. § 13-1104(C). If the victim was under fifteen years of age or an unborn child, a finding by the jury regarding that fact should be made as part of its verdict.

There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542, 81 P.3d 330, 333 (App. 2003).

~~The instruction is consistent with *State v. Eddington*, 226 Ariz. 72, 244 P.3d 597 (App. 2011). In *State v. Eddington*, 226 Ariz. 72, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010), the Court of Appeals held that fundamental, prejudicial error did not result from instructing the jury that it may only consider the offense of manslaughter upon a sudden quarrel or heat of passion if it first acquits or cannot reach a verdict on second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). The Court recognized, however, that the Arizona Supreme Court had already decided in *Peak v. Acuña*, 203 Ariz. 83, ¶¶ 5-6, 50 P.3d 833, 834-35 (2002), that “heat-of-passion manslaughter” is not a true lesser-~~

included offense of second-degree murder, because manslaughter includes all of the elements of second-degree murder and has the additional “circumstance” of being caused by a sudden quarrel or heat of passion. *Eddington* recognized that juries are presumed to follow the instructions, and a jury that follows the *LeBlanc*-modeled instruction for homicide lesser offenses could never reach the question of whether there was a sudden quarrel or heat of passion upon adequate provocation because the jury would have already found all of the elements of second-degree murder proven and found the defendant guilty. A majority of the committee recognized that the previous *LeBlanc*-modeled instruction rendered manslaughter under A.R.S. § 13-1103(A)(2) a nullity and modified the instruction to ensure that the jury would consider whether the circumstance justifying the lesser offense was present.

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### **11.04A – Second-Degree Murder (Mother and Unborn Child)**

The crime of second-degree murder requires proof that the defendant intentionally, knowingly or under circumstances manifesting extreme indifference to human life recklessly engaged in conduct that created a grave risk of death and caused the death of another person and thereby caused the death of an unborn child.

[The difference between first-degree murder and second-degree murder is that second-degree murder does not require premeditation by the defendant.]

[If you determine that the defendant is guilty of either first-degree murder or second-degree murder and you have a reasonable doubt as to which it was, you must find the defendant guilty of second-degree murder.]

[If you find the elements of second-degree murder proven beyond a reasonable doubt, you must consider whether the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim. If you unanimously find that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim, then you must find the defendant not guilty of second-degree murder.]

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**SOURCE:** A.R.S. § 13-1104 (statutory language as of January 1, 2009).

**USE NOTE:** The court shall instruct on the culpable mental state.

Use Statutory Definition Instruction 1.056(b) defining “knowingly.”

Use Statutory Definition Instructions 1.056(a)(1) and 1.056(a)(2) defining “intent” and “intent – inference.”

Use Statutory Definition Instruction 1.056(c) defining “reckless.”

This instruction should only be given when the defendant’s culpable mental state was directed at the mother of the unborn child, and the defendant’s conduct resulted in the death of the mother and the unborn child.

Use the first and/or second bracketed language if this instruction is given as a lesser-included offense instruction of first-degree murder.

Use the third bracketed language only when there is a claim that the homicide was committed upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim.

**COMMENT:** The statute provides that it “applies to an unborn child in the womb at any stage of its development” and gives three exceptions to its application. *See* A.R.S. § 13-1104(B).

If the victim was under fifteen years of age or an unborn child, the crime is a “dangerous crime against children” and sentencing is pursuant to A.R.S. § 13-604.01. *See* A.R.S. § 13-1104(C). If the victim was under fifteen years of age or an unborn child, a finding by the jury regarding that fact should be made as part of its verdict.

There is no crime of attempted second-degree murder if the defendant only knows that his or her action would cause serious physical injury rather than death. *See State v. Ontiveros*, 206 Ariz. 539, 542, 81 P.3d 330, 333 (App. 2003).

In *State v. Eddington*, 226 Ariz. 72, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010), the Court of Appeals held that fundamental, prejudicial error did not result from instructing the jury that it may only consider the offense of manslaughter upon a sudden quarrel or heat of passion if it first acquits or cannot reach a verdict on second-degree murder. *See State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). The Court recognized, however, that the Arizona Supreme Court had already decided in *Peak v. Acuña*, 203 Ariz. 83, ¶¶ 5-6, 50 P.3d 833, 834-35 (2002), that “heat-of-passion manslaughter” is not a true lesser-included offense of second-degree murder, because manslaughter includes all of the elements of second-degree murder and has the additional “circumstance” of being caused by a sudden quarrel or heat of passion. *Eddington* recognized that juries are presumed to follow the instructions, and a jury that follows the *LeBlanc*-modeled instruction for homicide lesser offenses could never reach the question of whether there was a sudden quarrel or heat of passion upon adequate provocation because the jury would have already found all of the elements of second-degree murder proven and found the defendant guilty. A majority of the committee recognized that the *LeBlanc*-modeled instruction rendered manslaughter under A.R.S. § 13-1103(A)(2)

a nullity and modified the instruction to ensure that the jury would consider whether the circumstance justifying the lesser offense was present.

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## Standard Criminal 39 - Identification

The State must prove beyond a reasonable doubt that the in-court identification of the defendant at this trial is reliable. In determining whether ~~this~~ **an** in-court identification is reliable, you may consider such things as:

1. the witness' opportunity to view at the time of the crime, **including such things as:**
  - (a) the length of time the observation occurred;
  - (b) the vantage point from which the observation occurred;
  - (c) the closeness or distance between the defendant/suspect and the witness;
  - (d) the lighting;
  - (e) whether a weapon was displayed and may have caused the witness to focus on that weapon rather than defendant/suspect;
  - (f) whether the witness and defendant/suspect of differing or the same races or ethnicities;
  - (g) the reason, if any, for the witness to notice the defendant/suspect;
  - (h) any other relevant factor.
2. the witness' degree of attention at the time of the crime;
3. the accuracy of any descriptions the witness made prior to the pretrial identification;
4. **The suggestiveness or reliability of any pretrial identification procedures, including such things as:**
  - (a) the police informed the witness that a suspect may or may not be present within any lineup or photographs;
  - (b) the police informed the witness that physical descriptions may actually change over periods of time;
  - (c) the police did not communicate to the witness that a positive or negative, correct or incorrect identification had been made;
  - (d) the fairness of the lineup subjects or photographs (their relative similarity and uniformity);

(e) any other statement, circumstance or advisement that may affect a witness' memory of the defendant/suspect's identification.

~~4.~~ 5. the witness' level of certainty at the time of the pretrial identification;÷.

~~5.~~ 6. the time between the crime and the pretrial identification;÷.

~~6.~~ 7. any other factor that affects the reliability of the identification;÷.

If you determine that the in-court identification of the defendant at this trial is not reliable, then you must not consider that identification.

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**Source:** RAJI (Criminal) No. 39 (1996); *State v. Dessureault*, 104 Ariz. 380, 381-85, 453 P.2d 951, 952-56 (1969), *cert. denied*, 397 U.S. 965 (1970). *See also* *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972).

**Use Note:** This instruction must be given, upon request, when the Court has concluded that pretrial identification procedures were unduly suggestive, but that the proposed in-court identification has been shown by clear and convincing evidence to be reliable and derived from an independent source. *State v. Dessureault*, 104 Ariz. at 384, 453 P.2d at 955.

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**Standard Criminal 51 - Judicial Notice of Adjudicative Facts**

During the course of the trial, you were informed that the Court had taken judicial notice that [describe adjudicative facts]. You may or may not accept this judicial notice as conclusive.

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**SOURCE:** Rule 201(f), Arizona Rules of Evidence (effective as of January 1, 2012).

**USE NOTE:**

This instruction should be given to the jury during the trial after the trial court has taken judicial notice of an adjudicative fact pursuant to Rule 201, and should be given again in the final instructions.

**COMMENT:**

The Arizona Supreme Court adopted a new Rule 201 on September 8, 2010, that is effective on January 1, 2012, as part of R-10-0035, in which subsection (f) specifically requires that this instruction be given in criminal cases when the trial court has taken judicial notice of an adjudicative fact.

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## 25.08 – Resisting Arrest

The crime of resisting arrest requires proof that:

1. A peace officer, acting under official authority, sought to arrest either the defendant or some other person; *and*
2. The defendant knew, or had reason to know, that the person seeking to make the arrest was a peace officer acting under color of such peace officers official authority; *and*
3. The defendant intentionally prevented, or attempted to prevent, the peace officer from making the arrest; *and*
4. The means used by the defendant to prevent the arrest involved either the use or threat to use physical force or any other substantial risk of physical injury to either the peace officer or another.

Whether the attempted arrest was legally justified is irrelevant.

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**Source:** A.R.S. 13-2508 (statutory language as of April 23, 1980).

**Use Note:** The court shall instruct on the culpable mental state.

Intentionally and knowingly are defined in A.R.S. 13-105 (Statutory Definition Instructions 1.056(a)(1) and 1.056(b)).

### **Comment:**

**This instruction was upheld by the Court of Appeals in *State v. Cagle*, \_\_\_ Ariz. \_\_\_, \_\_\_ P.3d \_\_\_, ¶¶11, 13, 2011 WL 5244336 (App. Nov. 3, 2011) (rejecting a defense argument that the statute requires the intent to create a substantial risk of physical injury).**

Case law protects on-duty peace officers dressed in uniform because the uniform identifies the peace officer. It is less clear that this instruction should be used when the evidence involves an off-duty peace officer without a uniform. *See generally State v. Zavala*, 136 Ariz. 389, 666 P.2d 489 (App. 1982); *State v. Davis*, 119 Ariz. 529, 582 P.2d 175 (App. 1978). Generally, this instruction would not be

warranted under a lesser-included offense analysis when the crime of disorderly conduct (A.R.S. 13-2904) is charged. Resisting arrest may be committed without committing disorderly conduct. *State v. Diaz*, 135 Ariz. 496, 662 P.2d 461 (App. 1983).

Lawfulness of the arrest is not an issue. *See State v. Windus*, 207 Ariz. 328, 86 P.3d 384 (App. 2004). However, the use of excessive force by the peace officer may be a defense. *See* A.R.S. 13-404(B)(2); ~~use~~ (Statutory Criminal Instruction 4.04.01).

There may be a need to define arrest. *See* A.R.S. 13-3881 and 13-3888; *State v. Stroud*, 209 Ariz. 410, 103 P.3d 912 (2005).

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