

Lesser-included offenses and necessarily-included offenses, organized by statute numbers of both greater and lesser offenses.....Revised 1/2016

TITLE 13 OFFENSES:

A.R.S. § 13-301 Accomplice Liability:

A lesser-included offense instruction must be given, if requested, if the jury could find that (1) the state failed to prove an element of the greater offense, and (2) the evidence is sufficient to support a conviction on the lesser offense. *State v. Hargrave*, 225 Ariz. 1, 11, ¶ 33 (2010), *citing State v. Wall*, 212 Ariz. 1, 4 ¶ 18 (2006). When the defendant is charged as an accomplice, the court looks to the accomplice's intent to aid the main actor. *Hargrave*, 225 Ariz. at 12, ¶ 35 (in armed robbery prosecution, instruction on lesser-included offenses of simple robbery was not warranted where defendant claimed he and his associate only intended to steal money from fast food restaurant while defendant distracted the employees but defendant's associate entered fast food restaurant brandishing a gun and defendant continued to assist his associate during the robbery), *citing Wall*, 212 Ariz. at 4–5 ¶ 20.

CHAPTER 10, PREPARATORY OFFENSES:

A.R.S. § 13-1001: Attempt

Forms of verdicts shall be submitted to the jury for all offenses necessarily included in the offense charged, an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense. Rule 23.3, Ariz. R. Crim. P.

A.R.S. § 13-110 provides:

A person may be convicted of an attempt to commit a crime, although it appears upon the trial that the crime intended or attempted was perpetrated by the person in pursuance of such an attempt, unless the court, in its discretion, discharges the jury and directs the person to be tried for the crime.

- This statute authorizes the reduction, via plea bargain, of a completed offense to an attempted offense. *State v. Cornish*, 192 Ariz. 533, 537-38, ¶ 18 (App. 1998)(in prosecution for aggravated assault for intentionally causing serious injury, there was no inconsistency in trial court's acceptance of plea to attempted aggravated assault and its finding of dangerousness, and nothing anomalous in defendant's conviction for attempted aggravated assault, dangerous).

The trial court need not always instruct jurors on attempt; such an instruction is only warranted when the evidence supports it. If the evidence shows only the completed offense or nothing at all, the court should not give any attempt instruction. *State v. Morgan*, 204 Ariz. 166, 170, ¶¶ 11-13 (App. 2002). *But see State v. Wall*, 212 Ariz. 1, 6, ¶¶ 29-30 (2006)(evidence in the record can be sufficient to require a lesser-included offense instruction even when the defendant employs an all-or-nothing defense).

Attempted theft is a lesser-included offense of attempted robbery. *State v. Wall*, 212 Ariz. 1, 3-4, ¶ 15 (2006).

Attempt to possess any controlled substance is a lesser-included offense of possession of that substance. *Stubblefield v. Trombino*, 197 Ariz. 382, 383, ¶ 4 (App. 2000).

Attempted aggravated DUI is a cognizable offense. A conviction for attempted aggravated DUI could result from findings by the trier-of-fact that the defendant (1) under the influence of intoxicating liquor or drugs (2) while his license was suspended, cancelled, revoked or refused or his privilege to drive was restricted (3) had taken a step beyond mere preparation and toward actual physical control of a vehicle without achieving actual physical control of the vehicle. *State v. Superior Court In & For County of Navajo*, 190 Ariz. 203, 206 (App. 1997).

Words may be acts sufficient to sustain a conviction for an attempt when viewed in the light of the circumstances in which they were uttered. *State v. Carlisle*, 198 Ariz. 203, 207, (App. 2000). Further, the absence of an actual victim under the age of 15 does not preclude an attempted crime from being a dangerous crime against children; it is well-settled in Arizona that factual impossibility is not a defense to attempt. *Id.* at 207-208, ¶ 17. All that is required to commit an attempted dangerous crime against children is for the perpetrator to believe that the intended victim is a minor under 15 years of age, and then to take any step in a course of conduct planned to culminate in one of the crimes enumerated in the statute. *Id.* at 208, ¶ 18.

Attempted second-degree murder can only be committed if the defendant intended to kill the victim or knew that the conduct would cause death. Accordingly, instructing the jury that it could convict the defendant of attempted second degree murder on a finding that he knew his conduct would cause serious physical injury is error. *State v. Dickinson*, 233 Ariz. 527, 530, ¶ 11 (App. 2013), *citing State v. Ontiveros*, 206 Ariz. 539, 542, ¶ 14 (App.2003)(there is no offense of attempted second-degree murder based on knowing merely that one's conduct will cause serious physical injury). *See also State v. Juarez-Orci*, 236 Ariz. 520, ¶¶ 14-16 (App. 2015)(despite using language from the attempt statute, the words "serious physical injury" in attempted second-degree murder jury instruction was not "mere surplusage"; the facts could have supported a finding of intent to either kill or knowingly cause serious physical injury and thus the instruction was erroneous.)

Like attempted second-degree murder, attempted manslaughter is not a cognizable offense if the person does not intend or know that his conduct will cause death. *State v. Ruiz*, 236 Ariz. 317, 321, ¶¶ 7-9 (App. 2014).

Aggravated assault is not a lesser-included offense of attempted first-degree murder, as attempted first-degree murder does not require either serious physical injury or reasonable apprehension of imminent physical harm, one of which must be proven for aggravated assault. *State v. Fernandez*, 216 Ariz. 545, 554, ¶ 30 (App. 2007).

Defendant charged with attempted armed robbery was entitled to lesser-included instruction for attempted robbery even though he denied participating in crime as charged, where there was evidence which could support claim that robber was not armed. *State v.*

McPhaul, 174 Ariz. 561, 562 (App. 1992), citing *State v. Dugan*, 125 Ariz. 194, 196 (1980).

A.R.S. § 13-1002: Solicitation:

The substantive offense and solicitation to commit it are separate offenses. Solicitation requires a different mental state and different acts if only because the solicitor must "command," "encourage," "request," or "solicit" another person to engage in a felony or misdemeanor. Thus, solicitation to sell narcotic drugs is not a lesser-included offense of sale of narcotic drug because the mental and physical elements of solicitation are not necessary elements of the underlying offense. Attempt differs from solicitation in that attempt retains the same mental element and elements as the underlying offense. Solicitation, however, remains a completely separate crime from the offense solicited. *State v. Tellez*, 165 Ariz. 381, 383- 84 (App. 1989).

Being an accomplice to a crime is not a separately chargeable offense but merely a theory the State may utilize to establish commission of a substantive criminal offense; therefore, the offense of solicitation cannot be a lesser included offense of the crime of being an accomplice to a substantive offense. *State v. Woods*, 168 Ariz. 543, 544 (App. 1991). Further, even where the defendant could have been charged with solicitation, determining which offense should be charged is a matter of prosecutorial discretion. *Id.* at 545.

Solicitation of sexual conduct with a minor, A.R.S. § 13-1405, is not a lesser-included offense of attempted sexual conduct with a minor, because a person can attempt oral sexual contact with a minor without requesting or soliciting the minor to engage in the contact. *State v. Fristoe*, 135 Ariz. 25, 31 (App. 1982).

A.R.S. § 13-1003: Conspiracy:

Conspiracy is a separate and distinct crime from the underlying substantive offense. *State v. Tellez*, 165 Ariz. 381, 383- 84 (App. 1989), citing *State v. Olea*, 139 Ariz. 280, 293 (App. 1983).

Conspiracy to possess stolen property is not a lesser-included offense of possession of stolen property. *State v. Wilson*, 126 Ariz. 348, 352 (App. 1980).

Since the crime of robbery could be completed by the act of an individual without necessarily conspiring with another to commit that crime, conspiracy to commit robbery is not a lesser-included offense of robbery. *State v. Estrada*, 27 Ariz. App. 183, 184 (1976).

"Wharton's Rule" provides that when an agreement between two people to commit an offense can only be committed by the actions of those persons, the agreement merges with the completed act, and a court may not convict the participants of conspiracy. This rule is an exception to the general principle that a conspiracy and the substantive offense are discrete crimes for which separate sanctions may be imposed; it does not rest on principles of double jeopardy but is a judicial presumption, to be applied in the absence of legislative intent to the contrary. *State v. Barragan-Sierra*, 219 Ariz. 276, 284-285 ¶ 24

(App. 2008)(Wharton's Rule did not apply to preclude prosecution for conspiring to smuggle oneself).

A.R.S. § 13-1004: Facilitation:

The only distinction between facilitation and accomplice liability is the requisite mental state; accomplice liability requires intent or acting intentionally, while facilitation requires only knowledge or acting knowingly. Thus, the driver of a drive-by shooting charged with aggravated assault as the shooter's accomplice is not entitled to a jury instruction on facilitation as a lesser-included offense of aggravated assault. Facilitation is not a necessarily-included offense of aggravated assault; further, the charging document did not describe the lesser offense of facilitation of aggravated assault. *State v. Garcia*, 176 Ariz. 231, 233-34 (App. 1993).

Facilitation is not a necessarily-included offense of first-degree murder because it is possible to commit first-degree murder without committing the offense of facilitation; further, the charging document does not describe the lesser offense of facilitation when it merely cites the statutory provisions of accomplice liability. *State v. Scott*, 177 Ariz. 131, 140-141 (1993).

Second-degree murder can be committed without committing facilitation. Thus, even though the defendant, who loaned a loaded shotgun to the codefendant and drove the codefendant to the victim's apartment could have been prosecuted for facilitation, an instruction on facilitation was not required. *State v. Gooch*, 139 Ariz. 365, 366 (1984).

Facilitation is not a necessarily-included offense of unlawful sale of drugs, since the sale can be committed without necessarily committing facilitation; further, a defendant is entitled to an instruction for another offense even though he might have been charged with and convicted of that offense. *State v. Politte*, 136 Ariz. 117, 121 (App. 1982).

Since burglary and theft can be committed without necessarily committing the crime of facilitation, facilitation is not a lesser-included offense of either burglary or theft. The net result is that the facilitation statute gives the prosecutor the option to charge a person as an aider and abettor under that statute or as a principal in the substantive offense. *State v. Harris*, 134 Ariz. 287, 288 (App. 1982).

CHAPTER 11, HOMICIDE

Trial judges are no longer required to instruct on every lesser included offense supported by the evidence in *all* homicide cases, whether or not such an instruction was requested. Rule 23.1(c); *State v. Gipson*, 229 Ariz. 484, 485, ¶ 13 (2012).

In capital cases, the trial court must instruct the jury on all lesser-included offenses reasonably supported by the evidence. *State v. Wood*, 180 Ariz. 53, 65 (1994); *State v. Comer*, 165 Ariz. 413, 422 (1990), *citing Beck v. Alabama*, 447 U.S. 625 (1980); *State v. Amaya-Ruiz*, 166 Ariz. 152, 174 (1990).

But, a defendant may waive any right to a jury instruction on a lesser included offense in a capital case by objecting to the instruction; the trial judge is not bound by to give the instruction under such circumstances. *State v. Gipson*, 229 Ariz. 484, 485, ¶¶ 8-9 (2012). See also *State v. Anderson*, 210 Ariz. 327, 344, ¶¶ 64-65, supplemented, 211 Ariz. 59, ¶¶ 64-65 (2005)(denial of aggravated assault instruction in capital homicide did not violate due process; jury was instructed on second-degree murder and manslaughter, and since jury had option of immediately-lesser included offenses but nonetheless found defendant guilty of first-degree murder, it necessarily rejected all other lesser-included offenses).

A.R.S. § 13-1102: Negligent homicide:

Negligent homicide is a lesser-included offense of manslaughter. *State ex rel Thomas v. Duncan [Regan, RPI]*, 216 Ariz. 260, 265, n. 7 (App. 2007).

Negligent homicide is generally a lesser-included offense of manslaughter, which in turn, is a lesser-included offense of second degree murder. *State v. Korovkin*, 202 Ariz. 493, 495, ¶ 4, (App. 2002); *State v. Hurley*, 197 Ariz. 400, 403, ¶ 14 (App. 2000).

Negligent homicide is generally a lesser-included offense of manslaughter because the only difference between the two offenses is the defendant's mental state at the time of the killing. Manslaughter requires that a person be aware of a substantial and unjustifiable risk that his conduct will cause another's death and consciously disregard the risk; negligent homicide is established where a person fails to perceive the substantial and unjustifiable risk. But when the only reason that a defendant is unaware of a substantial and unjustifiable risk is his voluntary intoxication, and when the evidence showed that his conduct was at best reckless, negligent homicide is not a lesser-included offense of manslaughter. *State v. Nieto*, 186 Ariz. 449, 456 (App. 1996).

A manslaughter defendant was not entitled to an instruction on negligent homicide because there was no evidence he "failed to perceive the risk that if he struck someone with enough force to drive a knife ten inches into his body, death could result." Rather, the evidence showed he was aware of the great danger his knife attack presented to the victim. *State v. Ruelas*, 165 Ariz. 326, 329 (App. 1990), *remanded on other grounds*, 165 Ariz. 298 (1990).

A.R.S. § 13-1103: Manslaughter:

Because a person can commit manslaughter by acts that create a substantial and unjustifiable risk of death, though not necessarily imminent death, felony endangerment is not a lesser-included offense of manslaughter. *State v. Dominguez*, 236 Ariz. 226, 229, ¶ 7 (App. 2014).

When a jury is given a choice between first-degree murder and second-degree murder and convicts on first-degree murder, it has necessarily rejected manslaughter and any purported error in failing to give a manslaughter instruction is harmless. *State v. Boyston*, 231 Ariz. 539, 552, ¶ 66 (2013), citing *State v. Nelson*, 229 Ariz. 180, 186, ¶ 24 (2012).

Under the "elements test," provocation manslaughter is not a lesser-included offense of second-degree murder. Although it is a lesser degree of homicide, provocation manslaughter has the same (not fewer) elements as second-degree murder, with the added mitigating "circumstance" of adequate provocation. Thus, it is possible to commit second-degree murder without committing provocation manslaughter; one who intentionally, knowingly, or with extreme recklessness kills another without premeditation and without provocation commits second-degree murder, but does not simultaneously commit provocation manslaughter. *State v. Lua*, 237 Ariz. 301, 303, ¶ 7 (2015), citing *Peak v. Acuna*, 203 Ariz. 83, 84, ¶ 6 (2002). However, the trial court may instruct the jury regarding attempted provocation manslaughter as a lesser-included offense of attempted second-degree murder so long as the evidence warrants such an instruction; such an instruction affords the jury a less drastic alternative than the choice between convicting and acquitting on a second-degree murder charge. *Lua*, ¶¶ 8-14. Such an instruction does not constructively amend the indictment because provocation manslaughter is not a lesser or necessarily included offense, but merely a less serious offense. *Id.* at ¶ 16. Finally, since provocation manslaughter is not a lesser-included offense of second-degree murder, the trial court need not provide the "reasonable efforts" instruction under *State v. Leblanc*, 186 Ariz. 437, 438 (1996). *Id.*, ¶ 19.

Reckless manslaughter is a necessarily included offense of knowing second-degree murder because recklessly is a lesser-included mental state of knowingly. Accordingly, a charge that a defendant killed another person knowing that his conduct would cause death or serious physical injury necessarily includes an allegation that the defendant acted recklessly by being aware of and consciously disregarding a substantial and unjustifiable risk that his conduct could result in death. *State v. Hurley*, 197 Ariz. 400, 403, ¶ 14 (App. 2000).

Reckless manslaughter involves being aware of a substantial and unjustifiable risk that one's conduct will cause death. In contrast, second-degree murder results when, without premeditation, one recklessly engages in conduct which creates a grave risk of death under circumstances manifesting extreme indifference to human life. Thus, a reckless manslaughter instruction is proper in a second-degree murder case if the evidence would support a finding that the defendant committed the murder recklessly, but not under circumstances manifesting extreme indifference to human life and not through conduct that created a grave risk of death. *State v. Valenzuela*, 194 Ariz. 404, 406-07, ¶ 11 (1999); see also *State v. Govan*, 154 Ariz. 611, 615 (App. 1987)(evidence that defendant and victim were arguing when victim was shot, that victim had previously shot at defendant, and that defendant did not actually aim at victim created jury question on lesser-included offense of manslaughter in prosecution for second-degree murder that resulted in conviction for manslaughter).

Manslaughter can be a lesser-included offense of first-degree murder when the defendant admits killing the victim, thus making the question whether the murder was premeditated or under a "sudden quarrel or heat of passion," so long as there is sufficient evidence from which the trier of fact could find "heat of passion." *Appeal in Maricopa County Juv. Action No. JV-506561*, 182 Ariz. 60, 62-63 (App. 1994)(evidence of Battered Child Syndrome was sufficient to establish heat of passion resulting from

adequate provocation by victim to support juvenile's adjudication for manslaughter for the intentional killing of her mother by shooting her in the back of the head while she was asleep).

Words alone are not adequate provocation to justify a manslaughter instruction. *State v. Runningeagle*, 176 Ariz. 59, 68 (1993).

Manslaughter by aiding another person to commit suicide is not a necessarily-included offense of first-degree murder, nor was any instruction on aiding suicide necessary when the evidence showed the victim was shot in the back of the head from two feet or more away. *State v. Khoshbin*, 166 Ariz. 570, 573 (App. 1990).

Reckless manslaughter instruction was not warranted where the defendant did not "recklessly disregard the risk" to the victim, but rather "created the risk" through a number of deliberate actions that showed planning and premeditation. *State v. Vickers*, 159 Ariz. 532, 542 (1989)(defendant charged with first-degree murder of fellow inmate by pouring flammable liquid on him was not entitled to instruction on lesser-included offense of manslaughter committed in heat of passion aroused by adequate provocation, notwithstanding defendant's contention that he acted after inmate made unwelcome sexual comment about his niece).

Manslaughter instruction is not warranted where the evidence shows the defendant's conduct was deliberate, not reckless. *State v. Ortiz*, 158 Ariz. 528, 534 (1988).

Trial court committed fundamental error in instructing jury in first-degree murder case on second degree murder, manslaughter, and negligent homicide, but only on "heat of passion" manslaughter, not on reckless manslaughter. *State v. Davis*, 154 Ariz. 370, 372-73 (App. 1987).

Defendant charged with second-degree murder was not entitled to a manslaughter instruction where he denied killing victim or claimed an inability to remember events at time of murder, there was a total absence of any evidence the killing took place in heat of passion or that there was adequate provocation by victim, and there was evidence of a cooling-off period. *State v. Reffitt*, 145 Ariz. 452, 463 (1985). Further, no instruction was required for reckless manslaughter where the defendant delivered nine blows to murder victim's head with a claw hammer. *Id.*

A.R.S. § 13-1104: Second degree murder

When a jury is given a choice between first-degree murder and second-degree murder and convicts on first-degree murder, it has necessarily rejected manslaughter and any purported error in failing to give a manslaughter instruction is harmless. *State v. Boyston*, 231 Ariz. 539, 552, ¶ 66 (2013), citing *State v. Nelson*, 229 Ariz. 180, 186, ¶ 24 (2012).

Second-degree murder is a lesser-included offense of premeditated first-degree murder, the difference between the two being premeditation. An instruction on second-degree

murder is only appropriate when a reasonable construction of the evidence tends to show a lack of premeditation. *State v. Sprang*, 227 Ariz. 10, 12, ¶ 6 (App. 2011).

A trial court should provide an instruction on a lesser-included offense only if the evidence supports it. To determine whether there is sufficient evidence to require the giving of a lesser-included offense instruction, the test is whether the jury could rationally fail to find the distinguishing element of the greater offense. Thus, in considering instructions on a lesser-included offense of premeditated first-degree murder, if a jury could rationally conclude that premeditation was lacking, a second-degree murder instruction would be needed. *State v. Sprang*, 227 Ariz. 10, 12, ¶ 7 (App. 2011). But when the defendant's theory of the case denies all involvement in the killing, and no evidence provides a basis for a second-degree murder conviction, such an instruction should not be given. *Id.*, ¶ 8, see also *State v. Jones*, 203 Ariz. 1, 11, ¶ 37 (2002); *State v. Sharp*, 193 Ariz. 414, 422-23, ¶¶ 28-29 (1999); *State v. Van Adams*, 194 Ariz. 408, 414, ¶¶ 14-15, (1999); *State v. Landrigan*, 176 Ariz. 1, 6 (1993).

As a practical matter, a jury could disregard the fact that the evidence supported only first-degree murder and decide to convict of second-degree murder. But where as a matter of law the evidence was insufficient to instruct the jury on the lesser charge, the error is not harmless. *State v. Sprang*, 227 Ariz. 10, 14-15, ¶¶ 13- 18 (App. 2011)(error instructing jury on second-degree murder when evidence did not support it was not harmless; while evidence showed someone committed first-degree murder, there was not overwhelming evidence that defendant had committed it, the second-degree murder verdict could have been a compromise, and if the second-degree murder instruction had not been given erroneously, the jury would have had to choose whether to convict or acquit defendant of first-degree murder). However, when a defendant is convicted of a lesser-included offense that is later reversed, the State may elect to retry the defendant for that lesser-included offense. *State v. Sprang*, 227 Ariz. 10, 15, ¶ 19 (App. 2011).

Reckless driving is not a necessarily-included offense of second-degree murder because it requires proof of an element – that the defendant was driving a vehicle – that is not required to prove second degree murder. *State v. Sucharew*, 205 Ariz. 16, 26 (App. 2003).

- But see *State v. Magana*, 178 Ariz. 416, 418 (App. 1994)(trial court erred in refusing to instruct on reckless driving where the language of the indictment implied that an automobile was used in committing the offense).
 - But see also *State v. Robles*, 213 Ariz. 268, 271-72, ¶¶ 8-9 (App. 2006), declining to extend *Magana's* “common sense” language to encompass or mandate consideration of all facts ultimately contained in the record in determining whether a lesser-included-offense instruction was required; *State v. Ortega*, 220 Ariz. 320, 324-25, ¶¶ 10-14 (App. 2008), disapproving use of charging documents test for purposes of double jeopardy to the extent underlying facts are considered.

A.R.S. § 13-1105: First-degree murder

In all capital cases, the trial court must instruct the jury on all lesser-included offenses

reasonably supported by the evidence. *State v. Wood*, 180 Ariz. 53, 65, (1994); *State v. Comer*, 165 Ariz. 413, 422 (1990), citing *Beck v. Alabama*, 447 U.S. 625 (1980); *State v. Amaya-Ruiz*, 166 Ariz. 152, 174 (1990).

But, a defendant may waive any right to a jury instruction on a lesser included offense in a capital case by objecting to the instruction; the trial judge is not bound by to give the instruction under such circumstances. *State v. Gipson*, 229 Ariz. 484, 485, ¶¶ 8-9 (2012). See also *State v. Anderson*, 210 Ariz. 327, 344, ¶¶ 64-65, supplemented, 211 Ariz. 59, ¶¶ 64-65 (2005)(denial of aggravated assault instruction in capital homicide did not violate due process; jury was instructed on second-degree murder and manslaughter, and since jury had option of immediately-lesser included offenses but nonetheless found defendant guilty of first-degree murder, it necessarily rejected all other lesser-included offenses).

When a jury is given a choice between first-degree murder and second-degree murder and convicts on first-degree murder, it has necessarily rejected manslaughter and any purported error in failing to give a manslaughter instruction is harmless. *State v. Boyston*, 231 Ariz. 539, 552, ¶ 66 (2013), citing *State v. Nelson*, 229 Ariz. 180, 186, ¶ 24 (2012).

Murder of police officer:

Where defendant shot police officer three times at close range in the face and neck during a traffic stop – actions almost certain to cause death –, there was no evidence supporting instructions for lesser-included offenses of second degree murder, manslaughter, and negligent homicide. *State v. Delahanty*, 226 Ariz. 502, 507, ¶¶ 22-27 (2011).

Premeditated murder:

In a first-degree murder trial, instructions for second-degree murder, manslaughter, or negligent homicide are required when supported by the evidence. *State v. Delahanty*, 226 Ariz. 502, 507, ¶ 23 (2011); see also *State v. Gipson*, 229 Ariz. 484, 486-87, ¶¶ 14-17 277 P.3d 189 (2012)(*sua sponte* jury instruction on manslaughter as a lesser-included offense over objections of defendant and the state at a trial for noncapital first-degree murder was not reversible error where manslaughter instruction was supported by the evidence and defendant did not claim the state had suggested before instructions were settled that it did not intend to pursue a manslaughter conviction).

Second-degree murder is a lesser-included offense of premeditated first-degree murder, the difference between the two being premeditation. An instruction on second-degree murder is only appropriate when a reasonable construction of the evidence tends to show a lack of premeditation. *State v. Sprang*, 227 Ariz. 10, 12, ¶ 6 (App. 2011). In considering instructions on a lesser-included offense of premeditated first-degree murder, if a jury could rationally conclude that premeditation was lacking, a second-degree murder instruction is required. *Id.*, ¶ 7. But when the defendant denies any involvement in the killing and no evidence provides a basis for a second-degree murder conviction, such an instruction should not be given. The issue is whether the evidence tends to show the murder was premeditated or whether a jury could conclude that evidence demonstrated premeditation was lacking due to the circumstances themselves or the instant effect of a

sudden quarrel or heat of passion. *Id.* at 13, ¶ 8 (evidence did not support instruction on second-degree murder where it showed only premeditation).

In a murder case in which the victim dies as a result of an aggravated assault, the trial court is not required to instruct the jury on the lesser-included offense of aggravated assault unless there is reasonable support on the record that the defendant's conduct was not the proximate cause of the victim's death. *State v. Sanchez*, 165 Ariz. 164, 169-170 (App. 1990). See *State v. Marty*, 166 Ariz. 233, 237 (App.1990) (proximate cause means difference between result intended by defendant and harm suffered by victim not so extraordinary that it would be unfair to hold defendant responsible).

Felony murder:

There is no lesser included offense to felony murder. *State v. Davolt*, 207 Ariz. 191, 213, ¶ 92 (2004). See also *State v. Nordstrom*, 200 Ariz. 229, 253, ¶ 82 (2001), *abrogated on other grounds*, *State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20 (2012); *State v. Bocharski*, 200 Ariz. 50, 28, ¶ 41 (2001); *State v. Canion*, 199 Ariz. 227, 231, ¶ 15 (App. 2000). It is well established that no lesser-included offense to felony murder exists because the *mens rea* necessary to satisfy the premeditation element of first-degree murder is supplied by the specific intent required for the felony. Where no lesser included offense exists, it is not error to refuse the instruction. *State v. LaGrand*, 153 Ariz. 21, 30 (1987).

A capital murder defendant charged with both premeditated and felony murder was not entitled to a lesser-included offense instruction on manslaughter where the jury was instructed on and rejected second-degree murder; by rejecting that lesser-included offense, the jury necessarily rejected all other lesser-included offenses. *State v. Cota*, 229 Ariz. 136, 150, ¶ 66 (2012). Moreover, manslaughter is not a lesser-included offense of felony murder. *Id.*, citing *State v. Schad*, 163 Ariz. 411, 417 (1989)(in a felony murder case, the defendant is not entitled to an instruction on the underlying felony that resulted in a death, because felony murder has no lesser-included offenses).

BUT: For purposes of double jeopardy, felony murder based on an armed robbery predicate is the same offense as armed robbery because robbery does not contain an element that is not also contained in felony murder. Indeed, the United States Supreme Court has consistently treated the predicate felony for felony murder and the felony-murder charge itself as the "same offense" under the Double Jeopardy Clause. *Lemke v. Rayes*, 213 Ariz. 232, 239, ¶ 18 (App. 2006), citing *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977)(defendant convicted for felony murder based on underlying offense of robbery with firearms; subsequent prosecution for robbery with firearms precluded by the Double Jeopardy Clause). This is because "lesser included offense" in regard to jury alternatives is different from what that term means in regard to double jeopardy. The former implements the non-constitutional right of an accused to an instruction which gives the jury an opportunity to convict of an offense with less severe punishment than the crime charged. The latter, on the other hand, involves distinguishing offenses in order to protect against multiple prosecutions for the same crime. *Lemke v. Rayes*, 213 Ariz. 232, 238, ¶ 17 (App. 2006), citing *State v. Baker*, 456 So.2d 419, 422 (Fla.1984).

Defendant's being found guilty of second-degree murder as a lesser-included offense of premeditated murder did not affect guilty verdict for felony murder; "extra" verdicts on the lesser-included offenses to the premeditated murder charge do not affect the validity of the unanimous guilty verdict on the felony murder charge. *State v. Canion*, 199 Ariz. 227, 231, ¶ 13 (App. 2000).

Jury's verdicts finding defendant guilty of felony murder and of second-degree murder with respect to the same victim was not an inconsistent verdict, as the same evidence could support a conviction for either crime. *State v. Canion*, 199 Ariz. 227, 231, ¶ 15 (App. 2000).

The two separate offenses, first-degree murder and child abuse, each requires proof of facts not required for the other. Murder requires causing the death of another, whereas child abuse requires a child victim. Thus, each offense requires an element that the other does not, and consecutive sentencing does not violate the double jeopardy clause. *State v. Jones*, 235 Ariz. 501, 503-04, ¶ 13 (2014), citing *State v. Lopez*, 174 Ariz. 131, 143 (1992)(child abuse is not a lesser-included offense of felony murder and does not merge into homicide).

A person may be guilty of felony murder even though the killing standing alone would be second-degree murder. It is the fact that the homicide was committed during a felony (burglary) that can raise what otherwise would be a second-degree murder to murder in the first degree. It is the felony that provides the malice which makes it first degree murder. *State v. Leslie*, 147 Ariz. 38, 48 (1985). Further, burglary is not a lesser-included offense of felony murder. *Id.* at 49.

Attempted Murder

Attempted second-degree murder can only be committed if the defendant intended to kill the victim or knew that the conduct would cause death. Accordingly, instructing the jury that it could convict the defendant of attempted second degree murder on a finding that he knew his conduct would cause serious physical injury is error. *State v. Dickinson*, 233 Ariz. 527, 530, ¶ 11 (App. 2013), citing *State v. Ontiveros*, 206 Ariz. 539, 542, ¶ 14 (App.2003)(there is no offense of attempted second-degree murder based on knowing merely that one's conduct will cause serious physical injury). See also *State v. Juarez-Orci*, 236 Ariz. 520, ¶¶ 14-16 (App. 2015)(despite using language from the attempt statute, the words "serious physical injury" in attempted second-degree murder jury instruction was not "mere surplusage"; the facts could have supported a finding of intent to either kill or knowingly cause serious physical injury and thus the instruction was erroneous.)

Aggravated assault is not a lesser-included offense of attempted first-degree murder, as attempted first-degree murder does not require either serious physical injury or reasonable apprehension of imminent physical harm, one of which must be proven for aggravated assault. *State v. Fernandez*, 216 Ariz. 545, 554, ¶ 30 (App. 2007).

CHAPTER 12, ASSAULT AND RELATED OFFENSES

A.R.S. § 13-1201: Endangerment:

Because a person can commit manslaughter by acts that create a substantial and unjustifiable risk of death, though not necessarily imminent death, felony endangerment is not a lesser-included offense of manslaughter. *State v. Dominguez*, 236 Ariz. 226, 229, ¶ 7 (App. 2014).

Endangerment is not a necessarily-included offense of drive-by shooting, because it is possible to commit drive-by shooting by firing a weapon from a vehicle at an abandoned structure or vehicle when no other person is present. *State v. Hoover*, 195 Ariz. 186, 188, ¶ 12 (App. 1998). However, if the charging document describes the offense of endangerment – as, for example, by specifying the fact that a person was present in the structure at which the defendant fired, or that the defendant fired at a person – endangerment may be a lesser-included offense under the facts of the particular case. *Id.* at ¶ 11.

It may be assumed that one cannot commit drive-by shooting, § 13-1209, without also committing endangerment, § 13-1201(A). A person commits drive-by shooting by (1) intentionally discharging a weapon, (2) from a motor vehicle, (3) at a person, another occupied motor vehicle or an occupied structure; endangerment is defined as recklessly endangering another person with a substantial risk of imminent death or physical injury. If it can be said that one cannot discharge a weapon at a person, occupied motor vehicle or an occupied structure without putting a person in substantial risk of imminent death or physical injury (the elements of endangerment), then endangerment would be a lesser included offense of drive-by shooting. But that assumption does not hold where the defendant claims the State did not prove he was the person who fired the shots; in such instance, there is no rational way the jury could find endangerment but not drive-by shooting. *State v. Torres-Mercado*, 191 Ariz. 279, 283 (App. 1997).

Aggravated assault under A.R.S. § 13-1204(A)(2) may be committed by using an unloaded gun and other situations in which the assault could be committed without placing the victim in actual risk. Thus, it is not a necessary element of aggravated assault that the victim be in actual substantial risk of imminent death or physical injury. All that is required is that the victim be in reasonable apprehension of physical injury. Endangerment is therefore not a lesser included offense of aggravated assault. *State v. Morgan*, 128 Ariz. 362, 367 (App. 1981).

Neither endangerment nor threatening or intimidating is a lesser-included offense of aggravated assault. *State v. Rineer*, 131 Ariz. 147, 148-49 (App. 1981).

A.R.S. § 13-1202: Threatening or intimidating:

While an assault, especially an aggravated assault, may terrify a victim, the offense does not require that the defendant intend to evoke terror in the victim. Therefore, threatening or intimidating under A.R.S. § 13-1202(A)(1) is not a lesser included offense of aggravated

assault under A.R.S. § 13-1204(A)(2). *State v. Morgan*, 128 Ariz. 362, 368-69 (App. 1981).

Neither endangerment nor threatening or intimidating is a lesser-included offense of aggravated assault. *State v. Rineer*, 131 Ariz. 147, 148-49 (App. 1981).

Misdemeanor threatening or intimidating, A.R.S. § 13-1202(A)(1), may be a lesser-included offense of felony threatening or intimidating to promote a street gang or criminal enterprise, § 13-1202(A)(3), if the charging document describes both the felony and the misdemeanor offense. *State v. Corona*, 188 Ariz. 85, 88-89 (App. 1997).

Assault, A.R.S. § 13-1203, is a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, but endangerment, § 13-13-1201, and threatening or intimidating, § 13-1202, are not lesser-included offenses of assault by a prisoner. *State v. Garcia*, 141 Ariz. 97, 103 (1984). Even though the elements of endangerment and threatening can be found within the elements of assault by a prisoner, a violation of § 13-1206 also depends on the defendant's status as a prisoner in the custody of the State Department of Corrections, the Department of Juvenile Corrections, a law enforcement agency, or a county or city jail. To be a lesser-included offense, the crimes of endangerment and threatening or intimidating must be committed by a prisoner, and there is no such crime as endangerment while a prisoner or threatening while a prisoner. *Id.*

A.R.S. § 13-1203: Assault

Disorderly conduct by recklessly displaying or handling a firearm is a lesser-included offense of aggravated assault in a prosecution arising when the defendant confronted the victims with a gun while acting as a bail recovery agent searching for a fugitive. *State v. Erivez*, 236 Ariz. 472, 475, ¶ 15 (App. 2015).

Assault is a lesser-included offense of aggravated assault in a prosecution arising when the defendant confronted the victims with a gun while acting as a bail recovery agent searching for a fugitive; the jury could determine the distinguishing element between assault and aggravated assault, the use or threatened use of a deadly weapon, was not present. *State v. Erivez*, 236 Ariz. 472, 475-76, ¶ 15 (App. 2015).

Disorderly conduct by recklessly displaying or handling a firearm is not a lesser-included offense of assault because it requires the reckless display/handling of a firearm, an additional element not required for assault. *State v. Erivez*, 236 Ariz. 472, 476, ¶ 17 (App. 2015).

Assault is not a lesser-included offense of disorderly conduct by recklessly displaying or handling a firearm; although the defendant may have committed disorderly conduct by intending to "disturb the peace or quiet" of the victim, such conduct did not necessarily rise to the level of placing the victim in reasonable apprehension of immediate physical injury, the conduct required for an assault. *State v. Erivez*, 236 Ariz. 472, 476, ¶ 18 (App. 2015).

The extra element distinguishing the lesser-included offense of assault under § 13-1203(A)(2)(placing another in reasonable apprehension of imminent physical injury) from

the greater offense, aggravated assault under § 13-1204(A)(2), is the use of a deadly weapon. *State v. Hansen*, 237 Ariz. 61, 64, n. 1 (App. 2015), citing *State v. Torres*, 156 Ariz. 150, 152 (App.1988). If the use of the gun is not disputed, the defendant is not entitled to a lesser-included instruction, even if the victim thought the gun was a fake and was never actually afraid of being injured by a deadly weapon. A victim's perception of the dangerousness of a deadly weapon used during an assault is not an element of aggravated assault under A.R.S. § 13–1204(A)(2). All that is required is that the victim reasonably apprehend physical injury pursuant to the assault statute, A.R.S. § 13–1203(A)(2); the apprehension need not extend to the fear of the gun. *Torres, id.*

Arizona case law has established the three subsections of § 13–1203(A) are not simply variants of a single, unified offense; they are different crimes. *State v. Delgado*, 232 Ariz. 182, 189, ¶ 22 (App. 2013). Therefore, aggravated assault § 13-1204(B)(committing an assault while the victim is bound or otherwise physically restrained or while the victim's capacity to resist is substantially impaired) creates a single offense; it is distinguishable from § 13-1203(A)(causing physical injury), which may be violated by distinctly different conduct causing different kinds of harm. *Id.*, ¶ 24.

Misdemeanor assault, pursuant to A.R.S. § 13-1203(A)(1) is not a lesser-included offense of child molestation (A.R.S. § 13-1410(A) under the elements test, as assault requires that the defendant cause injury to another person, while child molestation does not include that element. Whether assault is a lesser-included offense under the charging document test is dependent upon whether the wording of the charging document described an assault. *In Re James P.*, 214 Ariz. 420, 425, ¶ 22 (App. 2007).

Assault under § 13-1203(A)(3)(touching) is not a lesser-included offense of § 13-1203(A)(1)(causing physical injury), as their elements are distinct; (A)(1) requires physical injury but not touching, whereas (A)(3) requires touching but not resultant injury. *In Re Jeremiah T.*, 212 Ariz. 30, 33, ¶ 6 (App. 2006).

Assault under § 13-1203(A)(2)(reasonable apprehension) was the traditional crime of assault at common law. Assault under § 13-1203(A)(3)(touching) is what was known at common law as "battery." Therefore, these offenses are distinct and neither is a lesser-included offense of the other. *State v. Sanders*, 205 Ariz. 208, 216-17, ¶ 33 (App. 2003), overruled in part by *State v. Freaney*, 223 Ariz. 110 (2009).

While simple assault is a lesser-included offense of aggravated assault, no instruction on simple assault is appropriate unless the jury could rationally find that the State failed to prove the element distinguishing the greater offense from the lesser offense. When the defendant was charged with aggravated assault with a vehicle and there was no allegation that she committed any assault other than with the vehicle, she was guilty of aggravated assault or nothing, and was not entitled to an instruction on simple assault. *State v. Jansing*, 186 Ariz. 63, 68 (App. 1996), overruled on other grounds by *State v. Bass*, 198 Ariz. 571 (2000).

Simple assault can be a lesser-included offense of sexual assault. *State v. White*, 160 Ariz. 24, 28, n. 4 (1989); *State v. Rushing*, 156 Ariz. 1, 3 (1988).

Assault, A.R.S. § 13-1203, is not a lesser-included offense of attempted murder, A.R.S. § 13-1105, because a defendant may attempt to murder someone and not thereby cause physical injury or place another in reasonable apprehension of harm. *State v. Laffoon*, 125 Ariz. 484, 487 (1980).

Assault, A.R.S. § 13-1203, is a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, but endangerment, § 13-13-2101, and threatening or intimidating, § 13-1202, are not lesser-included offenses of assault by a prisoner. *State v. Garcia*, 141 Ariz. 97, 103 (1984). Even though the elements of endangerment and threatening can be found within the elements of assault by a prisoner, a violation of A.R.S. § 13-1206 also depends on the defendant's status as a prisoner in the custody of the State Department of Corrections, the Department of Juvenile Corrections, a law enforcement agency, or a county or city jail. To be a lesser-included offense, the crimes of endangerment and threatening or intimidating must be committed by a prisoner, but there is no such crime as endangerment while a prisoner or threatening while a prisoner. *Id.*

A.R.S. §13-1204: Aggravated Assault:

Aggravated assault is not a lesser-included offense of attempted first-degree murder, as attempted first-degree murder does not require either serious physical injury or reasonable apprehension of imminent physical harm, one of which must be proven for aggravated assault. *State v. Fernandez*, 216 Ariz. 545, 554, ¶¶ 30-31 (App. 2007).

Aggravated assault is not a lesser-included offense of attempted murder. "A defendant need not necessarily commit assault when attempting murder since murder may be attempted without committing physical injury or placing another in reasonable apprehension of harm." *State v. Laffoon*, 125 Ariz. 484, 487 (1980).

When aggravated assault and armed robbery arise from the same fact situation, aggravated assault can be a lesser-included offense of armed robbery. But, this is not the case where the aggravated assault of each victim is not the same crime as the armed robbery of each. *State v. Sowards*, 147 Ariz. 185, 190 (App. 1984).

- Compare: *State v. Price*, 218 Ariz. 311, 313-314, ¶ 7 (App. 2008)(where each offense requires proof of a fact that the other does not, armed robbery and aggravated assault are not the "same offense" for double jeopardy purposes).

A person cannot place a victim in reasonable apprehension of imminent physical injury without also disturbing the victim's peace. Thus, disorderly conduct against a person by recklessly handling a firearm is a lesser-included offense of aggravated assault with a deadly weapon. The distinguishing element is the intent to place the victim in reasonable apprehension of imminent physical injury. *State v. Burdick*, 211 Ariz. 583, 585-86, ¶ 9 (App. 2005), citing *State v. Miranda*, 200 Ariz. 67, ¶ 5 (2001)

All elements of disorderly conduct by reckless display of a firearm under § 13-2904(A)(6) are in fact elements of aggravated assault under § 13-2904(A)(2), and disorderly conduct instructions are thus appropriate in aggravated assault cases if the facts support both instructions. *State v. Miranda*, 200 Ariz. 67, 68, ¶¶ 2-3 (2001) disapproving *In re Maricopa*

County Juvenile Action No. JV133051, 184 Ariz. 473 (App. 1995); *State v. Cutright*, 196 Ariz. 567 (App. 1999).

Although disorderly conduct is a lesser-included offense of aggravated assault charged under § 13-1203(A)(2)(intent to place victim in reasonable apprehension of imminent physical injury), it is not a lesser-included offense of aggravated assault under § 13-1203(A)(1)(intentionally, knowingly, or recklessly causing any physical injury to another person). A person is guilty of aggravated assault under (A)(1) by recklessly causing physical injury to another; in this circumstance, the defendant need not intend to disturb the other person. Because intent to disturb is an essential element of disorderly conduct, a person can commit aggravated assault under (A)(1) without committing disorderly conduct. As such, disorderly conduct is not a lesser-included offense of aggravated assault § 13-1203(A)(1). *State v. Foster*, 191 Ariz. 355, 357, ¶¶ 9-10 (App. 1998).

Where the undisputed evidence showed the victim was in apprehension of imminent physical injury and it was not possible that the jury could have found the victim was only disturbed, defendant was guilty of aggravated assault or nothing and not entitled to a lesser-included offense instruction on disorderly conduct. *State v. Lara*, 183 Ariz. 233, 234 (1995).

Attempted aggravated assault is a lesser-included offense of aggravated assault. See *Andrade v. Superior Court*, 183 Ariz. 113, 116 (App. 1995).

In a murder case in which the victim dies as a result of an assault, the trial court is not required to instruct the jury on the lesser-included offense of aggravated assault unless there is reasonable support on the record that the defendant's conduct was not the proximate cause of the victim's death. *State v. Sanchez*, 165 Ariz. 164, 169-170 (App. 1990).

Threatening or intimidating, A.R.S. § 13-1202, is not a lesser included offense of aggravated assault, § 13-1204. *State v. Noriega*, 142 Ariz. 474, 481 (1984), overruled on other grounds by *State v. Burge*, 167 Ariz. 25 (1990).

Reckless driving, A.R.S. § 28-693, is not a lesser-included offense of aggravated assault, § 13-1204, because each offense requires proof of an element that the other does not. Proof of reckless driving requires showing the defendant was driving a vehicle in willful or wanton disregard of safety of persons or property; but aggravated assault does not require showing of use of dangerous instrument and assault becomes aggravated if any of eight listed statutory circumstances are also involved. *State v. Seats*, 131 Ariz. 89, 92-93 (1981).

Neither endangerment, A.R.S. § 13-1201, nor threatening or intimidating, § 13-1202, is a lesser included offense of aggravated assault, § 13-1204. *State v. Rineer*, 131 Ariz. 147, 148 (App. 1981).

Aggravated assault, A.R.S. § 13-1204, may be a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, when there is a dispute as to the defendant's

status as a prisoner. However, when the defendant admitted he was a prisoner but claimed the victim misidentified him as the assailant, the defendant was not entitled to an instruction on aggravated assault as a lesser-included offense of assault by a prisoner because there was no evidence presented to the jury that would have allowed the jury to find that the defendant was not a prisoner. *State v. Tims*, 143 Ariz. 196, 199 (1985). See also *State v. Williams*, 144 Ariz. 479, 486 (1985)(defendant could only be guilty of dangerous or deadly assault by a prisoner where defendant was in custody of Department of Corrections when offense was committed and victim suffered stab wound; thus, trial court did not err in failing to give instruction on simple and aggravated assault.)

A.R.S. § 13-1206: Dangerous or Deadly Assault by Prisoner or Juvenile

Assault, A.R.S. § 13-1203, is a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, but endangerment, § 13-13-1201, and threatening or intimidating, § 13-1202, are not lesser-included offenses of assault by a prisoner. *State v. Garcia*, 141 Ariz. 97, 103 (1984). Even though the elements of endangerment and threatening can be found within the elements of assault by a prisoner, a violation of § 13-1206 also depends on the defendant's status as a prisoner in the custody of the State Department of Corrections, the Department of Juvenile Corrections, a law enforcement agency, or a county or city jail. To be a lesser-included offense, the crimes of endangerment and threatening or intimidating must be committed by a prisoner, and there is no such crime as endangerment while a prisoner or threatening while a prisoner. *Id.*

Aggravated assault, A.R.S. § 13-1204, may be a lesser-included offense of dangerous or deadly assault by a prisoner, § 13-1206, when there is a dispute as to the defendant's status as a prisoner. However, when the defendant admitted he was a prisoner but claimed the victim misidentified him as the assailant, the defendant was not entitled to an instruction on aggravated assault as a lesser-included offense of assault by a prisoner because there was no evidence presented to the jury that would have allowed the jury to find that the defendant was not a prisoner. *State v. Tims*, 143 Ariz. 196, 199 (1985). See also *State v. Williams*, 144 Ariz. 479, 486 (1985)(defendant could only be guilty of dangerous or deadly assault by a prisoner where defendant was in custody of Department of Corrections when offense was committed and victim suffered stab wound; thus, trial court did not err in failing to give instruction on simple and aggravated assault.)

A.R.S. § 13-1209: Drive-by Shooting:

Because disorderly conduct requires proof of an element, that the defendant intend or know that his conduct will disturb someone's peace and quiet, not found in drive-by shooting, A.R.S. § 13-1209, disorderly conduct is not a lesser-included offense of drive-by shooting. *State v. Cisneroz*, 190 Ariz. 315, 317 (App. 1997). Accord, *State v. Torres-Mercado*, 191 Ariz. 279, 282 (App. 1997).

Endangerment is not a necessarily-included offense of drive-by shooting, because it is possible to commit drive-by shooting by firing a weapon from a vehicle at an abandoned structure or vehicle when no other person is present. *State v. Hoover*, 195 Ariz. 186,

188, ¶ 12 (App. 1998). However, if the charging document describes the offense of endangerment – as, for example, by specifying the fact that a person was present in the structure at which the defendant fired, or that the defendant fired at a person – endangerment may be a lesser-included offense under the facts of the particular case. *Id.* at ¶ 11.

CHAPTER 13, KIDNAPPING AND RELATED OFFENSES

A.R.S. § 13-1303: Unlawful Imprisonment:

If the facts do not support multiple kidnapping convictions, they will not support multiple unlawful imprisonment convictions. Kidnapping is the knowing restraint of another person with the intent to hold the victim for various listed purposes. A.R.S. § 13-1304(A). Unlawful imprisonment, in contrast, occurs when a person knowingly restrains another person. A.R.S. § 13-1303(A). In unlawful imprisonment, the intent element of the greater offense of kidnapping is omitted; the focus is solely on the restraint of the victim. *State v. Braidick*, 231 Ariz. 357, 360, ¶ 10 (App. 2013). Convictions on two counts of unlawful imprisonment as lesser-included offenses of kidnapping charges arising from one continuous act of restraining the victim violates double jeopardy. *Id.*, ¶¶ 11-13. However, multiple charges might be authorized when a victim is released, but then restrained again. *Id.*, ¶ 12.

Unlawful imprisonment, defined as “knowingly restraining another person,” § 13–1303(A) (2010), is a lesser-included offense of kidnapping, which is “knowingly restraining another person with the intent to [i]nflict death, physical injury or ... otherwise aid in the commission of a felony,” § 13–1304(A)(3). The “distinguishing element between kidnapping and unlawful imprisonment is the perpetrator’s state of mind, i.e., whether the unlawful imprisonment was accompanied with one of the enumerated intents set out in § 13-1304 so as to elevate the unlawful imprisonment to kidnapping.” *State v. Hargrave*, 225 Ariz. 1, 12, ¶ 38 (2010), quoting *State v. Detrich*, 178 Ariz. 380, 383 (1994); see also *State v. Bearup*, 221 Ariz. 163, 169 ¶ 24 (2009); *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 40 (App. 2001).

However, the trial court need not instruct on unlawful imprisonment unless the evidence supports the lesser offense. *State v. Hargrave*, 225 Ariz. 1, 12, ¶ 39 (2010) (instruction on unlawful imprisonment was not warranted, though defendant alleged he did not intend to harm employees of fast food restaurant at which incident took place because defendant intended to aid in the commission of a robbery and knew that the victims might be harmed; further, defendant knew his associate in robbery of restaurant always carried a gun, associate warned defendant that if it came down to it he would shoot employees, defendant watched the victims as associate took money from cash registers, and defendant opened the door to freezer as associate fired gun as the victims were being directed into the freezer). See also *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 41 (App. 2001)(instruction on unlawful imprisonment as lesser-included offense of kidnapping was not warranted despite defendant’s assertion that his intent in stopping teen-agers was only to gather information; manner in which defendant acted by brandishing gun constituted element of intent to place victims in reasonable apprehension of imminent physical injury, such as constituted distinguishing element between unlawful imprisonment and kidnapping); *State v. Trostle*, 191 Ariz. 4, 15-16 (1997)(when defendant bound the

victim's hands and feet and admitted knowing, or strongly suspecting, that his codefendant planned to kill her, he was not entitled to an instruction on unlawful imprisonment because the evidence showed only kidnapping or nothing).

A.R.S. § 13-1304: Kidnapping:

Attempted kidnapping is a necessarily-included offense of kidnapping. *State v. Rainwater*, 187 Ariz. 603, 605 (App. 1996), approved, 189 Ariz. 367 (1997). It is not impossible to attempt to commit a class 2 kidnapping; thus a negotiated plea to a class 3 attempted kidnapping is permitted. But attempted kidnapping need not always be classified as a class 3 felony; when a defendant has completed the offense of kidnapping, voluntarily and safely released the victim, and then entered a negotiated plea to attempted kidnapping, the defendant may well be entitled to a class 5 felony designation, embodying both the release-driven penalty reduction provided by A.R.S. § 13-1304(B) and the penalty reduction generally applicable to attempted offenses. *Id.*

The various sections of § 13–1304(A) are not lesser-included offenses or separate offenses, but various ways in which a person can be guilty of kidnapping. *State v. Braidick*, 231 Ariz. 357, 359, ¶ 7 (App. 2013), *citing State v. Stough*, 137 Ariz. 121, 123 (App. 1983)(kidnapping with the intent to place the victim or a third person in reasonable apprehension of imminent physical injury under § 13-1304(A)(4), is not a lesser- included offense or a separate offense of kidnapping with the intent to aid in the commission of a felony under § 13-1304(A)(3); instead, each is one of the ways in which a person can commit kidnapping).

If the facts do not support multiple kidnapping convictions, they will not support multiple unlawful imprisonment convictions. Kidnapping is the knowing restraint of another person with the intent to hold the victim for various listed purposes. A.R.S. § 13-1304(A). Unlawful imprisonment, in contrast, occurs when a person knowingly restrains another person. A.R.S. § 13-1303(A). In unlawful imprisonment, the intent element of the greater offense of kidnapping is omitted; the focus is solely on the restraint of the victim. *State v. Braidick*, 231 Ariz. 357, 360, ¶ 10 (App. 2013). Convictions on two counts of unlawful imprisonment as lesser-included offenses of kidnapping charges arising from one continuous act of restraining the victim violates double jeopardy. *Id.*, ¶¶ 11-13. However, multiple charges might be authorized when a victim is released, but then restrained again. *Id.*, ¶ 12.

Unlawful imprisonment, defined as “knowingly restraining another person,” § 13–1303(A) (2010), is a lesser-included offense of kidnapping, which is “knowingly restraining another person with the intent to [i]nflict death, physical injury or ... otherwise aid in the commission of a felony,” § 13–1304(A)(3). The “distinguishing element between kidnapping and unlawful imprisonment is the perpetrator's state of mind, i.e., whether the unlawful imprisonment was accompanied with one of the enumerated intents set out in § 13-1304 so as to elevate the unlawful imprisonment to kidnapping.” *State v. Hargrave*, 225 Ariz. 1, 12, ¶ 38 (2010), quoting *State v. Detrich*, 178 Ariz. 380, 383 (1994); see also *State v. Bearup*, 221 Ariz. 163, 169 ¶ 24 (2009); *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 40 (App. 2001).

However, the trial court need not instruct on unlawful imprisonment unless the evidence supports the lesser offense. *State v. Hargrave*, 225 Ariz. 1, 12, ¶ 39 (2010) (instruction on unlawful imprisonment was not warranted, though defendant alleged he did not intend to harm employees of fast food restaurant at which incident took place because defendant intended to aid in the commission of a robbery and knew that the victims might be harmed; further, defendant knew his associate in robbery of restaurant always carried a gun, associate warned defendant that if it came down to it he would shoot employees, defendant watched the victims as associate took money from cash registers, and defendant opened the door to freezer as associate fired gun as the victims were being directed into the freezer). See also *State v. Tschilar*, 200 Ariz. 427, 437, ¶ 41 (App. 2001)(instruction on unlawful imprisonment as lesser-included offense of kidnapping was not warranted despite defendant's assertion that his intent in stopping teen-agers was only to gather information; manner in which defendant acted by brandishing gun constituted element of intent to place victims in reasonable apprehension of imminent physical injury, such as constituted distinguishing element between unlawful imprisonment and kidnapping); *State v. Trostle*, 191 Ariz. 4, 15-16 (1997)(when defendant bound the victim's hands and feet and admitted knowing, or strongly suspecting, that his codefendant planned to kill her, he was not entitled to an instruction on unlawful imprisonment because the evidence showed only kidnapping or nothing).

Kidnapping is not "same offense" as sexual assault or sexual abuse for double jeopardy purposes; kidnapping requires proof that defendant knowingly restrained another person, but neither sexual abuse nor sexual assault requires proof of knowing restraint, and sexual assault and sexual abuse both require proof of sexual contact, while kidnapping does not. *State v. Eagle*, 196 Ariz. 27, 32, ¶ 22 (App. 1998) *aff'd*, 196 Ariz. 188 (2000).

Neither sexual abuse, A.R.S. § 13-1404, or attempted sexual abuse is a lesser-included offense of kidnapping, because one easily commit or attempt to commit kidnapping without committing sexual abuse, and vice versa. The same holds true for kidnapping and sexual assault. *State v. Harmon* 132 Ariz. 54, 57 (App. 1982).

Kidnapping, A.R.S. § 13-1304, is not a lesser-included offense of "domestic violence" under § 13-3601 because § 13-3601 is a procedural statute and does not create a separate offense of "domestic violence." *State v. Schackart*, 153 Ariz. 422, 423 (App. 1987). See also *State ex rel. McDougall v. Strohson (Cantrell)*, 190 Ariz. 120, 123 (1997); *State v. Sirny*, 160 Ariz. 292, 772 P.2d 1145 (App.1989).

CHAPTER 14, SEXUAL OFFENSES

A.R.S. § 13-1402: Indecent Exposure:

Indecent exposure, A.R.S. 13-1402, is not a lesser-included offense of public sexual indecency, § 13-1403; in order to support finding of indecent exposure, defendant must have exposed his or her own private bodily parts, but exposure of defendant's own private bodily parts was not necessary element of public sexual indecency by act of sexual contact. *Rolph v. City Court of City of Mesa*, 127 Ariz. 155, 159 (1980).

A.R.S. § 13-1403: Public Sexual Indecency:

Public sexual indecency, A.R.S. § 13-1403(A), is not a lesser-included offense of public sexual indecency to a minor, § 13-1403(B), because the subsection (A) offense contains the additional element that the person be reckless about whether the other person or persons present "would be offended or alarmed by the act." *State v. Jannamon*, 169 Ariz. 435, 440 (App. 1991).

A.R.S. § 13-1404: Sexual abuse:

Kidnapping is not "same offense" as sexual assault or sexual abuse for double jeopardy purposes; kidnapping requires proof that defendant knowingly restrained another person, but neither sexual abuse nor sexual assault requires proof of knowing restraint, and sexual assault and sexual abuse both require proof of sexual contact, while kidnapping does not. *State v. Eagle*, 196 Ariz. 27, 32, ¶ 22 (App. 1998) *aff'd*, 196 Ariz. 188 (2000).

Sexual abuse, A.R.S. § 13-1404, is a lesser-included offense of sexual assault, § 13-1406. *State v. Detrich*, 188 Ariz. 57, 63 (1997); *State v. Cuen*, 153 Ariz. 382, 383 (App. 1987).

Since a person necessarily directly or indirectly "fondles or manipulates" the genitals or anus in committing crime of sexual assault, crime of sexual abuse, defined in terms of sexual contact, is a lesser included offense of crime of sexual assault. *State v. Wise*, 137 Ariz. 477, 479 (App.) approved as modified, 137 Ariz. 468 (1983).

Sexual abuse, A.R.S. § 13-1404, is not a necessarily-included offense of child molesting, § 13-1410, because fondling the breasts of a female under the age of 15 would be sexual abuse, but not child molestation. *State v. Patton*, 136 Ariz. 243, 244-245 (App. 1983); *State v. Cousin*, 136 Ariz. 83, 86 (App. 1983); *State v. Davis*, 137 Ariz. 551, 562 (App. 1983).

Neither sexual abuse, A.R.S. § 13-1404, or attempted sexual abuse is a lesser-included offense of kidnapping, because one easily commit or attempt to commit kidnapping without committing sexual abuse, and vice versa. *State v. Harmon* 132 Ariz. 54, 57, 643 P.2d 1024, 1027 (App. 1982).

A.R.S. § 13-1405: Sexual conduct with a minor:

The elements of sexual conduct with a minor are not encompassed within the elements of continuous sexual abuse of a child under A. R. S. § 13-1417. One can commit continuous sexual abuse of a child without committing sexual conduct with a minor, and one can commit sexual conduct with a minor without satisfying any elements of continuous sexual abuse of a child. Consequently, sexual conduct with a minor cannot qualify as a lesser-included offense of continuous sexual abuse of a child under the "elements" test. *State v. Larson*, 222 Ariz. 341, 344, ¶ 12 (App. 2009). Moreover, the plain language of the continuous sexual abuse statute precludes its use under the "charging documents" test. *Id.*, ¶ 14. The legislature has specifically stated that another sexual felony cannot be

included with continuous sexual abuse of a child unless it occurred outside of the requisite time period or is charged in the alternative. *Id.* at 345, ¶ 16.

Both child molestation and sexual conduct with a minor under 15 require the same *mens rea*, and both may only be committed against a victim who is under the age of fifteen. Furthermore, by penetrating the penis, vulva, or anus with a body part or object or by engaging in masturbatory contact with the penis or vulva, one has necessarily also touched, fondled, or manipulated the genitals or anus of that person. Therefore, one cannot commit sexual conduct with a minor under fifteen without also committing molestation of a child. Molestation is a lesser included offense of sexual conduct with a minor under the age of fifteen. *State v. Ortega*, 220 Ariz. 320, 328, ¶ 25 (App. 2008).

Child molestation is not a lesser included offense of sexual conduct with a minor under the “elements” test, because – due to the different age requirements for the two crimes - it is not always a constituent part of sexual conduct with a minor. However, child molestation may be a lesser included offense of sexual conduct with a minor under the “charging document” test – where, as here, the charging document alleges that the victim is under 15 years of age. *In Re Jerry C*, 214 Ariz. 270, (App. 2007). *But see State v. Ortega*, 220 Ariz. 320, 324-25, ¶¶ 10-14 (App. 2008), disapproving use of charging documents test for purposes of double jeopardy to the extent underlying facts are considered.

Although attempted sexual conduct with a minor is a lesser-included offense of sexual conduct with a minor, the defendant is not entitled to a jury instruction on attempt where he confessed completed acts of sexual conduct with the minor. *State v. Morgan*, 204 Ariz. 166, 170, ¶¶ 11-13 (App. 2002).

In trial on sexual conduct with a minor under 15, where prosecution failed to provide proof of the victim’s age but the victim testified she was 9 and 10 years old when the defendant had sex with her and was 12 at the time of trial, court was not obliged to give instruction on sexual conduct with a minor over 15 as a lesser-included offense where there was no evidence the victim was over 15. *State v. Marshall*, 197 Ariz. 496, 505, ¶ 36 (App. 2000).

Since lack of consent is an element of sexual assault, while age of victim is element of sexual conduct with a minor, and neither element is common to both offenses, sexual conduct with a minor is not a lesser-included offense of sexual assault. *State v. Villegas*, 132 Ariz. 433, 433 (App. 1982).

Solicitation of sexual conduct with a minor, A.R.S. § 13-1405, is not a lesser-included offense of attempted sexual conduct with a minor, because a person can attempt oral sexual contact with a minor without requesting or soliciting the minor to engage in the contact. *State v. Fristoe*, 135 Ariz. 25, 31 (App. 1982).

A.R.S. § 13-1406: Sexual assault:

Kidnapping is not “same offense” as sexual assault or sexual abuse for double jeopardy purposes; kidnapping requires proof that defendant knowingly restrained another person,

but neither sexual abuse nor sexual assault requires proof of knowing restraint, and sexual assault and sexual abuse both require proof of sexual contact, while kidnapping does not. *State v. Eagle*, 196 Ariz. 27, 32, ¶ 22 (App. 1998) *aff'd*, 196 Ariz. 188 (2000).

Sexual abuse, A.R.S. § 13-1404, is a lesser-included offense of sexual assault, § 13-1406. *State v. Detrich*, 188 Ariz. 57, 63 (1997); *State v. Cuen*, 153 Ariz. 382, 383 (App. 1987).

Since a person necessarily directly or indirectly “fondles or manipulates” the genitals or anus in committing crime of sexual assault, crime of sexual abuse, defined in terms of sexual contact, is a lesser included offense of crime of sexual assault. *State v. Wise*, 137 Ariz. 477, 479 (App.) approved as modified, 137 Ariz. 468 (1983).

Simple assault can be a lesser-included offense of sexual assault. *State v. Rushing*, 156 Ariz. 1, 3 (1988).

Since lack of consent is an element of sexual assault, while age of victim is element of sexual conduct with a minor, and neither element is common to both offenses, sexual conduct with a minor is not a lesser-included offense of sexual assault. *State v. Villegas*, 132 Ariz. 433, 433 (App. 1982).

A.R.S. § 13-1410: Child molestation:

Our supreme court has long held that contributing to the delinquency of a child under § 13-3613 is a lesser-included offense of child molestation under § 13-1410. *State v. Speers*, 238 Ariz. 423, ¶ 21 (App. 2015), citing *State v. Jerousek*, 121 Ariz. 420, 428 (1979); *State v. Sutton*, 104 Ariz. 317, 318–19 (1969). Contributing to a child's delinquency is a broadly drawn offense, such that whether the act falls within the statutory prohibition is a question for the trier of fact. *State v. Speers*, 238 Ariz. 423, ¶ 22 (App. 2015).

Both child molestation and sexual conduct with a minor under 15 require the same *mens rea*, and both may only be committed against a victim who is under 15. Furthermore, by penetrating the penis, vulva, or anus with a body part or object or by engaging in masturbatory contact with the penis or vulva, one has necessarily also touched, fondled, or manipulated the genitals or anus of that person. Therefore, one cannot commit sexual conduct with a minor under 15 without also committing molestation of a child. Molestation is a lesser included offense of sexual conduct with a minor under the age of 15. *State v. Ortega*, 220 Ariz. 320, 328, ¶ 25 (App. 2008).

Child molestation is not a lesser included offense of sexual conduct with a minor under the “elements” test, because – due to the different age requirements for the two crimes - it is not always a constituent part of sexual conduct with a minor. However, child molestation may be a lesser included offense of sexual conduct with a minor under the “charging document” test – where, as here, the charging document alleges that the victim is under 15 years of age. *In Re Jerry C*, 214 Ariz. 270, (App. 2007). *But see State v. Ortega*, 220 Ariz. 320, 324-25, ¶¶ 10-14 (App. 2008), disapproving use of charging documents test for purposes of double jeopardy to the extent underlying facts

are considered.

Misdemeanor assault, pursuant to A.R.S. § 13-1203(A)(1) is not a lesser-included offense of child molestation (A.R.S. § 13-1410(A) under the elements test, as assault requires that the defendant cause injury to another person, while child molestation does not include that element. Whether assault is a lesser-included offense under the charging document test is dependent upon whether the wording of the charging document described an assault. *In Re James P.*, 214 Ariz. 420, 425, ¶ 22 (App. 2007).

Testimony by child molestation victim that he “accidentally bumped” defendant's penis did not warrant an instruction on attempted child molestation as a lesser-included offense of molestation of minor; defendant had knowingly caused contact by instructing victim to rub defendant's legs and to touch defendant under his shorts. *State v. Hummer*, 184 Ariz. 603, 606 (App. 1995).

Sexual abuse under § 13-1404, is not a necessarily-included offense of child molesting under § 13-1410, because fondling the breasts of a female under the age of 15 would be sexual abuse, but not child molestation. *State v. Patton*, 136 Ariz. 243, 244- 245 (App. 1983); *State v. Cousin*, 136 Ariz. 83, 86 (App. 1983); *State v. Davis*, 137 Ariz. 551, 562 (App. 1983).

CHAPTER 15, CRIMINAL TRESPASS AND BURGLARY

A.R.S. § 13-1503: Criminal Trespass in the Second Degree:

Criminal trespass is not a lesser-included offense of burglary, and the defendant is not entitled to an instruction on it so that the jury can choose to find he committed a less serious crime if it was doubtful about felonious intent. Further, where the defendant's theory of the case is simply that he was not guilty of burglary, the absence of a criminal trespass instruction does not affect that argument. *State v. Lewis*, 236 Ariz. 336, 347, ¶¶ 48-49 (App. 2014), *review denied* (Sept. 1, 2015).

Criminal trespass in the second degree under § 13-1503, is not a necessarily-included offense of burglary in the third degree under § 13-1506. To convict a defendant of trespass in the second degree, the State must prove that the defendant was aware that his entry or remaining was unlawful. To prove burglary, the State need not prove that the defendant was aware that his entry or remaining was unlawful, but rather must only show a knowing or voluntary entry with the requisite intent. *State v. Malloy*, 131 Ariz. 125, 130-31 (1981); *see also State v. Ennis*, 142 Ariz. 311, 314 (App. 1984)(the description of the burglary charge in the indictment does not describe the lesser offense of criminal trespass, first degree, in that it does not specifically include the element of knowingly entering or remaining unlawfully).

- The 1981 amendment to the definition of "Knowingly," adding the additional sentence "It does not require any knowledge of the unlawfulness of the act or omission," does not change this. Regardless of the definition of “knowingly,” the definition of criminal trespass itself requires that the person knowingly enter or

remain *unlawfully*. Where the criminal statute itself makes the requirement that the defendant know his entry or remaining was unlawful, it is still an essential element of the crime even though no longer required for the mental state of "knowingly." *State v. Kozan*, 146 Ariz. 427, 429 (App. 1985).

- Criminal trespass is generally not a lesser included offense of burglary **unless** the charging document describes the additional element of knowledge required to commit criminal trespass. See *State v. Malloy*, 131 Ariz. 125, 130-31 (1981); see also *State v. Kozan*, 146 Ariz. 427, 429 (App.1985).

A.R.S. § 13-1504: Criminal Trespass in the First Degree:

When the defendant enters a structure, the crime of criminal trespass in the first degree, A.R.S. § 13-1504, is a lesser-included offense of burglary in the second degree, A.R.S. § 13-1507. *State v. Engram*, 171 Ariz. 363, 365 (App. 1991).

A.R.S. § 13-1506: Burglary in the Third Degree:

When the nature of the burglarized structure is in question – *i.e.*, when the evidence establishes the defendant entered a structure and the only question is whether that structure was residential or nonresidential – burglary in the third degree of a nonresidential structure, A.R.S. § 13-1506, is a lesser-included offense of burglary in the second degree of a residential structure, A.R.S. § 13-1507. The elements of the two crimes are exactly the same, except that to prove burglary of a residential structure, one must prove one extra element, namely, that the structure is "adapted for both human residence and lodging." *State v. Bass*, 184 Ariz. 543, 545 (App. 1995). But the only way that burglary in the third degree can be a lesser-included offense of burglary in the second degree is when the third-degree burglary is of a structure, not a burglary of a fenced commercial or residential yard, because a yard is not a "structure" as defined in A.R.S. § 13-1501(8). *Id.* at 546.

When a defendant enters a building with intent to commit a theft, to determine whether the burglary is residential or nonresidential, the first inquiry is whether the building is used for commercial purposes or as a residence. If the building is used as a residence, then the next question is whether the area of the building that the defendant entered is "one that makes the building more suitable, comfortable or enjoyable for human occupancy. If the answer is also yes, then the inquiries cease as the definition of residence subsumes any 'lesser included structures' and the burglary is of a residential structure." *State v. Gardella*, 156 Ariz. 340, 342, 751 P.2d 1000, 1002 (App. 1988). Thus, a basement of a residential home would be part of the residential structure even though the basement was used for storage rather than lodging. However, if the building is primarily commercial, the inquiry becomes one of the nature of the structure within the building and whether the included structure is used for lodging. Only if the included structure is used for residence or lodging (such as a separately securable apartment or hotel room) is the burglary a residential burglary. Thus, entry into a motel laundry room was a third-degree burglary of a nonresidential structure. *Id.* In other words, the term "residence" as it is used in the statute includes every structure connected with the residential structure to make it more suitable, comfortable or enjoyable for human

occupancy. The definition of residence includes other structures within the residence, including those used for storage. *State v. Ekmanis*, 183 Ariz. 180, 182 (App. 1995), citing *Gardella, supra*.

Burglary is not a lesser-included offense of felony murder. *State v. Leslie*, 147 Ariz. 38, 49 (1985). SEE FELONY MURDER, *infra*.

Shoplifting, A.R.S. § 13-1805, is not a lesser-included offense of burglary in the third degree, A.R.S. § 13-1506; a person can commit burglary from a retail business that was open for business even if the intent to commit a theft was formed after he entered the store. *State v. Embree*, 130 Ariz. 64, 66 (App. 1981).

- BUT: after *Embree* was decided, the legislature amended A.R.S. 13-1501(2) to create an exception:

“Enter or remain unlawfully” means an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged **except** when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

Thus, *Embree* is superseded by statute. See *State v. Ortiz*, 2015 WL 7755958 (App. Dec. 2, 2015)(mem decision but possibly citable, see Az Brief – Revised, "Citing Memorandum Decisions").

Burglary, A.R.S. § 13-1506, is not a lesser included offense of robbery, § 13-1902. *State v. Clovis*, 127 Ariz. 75, 81 (App. 1980).

A.R.S. § 13-1507: Burglary in the Second Degree:

Second-degree burglary is lesser-included offense of first-degree (armed) burglary. *State v. Lewis*, 236 Ariz. 336, 344, ¶ 29 (App. 2014).

Criminal trespass is not a lesser-included offense of burglary, and the defendant is not entitled to an instruction on it so that the jury can choose to find he committed a less serious crime if it was doubtful about felonious intent. Further, where the defendant's theory of the case is simply that he was not guilty of burglary, the absence of a criminal trespass instruction does not affect that argument. *State v. Lewis*, 236 Ariz. 336, 347, ¶¶ 48-49 (App. 2014), *review denied* (Sept. 1, 2015).

A charge of burglary in the second degree (residential structure) provides fair notice that if the State proves all elements of the crime except that the structure in question was “adapted for both human residence and lodging,” then the State necessarily proves all elements of the lesser-included offense of burglary in the third degree (non-residential structure). If there is a genuine factual question about whether the structure is residential, the jury should be instructed on both burglary in the second degree (residential structure)

and burglary in the third degree (non-residential structure). If the State fails to offer substantial evidence that the structure was residential, then the jury should be instructed on only the lesser-included offense of burglary in the third degree (non-residential structure). *State v. Bass*, 184 Ariz. 543, 546 (App. 1995)(where state failed to present substantial evidence that the almost-completed cabin was a residential structure, trial court correctly instructed the jury on only the lesser-included offense of burglary in the third degree (non-residential structure)).

Attempted burglary in the second degree is a necessarily-included offense of attempted burglary in the first degree. *State v. Grijalva*, 137 Ariz. 10, 12 (App. 1983), superseded by statute on other grounds, *State v. Cons*, 208 Ariz. 409, 413, ¶ 9 (App. 2004).

A.R.S. § 13-1508: Burglary in the First Degree:

Second-degree burglary is lesser-included offense of first-degree (armed) burglary. *State v. Lewis*, 236 Ariz. 336, 344, ¶ 29 (App. 2014).

The element that distinguishes first-degree burglary from the lesser-included offense of second-degree burglary is the knowing possession of a weapon while committing a theft or felony inside the residence. *State v. Larin*, 233 Ariz. 202, 206-07, ¶ 9 (App. 2013)("mere presence" defense did not support jury instruction on second-degree burglary as lesser-included offense of first-degree burglary; even if defendant did not possess weapon in commission of burglary jury was instructed on accomplice liability and at trial defendant did not dispute that his accomplices had possessed guns and committed crimes).

The difference between first-degree burglary and second-degree burglary is the possession of a deadly weapon, dangerous instrument, or explosives by defendant during the burglary. *State v. Rendon*, 161 Ariz. 102, 103 (1989).

CHAPTER 17, ARSON

A.R.S. § 13-1702, Reckless Burning:

Reckless burning, A.R.S. § 13-702, may be a lesser-included offense of arson of an occupied structure, § 13-1704, when the only difference between the two crimes is the required mental state (reckless or knowing). Therefore, if the evidence at trial supports a lesser-included offense instruction, an instruction on reckless burning may be appropriate. *State v. Bay*, 150 Ariz. 112, 117 (1986).

A.R.S. § 13-1704, Arson of an Occupied Structure:

Reckless burning, A.R.S. § 13-702, may be a lesser-included offense of arson of an occupied structure, § 13-1704, when the only difference between the two crimes is the required mental state (reckless or knowing). Therefore, if the evidence at trial supports a lesser-included offense instruction, an instruction on reckless burning may be appropriate. *State v. Bay*, 150 Ariz. 112, 117, 722 P.2d 280, 285 (1986).

Chapter 18, Theft

A.R.S. § 13-1802, Theft:

Theft, §13-1802, is a lesser-included offense of organized retail theft, § 13-1819. *State v. Veloz*, 236 Ariz. 532, ¶ 11 (App. 2015), review denied (July 30, 2015).

Theft of a means of transportation, § 13-1814, is a lesser-included offense of armed robbery. *State v. Garcia*, 235 Ariz. 627, 630, ¶ 7 (App. 2014), citing *State v. Kinkade*, 147 Ariz. 250, 253 (1985); *State v. McNair*, 141 Ariz. 475, 482 (1984).

Theft is a lesser-included offense of robbery, *State v. Garcia*, 235 Ariz. 627, 630, ¶ 7 (App. 2014), citing *State v. Wall*, 212 Ariz. 1, 3–4 ¶ 15 (2006); *State v. McNair*, 141 Ariz. 475, 482 (1984); *State v. Celaya*, 135 Ariz. 248, 252 (1983); *State v. Dugan*, 125 Ariz. 194, 195 (1980); *State v. Yarbrough*, 131 Ariz. 70, 72–73 (App.1981)(“theft is always a lesser included offense of robbery”).

Attempted theft is a lesser-included offense of attempted robbery. *State v. Wall*, 212 Ariz. 1, 3-4, ¶ 15 (2006)(evidence sufficient to support a lesser-included offense instruction on attempted theft; defendant distracted the store manager by taking him outside to talk could support jury finding that defendant and his companion intended to steal money from store without anyone seeing the companion, rendering the element of threat or force required for robbery missing).

A robbery defendant is not entitled to a lesser-included offense instruction on theft if the evidence shows only that the defendant used force or threat of force to obtain the property. In such a case, the defendant is guilty of robbery or nothing. *State v. King*, 166 Ariz. 342, 343 (App. 1990).

Theft of property of a lesser value is not a lesser-included offense of theft of property of a greater value. The theft statute defines a single crime, with the punishment determined by the value of the stolen property; the value of the property is irrelevant to the question of guilt or innocence. *State v. Brokaw*, 134 Ariz. 532, 535 (App. 1982). See also *State v. Brown*, 204 Ariz. 405, 409, ¶ 14 (App. 2003).

Conspiracy to possess stolen property, A.R.S. § 13-1001, is not a lesser included offense of possession of stolen property, § 13-1802. *State v. Wilson*, 126 Ariz. 348, 352 (App. 1980).

Theft and petty theft are not lesser included offenses to burglary. *State v. Evans*, 110 Ariz. 407, 408 (1974), citing *State v. Miller*, 108 Ariz. 441 (1972).

Petty theft and burglary are not the same crime; nor is one a lesser included offense of the other, as either can be committed without necessarily committing the other. *State v. Arnold*, 115 Ariz. 421, 422 (1977).

A.R.S. § 13-1803, Unlawful Use of a Means of Transportation

Unlawful use of a means of transportation under § 13-1803(A)(1) is a lesser-included offense of theft of means of transportation under § 13-1814(A)(5) because it is impossible to have committed theft of means of transportation without also committing unlawful use. *State v. Breed*, 230 Ariz. 462, 463, ¶ 8 (App. 2012).

Unlawful use of a means of transportation, § 13-1803, is a necessarily-included offense of theft by conversion, § 13-1802(2); "it is impossible to commit theft of a vehicle by conversion without also committing joyriding." *State v. Griest*, 196 Ariz. 213, 214, ¶ 5 (App. 2000); *see also State v. Kamai*, 184 Ariz. 620, 623 (App. 1995)(evidence would have supported jury instruction on unlawful use of means of transportation; while defendant took his employer's truck for longer than his employer authorized, defendant's girlfriend returned truck within a few days, properly-instructed jury could have concluded that defendant did not intend to keep truck permanently or for so long as to substantially decrease its value to employer).

A.R.S. § 13-1804, Theft by Extortion

Theft by extortion under § 13-1804(A)(2), which does not require the use of a deadly weapon or dangerous instrument, is the necessarily included lesser offense of theft by extortion under § 13-1804(A)(1). *State v. Garcia*, 227 Ariz. 377, 381, ¶ 18 (App. 2011). *See State v. Mendoza-Tapia*, 229 Ariz. 224, 227-28, ¶ 9 (App. 2012)(theft by extortion is a class 2 felony if the defendant knowingly obtains or seeks to obtain property by means of a threat to cause physical injury to anyone by means of a deadly weapon or dangerous instrument, § 13-1804(A)(1), (C); theft by extortion is a class 4 felony if the defendant seeks to obtain property by threatening to cause physical injury, but not by means of a deadly weapon or dangerous instrument, § 13-1804(A)(2), (C)).

A.R.S. § 13-1805, Shoplifting:

Shoplifting, § 13-1805(A), like theft, requires an intent to deprive, and is thus a lesser-included offense of organized retail theft, § 13-1819. *State v. Veloz*, 236 Ariz. 532, ¶ 6, ¶ 11, n. 2 (App. 2015), review denied (July 30, 2015).

Shoplifting in violation of A.R.S. § 13-13-1805(A) is a necessarily-included offense of "facilitated shoplifting" under A.R.S. § 13-1805(I). *State v. Brown*, 204 Ariz. 405, 411, ¶ 22 (App. 2003).

Shoplifting, § 13-1805, is not a lesser included offense of theft, § 13-1802, despite contention that it was defendant's "theory of the case;" a finding that defendant was guilty of shoplifting would not mean that he was innocent of the theft charge. *State v. Teran*, 130 Ariz. 277, 278 (App. 1981), cited with approval in *State v. Lewis*, 236 Ariz. 336, 347, ¶ 47 (App. 2014), review denied (Sept. 1, 2015).

Shoplifting, A.R.S. § 13-1805, is not a lesser-included offense of burglary in the third degree, A.R.S. § 13-1506; a person can commit burglary from a retail business that was open for business even if the intent to commit a theft was formed after he entered the

store. *State v. Embree*, 130 Ariz. 64, 66 (App. 1981).

- BUT: after *Embree* was decided, the legislature amended A.R.S. 13-1501(2) to create an exception:

"Enter or remain unlawfully" means an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged **except** when the entry is to commit theft of merchandise displayed for sale during normal business hours, when the premises are open to the public and when the person does not enter any unauthorized areas of the premises.

Thus, *Embree* is superseded by statute. See *State v. Ortiz*, 2015 WL 7755958 (App. Dec. 2, 2015)(mem decision but possibly citable, see Az Brief – Revised, "Citing Memorandum Decisions").

A.R.S. § 13-1806, Unlawful Failure to Return Rental Property:

Unlawful failure to return rental property, § 13-1806, is not a lesser-included offense of theft by conversion, § 13-1802(A)(2), because one can clearly commit theft by conversion without violating a rental agreement. *State v. Newell*, 137 Ariz. 354, 356 (App. 1983).

A.R.S. § 13-1814, Theft of a Means of Transportation

Theft of a means of transportation is a lesser-included offense of armed robbery. *State v. Garcia*, 235 Ariz. 627, 630, ¶ 7 (App. 2014), citing *State v. Kinkade*, 147 Ariz. 250, 253 (1985); *State v. McNair*, 141 Ariz. 475, 482 (1984).

A.R.S. § 13-1819, Organized Retail Theft

Theft, §13-1802, is a lesser-included offense of organized retail theft, § 13-1819. *State v. Veloz*, 236 Ariz. 532, ¶ 11 (App. 2015), review denied (July 30, 2015).

Shoplifting, § 13-1805(A), like theft, requires an intent to deprive, and is thus a lesser-included offense of organized retail theft, § 13-1819. *State v. Veloz*, 236 Ariz. 532, ¶ 6, ¶ 11, n. 2 (App. 2015), review denied (July 30, 2015).

CHAPTER 19, ROBBERY

A.R.S. § 13-1902, Robbery:

Robbery is a lesser-included offense of armed robbery, *State v. Garcia*, 235 Ariz. 627, 630, ¶ 7 (App. 2014), citing *State v. Henry*, 176 Ariz. 569, 582 (1993); *State v. Scott*, 187 Ariz. 474, 476 (App.1996).

Defendant charged with attempted armed robbery was entitled to lesser-included instruction for attempted robbery even though he denied participating in crime as charged,

where there was evidence which could support claim that robber was not armed. *State v. McPhaul*, 174 Ariz. 561, 562 (App. 1992), citing *State v. Dugan*, 125 Ariz. 194, 196 (1980).

Since the crime of robbery could be completed by the act of an individual without necessarily conspiring with another to commit that crime, conspiracy to commit robbery is not a lesser-included offense of robbery. *State v. Estrada*, 27 Ariz. App. 183, 184 (1976).

A.R.S. § 13-1903, Aggravated Robbery:

Theft is a necessarily-included offense of aggravated robbery, § 13-1903. *State v. Alexander*, 175 Ariz. 535, 537 (App. 1993).

A.R.S. § 13-1904, Armed Robbery:

Theft of a means of transportation, A.R.S. § 13-1814, is a lesser-included offense of armed robbery. *State v. Garcia*, 235 Ariz. 627, 630, ¶ 7 (App. 2014), citing *State v. Kinkade*, 147 Ariz. 250, 253 (1985); *State v. McNair*, 141 Ariz. 475, 482 (1984).

Defendant who used simulated weapon to take victim's money was not entitled to instruction on attempted robbery, simple assault or attempted theft as lesser-included offenses of attempted armed robbery, in absence of any evidence that defendant intended to take victim's money without force. In *State v. Felix*, 153 Ariz. 417, 4019-420 (App. 1986).

When aggravated assault and armed robbery arise from the same fact situation, aggravated assault can be a lesser-included offense of armed robbery. But, this is not the case where the aggravated assault of each victim is not the same crime as the armed robbery of each. *State v. Sowards*, 147 Ariz. 185, 190 (App. 1984).

- Compare: *State v. Price*, 218 Ariz. 311, 313-314, ¶ 7 (App. 2008)(where each offense requires proof of a fact that the other does not, armed robbery and aggravated assault are not the “same offense” for double jeopardy purposes).

CHAPTER 20, FORGERY AND RELATED OFFENSES

A.R.S. § 13-2002: Forgery:

Criminal simulation, A.R.S. § 13-2004, is not a lesser-included offense of forgery, § 13-2002, but rather is a completely separate offense. The word "object" as used in § 13-2004 does not include "written instrument" as used in § 13-2002. *State v. Rea*, 145 Ariz. 298, 300 (App. 1985); accord, *State v. Livanos*, 151 Ariz. 13, 17 (App. 1986).

A.R.S. § 13-2004: Criminal Simulation:

The criminal simulation statute was designed to address “the problems of forged art treasures or the sale of faked antiques or rare natural objects.” Given that history, we hold that “object” in A.R.S. § 13-2004 does not include “written instrument” as defined in A.R.S. § 13-2001 and as used in A.R.S. § 13-2002. Section 13-2004 thus defines an offense

different from forgery and cannot be a lesser-included offense within it. *State v. Rea*, 145 Ariz. 298, 300 (App. 1985).

CHAPTER 23, ORGANIZED CRIME AND FRAUD

A.R.S. § 13-2307: Trafficking in stolen property:

Trafficking in stolen property in the second degree, § 13-2307(A), requires proof that the defendant acted recklessly, while trafficking in the first degree, § 13-2307(B), requires proof that the defendant acted knowingly. Since proof of the higher mental state of "knowingly" is sufficient to show that the defendant acted "recklessly", trafficking in the second degree is a necessarily-included offense of trafficking in the first degree. *State v. DiGiulio*, 172 Ariz. 156, 161 (App. 1992).

A.R.S. § 13-2310: Fraudulent Schemes:

Fraud in purchase or sale of securities, A.R.S. § 44-1991, is not a lesser-included offense of fraudulent schemes, A.R.S. § 13-2310, because each contains an element that the other does not. See *State v. Cook*, 185 Ariz. 358, 362 (App. 1995).

A.R.S. § 13-2312: Illegal Control of an Enterprise or Illegally Conducting an Enterprise:

Illegally conducting an enterprise, A.R.S. § 13-2312(B), is a lesser-included offense of illegal control of an enterprise, A.R.S. § 13-2312(A). See *State v. Schwartz*, 188 Ariz. 313, 316 (App. 1996).

CHAPTER 25, ESCAPE AND RELATED OFFENSES

A.R.S. § 13-2503 Escape:

The crimes of resisting arrest, § 13-2508(A), and escape § 13-2503(A)(2) are separate, each consisting of elements that differ from those that constitute the other. One is not a lesser-included offense of the other. If the facts are such that a reasonable jury can find that the elements of each crime are met, a conviction for each may stand, even in the same case. *State v. Stroud*, 209 Ariz. 410, 413-14, ¶ 15 (2005).

A.R.S. § 13-2504: Escape in the Second Degree:

Attempted second-degree escape is a lesser-included offense of second-degree escape under A.R.S. § 13-2503. See *State v. Herrera*, 131 Ariz. 35, 36 (1981).

A.R.S. § 13-2505 Promoting Prison Contraband

Contraband means any article whose use or possession would endanger the safety, security or preservation of order in a correctional facility, including but not limited to the articles that the statute lists by name. Applying this unitary definition, the class 5 felony is a lesser-included offense of the class 2 felony under the elements test. Under § 13-

2505(A)(3) and (F), a person commits the class 5 felony by knowingly making, obtaining or possessing any item of contraband without authorization, and commits the class 2 felony when that contraband is a deadly weapon, dangerous instrument, explosive, dangerous drug, narcotic drug or marijuana. The class 5 felony is therefore composed solely of some but not all of the elements of the class 2 felony, and it is impossible to commit the class 2 felony without committing the class 5 felony. *State v. Hines*, 232 Ariz. 607, 611, ¶ 14 (App. 2013).

A.R.S. § 13-2508: Resisting Arrest:

The crimes of resisting arrest, § 13–2508(A), and escape § 13–2503(A)(2) are separate, each consisting of elements that differ from those that constitute the other. One is not a lesser-included offense of the other. If the facts are such that a reasonable jury can find that the elements of each crime are met, a conviction for each may stand, even in the same case. *State v. Stroud*, 209 Ariz. 410, 413-14, ¶ 15 (2005).

Although misdemeanor resisting arrest, passive resistance, might be a lesser-included offense of felony resisting arrest, it was not a necessarily included offense of felony resisting arrest under facts presented and thus no error in not instructing the jury on misdemeanor resisting arrest. *State v. Madrid*, 2015 WL 2019342 (App. May 4, 2015). This is a memorandum decision but might be citable. See Az Briefs-Revised, Citing Memorandum Decisions.

Disorderly conduct, § 13-2904, is not a lesser-included offense of resisting arrest, § 13-2508, because disorderly conduct requires proof of an element not necessary to the commission of resisting arrest, namely, that the offender has the intent to disturb the peace or quiet of a neighborhood, family or person, or the knowledge that he is doing so. *State v. Diaz*, 135 Ariz. 496, 497 (App. 1983).

A.R.S. § 13-2510: Hindering Prosecution:

False reporting, § 13-2907, is not a lesser-included offense of hindering prosecution, § 13-2510. The conduct described by the false reporting statute consists essentially of the communication of a falsehood to a law enforcement agency. The conduct that can constitute hindering prosecution, on the other hand, is of a much greater variety. Examples include hiding another person, warning him of impending discovery, or hiding physical evidence. None of these acts involves communicating information to a law enforcement agency. Thus, false reporting is not, by its very nature, always a constituent part of hindering prosecution. *In re Victoria K.*, 198 Ariz. 527, 530, ¶ 12 (App. 2000).

- Further, there is no element of hindering prosecution by deception that is additional to the elements of false reporting; both require the defendant to knowingly act falsely to another in order to impede the processes of justice. Although one act may violate both statutes, it does not follow that one must be a lesser of the other. *In re Victoria K.*, 198 Ariz. 527, 531, ¶ 16 (App. 2000).

- Finally, the elements of false reporting are not composed solely of elements of hindering prosecution by deception so as to the render former offense a lesser-included offense of the latter; false reporting can be committed by an act of deception engaged in for benefit of the defendant, while hindering through deception could be committed only if act of deception was engaged in for benefit of another. *In re Victoria K.*, 198 Ariz. 527, 531, ¶ 19 (App. 2000).

CHAPTER 29, OFFENSES AGAINST PUBLIC ORDER

A.R.S. § 13-2904: Disorderly conduct

Disorderly conduct by recklessly displaying or handling a firearm is a lesser-included offense of aggravated assault where the defendant confronted victims with a gun while acting as a bail recovery agent searching for a fugitive. In addition, assault was a lesser-included offense of aggravated assault because the jury could have determined that the distinguishing element between assault and aggravated assault, the use or threatened use of a deadly weapon, was not present. *State v. Erivez*, 236 Ariz. 472, 475, ¶ 15, (App. 2015).

- Although disorderly conduct and assault are lesser-included offenses of the aggravated assault charge, neither offense is a lesser-included offense of the other. Disorderly conduct is not a lesser-included offense of assault because it requires the reckless display/handling of a firearm, an additional element not required for assault. Additionally, assault is not a lesser-included offense of disorderly conduct because intending to “disturb the peace or quiet” does not necessarily rise to the level of placing the victim in reasonable apprehension of immediate physical injury. Because disorderly conduct and assault are independent lesser-included offenses, and assault is not a lesser-included offense of disorderly conduct, the jury was not required to consider the charge of disorderly conduct before it could consider assault. *State v. Erivez*, 236 Ariz. 472, 476, ¶¶ 17-19, (App. 2015)

A person cannot place a victim in reasonable apprehension of imminent physical injury without also disturbing the victim's peace. Thus, disorderly conduct against a person by recklessly handling a firearm is a lesser-included offense of aggravated assault with a deadly weapon. The distinguishing element is the intent to place the victim in reasonable apprehension of imminent physical injury. *State v. Burdick*, 211 Ariz. 583, 585-86, ¶ 9 (App. 2005), citing *State v. Miranda*, 200 Ariz. 67, ¶ 5 (2001)

All elements of disorderly conduct by reckless display of a firearm under § 13-2904(A)(6) are in fact elements of aggravated assault under § 13-2904(A)(2), and disorderly conduct instructions are thus appropriate in aggravated assault cases if the facts support both instructions. *State v. Miranda*, 200 Ariz. 67, 68, ¶¶ 2-3 (2001) disapproving *In re Maricopa County Juvenile Action No. JV133051*, 184 Ariz. 473 (App. 1995); *State v. Cutright*, 196 Ariz. 567 (App. 1999).

Although disorderly conduct is a lesser-included offense of aggravated assault charged under § 13-1203(A)(2)(intent to place victim in reasonable apprehension of imminent

physical injury), it is not a lesser-included offense of aggravated assault under § 13-1203(A)(1)(intentionally, knowingly, or *recklessly* causing any physical injury to another person). A person is guilty of aggravated assault under (A)(1) by recklessly causing physical injury to another; in this circumstance, the defendant need not intend to disturb the other person. Because intent to disturb is an essential element of disorderly conduct, a person can commit aggravated assault under (A)(1) without committing disorderly conduct. As such, disorderly conduct is not a lesser-included offense of aggravated assault § 13-1203(A)(1). *State v. Foster*, 191 Ariz. 355, 357, ¶¶ 9-10 (App. 1998).

Because disorderly conduct requires proof of an element, that the defendant intend or know that his conduct will disturb someone's peace and quiet, not found in drive by shooting, § 13-1209, disorderly conduct is not a necessarily-included offense of drive by shooting. *State v. Cisneroz*, 190 Ariz. 315, 317 (App. 1997). Accord, *State v. Torres-Mercado*, 191 Ariz. 279, 282 (App. 1997).

Where the undisputed evidence showed the victim was in apprehension of imminent physical injury and it was not possible that the jury could have found the victim was only disturbed, defendant was guilty of aggravated assault or nothing and not entitled to a lesser-included offense instruction on disorderly conduct. *State v. Lara*, 183 Ariz. 233, 234 (1995).

Disorderly conduct is not a lesser-included offense of resisting arrest, § 13-2508, because disorderly conduct requires proof of an element not necessary to the commission of resisting arrest, namely, that the offender has the intent to disturb the peace or quiet of a neighborhood, family or person, or the knowledge that he is doing so. *State v. Diaz*, 135 Ariz. 496, 497 (App. 1983).

A.R.S. § 13-2905, Loitering

Unlawful use of narcotic drug is lesser included offense of the (former) loitering offense involving use of drugs, notwithstanding the disparity in punishment. *State v. Bowling*, 163 Ariz. 22, 23 (App. 1989).

A.R.S. § 13-2907.01: False Reporting to Law Enforcement Agencies:

False reporting is not a lesser-included offense of hindering prosecution, § 13-2510. The conduct described by the false reporting statute consists essentially of the communication of a falsehood to a law enforcement agency. The conduct that can constitute hindering prosecution, on the other hand, is of a much greater variety. Examples include hiding another person, warning him of impending discovery, or hiding physical evidence. None of these acts involves communicating information to a law enforcement agency. Thus, false reporting is not, by its very nature, always a constituent part of hindering prosecution. *In re Victoria K.*, 198 Ariz. 527, 530, ¶ 12 (App. 2000).

- Further, there is no element of hindering prosecution by deception that is additional to the elements of false reporting; both require the defendant to knowingly act falsely to another in order to impede the processes of justice. Although one act may

violate both statutes, it does not follow that one must be a lesser of the other. *In re Victoria K.*, 198 Ariz. 527, 531, ¶ 16 (App. 2000).

- Finally, the elements of false reporting are not composed solely of elements of hindering prosecution by deception so as to the render former offense a lesser-included offense of the latter; false reporting can be committed by an act of deception engaged in for benefit of the defendant, while hindering through deception could be committed only if act of deception was engaged in for benefit of another. *In re Victoria K.*, 198 Ariz. 527, 531, ¶ 19 (App. 2000).

A.R.S. § 13-2910: Cruelty to Animals:

Cruelty to animals is a lesser-included offense of interfering with a working animal. *State v. Doss*, 192 Ariz. 408, 410, ¶ 4 (App. 1998).

CHAPTER 31, WEAPONS AND EXPLOSIVES

A.R.S. § 13-3102: Misconduct involving Weapons:

A lesser-included offense cannot be more serious than the greater offense. Thus, possessing a dangerous drug for sale, a class 2 felony, and possession of equipment to manufacture a dangerous drug, a class 3 felony, are not lesser-included offenses of possession of a deadly weapon during the commission of a felony drug offense, § 13-3102(A)(8), a class 4 felony. *State v. Siddle*, 202 Ariz. 512, 516, ¶ 11 (App. 2002). Nor are those drug offenses necessarily-included offenses of possession of a deadly weapon during the commission of a felony offense, because "[a]ny drug felony will satisfy the requirements of" § 13-3102(A)(8). *Id.* at ¶ 12.

CHAPTER 34, DRUG OFFENSES

Drug offenses generally:

Attempt to possess a controlled substance is a lesser-included offense of possession of that substance. *Stubblefield v. Trombino*, 197 Ariz. 382, 383, ¶ 4, (App. 2000).

Possession of a drug for personal use is a lesser-included offense of possession of that drug for sale. *Gray v. Irwin*, 195 Ariz. 273, 276, ¶ 12 (App. 1999). *See also In re Pima County Juvenile Action No. 12744101*, 187 Ariz. 100, 101 (App.1996) ("it is not possible to complete a sale of marijuana without possessing it"); *State v. Moroyoqui*, 125 Ariz. 562, 564 (App.1980) (possession of marijuana is a lesser-included offense of possession of marijuana for sale and transportation of marijuana); *State v. Ballinger*, 19 Ariz.App. 32, 37 (1973) ("Possession of heroin is a lesser[-] included offense of the greater offense of possession of heroin for sale, since the second cannot be committed without necessarily committing the first.").

Possession of a smaller amount of controlled substance is a necessarily-included offense of possession of a larger amount of the same controlled substance. Thus, when the

parties stipulated that the marijuana weighed over four pounds, but the jury made no finding of the actual amount, the defendant was properly found guilty of simple possession of marijuana in a usable quantity. See *State v. Virgo*, 190 Ariz. 349, 352 (App. 1997).

A.R.S. § 13-3405: Possession/sale of marijuana:

Simple possession of marijuana is a lesser-included offense of both transportation of marijuana and sale of marijuana, because a person cannot transport or sell marijuana without possessing it; this rationale applies to other drugs as well. *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 364, ¶ 15 (App. 1998). Nevertheless, possession of marijuana for sale is not a lesser-included offense of the former offense of simple transportation of marijuana because the latter has no 'for sale' element and the former has no 'transportation' element." *Id.*, ¶ 16.

Possession of marijuana is a lesser-included offense of sale of marijuana, because it is impossible to complete a sale of marijuana without possessing it. *Matter of Appeal in Pima County Juvenile Delinquency Action No. 12744101*, 187 Ariz. 100, 101 (App. 1996).

A.R.S. § 13-3407: Dangerous Drug Offenses:

Both possession of dangerous drugs and possession of dangerous drugs for sale are lesser-included offenses of transportation or importation of dangerous drugs. *State v. Salcido*, ___Ariz.___, ¶ 17, 362 P.3d 508, 513 (App. 2015).

Possession of a dangerous drug under § 13–3407(A)(1) does not require proof of a usable quantity and is thus a lesser-included offense of transportation for sale of a dangerous drug under § 13–3407(A)(7). *State v. Cheramie*, 218 Ariz. 447, 451, ¶22 (2008).

It is impossible to manufacture methamphetamine without possessing the equipment and/or chemicals for that purpose. Therefore, possession of chemicals and equipment for manufacturing a dangerous drug under § 13-3407(A)(3), a class 3 felony, is a necessarily-included offense of manufacturing the same dangerous drug under § 13- 3407(A)(4), a class 2 felony. *State v. Welch*, 198 Ariz. 554, 557, ¶ 11 (App. 2000). However, possession of drug paraphernalia under. § 13-341, is not a lesser-included offense of manufacturing a dangerous drug, both because the intent requirements of the statutes are different, and because § 13-3450 contains elements not found in the manufacturing statute. *Id.* at 558, ¶ 14.

A lesser-included offense cannot be more serious than the greater offense. Thus, possessing a dangerous drug for sale, a class 2 felony, and possession of equipment to manufacture a dangerous drug, a class 3 felony, are not lesser-included offenses of possession of a deadly weapon during the commission of a felony drug offense, § 13-3102(A)(8), a class 4 felony. *State v. Siddle*, 202 Ariz. 512, 516, ¶ 11 (App. 2002). Nor are those drug offenses necessarily-included offenses of possession of a deadly weapon during the commission of a felony offense, because "[a]ny drug felony will satisfy the requirements of" § 13-31002(A)(8). *Id.* at ¶ 12.

A.R.S. § 13-3408: Possession of Narcotic Drugs

Defendant was not entitled to instruction on attempted unlawful transfer of narcotic on charge of unlawful transfer of narcotic merely because the package of heroin which defendant gave to the air freight clerk never reached its ultimate destination; crime of unlawful transfer of narcotic did not require transfer to named individual but rather transfer to any individual together with culpable mental state. *State v. Puls*, 176 Ariz. 273, 275 (App. 1993).

The crime of offering to sell a narcotic drug is not akin to an attempt; an offer to sell narcotic drugs is a completed offense and is not a lesser-included offense of the completed crime of actual sale of illegal drugs. Both offenses are the same degree. *State v. Padilla*, 169 Ariz. 70, 72 (App. 1991).

Solicitation to sell narcotic drugs was not a lesser-included offense of sale of narcotic drugs by accomplice because solicitation is not a constituent part of the crime of sale of narcotic drug and where the indictment, which contained no reference to defendant acting as accomplice, did not describe a solicitation offense. *State v. Woods*, 168 Ariz. 543, 544 (App. 1991).

Solicitation requires a different mental state and different acts if only because the solicitor must "command", "encourage", "request" or "solicit" another person to engage in the felony or misdemeanor. A.R.S. § 13-1002(A). Solicitation is not a lesser included offense of the sale of narcotic drugs because the mental and physical elements of solicitation are not necessary elements of the underlying offense. *State v. Tellez*, 165 Ariz. 381, 383 (App. 1989).

A.R.S. § 13-3415: Possession of Drug Paraphernalia:

Possession of drug paraphernalia under § 13-3415, is not a lesser-included offense of manufacturing a dangerous drug under § 13-3407(A)(4), both because the intent requirements of the statutes are different, and because § 13-3450 contains elements not found in the manufacturing statute. *State v. Welch*, 198 Ariz. 554, 558, ¶ 14, (App. 2000).

Possession of drug paraphernalia under § 13-3415, is not a necessarily-included offense of personal drug possession or use, because one can possess paraphernalia without necessarily possessing or using a controlled substance, and one can possess drugs without possessing paraphernalia. *State v. Holm*, 195 Ariz. 42, 44, ¶ 10 (App. 1998), disapproved on other grounds by *State v. Estrada*, 201 Ariz. 247, 250, ¶ 12 (2001). However, "in actual practice, drug possession routinely requires a container of some sort, such as a plastic bag or an envelope. And similarly, drug use is regularly facilitated by a delivery device of some kind, such as a syringe, a wrapper, or a smoking pipe." *State v. Estrada*, 201 Ariz. 247, 252, ¶ 22 (2001).

CHAPTER 36, FAMILY OFFENSES

A.R.S. § 13-3613: Contributing to delinquency and dependency of a minor:

Our supreme court has long held that contributing to the delinquency of a child under § 13-3613 is a lesser-included offense of child molestation under § 13-1410. *State v. Speers*, 238 Ariz. 423, ¶ 21 (App. 2015), citing *State v. Jerousek*, 121 Ariz. 420, 428 (1979); *State v. Sutton*, 104 Ariz. 317, 318–19 (1969). Contributing to a child's delinquency is a broadly drawn offense, such that whether the act falls within the statutory prohibition is a question for the trier of fact. *State v. Speers*, 238 Ariz. 423, ¶ 22 (App. 2015).

Contributing to the delinquency of a minor, § 13-3613, is a lesser-included offense of child molestation, § 13-1410. See *State v. Brown*, 191 Ariz. 102, 103 (App. 1997); *State v. Sanderson*, 182 Ariz. 534, 543 (App. 1995).

Defendant was not entitled to instruction on contributing to delinquency of minor as lesser-included offense to charges of child molestation and sexual conduct with minor, where defendant's sole defense to charges was insanity. *State v. Turrentine*, 152 Ariz. 61 (App. 1986).

A.R.S. § 13-3619: Permitting life, health or morals of minor to be imperiled by neglect, abuse or immoral associations

Permitting life, health or morals of minor or morals of minor to be imperiled, § 13-3619, held not to be a lesser-included offense of intentional or knowing child abuse under § 13-3623 where elements of lesser offense, i.e., age differences in children protected, inclusion of imperilment of moral welfare as an injury, and inclusion of immoral associations as proscribed conduct, were not contained in greater offense. There was no factual dispute concerning the elements differentiating the greater from the lesser; thus, the defendant was either guilty of the crime charged or not at all. *State v. Poehnelt*, 150 Ariz. 136, 148 (App. 1985).

A.R.S. § 13-3623: Child or Vulnerable Adult Abuse:

The two separate offenses, first-degree murder and child abuse, each requires proof of facts not required for the other. Murder requires causing the death of another, whereas child abuse requires a child victim. Thus, each offense requires an element that the other does not, and consecutive sentencing does not violate the double jeopardy clause. *State v. Jones*, 235 Ariz. 501, 503-04, ¶ 13 (2014), citing *State v. Lopez*, 174 Ariz. 131, 143 (1992)(child abuse is not a lesser-included offense of felony murder and does not merge into homicide).

Negligent child abuse under circumstances other than those likely to produce death or serious physical injury is a lesser-included offense of intentional or knowing child abuse under circumstances likely to produce death or serious physical injury. *State v. Mott*, 187 Ariz. 536, 539 (1997); *State v. Mahaney*, 193 Ariz. 566, 567-68, ¶ 8, (App. 1999). See also *State v. Greene*, 168 Ariz. 104, 107 (App. 1991)(evidence was sufficient to support

conviction for child abuse under circumstances other than those likely to cause death or serious physical injury where house was extremely dirty and contained rotten food, dog feces and urine, where furnace was shut off, and where children observed mother cooking cocaine in house).

When there is premeditated murder, defendant cannot also be convicted for intentional child abuse that necessarily occurs when there is premeditated murder of child victim. *State v. Styers*, 177 Ariz. 104, 110 (1993).

Negligent child abuse is a lesser-included offense of intentional or knowing child abuse. See *State v. Albrecht*, 158 Ariz. 341, 342 (App. 1988).

Child abuse under circumstances other than those likely to produce serious physical injury is a lesser offense of child abuse under circumstances likely to produce serious injury. *State v. Doan*, 158 Ariz. 336, 337 (App. 1988).

Reckless child abuse and criminally negligent child abuse are lesser-included offenses of intentional or knowing child abuse, A.R.S. § 13-3626. *State v. Van Winkle*, 149 Ariz. 469, 471 (App. 1986).

TITLE 28 OFFENSES

A.R.S. § 28-622: Failure to Comply with Police Officer:

The misdemeanor offense of failure to obey under § 28–622 has two elements not included in the felony offense of unlawful flight under § 28–622.01, and thus is not a lesser-included offense. The misdemeanor offense requires that “a police officer invested by law with authority to direct, control or regulate traffic” issue “any lawful order or direction.” The felony offense requires only that an “appropriately marked ... official law enforcement vehicle” pursuing a driver exhibit flashing lights and a siren as reasonably necessary. Under the unlawful flight statute, the officer need not explicitly issue an order or direction, or have the authority to direct, control, or regulate traffic. *State v. Gonzalez*, 221 Ariz. 82, 84, ¶ 10 (App. 2009), disapproving *State v. Gendron*, 166 Ariz. 562, 565–66 (App.1991)(holding that failure to instruct on the former offense was not error because it was undisputed that defendant failed to stop when pursued, and because his defense was justification, if he was guilty, he could only “be guilty of the offense charged and no other”), *vacated in other part by State v. Gendron*, 168 Ariz. 153, 812 P.2d 626 (1991).

A.R.S. § 28-622.01: Unlawful Flight from Pursuing Law Enforcement Vehicle:

Pursuant to A.R.S. § 28–622.01, the essential elements of the crime of unlawful flight are: (1) the defendant, who was driving a motor vehicle, wilfully fled or attempted to elude a pursuing official law enforcement vehicle, and (2) the law enforcement vehicle was appropriately marked showing it to be an official law enforcement vehicle. *State v. Martinez*, 230 Ariz. 382, 384, ¶ 8 (App. 2012). On its face, A.R.S. § 28–624(C) does not require the activation of emergency lights to prove the crime of unlawful flight. *State v. Martinez*, 230 Ariz. 382, 384, ¶ 6 (App. 2012).

The misdemeanor offense of failure to obey under § 28-622 has two elements not included in the felony offense of unlawful flight under § 28-622.01, and thus is not a lesser-included offense. The misdemeanor offense requires that “a police officer invested by law with authority to direct, control or regulate traffic” issue “any lawful order or direction.” The felony offense requires only that an “appropriately marked ... official law enforcement vehicle” pursuing a driver exhibit flashing lights and a siren as reasonably necessary. Under the unlawful flight statute, the officer need not explicitly issue an order or direction, or have the authority to direct, control, or regulate traffic. *State v. Gonzalez*, 221 Ariz. 82, 84, ¶ 10 (App. 2009), disapproving *State v. Gendron*, 166 Ariz. 562, 565-66 (App.1991)(holding that failure to instruct on the former offense was not error because it was undisputed that defendant failed to stop when pursued, and because his defense was justification, if he was guilty, he could only “be guilty of the offense charged and no other”), *vacated in other part by State v. Gendron*, 168 Ariz. 153, 812 P.2d 626 (1991).

Failure to stop under § 28-1595(A) is not a lesser-included offense of felony flight under § 28-622.01 because a person can violate the former by failing to stop as signaled or instructed by an on-foot police officer without always satisfying the corresponding elements of the greater offense found in § 28-622.01. *State v. Fiihr*, 221 Ariz. 135, 138, ¶ 12 (App. 2008).

The crime of reckless driving under § 28-693 requires reckless disregard for the safety of persons or property, while the offense of unlawful flight under § 28-622.01, does not. Therefore, reckless driving is not a lesser-included offense of unlawful flight. *State v. Mounce*, 150 Ariz. 3, 5 (App. 1986).

A.R.S. § 28-693: Reckless Driving:

Reckless driving is not always a constituent part of second-degree murder because it requires the proof of an element—driving a vehicle—that is not required for second-degree murder. *State v. Sucharew*, 205 Ariz. 16, 26, ¶ 35 (App. 2003)

In a vehicular homicide case, reckless driving may be a lesser-included offense of second degree murder if the charging document describes the lesser offense of reckless driving. *State v. Magana*, 178 Ariz. 416, 418 (App.1994)(“Although the indictment does not refer to the use of a specific deadly weapon or dangerous instrument in the commission of the crime, it does refer to Highway 95 near milepost 240.9 as the location where the crime was committed.”).

- But see *State v. Robles*, 213 Ariz. 268, 271-72, ¶¶ 8-9 (App. 2006), declining to extend *Magana’s* “common sense” language to encompass or mandate consideration of all facts ultimately contained in the record in determining whether a lesser-included-offense instruction was required; *State v. Ortega*, 220 Ariz. 320, 324-25, ¶¶ 10-14 (App. 2008), disapproving use of charging documents test for purposes of double jeopardy to the extent underlying facts are considered.

The crime of reckless driving requires reckless disregard for the safety of persons or property. The offense of unlawful flight, however, does not. It only requires a willful attempt to flee or elude an official law enforcement vehicle. A criminal defendant may attempt to

flee an officer under circumstances that do not recklessly endanger persons or property. Therefore, reckless driving is not a lesser-included offense of unlawful flight because unlawful flight does not always involve reckless disregard for persons or property. *State v. Mounce*, 150 Ariz. 3, 5 (App. 1986).

Reckless driving, A.R.S. § 28-693, is not a lesser-included offense of aggravated assault, § 13-1204, because each offense requires proof of an element that the other does not. Proof of reckless driving under s 28-693(A) requires a showing that the defendant was (1) driving a vehicle (2) in willful or wanton (reckless) disregard for the safety of persons or property. The offense of aggravated assault, however, does not require a showing of the use of a dangerous instrument; the assault becomes aggravated if any of the circumstances listed under § 13-1204(A) are also involved. It is apparent from an examination of those circumstances enumerated under subsection (A) that aggravated assault may require proof of facts which the offense of reckless driving does not. *State v. Seats*, 131 Ariz. 89, 93 (1981).

A.R.S. § 28-729: Driving on Roadways Laned for Traffic:

Unsafe movement on a roadway, A.R.S. § 28-729, is not a lesser-included offense of DUI. *State ex rel. Dean v. Hantman [Root, Real Party in Interest]*, 169 Ariz. 414, 416 (App. 1991).

A.R.S. § 28-1381: DUI:

Unsafe movement on a roadway, A.R.S. § 28-729, is not a lesser-included offense of DUI. *State ex rel. Dean v. Hantman [Root, Real Party in Interest]*, 169 Ariz. 414, 416 (App. 1991).

A.R.S. § 28-1382: Aggravated DUI:

Prior DUI convictions do not constitute lesser-included offenses of aggravated DUI. A lesser-included offense is one that is necessarily committed during the commission of a greater offense, and a person does not commit past crimes, much less necessarily commit them, with present or future actions. The only lesser-included offense is the basic DUI that is necessarily committed at the time of the present offense. Both the lesser and greater offenses share the same act of driving. *State v. Cooney*, 233 Ariz. 335, 340, ¶¶ 13-14 (App. 2013).

When the only difference between two driving DUI charges is the BAC threshold, a court cannot allow a conviction on the lesser charge to stand. Therefore, the charges of driving with a BAC of .08 or more under § 28-1381(A)(2) and extreme DUI with a BAC of .15 under § 28-1382(A) are lesser-included offenses of extreme DUI with a BAC of .20 or more. *State v. Solis*, 236 Ariz. 242, 249, ¶ 24 (App. 2014), citing *State v. Nereim*, 234 Ariz. 105, ¶ 24 (App.2014).

When the only difference between two DUI charges is the BAC threshold, the lesser charge cannot stand. Likewise, a conviction for misdemeanor DUI violates principles of double jeopardy if the defendant has also been convicted of the same form of aggravated

DUI. Therefore, both driving with a BAC of .20 or more under § 28-1382(A)(2) and aggravated driving with a BAC of .08 or more while a minor is present under § 28-1383(A)(3)(a) were lesser-included offenses of aggravated driving under the influence (DUI) with a BAC of .20 or more while a minor is present under § 28-1383(A)(3)(b). Similarly, misdemeanor DUI under § 28-1381(A)(1) is a lesser-included offense of aggravated DUI while a minor is present under § 28-1383(A)(3). *State v. Nereim*, 234 Ariz. 105, 112, ¶¶ 24-25 (App. 2014).

Offense of driving with a prohibited drug in the body under § 13-3401 is a lesser included offense of aggravated driving with a prohibited drug in the body under § 28-1383(A)(1); driving with a prohibited drug in the body contains all but one of the elements of aggravated driving with a drug in the body, that of driving while suspended. *State v. Becerra*, 231 Ariz. 200, 205, ¶ 20 (App. 2013).

Because one can commit aggravated DUI merely by being in “actual physical control” of a vehicle or while on a non-public roadway, that crime can be committed without necessarily committing the offense of driving on a suspended license. Particular charging language would be necessary in the indictment in order for driving on a suspended license to be a lesser-included offense of aggravated DUI on a suspended license. *State v. Robles*, 213 Ariz. 268, 271, ¶¶ 6-7 (App. 2006), citing *State v. Brown*, 195 Ariz. 206, 208, ¶¶ 6-8 (App. 1999)(driving on a suspended driver’s license is not a necessarily-included offense of aggravated DUI; by statute, aggravated DUI may be committed by being in actual physical control and while on any roadway, while driving while one’s license is suspended, revoked, cancelled, or refused requires proof of driving on a public highway); but see *State v. Rodriguez*, 198 Ariz. 139, 140, ¶ 2, n. 2 (App. 2000)(driving on a suspended license is a lesser-included offense of aggravated DUI with a suspended license).

The .08 DUI offense is a lesser-included offense of extreme DUI, which has a specified blood-alcohol level of .15; no defendant could commit extreme DUI, with a specified BAC level of .15, without also committing *per se* DUI, with a specified BAC level of .08. *Merlina v. Jejna*, 208 Ariz. 1, n. 1 (App. 2004).

- However, these two charges neither contain identical elements nor involve identical proof. Extreme DUI requires proof of a BAC level of .15, whereas the lesser charge requires proof of a BAC level of .08. Although the greater cannot be committed without also committing the lesser offense, the totality of proof is not the same. Both charges may be submitted to the jury to decide whether the facts support the lesser charge only, or also the greater charge. *Merlina v. Jejna*, 208 Ariz. 1, 5, ¶ 17 (App. 2004).

A.R.S. § 28-1595(a): Failure to Stop:

Failure to stop under § 28-1595(A) is not a lesser-included offense of felony flight under § 28-622.01 because a person can violate the former by failing to stop as signaled or instructed by an on-foot police officer without always satisfying the corresponding elements of the greater offense found in § 28-622.01. *State v. Fiihr*, 221 Ariz. 135, 138, ¶ 12 (App. 2008).

A.R.S. § 28-3473: Driving while License is Suspended, Revoked, Cancelled, or Refused:

Because one can commit aggravated DUI merely by being in “actual physical control” of a vehicle or while on a non-public roadway, that crime can be committed without necessarily committing the offense of driving on a suspended license. Particular charging language would be necessary in the indictment in order for driving on a suspended license to be a lesser-included offense of aggravated DUI on a suspended license. *State v. Robles*, 213 Ariz. 268, 271, ¶¶ 6-7 (App. 2006), citing *State v. Brown*, 195 Ariz. 206, 208, ¶¶ 6-8 (App. 1999)(driving on a suspended driver’s license is not a necessarily-included offense of aggravated DUI; by statute, aggravated DUI may be committed by being in actual physical control and while on any roadway, while driving while one’s license is suspended, revoked, cancelled, or refused requires proof of driving on a public highway); but see *State v. Rodriguez*, 198 Ariz. 139, 140, ¶ 2, n. 2 (App. 2000)(driving on a suspended license is a lesser-included offense of aggravated DUI with a suspended license).